



Citation: *JD v Canada Employment Insurance Commission*, 2022 SST 1144

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: J. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (463666) dated April 27, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: October 11, 2022

Hearing participant: Appellant

Decision date: October 13, 2022

File number: GE-22-1706

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because he lost his job due to his own misconduct.

Overview

[3] The Claimant worked as a Security Electrician and was employed by The City of X (the City). In September 2021, the employer implemented a mandatory Covid-19 vaccination policy (the policy). The Claimant did not want to comply with the reporting requirements in the policy because he was concerned about security of his personal medical information. He was placed on an unpaid leave of absence after his last paid day on October 29, 2021 because he failed to submit proof he had received two doses of a Covid-19 vaccine and was unwilling to participate in the employer's rapid testing program, as required by the policy. On January 26, 2022, he was dismissed because he remained non-compliant with the policy.

[4] The Claimant applied for EI benefits. The Respondent (Commission) determined that he lost his job because he was suspended – and subsequently dismissed – due to his own misconduct¹ and could not be paid any EI benefits².

¹ See the March 28, 2022 decision letter at GD3-36.

² Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. It does not matter whether the Record of Employment says suspension or leave of absence. Where an employer unilaterally places an employee on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment **if the reason for the unpaid leave is due to misconduct**. In the present case, the Commission determined that the reason for the Claimant's unpaid leave of absence (namely, his failure to comply with the employer's mandatory vaccination policy) was misconduct and, therefore considered his separation from employment between October 29, 2021 and January 26, 2022 to be a suspension, and he has been **disentitled** to EI benefits from October 29, 2021. .

Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. Since the Commission determined that the reason the Claimant was terminated from his employment on January 26, 2022 was due to his own misconduct, he has been **disqualified** from EI benefits from that date.

[5] The Claimant asked the Commission to reconsider. He admitted he was suspended and then dismissed for non-compliance with the policy, but stated he was not satisfied as to the security of his personal medical information. He worked with sensitive information and security systems for the City, and felt the policy was flawed when it came to reporting his medical history and test results³. He also said his union filed a grievance on his behalf.

[6] The Commission was not persuaded, and maintained the misconduct decision on his claim⁴. He appealed that decision to the Social Security Tribunal (Tribunal).

[7] I must decide whether the Claimant lost his job due to his own misconduct⁵. To do this, I have to look at the reason for his suspension and dismissal, and then determine if the conduct that caused his job loss is conduct the law considers to be “misconduct” for purposes of EI benefits.

[8] The Commission says the Claimant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with the policy. He knew he could be suspended and then dismissed from his job by making this choice – and that’s what happened. The Commission says these facts prove the Claimant lost his job due to his own misconduct, which means he cannot receive EI benefits.

The combined effect of these decisions is that the Claimant cannot be paid any EI benefits on his claim starting from October 29, 2021. However, since he did not apply for EI benefits until February 7, 2022, EI benefits have only been refused from the start of his benefit period on February 6, 2022.

³ At GD3-41, he told the Commission that he was specifically concerned about reporting his vaccination status and rapid test results to his direct supervisor, who he said could not be trusted with such personal information. He also said he was not vaccinated and could have been asked up to 40 times a day for his test results because the employer said that anyone working in his vicinity or any clients in the area could ask to see it. These people did not have a right to ask him his test results and he did not want to be hassled and disrupted during his working day to show his test results.

⁴ See the April 27, 2022 decision letter at GD3-43.

⁵ That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term “misconduct” for EI purposes is discussed under Issue 2 below.

[9] The Claimant disagrees. He says he made a personal choice not to disclose his personal medical information to his direct supervisor (and others) because of privacy concerns, and that the employer's policy effectively "forced" him into the misconduct. He also says the employer should have accommodated his requests to work from home or only report the information he felt the employer needed to know, and that the policy violated his collective agreement. He believes he should receive financial support because he has paid into the EI program and because the employer acted in bad faith and in a way that caused him hardship.

