Citation: *KN v Canada Employment Insurance Commission*, 2022 SST 1048

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. N.
Representative:	Perrys LLP
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (460320) dated April 14, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	September 21, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	September 29, 2022
File number:	GE-22-1714

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he did not comply with the employer's mandatory COVID-19 vaccination policy (Policy).

[4] The Claimant doesn't dispute that this happened. He says that his non-compliance with the Order is not misconduct.

[5] 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 is disqualified from receiving EI benefits.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] The representative for the Claimant relied on a number of court decisions, arbitrator decisions and one Tribunal decision in his submissions. I asked him to forward some of those decisions for me to review in making this decision.

Issue

[7] Did the Claimant lose his job because of misconduct?

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

Analysis

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

Why did the Claimant lose his job?

[9] I find that the Claimant was dismissed because he did not take the COVID vaccine as required by the mandatory Order.

[10] The Claimant testified that the employer fired him because he broke the collective agreement between the union and the employer. On further questioning, he stated that both the Policy and the collective agreement were the reason for his dismissal. He referred to the employer's termination letter of October 22, 2022 (GD3-54). That first three paragraphs of that letter refer to the Policy, its rationale and its requirements. The only mention of the collective agreement in the letter is in the next paragraph. That paragraph notes the Claimant's failure to comply with the Policy. It concludes, "Consequently, your continued failure to abide by the *Mandatory COVID-19 Vaccination Policy* is in breach of the Collective Agreement and your employment with [employer's name] is being terminated effective immediately for reasons of just cause." The Policy itself was clear that failure to comply after October 22, 2021, would result in termination (GD3-33). There was no evidence as to how the collective agreement may have been breached. The Claimant stated in his application for EI benefits that the allegation of breaking the collective agreement was completely untrue and totally false. I see no evidence to contradict that non-compliance with the Policy was the only reason for the dismissal. I find that the Claimant was dismissed for non-compliance with the Policy.

Is the reason for the Claimant's dismissal misconduct under the law?

[11] The Claimant made a number of submissions respecting the proper test for misconduct for EI purposes. He provided a number of court and tribunal decisions in

support of those submissions. I will outline in the next paragraphs the test that has been applied by the Tribunal in its decisions, then review the Claimant's submissions.

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] 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.[4]

[13] 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 let go because of that.[5]

[14] The Commission has to prove that the Claimant 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 lost his job because of misconduct.[6]

[15] The Commission must prove all of these factors in order to prove misconduct by the claimant.

[16] Before applying these criteria to the facts in this appeal, I will deal with a number of submissions put forward by the Claimant to support his appeal.

– The Claimant's submissions on the law of misconduct

[17] Before dealing with the submissions, I need to point out the limited jurisdiction of the Tribunal in deciding appeals, such as this one.

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] See *Attorney General of Canada v Secours*, A-352-94; (*Canada (Attorney General)* v *Johnson*, 2004 FCA 100.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[18] The starting point of the analysis is the limited authority of the Tribunal in deciding EI appeals. Unlike the superior courts, the Tribunal does not have wide-ranging jurisdiction or authority to deal with all factual or legal issues that may be presented to it. The General Division EI Section of the Tribunal only has jurisdiction to deal with a specific reconsideration decision made by the Commission.[7] In relation to an appeal from that specific decision, the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.[8] That limits what the Tribunal can do in EI matters to reviewing decisions the Commission makes under the *Employment Insurance Act* and its regulations. The Tribunal General Division EI section has to work within that framework. The Tribunal's authority to decide any question of fact or law necessary for the disposition of the appeal is similarly limited.[9] Many of the arguments advanced by the Claimant are outside the jurisdiction of the Tribunal, as reviewed below.

