



Citation: *KJ v Canada Employment Insurance Commission*, 2022 SST 1216

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

Decision

Appellant: K. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (475395) dated May 20, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference

Hearing date: October 12, 2022

Hearing participant: Appellant

Decision date: November 7, 2022

File number: GE-22-2078

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.

[3] This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[4] The Claimant lost his job as a part-time instructor teaching one class at a community college. His employer says it let him go because he didn't follow its mandatory COVID vaccination policy (vaccination policy). Under the vaccination policy he had to get fully vaccinated and give his employer proof, or get an exemption, by the deadline.² He told his employer he wasn't going to get vaccinated, and he didn't. And he didn't apply for an exemption.

[5] The Claimant doesn't dispute that this happened.

[6] But he says there's no misconduct. His employer's policy is unreasonable and shouldn't apply to him. He says his employer knew before he was hired he wouldn't get vaccinated. His employer said he wouldn't have to because he could teach the class online. Then his employer adopted its vaccine policy, but didn't communicate it clearly. He believed he could still teach the course. He did nothing wrong, and was never disciplined by the employer.

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 In this appeal there is no legal difference between the Claimant's duty to get vaccinated and his duty to give his employer with proof. This is because he didn't do either. So, I have focused my analysis on his failure to get vaccinated.

[7] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job for misconduct. Because of this, the Commission disqualified him from receiving EI benefits.

[8] I have to decide if he lost his job due to misconduct under the EI Act.

Matters I have to consider first

The decision the Claimant is appealing

[9] The Claimant argues I need to consider his previous job.³ In that job he worked and contributed to EI for ten years. He says he needs EI benefits now and he should be able to get them.

[10] He says the Commission's disqualification decision isn't justified. It acted unfairly and in bad faith by disqualifying him from getting benefits based on his community college job. That job lasted for 15 hours. So, he says, the Commission should not be able to wipe out 10 years of contributions and insurable earnings based on a job he worked at for only 15 hours (his community college job).

[11] There is no question that the financial consequences of the Commission's disqualification decision are harsh for the Claimant.

[12] Unfortunately for the Claimant, I have to follow the EI Act when I make my decision.⁴ I have no power outside the EI Act to make my decision based on principles of fairness or equity.

[13] The EI Act is an insurance plan. Like other insurance plans, someone who makes a claim for a specific benefit needs to show that they meet all the conditions required to get that benefit.⁵ The EI Act says that a claimant is **disqualified from receiving any benefits** if they lost their employment because of misconduct, unless

³ See his notice of appeal at GD2. He also said this at the hearing.

⁴ See *Canada (Attorney General) v Knee* 2011 FCA 301

⁵ See *Pannu v. Canada (Attorney General)* 2004 FCA 90

they fit under an exception to that rule.⁶ Unfortunately for the Claimant, he doesn't fit under any exception.

[14] So at the beginning of the hearing I let the Claimant know that I can only review the Commission's reconsideration decision about his community college job. I can't consider the effect of the Commission's decision on his contributions and insurable hours from his previous job.

The Claimant withdrew his Constitutional (Charter) challenge

[15] The Claimant emailed legal submissions to the Tribunal two days before his hearing.⁷

[16] In those submissions he makes legal arguments about the meaning of misconduct.

[17] He also makes arguments based on the *Canadian Charter of Rights and Freedoms* (Charter), and on Constitutional principles such as the rule of law and access to justice. He uses the Charter to challenge "problematic provisions" of the EI Act. And uses the Charter to challenge how the Commission interpreted and applied the EI Act to deny him benefits.

[18] The Tribunal can consider and decide Constitutional (including Charter) challenges to the EI Act and to the Commission's interpretation and application of the EI Act. However, the Tribunal can only consider Constitutional challenges if a Claimant has followed the rules about this.⁸ In this appeal, the Claimant didn't follow those rules.

[19] Before the hearing the Tribunal emailed its "Charter challenge" information package to him.

[20] At the beginning of the hearing I explained the rules he needed to follow to make a Constitutional challenge. And I gave him a choice: I could adjourn the hearing so he

⁶ See EI Act section 30(1). Section 30(4) suspends a disqualification if a claimant is entitled to special benefits, sick as sickness, parental, and pregnancy benefits.

⁷ See GD6.