[10] I agree with the Commission. These are my reasons.

Issue

[11] Was the Claimant suspended and subsequently dismissed from his job at the City because of his own misconduct?

Analysis

[12] To answer this question, I have to decide two things. First, I have to determine why the Claimant was suspended and subsequently dismissed from his job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Claimant suspended and subsequently dismissed from his job?

[13] The Claimant was suspended – and subsequently dismissed – from his job because he failed to provide proof of vaccination as required by the policy and was unwilling to comply with the rapid testing program required by the policy.

[14] The employer told the Commission that⁶:

⁶ See Supplementary Record of Claim at GD3-30.

- All employees were told on September 16, 2021 that the City was implementing a mandatory Covid-19 vaccination policy.
- The policy required employees to have at least one dose of a Covid-19 vaccine by September 30, 2021, and to provide proof of their vaccination status by October 8, 2021.
- Employees were then required to have their second dose *and* provide proof of full vaccination by October 31, 2021.
- Employees who did not provide proof they were fully vaccinated (or had an approved exemption) by October 31, 2021 were required to submit to on-going Covid-19 rapid testing up to twice per week (with the frequency to be determined at the employer's discretion), at their own cost, through the City's designated process.
- If any employee failed to comply with the testing requirements, they would be deemed unfit for work and placed on leave without pay. Continued non-compliance would be subject to discipline up to and including termination.
- The Claimant did not comply with the policy and was terminated.

[15] The Claimant does not dispute any of this.

[16] He told the Commission that he was placed on unpaid leave and then dismissed because he failed to disclose his vaccination status and was unwilling to participate in the employer's rapid testing program.⁷

[17] I therefore find that the Claimant was suspended – and subsequently dismissed – from his job because he failed to provide proof of vaccination as required by the policy and was not willing to participate in the employer's rapid testing program, also required by the policy.

⁷ See Supplementary Records of Claim at GD3-29, GD3-32 and GD3-41.

Issue 2: Is the reason for the suspension and subsequent dismissal misconduct under the law?

[18] Yes, the reason for the Claimant's suspension and subsequent dismissal is misconduct for purposes of EI benefits.

[19] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional⁸. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful⁹ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[20] The Claimant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law¹⁰.

[21] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended and dismissed because of it¹¹.

[22] The Commission has to prove the Claimant was suspended and then dismissed from his job due to misconduct¹². It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

Evidence from the Employer

[23] The employer's statements are set out in paragraph 13 above.

⁸ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

⁹ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

¹⁰ See *Attorney General of Canada v. Secours*, A-352-94.

¹¹ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹² The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost her job because of misconduct.

[24] The employer also provided a copy of the policy to the Commission (at GD3-37 to GD3-40).

Evidence from the Claimant

[25] The Claimant told the Commission that¹³:

- He would not comply with the policy because it required him to report his vaccine status to his direct supervisor.
- He refused to disclose his medical information to his direct supervisor because it was not secure. His supervisor has a big mouth. He also has friends in the department and they spread information around.
- He believes his medical information is private and needs to be handled in a secure manner.
- He felt that he could have posted his information online and it would have been safer than giving it to his direct supervisor.
- He works on the most secure information infrastructure of the City, yet his employer could not protect his own privacy.
- He also would not participate in the rapid testing program, as this also involved disclosing his private medical information.
- The employer required him to provide 3 rapid test results per week, and told him he would have to give his test results to anyone who asked while he was at work¹⁴.

¹³ See Supplementary Records of Claim at GD3-32 and GD3-41. See Also Request for Reconsideration at GD3-35.