[19] In cases of a disqualification or a disentitlement from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration.[10] If an employer has violated a law outside the EI program, that is (with one exception noted at the end of this paragraph) a matter for a different authority than the Commission or the Tribunal. If the Commission has disregarded EI law in making its decision whether to grant benefits, then the Tribunal has the legal authority to deal with that. A claimant must meet the qualifying criteria to be eligible to receive EI benefits. If he fails to satisfy those criteria, or meets the conditions to be disentitled or disqualified from receiving benefits, then he will not receive EI benefits. It is only when the *Employment Insurance Act* or regulations make specific reference to other laws that those laws are relevant to eligibility for EI benefits. An example is the reference to other laws in the context of just cause for

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[7] *Employment Insurance Act,* sections 112 and 113.
[8] *Department of Employment and Social Development Act*, section 54(1).
[9] *Department of Employment and Social Development Act*, section 64.
[10] *Paradis v Canada (Attorney General)*, 2016 FC 1282.

voluntarily leaving a job.[11] Those references only apply to cases in which the claimant has voluntarily quit his job (or taken a voluntary leave of absence), and the issue is whether he will be denied EI benefits because he quit (or took voluntary leave) without just cause. Those references do not apply to cases involving misconduct. I cannot, in this misconduct appeal, deal with the issues of violation of human rights legislation or occupational health and safety laws as factors in deciding the Claimant's eligibility for EI benefits. The Claimant's reference to the *Ontario Human Rights Code*, sections 8 and 13(1), and the *Occupational Health and Safety Act* (OHSA), section 50(1) (GD3-25), lie outside my jurisdiction. His remedies lie with the Human Rights Commission, or the collective agreement grievance process, or the courts. In a telephone conversation with the Claimant and his representative, there is a reference to the *Hospital Labour Disputes Arbitration Act* protecting employees from an employer changing the terms of employment while those terms are in dispute (GD3-50). This appears to be a reference to section 13 of that Act. There is no evidence before me that the provisions of this Act have been triggered under section 3 by a conciliation officer reporting not reaching a collective agreement with the parties. If that had happened, the remedy is the matter being referred to the Ontario Labour Relations Board. Again, this matter lies outside the Tribunal's jurisdiction.

[20] The main submission focused on the proper test for wilfulness, and the role of choice in assessing misconduct. The Claimant argued that the test used by the Commission lowers the standard in the proper test for misconduct, and reverses the onus of proof onto the Claimant. He relied on a number of court decisions in support. He said that there was no decision supporting the Commission's position. He relied on one decision to support the submission that the Claimant's ability to perform duties for the employer was not impaired, so that the part of the misconduct test dealing with impairment of duties had been improperly applied to him.[12] He relied on fact situations

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[11] *Employment Insurance Act*, section 29(c)(i), (iii) and (xi), sexual or other harassment, discrimination under the *Canadian Human Rights Act*, and practices of an employer that are contrary to law, respectively.

[12] *Canada (Attorney General v Tucker),* A-381-85. The claimant was an airline steward who took non-prescribed tranquillizers, which interfered with her ability to perform her work during the flight. The Claimant appears to be relying on the dissent by Justice Marceau, in which he stated that "…one should not confuse a certain action and the effects thereof…Impairment is not an action, it is the effect of an

involving possible or actual criminal conduct as being misconduct for EI purposes to show that the lower standard used by the Commission was wrong.[13] The proper test for misconduct has been set out in the paragraphs [12] to [15] above. The Commission applied the proper test in this case, so did not reverse the onus as alleged.

[21] The other submission focused on the role of choice in assessing misconduct. The Claimant argued that the threat of job loss meant that there was no choice for him to make. He was faced with an ultimatum. He had no choice but to let the employer fire him. He did not choose, did not consent, therefore did not meet the criterion of wilfullness. He did nothing wrong. He was fired for making a personal medical decision. This argument does not succeed, for a number of reasons. On the facts of this appeal, the Claimant did decide not to be vaccinated by relying on his right to bodily autonomy. That shows that he did make a choice. The fact that the choice was made in the face of the pressure of loss of his job and income, shows that it was a deliberate, conscious, intentional, choice. It was therefore wilful. If the Claimant's argument were accepted, it would gut the concept of wilfulness in the EI context. It could allow any claimant who was faced with suspension or dismissal to avoid denial of EI benefits by saying that he did not make a choice; the suspension or dismissal was imposed on him

