



Citation: *RJ v Canada Employment Insurance Commission*, 2022 SST 1644

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

Decision

Appellant:	R. J.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (469522) dated May 6, 2022 (issued by Service Canada)
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Tribunal member:	Linda Bell
Type of hearing:	Teleconference
Hearing date:	November 9, 2022
Hearing participants:	Appellant Observer (Appellant's wife)
Decision date:	November 17, 2022
File number:	GE-22-2047

Decision

[1] The appeal is dismissed. I disagree with the Appellant (Claimant).

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

Overview

[3] The Claimant worked for X, which is funded by provincial health services. The employer dismissed the Claimant because he did not comply with their COVID-19 vaccination policy.

[4] The Claimant applied for regular EI benefits. The Commission decided the Claimant was disqualified from receiving EI benefits because he lost his job due to his own misconduct. The Commission maintained its decision upon reconsideration.

[5] The Claimant disagrees with the Commission's decision. He appeals to the Social Security Tribunal (Tribunal). The Claimant says the employer's COVID-19 vaccination policy is a breach of his charter rights and freedoms. He also says his employer terminated him "without cause."

Matters I have to consider first

Potential added party

[6] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

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

Late document

[7] The Claimant submitted a late document on November 8, 2022. I received the document after the hearing. This document contained a transcript of the statement he read into evidence at the November 9, 2022, hearing. I have considered the contents of this document.² In the interests of procedural fairness, the Tribunal provided copies of this document to both parties.

Issue

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

Analysis

[9] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.³

[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 is no longer working for his employer. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[11] The employer told the Commission the Claimant had not complied with their vaccination policy so they dismissed him as of December 1, 2021.

[12] The Commission relied on the employer's statements and policy documents to support their decision that the employer dismissed the Claimant due to his own misconduct.

² See pages GD7-1 to GD7-8.

³ See sections 30 and 31 of the Act.

[13] The Claimant agrees he lost his job because he refused to be vaccinated against COVID-19. He argues he was terminated “without cause” and not due to misconduct. He says the employer’s policy breached his charter rights and freedoms.

[14] The Claimant says his employer notified him of the vaccination policy, in writing, while he was at home sick with COVID from September 28, 2021, to October 18, 2021. While at home sick, he says he received an email on October 1, 2021, regarding the Workplace Vaccination Program Policy.⁴ Then while at work on October 18, 2021, he received another email with the update issued by provincial health services.⁵

[15] The Claimant says he doesn’t recall when or if he learned the deadline for vaccination was extended to November 30, 2021. But he does recall learning on October 18, 2021, that he could be dismissed because that is when he was told his employer was not granting religious exemptions.

[16] I am satisfied that, for the purposes of the EI Act, the Claimant’s circumstances can be considered a dismissal for failing to comply with the employer’s vaccination policy.

What was the employer’s policy?

[17] The employer implemented a COVID-19 vaccination policy (policy). A copy of the policy is included in the file. The policy was effective October 1, 2021.⁶

[18] The policy requires all employees be fully vaccinated from COVID-19 by November 19, 2021, and to provide proof of vaccination to the employer, unless they are granted an exemption.⁷ This date was extended to November 30, 2021.

Was the policy communicated to the Claimant?

[19] The Claimant agrees the employer communicated the policy to him on October 1, 2021. The policy states that reporting vaccination status was mandatory and there were

⁴ See pages GD6-2 to GD6-4.

⁵ See page GD6-5.

⁶ See the policy at pages GD3-26 to GD3-29.

⁷ See pages GD3-27.

deadlines for complying. All employees had to report whether they were vaccinated. If not vaccinated, they were required to submit a copy of the exemption approved by the employer.

What were the consequences of not complying with the policy?

[20] The policy says, “Employees not in compliance with this Policy will be considered unfit to work and will be terminated effective immediately.”⁸

[21] The documents on file show that, in cases where the employee isn’t granted an exemption, the policy requires all staff to be fully vaccinated against COVID-19, and report their vaccination status to their employer by November 19, 2021 (later amended to November 30, 2021) in order to continue working.⁹

[22] The Claimant says he was aware the policy required him to report his vaccination status if he wasn’t granted an exemption. He also knew he would be dismissed if he wasn’t vaccinated. He confirmed receiving the employer’s October 1, 2021, and October 18, 2021, emails regarding the requirement to be vaccinated if he wished to continue working.¹⁰

[23] When the Claimant failed to comply with the policy, the employer dismissed him, effective December 1, 2021.

