



Citation: *KG v Canada Employment Insurance Commission*, 2022 SST 1306

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

## Decision

**Appellant:** K. G.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (460368) dated March 7, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** July 7, 2022

**Hearing participant:** Appellant

**Decision date:** July 13, 2022

**File number:** GE-22-961

## Decision

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

[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 this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] K.G. is the Claimant in this case. He worked as a driver. The employer put the Claimant on an unpaid leave and then dismissed him because he did not comply with the covid19 vaccination policy at work. The Claimant then applied for EI regular benefits.<sup>2</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his own misconduct.<sup>3</sup>

[5] The Claimant disagrees because the covid19 vaccine is experimental and the tests are inaccurate and faulty.<sup>4</sup> As well, the employer is guilty of misconduct because he did not consent to the unpaid leave and dismissal.

## Issue

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

## Analysis

[7] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>5</sup>

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving EI benefits.

<sup>2</sup> See application for benefits at GD3-3 to GD3-22.

<sup>3</sup> See initial decision at GD3-49 to GD3-50 and reconsideration decision at GD3-57 to GD3-58.

<sup>4</sup> See appeal forms at GD2-1 to GD2-13.

<sup>5</sup> Section 30 of the *Employment Insurance Act* (EI Act).

[8] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>6</sup>

[9] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>7</sup>

[10] 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?**

[11] I find that the Claimant was put on a mandatory and unpaid leave of absence on October 28, 2021 and dismissed from his job on November 1, 2021 because he did not comply with the employer's covid19 policy. This is consistent with the Claimant's testimony and termination letter in the file.<sup>8</sup>

### **What was the employer's policy?**

[12] The employer implemented a "*Covid19 North America Mitigation Measures Policy*" (policy) effective September 28, 2021. The policy says its purpose was to implement enhanced safety measures to protect employees and their business following public health guidance and reports of a steady rise in covid19 transmission and case counts across the regions they operate.<sup>9</sup> A copy of the policy is included in the file.<sup>10</sup>

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<sup>6</sup> See section 31 of the Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

<sup>7</sup> See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

<sup>8</sup> See unpaid leave letter at GD3-41 to GD3-42; termination letter at GD3-43 to GD3-45 and records of employment at GD3-25 and GD3-27.

<sup>9</sup> See GD3-39.

<sup>10</sup> See policy at GD3-34 to GD3-38.

[13] The policy does not require vaccination, but asked employees to provide their covid19 vaccination status by October 4, 2021.<sup>11</sup> Employee who are not fully vaccinated or who choose not to disclose their vaccination status would be considered unvaccinated and would be required to participate in the company's rapid testing program.<sup>12</sup>

[14] The policy also provided accommodation for medical reasons, religious reasons, or other reasons based on protected grounds.

### **Was the policy communicated to the Claimant?**

[15] The Claimant agrees that the policy was communicated to him in a few different ways. He was on a company wide call on September 17, 2021 and then saw a memo posted at work. He also received a workday notification prompting him to go online and accept the conditions of the policy, but he did not accept them.

[16] The employer told the Commission that the policy was communicated to employees on a company wide call on September 17, 2021; by memo on September 28, 2021; workday notification on September 28, 2021 and some employees had a one-on-one discussions with the employer.<sup>13</sup>

### **What were the consequences of not complying with the policy?**

[17] The policy says that a "failure to comply with this policy, or providing inaccurate vaccination status, may result in disciplinary measures up to and including termination of employment".<sup>14</sup>

[18] The employer told the Commission that employees who did not comply with the policy would be put on a 72 hour unpaid leave of absence to allow them time to reflect on the decision, ask questions, seek clarification and seek external advice.<sup>15</sup> Prior to the

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<sup>11</sup> See GD3-39.

<sup>12</sup> See GD3-36.

<sup>13</sup> See GD3-31 to GD3-32.

<sup>14</sup> See GD3-37.

<sup>15</sup> See GD3-32 to GD3-33.

end of the 72 hour leave, employees would be asked to comply with the policy and participate in rapid testing, or take additional unpaid leave to avoid rapid testing to become fully vaccinated.