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action." This ties in with the Claimant's argument that his refusal to take the vaccine did not impair his abilities to do his job. The majority in *Tucker* disagreed, adopting the reasoning of the Umpire that "to constitute misconduct, the act complained of must have been wilful or at least of such carelessness or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance." Based on that, the Claimant's refusal to be vaccinated cannot be viewed in isolation. The effects of that refusal must be considered in assessing whether there has been an impairment of his ability to carry out his duties as a factor in determining whether there was misconduct. His being dismissed for non-compliance totally impaired his abilities to carry out his duties.

[13] *Canada* (*A. G.) v. Lemire*, 2010 FCA 314 (selling contraband cigarettes on employer's property); *Canada (Attorney General)* v *Brissette*, A-1342-92 (losing driver's licence for impaired driving outside work hours). *Canada (Attorney General)* v *Secours*, A-352-94 (altering time cards). Many misconduct decisions do not involve possible or actual criminal conduct, so do support the Commission's position: *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (persistent lateness and absenteeism); *Canada (Attorney General) v Bigler*, 2009 FCA 91 (going on a drinking binge then being absent from work for several days); *Canada (Attorney General) v Bedell,* A-1716-83 (refusing to follow employer's direction, amounting to insubordination); *Canada (Attorney General)* v *Locke*, A-799-95 (missing a shift without advising supervisor); *Fleming* v *Canada (Attorney General)*, 2006 FCA 16 (leaving a work station a number of times without permission, sleeping on the job, taking extended breaks and wasting time, when had received written warnings and many suspensions).

by the employer. The argument that the Claimant did nothing wrong, so did not meet the definition of misconduct, also fails.[14]

[22] The Claimant argued that termination for just cause was not reasonable in his circumstances. He says that there was no just cause here. The common law concept of just cause does not apply to the EI concept of misconduct. There is a concept of "just cause" in the *Employment Insurance Act*, but it only applies in situations where a claimant has voluntarily left their job, or voluntarily taken a leave of absence from the job.[15] The common law of wrongful or unjust dismissal uses a different test for misconduct than does the law of employment insurance.[16] The common law and the EI concepts of "just cause" focus on very different contexts. The common law concept asks whether the employer had just cause to dismiss an employee. The EI concept asks whether the employee had just cause to quit the employer. Court decisions under the *Employment Insurance Act* have been consistent. The role of tribunals and courts in the EI context is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.[17] The Tribunal has to determine whether the claimant's conduct amounted to misconduct within the meaning of the EI Act.[18] It is irrelevant to determine whether dismissal is too severe of a penalty.[19] The common law of wrongful dismissal uses a different test for misconduct than does the law of employment

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[14] *Attorney General of Canada v Secours*, A-352-94; *Canada (Attorney General) v Johnson*, 2004 FCA 100, as noted above.
[15] *Employment Insurance Act*, sections 29, 30 and 31.
[16] *Minott v. O'Shanter Development Company Ltd*., 1999 CanLII 3686, 42 O.R.(3d) 321 (C.A).
"Conversely, an employee who is incompetent or persistently careless may be dismissed for cause though no misconduct is made out, because misconduct requires a wilful or reckless disregard of an employer's interest: see generally Canada (Attorney General) v. Tucker, 1986 CanLII 6794 (FCA), [1986], 2 F.C. 329, 66 N.R. 1 (C.A.) per MacGuigan J.A.; Rudner, The 1998 Annotated Employment Insurance Statutes (1997), at p. 607; and Canada (Attorney General) v. Jewell (1994), 175 N.R. 350, 94 C.L.L.C. 14,046 (F.C.A.). In short, misconduct under the [Employment Insurance] Act cannot automatically be equated with just cause for dismissal at common law.
Just cause for dismissal at common law demands a broader inquiry than the search for misconduct under the Act. To decide whether an employer had just cause for dismissal, a court may have to take into account a host of considerations: the seriousness of the employee's misconduct; whether the misconduct was an isolated incident; whether the employee received warnings; the employee's length of service; how other employees were disciplined for similar incidents; and any mitigating considerations. Misconduct under the Act seems to focus more narrowly on the employee's actions that led to the dismissal."
[17] *Canada (Attorney General)* v *Caul*, 2006 FCA 251.
[18] *Canada (Attorney General)* v *Marion*, 2002 FCA 185.
[19] *Canada (Attorney General)* v *Secours*, A-352-94; *Canada (Attorney General)* v *Namaro*, A-834-82.