⁸ These rules are in section 20 of *the Social Security Tribunal Regulations*.

could follow the rules and get legal advice about doing this if he wanted to. Or, he could go ahead with the hearing without making a Constitutional challenge. I explained that if he went ahead with the hearing and then appealed my decision, he could not make a Constitutional challenge in that appeal.

[21] He thought about his options. He decided to give up his Constitutional challenge and go ahead with the appeal hearing. I checked to make sure he wanted to do this. And he said he wanted to go ahead with the hearing. So we did.

The Claimant sent the Tribunal a document after the hearing

[22] The day after the hearing the Claimant emailed the Tribunal an amended record of employment.⁹ He says his employer emailed it to him during the hearing. So he didn't see it until after the hearing.

[23] I had not made my decision yet. So, the Tribunal sent the amended record of employment to the Commission. The Commission replied to the Tribunal with supplementary representations.¹⁰

[24] I will allow the amended record of employment to be part of the evidence I consider when I make my decision, for the following reasons: I have no reason to doubt the employer completed the record and sent it to the Claimant. I have no reason to doubt the Claimant first saw it after the hearing. So he could not have sent it to the Tribunal before the hearing. The Commission isn't prejudiced because it had a chance to respond to the document and did.

[25] Finally, it's in the interests of fairness and justice to allow the document into evidence. It didn't slow down the Tribunal's process too much. And it is relevant to an issue I have to consider and decide.

⁹ See GD8.

¹⁰ See GD9.

Issue

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

Analysis

[27] The law says that you can't get EI benefits if you lose your job because of misconduct.¹¹

[28] I have to decide two things:

- First, I have to decide the reason the Claimant lost his job.
- Second, I have to decide whether the EI Act considers that reason to be misconduct.

The reason the Claimant lost his job

[29] I find the Claimant's employer dismissed him because he didn't follow its vaccination policy.

[30] I have to consider and assess the evidence and come to a conclusion about the reason the Claimant's job ended. In other words, I have to make a finding of fact based on the evidence. I don't have to follow, accept, or believe the reason given by the employer on a record of employment. I have to consider and assess all the relevant evidence about this issue.¹²

[31] The Claimant and the Commission largely agree that the employer dismissed the Claimant because he didn't follow its vaccination policy. (There is one piece of evidence that goes against this, and I will consider that document below.)

¹¹ The Commission only used section 30, see its representations at GD4. But I can also look at section 31, because both sections are about not getting benefits as a result of misconduct. See *Canada (Attorney General) v Desson*, 2004 FCA 303; and *Canada (Attorney General) v Easson*, A-1598-92 (FCA).

¹² See *Chrichlow v Canada (Attorney General)*, A-562-97 (FCA).

[32] It's what the Claimant told the Commission and testified to at the hearing.¹³ It's what he wrote on his reconsideration request and his notice of appeal.¹⁴

[33] His employer wrote "dismissal" and used code M (dismissal or suspension) on the first record of employment.¹⁵ And told the Commission it dismissed him because he didn't follow its vaccination policy.¹⁶

[34] I accept the Claimant's evidence and the employer's evidence because I have no reason to doubt it. Their evidence was consistent—each time they gave it, and with each other's evidence. And what they said is supported by all the documents in the case. Except for one document, which I will consider next.

[35] The employer sent the Claimant an **amended** record of employment, which was completed over 11 months after the first record of employment. He says he received it after the hearing.

[36] I give no weight to the reason the employer gave on the amended record of employment ("shortage of work / end of contract or season", Code "A"). I give it no weight for two reasons.

[37] First, I find the first record of employment is more likely to be true. The Commission didn't have a chance to contact the employer to ask why it changed the reason on the amended record. The first record was issued shortly after the Claimant was dismissed, when the employer was probably dealing with many dismissals for not following the vaccination policy. And all of the other evidence (which I have no reason to doubt) says the employer dismissed him for not following its vaccination policy.

[38] Second, there is no evidence to support a "shortage of work / end of contract or season". The Claimant was on a fixed-term contract till the end of the semester. His contract says, "End date: 15-DEC-2021".¹⁷ In other words, his contract was not

¹³ See the Commission's notes of its calls with the Claimant at GD3-15, GD3-24, and GD3-43.

