



Citation: *CJ v Canada Employment Insurance Commission*, 2022 SST 1304

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

Decision

Appellant: C. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (467243) dated May 10, 2022
(issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing:

Decision date: September 20, 2022

File number: GE-22-1799

Introduction

[1] The Claimant (who is the Appellant in this appeal) worked as a Manager for X. He was placed on an unpaid leave of absence and later dismissed from his job because he failed to comply with the employer's mandatory Covid-19 vaccination policy¹ (the policy).

[2] He applied for regular employment insurance (EI) benefits, but the Commission (who is the Respondent in this appeal) said he was suspended from his job – and ultimately lost his job – due to his own misconduct. This meant he could not be paid any EI benefits.

[3] The Claimant asked the Commission to reconsider its decision. He admitted he was put on an unpaid leave of absence and later terminated from his job for non-compliance with the policy. But he said he considers his personal medical information to be private and confidential and the requirement to disclose his vaccination status a violation of his Human Rights.

[4] The Commission maintained that he could not be paid EI benefits. The Claimant appealed that decision to the Social Security Tribunal (Tribunal).

Issue

[5] I must decide whether the appeal should be summarily dismissed.

¹ X is subject to federal government regulations. The Government of Canada announced a mandatory vaccination policy for all employees in August 2021. This policy applied to employees of X, as described in the Claimant's lawyer's letter of September 27, 2021 re: Mandatory Employee Vaccination Policy at GD2-22.

The law

[6] The law says I **must** dismiss an appeal summarily (which means without a hearing) if the appeal has no reasonable chance of success². This means I must consider whether it is plain and obvious on the record that the appeal is bound to fail³.

[7] The Tribunal's own regulations say that before summarily dismissing an appeal, I must give the Claimant notice in writing and allow a reasonable period of time to make submissions⁴.

[8] On August 27, 2022, the Claimant was advised of my intention to summarily dismiss his appeal (GD06). He was given until September 12, 2022 to make detailed written submissions explaining why his appeal had a reasonable chance of success.

[9] The Claimant responded by filing the documents and information at GD7, GD8 and GD9⁵.

[10] I am summarily dismissing his appeal because it has no reasonable chance of success. These are the reasons for my decision.

² This requirement is set out in section 53(1) of the *Department of Employment and Social Development Act*.

³ To do this, I must ask whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing: see *Mishibinjima v. Canada (Attorney General)* 2007 FCA 36.

⁴ This requirement is set out in section 22 of the *Social Security Tribunal Regulations*.

⁵ I have reviewed and considered this evidence. It was also shared with the Commission, who confirmed it had no additional representations in response.

Analysis

[11] The law says a claimant cannot be paid EI benefits if they are suspended from their employment due to their own misconduct⁶ or if they lose their employment because of their own misconduct⁷.

[12] 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).

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

[14] 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 or dismissed because of it¹¹.

⁶ 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. 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.

⁷ This is set out in section 30(2) of the EI Act.

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.

[15] The Commission has to prove the Claimant was suspended and lost his job due to misconduct¹². It relies on evidence its representatives¹³ obtain from the employer and the Claimant to do so.

[16] The undisputed evidence in the appeal file shows that:

- a) the employer implemented a mandatory Covid-19 vaccination policy in response to the Covid-19 pandemic¹⁴. The policy was intended to protect health and safety in the workplace, and it applied to all X employees¹⁵.
- b) the Claimant was informed of the policy and given time to comply with it¹⁶.
- c) the Claimant refused to comply with the policy when he failed to disclose his vaccination status by the deadlines set out in the policy¹⁷.

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 his job because of misconduct.

¹³ The Commission's representatives are the Service Canada officers who interview claimants and employers about their EI claims.

¹⁴ The reconsideration file does not include a copy of the policy, but both the employer and the Claimant agree that X implemented the Government of Canada's mandatory vaccination policy announced in August 2021 (See Supplementary Records of Claim at GD3-23 and GD3-24). See also the Claimant's lawyer's letter of September 27, 2021 re: Mandatory Employee Vaccination Policy GD2-22. See also the employer's announcement to all employees on November 11, 2021 (starting at GD2-66).

¹⁵ See employer's statement at GD3-23. See also employer's E-mail to the Claimant on October 19, 2021 at GD2-61. See also the employer's announcement to all employees on November 11, 2021 (starting at GD2-66).