insurance.[20] There is a limited exception with respect to an employer's conduct before the misconduct occurs. If the employer's conduct may have led to the alleged misconduct, that should be considered in order to properly assess whether the employee's alleged misconduct was intentional.[21]

[23] The Claimant based his objection to taking the vaccine on bodily autonomy, and the high value the law accords to such autonomy.[22] However, bodily autonomy is not an absolute right that overrides all others. This can be illustrated by a recent Québec court decision involving a situation parallel to the one in this case: a government directive that employers have a COVID-19 mandatory vaccination policy, the employer having such a policy, and unvaccinated employees facing dismissal as a result.[23] This was a challenge to the government directive under the *Canadian Charter of Rights and Freedoms* (Charter). The Claimant is not raising the Charter in this appeal. I refer to this case because the Charter does deal with fundamental rights and freedoms, including bodily autonomy (as part of security of the person under section 7). The Charter represents the strongest legal protections against government interference with fundamental rights and freedoms. If a mandatory vaccine directive passes Charter scrutiny, non-Charter challenges (such as this appeal) to the directive, or to policies passed pursuant to the directive, are unlikely to succeed. The court found that the directive did violate the right to liberty by imposing the choice between vaccination or dismissal, and did violate security of the person in breaching psychological integrity,

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[20] *Minott v. O'Shanter Development Company Ltd*., 1999 CanLII 3686, 42 O.R.(3d) 321 (C.A).
[21] *Astolfi v Canada (Attorney General)*, 2020 FC 30. In that case, the Federal Court sent the appeal back to the Tribunal to deal with a matter raised by the claimant, but on which the Tribunal had not made any findings. The claimant said that he was harassed and threatened by a manager, that he did not feel safe at work because of that, and said he would work from home until the employer had investigated. The employer told him to report to the office or be fired. He did not report. He was fired. The Court held that the Tribunal needed to consider the allegations of harassment in their full context, and that the Tribunal erred in not undertaking an analysis of this issue.
[22] *Fleming v. Reid*, 1991 CanLII 2728, 4 O.R.(3d) 74 (CA): "The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered."
[23] *Syndicat des métallos, section local 2008 c. Procureur general du Canada*, 2022 QCCS 2455 (French only at time of publishing).

particularly from the government intervention. There was no breach of the principles of fundamental justice, as the directive was not arbitrary, overbroad, or grossly disproportionate. The court also found that a breach of section 7 was justified by section 1 of the Charter, placing limits on the rights and freedoms set out in the Charter. In light of that court decision, and the purpose of protecting health and safety as set out in Directive 6 in this appeal, this Claimant's argument does not succeed. It also answers his assertion that it is an injustice for the Commission to find misconduct and deny EI to an employee who declines invasive and novel medical interventions solely to keep his job (GD2-5).