¹⁴ See his reconsideration request at GD3-29, and his appeal notice at GD2-22.

¹⁵ See the record of employment at GD3-12.

¹⁶ See the Commission's notes of a call with the employer at GD3-16.

¹⁷ See the contract at GD2-9.

supposed to end on October 7, 2021, the day his employer dismissed him. And he testified that another teacher was hired to take over the class. I have no reason to doubt that. So, I find there was no shortage of work. And none of the other reasons the contract could be cancelled existed at the time he left the job.¹⁸

[39] So, based on all the documents and testimony, I find the Claimant didn't stop working because of a "shortage of work / end of contract or season". I find the real reason the Claimant's employer dismissed him is because he didn't follow its vaccination policy.

The reason is misconduct under the law

[40] The Claimant's failure to follow his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[41] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the questions and issues I have to consider when making my decision.

[42] I have to focus on what the Claimant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.¹⁹ I can't consider whether the employer's policy is reasonable, or whether suspension and dismissal were reasonable penalties.²⁰

[43] The Claimant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.²¹ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or

¹⁸ The contract gives three other reasons it could be "ended": insufficient course enrolment; unavailability of work; and termination with one week's notice. I understand the last reason to exclude termination for another reason, like being dismissed for not following the employer's vaccination policy.

¹⁹ This is what section 30 and 31 of the EI Act say.

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²¹ See *Attorney General of Canada v Secours*, A-352-94 (FCA).

intentional.²² And misconduct also includes conduct that is so reckless that it is almost wilful.²³

[44] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer, and knew or should have known there was a real possibility of being let go because of that.²⁴

[45] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.²⁵ So, for example, I can't decide whether the Claimant was wrongfully dismissed under employment law. I can't decide whether his employer should have accommodated him under human rights law. And I can't decide if his employer breached a collective agreement.

[46] The Commission has to prove that it is more likely than not he lost his job because of misconduct.²⁶

What the Commission says about misconduct

[47] The Commission says that there was misconduct under the EI Act because the evidence shows it more likely than not the Claimant:²⁷

- knew about the vaccination policy and knew it applied to him even though he was working remotely²⁸
- knew that he had to get vaccinated or get an exemption by the deadline²⁹
- knew or should have known that he might be dismissed if he didn't because the policy said this and he told the Commission this³⁰

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²³ See *McKay-Eden v his Majesty the Queen*, A-402-96 (FCA).

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

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88 (FCA).

²⁷ See the Commission's Representations at GD4.

²⁸ See the Commission's notes of its call with the Claimant at GD3-15.

²⁹ See the Commission's notes of its calls with the Claimant at GD3-15, GD3-24, and GD3-43.

³⁰ See the Commission's notes of its calls with the Claimant at GD3-15, GD3-24, and GD3-43. See also the Commission's notes of a call with the employer at GD3-16.

- didn't get vaccinated or apply for an exemption,³¹ which was wilful conduct
- was dismissed for not following his employer's vaccination policy³²

[48] The Commission uses the employer's vaccination policy to support its case. The employer sent the Commission two communications it said it sent to all students and employees—dated September 2, 2021 and September 10, 2021.³³

[49] The September 2, 2021 communication includes these points:

- vaccination policy takes effect September 7, 2021 for all students and employees
- all students and employees required to have first dose of approved vaccine effective September 7, 2021 to participate in college sanctioned activities requiring face-to-face contact on or off campus
- effective November 1, 2021, all students and employees participating in face-to-face college activities must be fully vaccinated (with second dose administered no later than October 17, 2021) unless they have been granted an exemption in accordance with the policy and procedure
- a hypertext link to the "COVID-19 Vaccination Policy and Procedure"

[50] The September 10, 2021, communication includes these new points:

- all students and employees are required to disclose their vaccine status to the college
- disclosing vaccination status is a condition of learning and working at the college

³¹ See the Commission's notes of its call with the Claimant at GD3-15, GD3-24, and GD3-43. See also the Commission's notes of a call with the employer at GD3-16.

³² See my reasons above, in the section, "The reason the Claimant lost his job".

³³ See the college's *September 2, 2021: Vaccination Policy and Procedure* at GD3-17 to GD3-19; and *September 10, 2021: COVID-19 Testing and Safety Requirements* at GD3-20 to GD3-23.