[19] The employer also told the Commission that if after the 72 hour unpaid leave, the employee is still non-compliant, that their employment would be terminated immediately. However, they also permitted the Claimant an additional 24 hours after termination to change his mind as noted in the termination letter.<sup>16</sup>

[20] The Claimant testified that he was told by Human Resources he would be suspended for failure to comply with the policy. He agrees that he knew disciplinary action would be taken.

### **Is there a reason the Claimant could not comply with the policy?**

[21] The Claimant testified he knew the policy provided for exemption and accommodation for specific reasons, but he was unable to submit his request to the employer. He explained that he would have to agree to the policy first, before making his exemption request. Because of this, he says that he was unable to ask for an accommodation.

[22] The employer told the Commission that the Claimant did not request an accommodation, nor was his refusal to comply with the policy based on any prohibited ground protected based on human rights legislation.<sup>17</sup>

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

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>18</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>19</sup>

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<sup>16</sup> See GD3-45.

<sup>17</sup> See GD3-31.

<sup>18</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>19</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[24] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>20</sup>

[25] 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.<sup>21</sup>

[26] 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.<sup>22</sup>

[27] I find that the Commission has proven that there was misconduct for the following reasons.

[28] First, I find that the policy was communicated to the Claimant on more than one occasion, he was aware of the deadline dates to comply and had time to comply. More specifically, the Claimant knew that he had provide his vaccination status to the employer by October 4, 2021, and if he remained unvaccinated to agree to rapid testing.

[29] Second, I find that the Claimant willfully chose to not to comply with the policy for his own personal reasons. After the hearing, he submitted a copy an email he sent to his employer on October 31, 2021 confirming that he would not comply with the policy refusing vaccination and refusing testing.<sup>23</sup>

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<sup>20</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>21</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>22</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>23</sup> See GD6-1 to GD6-2. This was a post-hearing document that I accepted because it was relevant to the issue. It was shared with the Commission.

[30] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>24</sup>

[31] Third, I find that the Claimant knew (or ought to have known) the consequences of not complying would lead to an unpaid leave of absence or suspension and dismissal. The consequences were communicated to the Claimant on September 28, 2021 and October 28, 2021, as well as included in the policy itself.<sup>25</sup>

[32] Fourth, I find that the Claimant was not exempt from the policy. The employer confirmed that he had not ask for one.<sup>26</sup>

[33] I was not persuaded by the Claimant's argument that he was unable to ask for an exemption because he had to agree to the policy first. The Claimant could have asked for exemption and accommodation as the policy provided for it. I note that he emailed the employer about his refusal to comply, and could have asked for an accommodation at time.<sup>27</sup> As well, the employer wrote that employees should work with their Human Resources Business Partner to request a workplace accommodation.<sup>28</sup>

[34] Lastly, I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. So, this became a condition of his employment when they introduced the policy. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duty to the employer.

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<sup>24</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>25</sup> See GD3-39 to GD3-40; GD3-34 to GD3-38; GD3-41 to GD3-42.

<sup>26</sup> See GD3-31.

<sup>27</sup> See GD6-1.

<sup>28</sup> See GD3-39.

[35] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment or suspension, which is insured, must be involuntary.<sup>29</sup> In this case, it was not involuntary because it was the Claimant's actions that led to his dismissal.

### **What about the Claimant's other arguments?**

[36] The Claimant raised other arguments, including some of the following:

- a) He does not consent to receiving an experimental vaccine
- b) The tests are faulty and unreliable
- c) His health comes before his job and his medical history is private
- d) The employer crossed the line by imposing the policy, it is against the law and unjust
- e) He was not paid any severance
- f) He was not accommodated by the employer
- g) It is against the Genetic Non-Discrimination Act
- h) He works alone in a truck and has no contact with others, so he was not a danger to others
- i) It was not a condition of his employment

[37] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>30</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

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<sup>29</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>30</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.



[38] I acknowledge the Claimant's other arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.

## **Conclusion**

[39] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence or suspension and dismissal.

[40] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[41] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section