[24] The Claimant raises a number of matters that he says the Tribunal must consider. Based on the reasons below, these are not matters that I must consider. Overall, the Claimant says that the employer must justify its position, and has not done so. There must be a contextual analysis dealing with a number of matters: the vaccine's efficacy; the lack of a rational connection of the Policy to the Claimant's job; and the lack of evidence from the employer of the risk that the Claimant may present to others from being unvaccinated. And finally, that too much deference is being paid to the employer.[24] What the Claimant is asking for here is in line with the test at common law for just cause for dismissal, and with arbitral decisions in labour relations law. It is not consistent with the understanding of misconduct for EI purposes. The reasonableness of the Policy is not a factor.[25] In the employment insurance context,

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[24] The Claimant provided a 1967 court decision and four recent arbitrators' decisions, all involving employees' rights under a collective agreement between an employer and a union representing employees. The court decision dealt with the validity of an arbitrator interpreting "proper cause" for dismissal in the collective agreement as being the same as "just cause". The court said the arbitrator was correct. The arbitrator's decisions deal with employers' COVID vaccination policies. The decisions certainly focus closely on the employers' actions, their justification and reasonableness. But in each case the central question is whether the employer's actions violated the collective agreement. Three found that mandatory vaccination violated the collective agreement. One found that only the enforcement mechanism of suspension or termination violated that collective agreement. None of these decisions assist the Claimant. The law relating to labour relations (involving unions and employers) is substantially different from that relating to employment insurance. They are based on widely differing policy considerations. Arbitrators are given authority to review and interpret employers policies for compliance with the collective agreement. In that role, they can review policies based on contextual factors, and can assess justification and reasonableness. The Commission and Tribunal have been given no such authority to review employers' policies in deciding EI matters.

[25] *Canada (Attorney General)* v *Summers*, A-225-94. It is wrong to address the question of misconduct by looking at the reasonableness of the employer's decision.

the role of tribunals and courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.[26] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment.[27] It is misconduct for a claimant to wilfully refuse to comply with their employer's lawful direction respecting their work as an employee.[28] There is nothing in the evidence in this appeal that shows that the employer's conduct prior to the dismissal of the Claimant was a factor leading to the misconduct.[29]

[25] The Claimant also relied on a recent Tribunal – General Division decision.[30] The claimant had been dismissed for failing to become vaccinated on two days notice. The Commission denied EI benefits for misconduct. The Tribunal reversed the denial. It found that the Commission had failed to prove all of the four factors in the definition of misconduct. The employer's evidence, on which the Commission based its case, was inconsistent and not credible. The claimant's conduct was not wilful, because he was only given two days to comply. He did not know or could have known of the consequences of not being vaccinated. He was not told he faced dismissal. Instead the employer told him he could quit. He was given no documents about this policy. He might have had a medical exemption from vaccination, but had no chance to make a request. The member acknowledged that the employer can develop and impose policies in the workplace. But employees ought to be given the chance to understand the policy, know what is required, have an opportunity to review and get information about the policy, and be given enough time to comply. The Claimant's appeal is

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[26] *Canada (Attorney General)* v *Caul*, 2006 FCA 251.
[27] *Canada (Attorney General)* v *McNamara*, 2007 FCA 107; *Fleming* v *Canada (Attorney General)*, 2006 FCA 16.
[28] *Canada (Attorney General)* v *Bedell*, A-1716-83.
[29] *Astolfi v Canada (Attorney General)*, 2020 FC 30. Allegations of employer harassment by yelling at the employee and pounding the table with other staff present, as opposed to a Policy that applied to all employees.
[30] *TC v Canada Employment Insurance Commission,* GE-22-829 (General Division; September 12, 2022), not yet reported.

substantially different from this. The Claimant had sufficient time to consider and assess the Policy and its requirements. He had reviewed the Policy. He was aware of the possibility of an exemption, but was unsuccessful in his request for one. He was aware of the possibility of dismissal. He was a party to a court action to challenge the Policy, and to seek a court order stopping dismissals until the law suit had been decided. He had legal advice respecting the Policy. He had sufficient time to decide whether to comply or not. This Tribunal decision does not assist the Claimant.