¹⁶ See GD2-19, where the Claimant states the vaccine mandate was implemented August 13, 2021. See also GD3-23, where the employer told the Commission that the policy required the Claimant to be fully vaccinated as a condition of his employment. "Fully vaccinated" meant the Claimant needed to have his first dose of a Covid-19 vaccination by November 15, 2021, after which he needed to be rapid tested every 3 days – and then have his second dose by January 20, 2022. See also GD3-24, where the Claimant agreed with the employer's version of events and agreed he was given time to get vaccinated and disclose his vaccine status.

¹⁷ See November 15, 2021 E-mail from Employer to Claimant (at GD2-72). The Claimant's lawyer's letter of September 27, 2021 indicates that the Claimant requested a religious exemption, which was denied (see GD2-38). In the absence of an approved exemption, the Claimant was required to provide proof of vaccination as set out in footnote 15 above.

- d) the Claimant made a conscious, deliberate and intentional choice not to disclose his vaccination status or be vaccinated¹⁸. This made his refusal to comply with the policy wilful.
- e) he knew his refusal could cause him to be placed on an unpaid leave of absence¹⁹ and eventually lose his job²⁰.
- f) his refusal to comply with the policy was the direct cause of his unpaid leave of absence²¹ and subsequent dismissal²².

[17] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act²³. The undisputed evidence in the appeal file similarly supports a conclusion that the Claimant's wilful refusal to comply with the policy (by providing proof of vaccination by the given deadline) was misconduct under the EI Act.

[18] The Claimant argues that the employer acted unfairly and in a discriminatory fashion when it placed him on an involuntary leave of absence without pay and

¹⁸ See Claimant's statements to the Commission at GD3-24 and GD3-29. See also GD2-5 and GD2-17 to GD2-20. See also Claimant's lawyer's letters of September 27 and 28, 2021 re: Mandatory Vaccination Policy, starting at GD3-22 and GD3-24 respectively. And see also Claimant's lawyer's letter of February 7, 2022 re: Wrongful Dismissal, starting at GD3-33.

¹⁹ See Claimant's statements to Commission at GD3-24. See also the Claimant's lawyer's letter of September 27, 2021 (at GD2-22), where the lawyer refers to the Claimant as part of a "class of employees whose employment is threatened by suspension without pay and with the possibility of termination" by X's announcement that having "double Covid-19 vaccination" would be a "bona fide occupational requirement effective November 1, 2021". See also letters from Employer to Claimant re: unpaid leave of absence on November 30, 2021 (at GD2-72), January 10, 2022 (at GD2-73).

²⁰ See Requirement to advise on vaccination status letter issued to Claimant on November 30, 2021 (at GD2-72).

²¹ See Unpaid Leave of Absence letter at GD2-73.

²² See employer's statements to Commission at GD3-23.

²³ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

subsequently summarily terminated his employment²⁴. He also argues that the policy amount to a “criminal assault”²⁵, and violated his constitutional and human rights²⁶.

[19] But the employer’s conduct is not the issue on this appeal. It’s not the Tribunal’s role to decide if the employer acted fairly or if the penalty for non-compliance with the policy was too severe²⁷. Nor is it open to the Tribunal to decide if the policy violated the Claimant’s human rights²⁸. The Claimant is free to make these arguments before the appropriate adjudicative bodies and seek relief there²⁹.

[20] I can only consider whether the Claimant’s actions were misconduct under the EI Act.

[21] There is no evidence the Claimant could present at a hearing that would change the facts listed in paragraph 16 above. And if I accept these facts as true, there is no argument the Claimant could make that would allow me to conclude anything *other than* that he was suspended – and later dismissed – from his employment due to his own misconduct, and cannot be paid EI benefits as a result.

[22] This means his appeal has no reasonable chance of success.

[23] Since it is plain and obvious to me on the record that the Claimant’s appeal is bound to fail, the law requires me to summarily dismiss his appeal.

²⁴ These arguments are set out in the Claimant’s lawyer’s letter of February 7, 2022 re: wrongful dismissal (starting at GD2-33). See also GD2-5.

²⁵ See GD2-34.

²⁶ See footnote 24 above.

²⁷ 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 the 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.

²⁸ These questions are best left to the provincial Human Rights tribunals and/or the Canadian Human Rights Tribunal.

²⁹ An example of this is the wrongful dismissal action referred to in the Claimant’s lawyer’s letter of February 7, 2022 (starting at GD2-33).

Conclusion

[24] The appeal has no reasonable chance of success and is, therefore, summarily dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section