¹⁴ The Claimant gave an example at GD3-41: if he were in a recreation facility owned by the City, a lifeguard could ask him for proof that he had a negative test. He stated this information was no one's business. The Claimant said he was told that because he was not vaccinated, he could be asked up to 40 times per day for his test results. His employer said that anyone working in his vicinity of any clients in the area could ask to see it. But he doesn't think these people have a right to ask him his test results. He

- He was well aware that failure to comply would result in a loss of employment.
- He suggested alternatives, such as working from home¹⁵ or using the honour system to call in sick if he was sick¹⁶. But the employer denied all of his alternatives.
- The policy was flawed and his personal information (namely, his vaccination status and the reporting of rapid test results) was not safe.
- He had no option but to stand firm and keep his information safe – which led to his termination.
- He was forced to choose between his job and his morals. It was a difficult choice, but he objected to providing the employer with his medical information because it was not properly safeguarded.
- He has been paying into EI for 12 years and needs some financial assistance until his grievance is complete.

[26] The Claimant testified at the hearing that:

- The issue of misconduct applies to both the employee and the employer.
- He was aware of the policy in early September 2021, but it was vague about how employees were to report their vaccination status.

also did not want to be hassled and disrupted during his working day to show test results. When the employer advised him of this requirement, he refused to provide the test results and asked if he could work on an honour system and just report to his employer if he was sick and then stay home.

¹⁵ The Claimant said he had enough work for at least 2 years of working remotely, without the need to visit a City facility.

¹⁶ He asked the employer if he could just report that he was sick if he were not feeling well. He wanted to work on more of an honour system, but was told he had to provide the negative test results. He said he was not willing to report to his employer if he had Covid, but would just state that he was sick – as it's none of his employer's business why he was sick.

- If the employer doesn't establish a "proper way" of complying with the policy, then there can't be misconduct for refusing to do so.
- He asked to report to the employer's "corporate security department", but the employer offered him no alternative but to disclose his personal medical information to his direct supervisor.
- He was certain it would be leaked to his co-workers, because he'd had other people's information leaked to him by his direct supervisor.
- He didn't have the "trust factor" in his direct supervisor to disclose his personal medical information to him. He might as well have "told the whole city of Edmonton".
- But the employer offered no alternative way of reporting his vaccination status.
- At a meeting to discuss the Claimant's privacy concerns, he asked to report to "anyone other than" his direct supervisor. But the employer told him that the only option was to report verbally to his direct supervisor and anyone at the job site – including members of the general public – who asked about his vaccine status or rapid test results.
- After he missed the October 31, 2021 deadline, the policy led him to the rapid testing option. But this wasn't any better, because it meant he would have to report all of his test results to his direct supervisor, his foreman, and anyone at a worksite who asked what his status was.
- He was not prepared to do this, so he was "forced into a situation of misconduct" because of "flaws" in the employer's reporting system.
- He never refused to be vaccinated or rapid test. He refused to report his vaccine status or rapid test results to his direct supervisor.
- He offered several alternative scenarios that would have accommodated his privacy concerns, but the employer refused all of his requests.

- He understood the consequences of his decision not to report his vaccine status and not to participate in the rapid testing program. But “for the safety” of his information, he could not do so.
- The employer engaged in a number of acts which he believes were meant to force him to comply, including refusing his request to take vacation and withholding the pay-out of his vacation pay until termination. This shows the employer was trying to coerce him into reporting to his direct supervisor.
- He went back to work on August 2, 2022, but his grievance is continuing and going to arbitration.

[27] At the hearing, the Claimant said he understands that his decisions not to provide proof of vaccination by the policy deadline and not to participate in the employer’s rapid testing program constitute misconduct for purposes of EI benefits.

[28] He is arguing that his misconduct was “forced” by the employer’s conduct – which itself was a violation of the employer’s policy on protection of personal information, as well as the collective agreement and his human rights and constitutional rights. He says this should mitigate against the finding of misconduct and allow him to be paid EI benefits.

[29] It is not the Tribunal’s role to decide if the employer’s policy was reasonable, or whether the employer should have accepted the Claimant’s request to work from home and/or report on an honour system, or whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed on was too severe¹⁷. The Tribunal must

¹⁷ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

focus on the conduct that caused the Claimant to be suspended and dismissed – and decide if it constitutes misconduct under the EI Act.