[26] The Claimant had raised a number of matters in writing that were not pursued at the hearing. I will deal with them here briefly, for the sake of completeness, and natural justice. He submitted that the Policy was illegal for a number of reasons. First, there was no government mandate for vaccination of hospital staff (GD3-23). With respect to a government mandate, Directive 6 (GD2-108) required hospitals to have a policy requiring all employees to provide proof of full vaccination, or proof of medical exemption, or proof of completion of an education session and ongoing proof of negative antigen tests. The first two items were mandatory. The last item was optional. The employer opted out of the last item. Directive 6 gave the employer legal authorization to have its mandatory vaccination Policy.

[27] Second, the Policy allegedly also violates the *Ontario Human Rights Code* sections 8 and 13(1), and the *Occupational Health and Safety Act*, section 50(1) (GD3-25). As noted above, those matters are outside the Tribunal's jurisdiction. In addition, the Claimant did not provide any evidence or submissions as to what the alleged violations were, and how they supported his appeal.

[28] The Claimant also says that he has paid into EI for 17 years, and says he therefore should receive benefits (GD3-24). The EI scheme does not provide automatic entitlement to EI benefits to a person who has contributed to the scheme and who has become unemployed. Under the EI scheme, the claimant must prove that he meets a number of qualification criteria, such as a minimum number of hours of insurable employment in the year before applying for benefits, loss of employment, being available for work and looking for work, and not being disqualified or disentitled for

reasons such as quitting without just cause, or being dismissed for misconduct. In this case, the Claimant has been disqualified for losing his employment for misconduct, so does not meet the qualification criteria to receive EI benefits.

[29] The Claimant alleged that the Commission's investigation was inadequate, because it made no contact with the employer, did not review the collective agreement, and failed to consider the Claimant's grievance against termination of his employment (GD2-5). The Reconsideration File (GD3) shows one failed attempt to contact the employer, then four subsequent contacts. The employer provided the Commission with documents relevant to the decision on misconduct. The collective agreement and the grievance are not matters relevant to the issue of misconduct for EI purposes, so did not have to be considered by the Commission. The Claimant further alleged that the Minister responsible for EI matters publicly stated that employees terminated for refusing COVID-19 vaccination will all be denied EI, inferring that the Commission failed to investigate those applications on a case-by-case basis, or consider the merits of the Claimant's application. My review of the Reconsideration File shows that the Commission did investigate his application, assessed the facts and his reasons, then decided his application. This argument does not succeed.

[30] The Claimant alleged that the Commission departed from the standards and principles imposed by the Digest of Benefit Entitlement Principles (Digest) chapter 7.3.4, and by sections 29(a), (b), 30 and 51 of the *Employment Insurance Act* (GD2-5). The section of the Digest cited deals with breach of rules in the context of misconduct. The Claimant does not say what standard or principle of the Digest has been departed from. Even if the Claimant showed a departure from the Digest standards or principles, Commission representatives` interpretation of the law does not have the force of law. Commitments to act in a way other than written in law is absolutely void.[31] With respect to the sections in the *Employment Insurance Act*, the Claimant says nothing about a departure from the standards and principles of those sections of sections 29 and 30. The closest he comes is in dealing with section 51, which in cases of misconduct,

[31] *Granger v Employment and Immigration Commission*, A-684-85, affirmed [1989] 1 S.C.R. 141.

requires the Commission to give the employer and the claimant an opportunity to provide information about the loss of employment, and to take any information provided into account in deciding the claim. The Commission received information from both the employer and the Claimant. From my review of the Reconsideration File, the Commission took all this information into account in reaching its initial decision and its reconsideration decision. This argument too does not succeed.

– **The parties' positions**

[31] The Commission says that there was misconduct because it has proven the factors to establish misconduct. The Claimant wilfully refused to comply with the Policy. He was aware of the consequence of dismissal for refusal to comply. The non-compliance caused his dismissal. The Commission cited, but did not expressly deal with the factor of impairment of duties owed the employer. The Claimant's disagreement with the Policy, and his concern with the efficacy of the vaccine, are not relevant to this appeal. Disagreeing with a policy does not excuse an employee from complying with it.

