



Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 1368

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

# Decision

**Appellant:** J. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (473653) dated May 31, 2022 (issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Videoconference

**Hearing date:** August 30, 2022

**Hearing participant:** Appellant

**Decision date:** September 16, 2022

**File number:** GE-22-2109

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was dismissed because of misconduct (in other words, because he did something that caused him to be dismissed). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job for not complying with his employer's vaccination policy. The policy required him to be vaccinated against COVID-19 or have an approved exemption. The Claimant didn't provide proof of vaccination by the deadline, so the employer placed him on an unpaid leave of absence (suspension), and later dismissed him.

[4] The Commission 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.

[5] The Claimant disagrees that it was misconduct. The requirement to be vaccinated and to disclose his private medical information was not part of his employment contract when he was hired. Further, the employer unreasonably denied his religious exemption request.

## Matter I have to consider first

### The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not

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

respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

## **Issue**

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

## **Analysis**

[8] The law says that claimants who lose their job because of misconduct are disqualified from receiving benefits.<sup>2</sup>

[9] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.<sup>3</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] Both parties agree that the Claimant was suspended and later dismissed because he did not comply with the employer's mandatory COVID-19 vaccination policy. I see no evidence to contradict this, so I accept it as fact.

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<sup>2</sup> See section 30 of the Act.

<sup>3</sup> See section 31 of the Act.

## **Is the reason he lost his job misconduct under the law?**

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

[13] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</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>6</sup>

[14] 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>7</sup>

[15] 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 was dismissed because of misconduct.<sup>8</sup>

[16] The Commission says that there was misconduct because the Claimant was aware that he was required to comply with the employer's policy to continue working in his job. The Claimant didn't provide proof of vaccination or an approved exemption by the deadline. In doing so, he willfully made the choice not to comply with the employer's policy.

[17] The Claimant says that there was no misconduct because the employer's mandatory vaccination policy was not part of his terms and conditions of employment when he was hired. The policy violated his rights and the privacy of his medical

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

information. And the employer unreasonably denied his request for an exemption to the policy on religious grounds.

[18] The Claimant was employed at a printing company. On September 30, 2021, the employer put in place a policy that required employees to be vaccinated against COVID-19 or have an approved exemption. Employees were required to show proof of their full vaccination by November 30, 2021.

[19] The policy states that staff who were not fully vaccinated or who did not disclose their vaccination status would be non-compliant with the policy. Anyone who was non-compliant with the policy by November 30, 2021, would be placed on unpaid leave until they became in compliance. If they were not compliant with the policy by January 7, 2022, they would be dismissed.<sup>9</sup>

[20] The Claimant said that the employer gave him a copy of the policy on September 30, 2021. He sent the employer a list of questions and a request for the employer to assume liability in case he is harmed by the COVID-19. He said that he would need the employer's answers before he could give "informed consent" to get the COVID-19 vaccine.

[21] The employer sent the Claimant a letter dated November 5, 2021. It states that it has received the Claimant's documents, but that it doesn't appear the Claimant has disclosed his vaccination status or requested an accommodation from the policy. It reminds him that he needs to comply with the requirements of the policy or he will be placed on unpaid leave as of December 1, 2021.

[22] On November 12, 2021, the Claimant sent a request for an accommodation from the policy on religious grounds. The employer denied this request on November 22, 2021.

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<sup>9</sup> The policy states that employees who are non-compliant with the policy by January 7, 2022, will be "deemed to have voluntarily resigned from their employment." Since the employer is initiating the separation from employment, I consider this to be the equivalent of a dismissal, not a voluntary action on the Claimant's part. I have used the word dismissal in this decision for the purpose of clarity.

[23] On November 25, 2021, the Claimant sent the employer a notice that it has a duty to accommodate him on human rights grounds. The employer denied this accommodation request on November 29, 2021. In its letter, the employer reminded him that he would lose his job if he was not vaccinated by January 7, 2022.

[24] The Claimant was placed on unpaid leave (suspended) on November 29, 2021.

[25] The Claimant made several other requests to be exempted from the policy. On December 1, 2021, he sent the employer a "Notice of Potential Claim" saying that he should be accommodated based on his religious beliefs. And on December 24, 2021, he sent the employer a "Notice of Opportunity to Cure" asking the employer to provide the information previously requested and to assume liability for any adverse effects caused by its COVID-19 policy.

[26] The employer dismissed the Claimant on January 7, 2022. The termination letter states that the Claimant has failed to comply with the vaccination policy by the required deadline and so his employment is terminated.

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

[28] The Claimant was notified about the employer's policy in September 2021. He wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that he reasonably should have known the consequences of not complying would result in the loss of his employment.

[29] The Claimant said that he didn't understand that he could lose his job because of this policy, because the policy itself was unprecedented. However, it is clear from the policy and from the communications from the employer that the consequences of not complying would result in the loss of his employment. This tells me that the Claimant reasonably should have known that he needed to be fully vaccinated and provide proof of his vaccination or an approved exemption to continue working.

[30] Based on this evidence, I'm satisfied that the Claimant was notified about the employer's policy and that not complying with the policy could result in him losing his job.

[31] I understand that the Claimant requested an exemption or accommodation from the policy. But, the employer denied his requests. The Claimant knew that he was not exempted from the employer's policy. Regardless, he chose not to comply with the policy's requirements. If he intended to comply with the policy, the Claimant could have communicated that to his employer and asked for an extension of time.

[32] After he was suspended on November 29, 2021, the Claimant was given a further opportunity to comply with the employer's policy. The employer communicated to the Claimant that he had until January 7, 2021, to comply with the policy's requirements. The Claimant had a choice to comply with the employer's policy at that time, but deliberately chose not to do so.

[33] Based on this evidence, I am satisfied that the Claimant acted willfully when he chose not to comply with the employer's vaccination policy.

[34] The Claimant argued that the employer's policy violated his right to privacy. He shouldn't have to disclose his medical information to his employer. And the policy wasn't part of his terms and conditions of employment when he was hired.

[35] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.<sup>10</sup>

[36] I understand the Claimant's concerns that the employer's policy did not give him any option other than to get vaccinated. I acknowledge that he disagrees with the employer's policy and feels that the loss of his employment was unjustified. But, I do not have the authority to decide whether the employer breached his rights by dismissing

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<sup>10</sup> See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

him, or that it should have approved his religious exemption request or accommodated him in some other way.

[37] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>11</sup>

[38] The Claimant may have other recourse to pursue her claims that the employer's policy breached his rights and unjustly dismissed him. But these matters must be addressed by the correct court or Tribunal.

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

[39] Based on my findings above, I find that the Claimant was dismissed because of misconduct.

### **Conclusion**

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

[41] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section

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<sup>11</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.