[30] I have already found that the conduct which led to the Claimant's suspension and dismissal was his refusal to provide proof of vaccination as required by the policy and his refusal to participate in the employer's rapid testing program, also required by the policy.

[31] The uncontested evidence obtained from the employer, together with the Claimant's evidence and testimony at the hearing, allow me to these additional findings:

- a) the Claimant was informed of the policy and given time to comply with it.
- b) his refusal to comply with the policy was deliberate and intentional. This made his refusal wilful.
- c) he knew his refusal to provide proof of vaccination and participate in the rapid testing program thereafter – after failing to obtain an accommodation to work at home or report his rapid test results as he saw fit – could cause him to be suspended and then dismissed from his job. This means he accepted the consequences.
- d) his refusal to comply with the policy was the direct cause of his suspension and subsequent dismissal.

[32] The employer has the right to set policies for workplace safety. The Claimant always had the right to refuse to comply with the policy.

[33] But by choosing not to comply with the policy, he made a personal decision that led to foreseeable consequences for his employment.

[34] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if that personal decision is based on religious beliefs or medical concerns or privacy

considerations. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits¹⁸.

[35] These cases are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act¹⁹.

[36] I therefore find that the Claimant's wilful refusal to provide proof of vaccination as required by the policy and to participate in the employer's rapid testing program, also required by the policy – constitutes misconduct under the EI Act.

[37] The Claimant' submits that his misconduct should be forgiven and should not disentitle or disqualify him from EI benefits because the employer "forced him" into the misconduct. He says he had no choice but to refuse to comply with the policy after the employer refused to accommodate his concerns about the security of his personal medical information.

[38] This is not a persuasive argument. There is no provision in the EI Act or case law that allows me to disregard the Claimant's misconduct or excuse him from the EI Act's consequences for losing his employment due to that misconduct.

[39] The Claimant may have hoped to work from home or to persuade the employer to alter its reporting arrangements for vaccination status and rapid test results prior to the October 31, 2021 deadline. But this does not diminish the fact that, by October 31, 2021, he knew the employer had rejected his request to work from home and his suggestions for alternative reporting, and he had received notice from the employer that he was being placed on an unpaid leave of absence and would be terminated if he

¹⁸ See: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628, and *JF v Canada Employment Insurance Commission*, 2022 SST 690

¹⁹ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

remained non-compliant. He still chose not to comply with the policy, and this choice makes his conduct wilful.

[40] The Claimant believes the employer's decision to refuse his accommodation request and place him on unpaid leave and then dismiss him – violated his collective agreement. He also argues that the employer's policy had the effect of forcing him to choose between working and disclosing information he believes is private and confidential. He says this was a violation of his human rights and Canadian law.

[41] But I have no authority to decide whether the employer breached the Claimant's collective agreement²⁰ or any of his rights²¹. Nor do I have authority to decide if the employer's accommodation request process was proper – or whether the employer should have accommodated the Claimant. The Claimant's recourse for his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.

[42] I therefore make no findings with respect to the validity of the policy or any violations of the Claimant's rights. He is free to make these arguments before the appropriate adjudicative bodies and seek relief there²².

[43] However, none of the Claimant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that he was suspended and subsequently dismissed because of conduct that is considered to be misconduct under the EI Act.

[44] And this means he cannot be paid EI benefits.

²⁰ This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

²¹ See footnote 13 above.

²² I note that the Claimant said his grievance is continuing and going to arbitration.

Conclusion

[45] The Commission has proven the Claimant was suspended and subsequently dismissed from his employment because of his own misconduct. This means he is not entitled to be paid EI benefits starting from February 6, 2022.

[46] The appeal is dismissed.

Teresa Day
Member, General Division – Employment Insurance Section