- even people able to work remotely are required to be vaccinated because they may be required to attend campus for a variety of reasons

What the Claimant says about misconduct

[51] The Claimant says that the COVID vaccination requirement was not part of his contract.³⁴ Before he took the job he asked the dean of the department whether he would have to be vaccinated. And he told the dean he couldn't get vaccinated. (This was before the vaccination policy was announced by the college.) He says the dean told him that he wouldn't have to get vaccinated. So he signed the contract.

[52] He also says what the dean told him was part of his contract. So the employer broke his contract when it dismissed him because he didn't follow the vaccination policy.

[53] He also says the vaccination policy didn't apply to him because he worked remotely, not face-to-face. And he says his employer did not clearly communicate its vaccination policy to him. When the employer first sent around the policy it didn't say it applied to remote workers. And he told the Commission that he only found out from the dean, on September 29, that the policy applied to remote workers. He also told the Commission he knew he could be dismissed if he didn't get vaccinated.³⁵

[54] At the hearing he testified he assumed things would work out. He was not expecting to receive a termination letter. He thought remote workers wouldn't be dismissed under the policy because it's unreasonable to force remote workers to get vaccinated. And it went against his contract.

[55] He testified that he spoke with the dean sometime after the September 10 communication. The dean told him that the policy had changed and applied to the Claimant now, even though he was teaching remotely.

³⁴ See the emails between the Claimant and the dean at GD2-5 to GD2-7, and the timeline the respondent sets out at GD2-21 and GD2-22.

³⁵ See the Commission's notes of its call with the Claimant at GD3-15, GD3-24, and GD3-43, where the notes say he knew he could be dismissed if he didn't follow the vaccination policy.

[56] He testified that after speaking with the dean he contacted the community college directly. He asked if they would say his contract ended, rather than saying he was dismissed under the vaccination policy. He says the college didn't respond.

[57] He testified he didn't apply for an exemption because he was uncomfortable asking for an exemption. He didn't think he should have to. He didn't believe he could be forced to provide his employer with his personal information. He didn't trust his employer with his personal information. And he feared being ostracized if he applied.

[58] Finally, he testified that it isn't misconduct because his employer didn't take any disciplinary action against him before dismissing him. And it dismissed him before the deadline to get vaccinated or get an exemption.

The Commission has proven misconduct under the EI Act

[59] The Commission has proven that it is more likely than not the Claimant's refusal to follow his employer's vaccination policy was misconduct under the EI Act.

[60] I find that his employer's vaccination policy became a condition of the Claimant's employment. It overtook what the dean said to him about vaccination before he signed his contract. His employer clearly communicated the policy and his duties under the policy, in writing. And he doesn't deny he got those communications.

[61] I find that the Claimant knew about the vaccination policy and knew it applied to him, even though he was working remotely. And he knew he could be dismissed if he didn't follow it. He told the Commission and testified at the hearing he knew about the vaccination policy and knew he would be dismissed if he didn't comply. After the vaccination policy was changed to include remote workers he contacted the dean. He says the dean told him the policy applied to him. I have no reason to doubt his evidence on these points. It is supported by what he and his employer told the Commission, and the vaccination policy. So, he knew.

[62] The Claimant said two different things about when he found out the vaccination policy applied to remote workers. He told the Commission and said at the hearing the

September 10 email from his employer didn't say it applied to remote workers. So he found out on September 29, when he spoke with the dean. But, at the hearing I asked the Claimant to look at page GD3-20, where the September 10 policy communication says it applies to remote workers. He acknowledged the policy said this.

[63] I find that the employer clearly communicated its vaccination policy to the Claimant. There is no evidence that goes against this. The fact he may not have clearly understood it, or misread it, doesn't mean it wasn't clearly communicated to him.

[64] Even if I am wrong that he **knew** the policy applied to him and he could be dismissed if he didn't get vaccinated (or get an exemption) by the deadline, I find that he **should have known** this.

[65] In the circumstances, it was unreasonable for him to continue to believe what the dean told him in August and early September, given the following evidence. On September 10 his employer communicated clearly that its vaccination policy applied to "remote workers" and that vaccination was a condition of work. He says he got that document. I accept his evidence that on September 29 the dean told him that it applied to him and he could be dismissed. And I accept the Commission's notes that he told it three separate times he knew he could be dismissed if he didn't get vaccinated. So, he should have known it applied to him and he would be dismissed if he didn't follow it.

