



Citation: *CJ v Canada Employment Insurance Commission*, 2023 SST 29

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

# Decision

**Appellant (Claimant):** C. J.

**Respondent (Commission):** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision dated May 10, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy

**Type of hearing:** Videoconference

**Hearing date:** January 5, 2023

**Hearing participant:** Appellant

**Decision date:** January 12, 2023

**File number:** GE-22-3689

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost his job because of misconduct (in other words, because he did something that caused him to be suspended and to lose his job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from November 15, 2021, to February 10, 2021, and disqualified from receiving EI benefits from February 11, 2022.<sup>1</sup>

## Overview

[3] The Claimant worked as Real Estate Manager and was placed on an unpaid leave of absence by his employer on November 15, 2021. The Claimant then lost his job on February 11, 2022. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence and then dismissed because he didn't comply with their vaccination policy (GD3-23).

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant was disqualified from receiving EI benefits from November 21, 2021.

[5] However, the Claimant didn't lose his job until February 11, 2022. So, the Claimant's disqualification shouldn't have started until February 11, 2022. Nevertheless, the Claimant was placed on an unpaid leave of absence on November 15, 2021,

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits they meet one of the following provisions: (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves their employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

because he didn't comply with the employer's vaccination policy. The **employer did initiate** the Claimant's unpaid leave of absence. As a result, this was considered a suspension from employment.

[6] The Commission says the Claimant was aware of the employer's vaccination policy and understood that failing to comply could lead to his dismissal.

[7] The Claimant says there was no misconduct on his part. He further says he had a right to his bodily autonomy.

## **Matter I have to consider first**

### **Post-Hearing Documents**

[8] The Claimant submitted additional documents that arrived close to the hearing date. I accepted these documents, and they were listed in the Appeal Docket as RGD3-1 to RGD3-98. The documents were then automatically shared with the Commission.

[9] The Commission submitted supplementary representations that were dated January 4, 2023. However, the supplementary representations arrived post-hearing. I accepted these post-hearing submissions, and they were listed as RGD4-1 in the Appeal Record. The Commission's post-hearing representations were automatically shared with the Claimant.

### **Issue**

[10] Was the Claimant suspended and dismissed because of misconduct?

### **Analysis**

[11] To answer the question of whether the Claimant was suspended and lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended and lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

## **Why was the Claimant suspended and dismissed from his job?**

[12] I find the Claimant was suspended and lost his job because he didn't comply with the employer's vaccination policy.

[13] The Commission says the reason the employer gave is the reason for the dismissal. The employer told the Commission that the Claimant was placed on an unpaid leave of absence and then dismissed because he didn't provide proof of vaccination (GD3-23)

[14] The Claimant doesn't dispute that he lost his job because he didn't disclose his vaccination status. However, the Claimant says there was no misconduct on his part.

[15] In summary: I find the Claimant was suspended and lost his job because he didn't comply with the employer's vaccination policy.

## **Is the reason for the Claimant's suspension and dismissal misconduct under the law?**

[16] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>4</sup>

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

[18] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended and let go because of that.<sup>5</sup>

[19] The Commission has to prove that the Claimant was suspended and lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended and lost his job because of misconduct.<sup>6</sup>

[20] The Commission says there was misconduct because Claimant was aware of the employer's vaccination policy and understood that failing to comply could lead to his dismissal.

[21] The Claimant says there was no misconduct on his part. The Claimant further says he was constructively dismissed and forced out of his job. He also says the vaccination policy wasn't included in his employment agreement.

[22] I find the Commission has proven that there was misconduct, because they showed the Claimant was aware he could be suspended and potentially dismissed if he didn't disclose his vaccination status (GD3-24). I realize the Claimant argued that the vaccination requirement or policy wasn't included in his employment agreement. However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.<sup>7</sup>

### **Additional Testimony and Submissions from the Claimant**

[23] I realize the Claimant further testified that a recent decision (GE-22-1889) from the General Division of the Social Security Tribunal (Tribunal) contained the same type of circumstances as his own and was allowed. However, the decisions from the General Division Tribunal decisions **were not binding** on me as a legal precedent. Furthermore,

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

I agree with the Commission that it was too soon to know if this decision (GE-22-1889) would be challenged to a higher level and (or) if this decision will stand or potentially be overturned (RGD04).

[24] I recognize the Claimant also argued that there was no misconduct on his part, but there was misconduct by the employer. However, I must apply the legal test for misconduct as established in the case law. In other words, I cannot ignore the law even for compassionate reasons.<sup>8</sup>

[25] Finally, the Claimant argued that he was constructively dismissed and forced out of his job. The Claimant further argued that the employer's vaccination policy was coercive and violated his privacy rights. Nevertheless, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. The only issue before me was whether the Claimant was suspended and dismissed from his job because of misconduct. On this matter, I must apply the law.

### **So, was the Claimant suspended and dismissed job because of misconduct?**

[26] Based on my findings above, I find the Claimant was suspended and lost his job because of misconduct.

### **Conclusion**

[27] The Commission has proven that the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant was disentitled and disqualified from receiving EI benefits.

[28] This means the appeal is dismissed.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section

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<sup>8</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.