Were there exemptions provided in the policy?

[24] Yes. The policy provides accommodation for employees who are unable to be vaccinated for religious grounds or medical reasons. The Claimant said he requested accommodation on a religious ground but the employer refused his request. He did not request a medical exemption.

⁸ See page GD3-27.

⁹ See the policy at pages GD3-27 and GD6-4.

¹⁰ See pages GD6-4 to GD6-6.

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

[25] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[26] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.¹¹ Misconduct also includes conduct that is so reckless it is almost wilful.¹²

[27] The Claimant does not 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.¹³

[28] 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 there was a real possibility of being let go because of that.¹⁴

[29] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show it is more likely than not the Claimant lost his job because of misconduct.¹⁵

[30] I find the Claimant willfully and consciously chose not to comply with the employer's policy. He knew the consequences of not complying would result in his dismissal.

[31] The employer told the Commission it communicated the policy to the Claimant verbally, several weeks before it was effective on October 1, 2021. The Claimant doesn't recall hearing about the policy until he received the October 1, 2021, email. He also confirms he received the update on October 18, 2021.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹³ See *Attorney General of Canada v Secours*, A-352-94.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[32] The Claimant says he doesn't recall if he was told the deadline to report vaccinations was extended to November 30, 2022. While he may not recall the exact date he was informed, he didn't deny knowing about the new deadline.

[33] I find it highly unlikely that the Claimant didn't know about the policy deadlines given that he worked as the Facility Operations Manager who oversaw a team of maintenance people and hired skilled contractors, to which the policy applied. Further, he admits he knew he would be terminated if he didn't comply with the policy and he remained employed until November 30, 2021.

[34] The Federal Court of Appeal has said the Tribunal has 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. Instead, the question before me is whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing his employment.¹⁶

[35] In this case, the Claimant made a deliberate choice not to comply with the employer's policy. His conduct was a breach of the employer's policy and he knew it would result in discipline with the employer dismissing him.

[36] I acknowledge the Claimant has a right to decide whether to be vaccinated, but he knew there were consequences if he refused to follow the employer's vaccination policy, which in this case was dismissal from his employment. I also acknowledge the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose policies at the workplace to ensure the health and safety of all their employees and clients.

[37] In this case, the Claimant chose not to be vaccinated against COVID-19 even though he knew it could get in the way of carrying out his duties toward his employer.

[38] The undisputed facts are the Claimant worked for an employer who is funded by the provincial health authority. The employer told the Claimant it implemented the policy

¹⁶ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

in accordance with the requirements of the provincial health authority's mandate, requiring all employees to be vaccinated who do not meet the exemptions. The employer created its vaccine policy in its efforts to protect public safety and did so without distinction.

[39] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary.¹⁷ This is not an automatic right, even if a claimant has paid EI premiums.

[40] In my view, the Claimant did not lose his job involuntarily. This is because his non-compliance with the employer's policy is what led to his dismissal. Based on my findings above, I find the Claimant lost his job because of misconduct.

Other arguments

[41] The Claimant disagrees with the employer's policy and his dismissal for a variety of reasons. He says "misconduct" was never mentioned during his discussions with his employer or in any of their correspondence. Rather, his discussions and letter of termination support he was terminated "without cause." He also says the policy breaches his charter rights and freedoms, human rights, etc.

[42] Although the Record of Employment and other documents may state dismissal without cause, the facts of the case are what leads to a finding of misconduct and disqualification from EI benefits.

[43] The Federal Court of Appeal and Federal Court have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹⁸

¹⁷ See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[44] I also considered the Federal Court of Appeal decision that states the role of the Tribunal is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.¹⁹

[45] I do not have the authority to determine whether the employer's vaccination policy was unlawful. Equally, I do not have the authority to decide whether the employer breached any of the Claimant's rights as an employee when they dismissed him, or whether they could or should have accommodated him in some other way. The Claimant's recourse against his employer is to pursue his claims in Court or any other tribunal that may deal with those particular matters.

[46] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.²⁰ Based on the facts of this case, I already decided the Claimant's conduct amounts to wilful misconduct, as set out above.

Conclusion

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

[48] This means the appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

¹⁹ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

²⁰ See *Canada (Attorney General) v Marion*, 2002 FCA 185.