



Citation: *WW v Canada Employment Insurance Commission*, 2022 SST 1044

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

Decision

Appellant: W. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (490784) dated June 26, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: October 13, 2022

Hearing participant: Appellant

Decision date: October 14 , 2022

File number: GE-22-2423

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] W. W. is the Claimant in this case and worked for an architectural firm. The employer dismissed the Claimant because he did not comply with their mandatory covid19 vaccination policy at work.² The Claimant then applied for EI regular benefits.³

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

[5] The Claimant disagrees because his work contract does not require vaccination and he was wrongfully terminated from his job.⁵ As well, he was working from home during the pandemic and could have continued to do so, but the employer failed to accommodate him.

Issue

[6] Did the Claimant lose his job 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.⁶

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

² See record of employment at GD3-19 to GD3-20.

³ See application for EI benefits at GD3-3 to GD3-18.

⁴ See initial decision at GD3-26 to GD3-27 and reconsideration decision at GD3-28 to GD3-29.

⁵ See Claimant's notice of appeal forms at GD2-1 to GD2-63.

⁶ Section 30 of the *EI Act*.

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

The Claimant stopped working because he was dismissed

[9] I find that the Claimant was dismissed from his job effective December 19, 2021 because he did not comply with the employer's "*mandatory covid19 vaccination policy*" (policy). This is not disputed between the parties.

[10] In this particular case, the Claimant was given a "working notice" by the employer. So, he was advised of his termination on October 18, 2021 that his last day would be December 19, 2021.⁷ The Claimant explained that this permitted him to finish working on an important project, which he agreed to-do. He disputes the employer's statement that he received a large severance, because he only received his regular salary during the working notice period.⁸

[11] This is consistent with the Claimant's testimony, record of employment, termination letter and discussions between the Claimant and the Commission, as well as the employer and the Commission, etc.⁹

The employer's policy – provide proof of vaccination or exemption

[12] The employer implemented a vaccination policy effective September 7, 2021.¹⁰ A copy of the policy is included in the file.¹¹

⁷ See termination letter at GD2-62.

⁸ See supplementary record of claim (SROC) at GD3-21.

⁹ See record of employment at GD3-19 to GD3-20; termination letter at GD2-62; SROC at GD3-21 and GD3-22.

¹⁰ See GD3-24.

¹¹ See policy at GD3-23.

[13] The policy states that its purpose is to provide and maintain a healthy and safe workplace, so they are adopting the policy to safeguard the health of their employees, families, clients, visitors and community at large from infection by covid19.¹²

[14] The policy requires employees to provide either proof of vaccination for covid19 or receive an exemption. The policy provides for exemption for reasons protected by British Columbia *Human Rights Code*.¹³

[15] The Claimant testified that the deadline to comply with the policy was October 24, 2021 and not October 18, 2021. The employer told the Commission that the deadline to comply with the policy was October 18, 2021.¹⁴ However, this was not consistent with the employer's previous letters to the Claimant. For example, a letter dated September 13, 2021 ("*notice of intent to terminate employment*")¹⁵ and October 18, 2021 ("*termination of employment*") reference a deadline date of October 24, 2021.

[16] I find it was more likely than not, that the deadline date to comply with the policy was October 24, 2021. I preferred the Claimant's testimony and the previous letters issued by the employer over the subsequent statement made by the employer.¹⁶

The policy was communicated to the Claimant

[17] I find that the policy was communicated to the Claimant. This is not disputed between the parties. The Claimant agreed that he received an email about the policy around 1 or 2 months in advance of the deadline to comply. A copy of the email is included in the file.¹⁷

¹² See "purpose" of policy at GD3-23.

¹³ See British Columbia's *Human Rights Code*, RSBC 1996, c 210.

¹⁴ See SROC at GD3-21.

¹⁵ See GD2-61.

¹⁶ See SROC at GD3-21.

¹⁷ See GD3-24.

Non-compliance with the policy led to the Claimant's dismissal

[18] In a letter to the Claimant, the employer wrote that a failure to comply with the policy by October 24, 2021 will result in a termination without cause.¹⁸

[19] A subsequent letter advises states that the Claimant is terminated without cause effective December 19, 2021.¹⁹ As noted above, the Claimant was given around 2 months of working notice.

[20] The Claimant testified that he knew not complying with the policy would result in his termination.

The Claimant did not ask for an exemption from the policy

[21] The policy provided for exemption for reasons protected by British Columbia's *Human Rights Code*.²⁰

[22] The Claimant testified that he was aware of the exemptions available, but did not apply for any of them.

Is it misconduct based on the law – the *Employment Insurance Act*?

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²¹ Misconduct also includes conduct that is so reckless that it is almost wilful.²²

[24] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²³

¹⁸ See GD2-61.

¹⁹ See GD2-62.

²⁰ See British Columbia's *Human Rights Code*, RSBC 1996, c 210.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²³ See *Attorney General of Canada v Secours*, A-352-94.

[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 let go because of that.²⁴

[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.²⁵

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

[28] The policy was communicated to the Claimant and he was aware of the October 24, 2022 deadline date to comply. The Claimant was also given enough time to comply with the policy.

[29] The Claimant willfully and consciously chose to not to comply with the policy for his own personal reasons. He did not ask for an exemption, so he has not shown he was exempt from the policy.

[30] This was a deliberate choice he made. The court has said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.²⁶ The court has also said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.²⁷

[31] The Claimant agreed that he knew the consequences of not complying would lead to the termination of his employment. The consequences were communicated to him several weeks before he was terminated.

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁶ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²⁷ See *Canada (Attorney General) v Brissette* 1993, A-13242-92; *Canada (Attorney General) v Lemire*, 2010 FCA 314

[32] 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. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duties and duty to the employer.

What about the Claimant's other arguments?

[33] The Claimant raised other arguments to support his position. Some of them included the following:

- a) He was not contractually required to be vaccinated for covid19²⁸
- b) He was wrongfully dismissed²⁹
- c) His employer failed to accommodate him by allowing him to work from home
- d) He is protected by section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*³⁰
- e) He had concerns about the lack of long-term clinical studies and adverse effects connected to covid19 vaccines³¹

[34] 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.³² I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

²⁸ See employment contract at GD2-3 to GD2-12 and amendment to contract at GD2-14.

²⁹ See SROC at GD3-22.

³⁰ See *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³¹ See article about adverse event reports at GD2-23 to GD2-60.

³² See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[35] I acknowledge the Claimant's additional arguments, but his recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments. As well, the *Charter* applies to governments only and not to private individuals or private businesses. This means that the Tribunal does not have authority to rule on his Charter claim relating to the employer's policy.

[36] I note that the Claimant testified that he had been considering a lawsuit against his employer, but has not started one yet.

Conclusion

[37] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a dismissal.

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

Solange Losier

Member, General Division – Employment Insurance Section