[32] The Claimant says that there was no misconduct for a number of reasons. Reasons dealing with the proper interpretation of misconduct for EI purposes, and with other broad arguments, have been dealt with above. For the purposes of the proper misconduct test under EI law, the Claimant says that his conduct was not wilful, because it was coerced. His ability to perform his job was not impaired by not taking the vaccine. The only impairment was the employer's decision to remove him from the workplace. He was not aware that he would be dismissed from his job because of the court proceeding for an injunction. Since his conduct was not wilful, it was not the cause of his dismissal.

[33] I find that the Commission has proven that there was misconduct, because it has proven the four factors that comprise the definition of misconduct for EI purposes.

– **Findings of fact**

[34] The Claimant worked part-time in the receiving department of a major hospital, starting in October 2004. He was a member of the union representing employees. His work involved minimal contact with patients. He worked his regular hours during the COVID-19 pandemic, from March 2020 to the end date of his employment on October 22, 2021. Initially, COVID prevention measures consisted of masking, distancing and sanitizing. On August 9, 2021, the employer required antigen rapid testing as well (GD2-94). On August 20, 2021, the employer emailed all employees announcing changes to the COVID vaccination policy (GD2-102). The change required all employees to be fully vaccinated against COVID from October 8th forward. Employees could continue rapid testing until they were fully vaccinated, meaning 14 days after the second dose of the vaccine. The email stated that if the employee had not been vaccinated with two doses and had not reported that information, they would be placed on unpaid leave after October 8, 2021. After a further two weeks, if they remained unvaccinated, their employment would end. Prior to August 20, 2021, vaccination had been the employee's choice. Now it changed to mandatory.

[35] The employer amended the policy in response to Directive 6 from the province's Chief Medical Officer of Health, issued on August 17, 2021. The Directive applied to hospitals and other health care providers. It was based on the increased risk of transmission and severity of the Delta variant of COVID, and the impact on vulnerable patients and the health care system's capacity. The Directive required hospitals to have a COVID vaccination policy. The policy must require employees to provide proof of full vaccination, or written proof of a medical reason for not being fully vaccinated, or proof of completing an education session prior to declining vaccination for any reason other than medical. Hospitals could remove the education session option, and require that employees comply with one of the other two options. Directive 6 did not expressly say that non-compliant employees should be suspended or dismissed, or otherwise disciplined. Nor did it expressly say that non-compliant employees cannot attend the hospital for work. The rationale for Directive 6 supports an inference that removal of unvaccinated or unexempted employees from hospitals was necessary to support that

rationale. Suspension or termination of non-compliant employees is consistent with that rationale. Even without that argument, an employer is permitted to create its own policies. The employer is permitted wide latitude in creating and imposing policies, and does not need express legal authority to impose dismissal as a consequence.[32]

[36] The employer amended its vaccination policy to create the mandatory Policy that is at issue in this appeal (GD2-112). The Policy document is dated September 21, 2021. It requires all employees to be vaccinated against COVID by October 22, 2021. There are three options: being fully vaccinated; proof of exemption from vaccination based on medical grounds; or exemption on a ground under the *Human Rights Code*. Exemptions had to be approved by the employer. The Policy outlined the consequences of non-compliance with its requirements. An employee without an approved exemption who refused to be fully vaccinated after October 22, 2021, will be terminated with cause.

[37] The Claimant received the August emails and the Policy. He read them. He sought clarification from the employer, but received little. He was told verbally simply to comply. He did receive an email with a link to a website. The information on the website was not clear to a layperson.

[38] The Claimant applied for an exemption, but it was turned down as incomplete and not based on religious grounds. The Claimant based his application on his right to choose, and to protect his bodily autonomy. He made no request based on religion.