[66] I find that his employer terminated him before the deadline to get vaccinated or get an exemption. There is no evidence that goes against this fact.

[67] But this doesn't change my decision that his conduct was misconduct under the EI Act, for three reasons:

- First, he had no intention of getting vaccinated and didn't. This is what he said and I have no reason to doubt it. He made this clear to his employer, and he repeated it to me at the hearing. It makes sense the employer took steps to replace him since the class he was teaching had already started.

- Second, even if I am wrong about the first reason, I find it is more likely than not he had already breached his employer's vaccination policy when he was terminated on October 7. He had already run out of time to comply with the policy. The policy says he had to get the second dose administered no later than October 17, 2021. And there is no way he could have done that under the accepted medical guidelines for COVID vaccination. The guidelines say there should be a waiting period of at least 19 days between first and second doses.³⁶ I have accepted this as evidence because it is "so notorious or generally accepted as not to be the subject of debate among reasonable persons".³⁷
- Third, he had no intention of applying for an exemption. He testified that he didn't think he should have to, or that he could be forced to under various laws. And he didn't trust his employer with his personal information. I have no reason to doubt what he said about what he believed and his intention.

[68] Finally, I find he consciously, deliberately, and intentionally didn't follow his employer's vaccination policy. I accept his evidence about this. His evidence was clear and consistent on this point. He wasn't going to get vaccinated or apply for an exemption. He gave many reasons why he shouldn't have to. And he didn't think his employer had the legal power to make him do either as a condition of his employment. There is no evidence to contradict his evidence about this.

The Claimant's other arguments

[69] The Claimant said I should allow his appeal because of the Tribunal's decision in Tribunal appeal file GE-22-829.

³⁶ I am taking notice of and accepting as evidence the immunization schedule for 2-doses from the [Canadian Immunization Guide, Part 4—Active Vaccines](#). Under these guidelines, the minimum interval between doses is 19 days for the Pfizer-BioNTech vaccine. The interval is longer for other brands of the vaccine.

³⁷ The Supreme Court of Canada's decision in *R v Fine* 2001 SCC 32, which states this legal test for "judicial notice".

[70] I disagree for two reasons.

[71] First, I don't have to follow past decisions of the Tribunal.

[72] Second, the facts in GE-22-829 are very different from the Claimant's appeal. The claimant in GE-22-829 won his appeal because his employer dismissed him two days after it told him about its vaccination policy. He didn't have a chance to comply with the policy. This means his conduct wasn't willful or so reckless that it was almost willful. So, his conduct wasn't misconduct under the EI Act.

[73] In this appeal, the Claimant had enough time to comply with his employer's policy. He chose not to. So, he wilfully didn't follow his employer's vaccination policy.

[74] The Claimant made other arguments:³⁸

- His employer breached his employment contract
- His employer should have accommodated him and explored alternatives to vaccination
- The vaccination policy was not reasonable given the evidence about COVID vaccines
- Misconduct under the EI Act should look at other factors, from labour law and employment law
- His employer violated Ontario privacy law by requiring employees to disclose their COVID vaccination status

[75] Unfortunately for the Claimant, I can't consider these arguments. The courts have clearly said that my job in misconduct cases is to consider whether the Claimant's conduct is misconduct under the EI Act. I shouldn't focus on his employer's conduct. So, I can't consider whether his employer's policy or the penalty it applied to him is

³⁸ See his notice of appeal at GD2, and his submissions at GD-6.

reasonable. And I can't consider other laws, such as employment law, labour law, or privacy law.

The Claimant's conduct was misconduct under the EI Act

[76] Based on all the documents and testimony, and the findings I made above, I find that the reason the Claimant's employer dismissed him is misconduct under the EI Act. This means he is disqualified from receiving EI benefits.

[77] As I recognized above, the Commission's decision has resulted in harsh financial consequences for the Claimant. But I have to follow the EI Act when I make my decision. I can't decide appeals based on general principles of fairness or equity.

Conclusion

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

[79] This means that the appeal is dismissed.

Glenn Betteridge
Member, General Division – Employment Insurance Section