[39] The Claimant has sought relief from the requirements of the Policy by a grievance through his union, and by participation in a law suit challenging the legality of the Policy. The grievance has advanced to the arbitration stage, and remains outstanding. As part of the law suit, the applicants (including the Claimant) asked the court to grant an interim injunction to temporarily stop the employer from dismissing

[32] *TC v Canada Employment Insurance Commission,* GE-22-829 (General Division; September 12, 2022), not yet reported; *SC v Canada Employment Insurance Commission*, 2022 SST 121 (Appeal Division).

employees under the Policy. The court declined to grant the injunction on October 29, 2021. The law suit is ongoing.

[40] The Claimant did not take the vaccine. He did not obtain an exemption from the employer. After the court decision declining to grant the injunction, the employer terminated his employment effective October 22, 2021.

– **Ruling on whether the Commission has proven misconduct**

[41] *Wilful.* After the employer denied the Claimant's exemption request, he acted to preserve his bodily integrity by not taking the vaccine. The Claimant argues that he had no choice, he was presented with an ultimatum, and it was the employer's decision, not his, that led to his dismissal. The Claimant was presented with a dilemma: take the vaccine and keep his job; or refuse the vaccine (either expressly or passively) and lose his job. In the face of such a dilemma, doing nothing is itself making a choice. It is a choice not to take action to get the vaccine. In the absence of an exemption, the Policy required him to get the vaccine, and to provide proof of vaccination. The Claimant did neither. By doing neither, he made a choice not to comply with the Policy. His non-action with respect to getting vaccinated was intentional, deliberate and conscious. It was wilful for EI purposes.

[42] *Impairment of duty.* The Claimant's testimony was that his ability to perform all the job duties was not impaired. He could carry on his duties. I accept that evidence. What prevented him was the employer not allowing him to come back to work. I do not accept that evidence. The performance of services is an essential condition of the employment contract. Where a claimant, through his own actions, can no longer perform the services required from him under the employment contract and as a result loses his employment, that claimant "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily".[33] After his dismissal, the Claimant was completely unable to perform the services under his employment contract, notwithstanding his ongoing ability to do so. The dismissal was

[33] *Canada (Attorney General)* v *Wasylka*, 2004 FCA 219; *Canada (Attorney General)* v *Lavallée*, 2003 FCA 255; *Canada (Attorney General)* v *Brissette*, A-1342-92.

the result of the Claimant's non-compliance with the Policy. That non-compliance, and the resulting dismissal based on the non-compliance, are what prevented the Claimant from carrying out his duties.[34] And that satisfies this factor in the EI misconduct test.

[43] *Knew or should have known of the possibility of dismissal.* The Claimant was aware of the October 22, 2021, deadline for complying with the Policy. He understood he would be fired if he did not comply. He argued that the delay for the injunction decision, and the employer's undertaking not to dismiss any employees until the outcome of that decision, meant that he was not aware of the possibility of dismissal until October 29th, when the decision was released. That argument does not succeed. The Claimant was aware that he would be dismissed under the Policy if he was not vaccinated by the deadline. The employer's undertaking did not extend that deadline. It granted a temporary reprieve from actual dismissal, pending the outcome of the injunction application. When the application was dismissed, the employer dismissed the Claimant, effective October 22nd, not October 29th. Even if the injunction had been granted, he would have known that if whole proceeding challenging the Policy was dismissed, he would have been dismissed.

[44] *Cause of dismissal.* The Claimant argued that his conduct was not wilful, and therefore was not the cause of his dismissal. I have found above that his conduct in not being vaccinated was wilful, and that it was that conduct that caused his dismissal. His claim that he was dismissed for breaking the collective agreement has been rejected, above, so does not assist the Claimant in showing some other cause for dismissal.

So, did the Claimant lose his job because of misconduct?

[45] Based on my findings above, I find that the Claimant lost his job because of misconduct.

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[34] *Canada (Attorney General v Tucker),* A-381-85. As the majority said, "to constitute misconduct, the act complained of must have been wilful or at least of such carelessness or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."

Conclusion

[46] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[47] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance