



Citation: *NR v Canada Employment Insurance Commission*, 2022 SST 1639

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

**Decision**

**Claimant:** N. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (477608) dated July 4, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** Videoconference

**Hearing date:** November 22, 2022

**Hearing participant:** Claimant

**Decision date:** December 9, 2022

**File number:** GE-22-2430

## Decision

[1] The appeal is dismissed. I disagree 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.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he went against their mandatory COVID-19 vaccination policy.

[4] The Claimant agrees that he was let go for this reason. But he says that his employer's policy was unfair and he didn't think he would actually be let go for going against it.

[5] The Commission accepted the employer's reason for the dismissal. It 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.

## Matter I have to consider first

### The Claimant sent in documents after the hearing

[6] The Claimant sent in documents after the hearing. These documents were added to the appeal record, but I can't give any weight to them for the following reasons.

[7] One document is a letter from the Claimant's employer, dated November 21, 2022, inviting him back to work because they lifted their mandatory COVID-19 vaccination policy.<sup>2</sup> This doesn't relate in any way to the Claimant's dismissal from his job on December 17, 2021, so I don't need to consider it here.

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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 benefits.

<sup>2</sup> GD7-1 to GD7-3.

[8] As for the other documents, I note that they are blurry and illegible.<sup>3</sup> The Claimant sent them on December 2, 2022 and didn't say what they were. The Tribunal called the Claimant the same day (December 2, 2022) to ask him to send readable copies of the documents. I waited a week for the Claimant to acknowledge the message and resend the documents, but he never did. I feel that a week is a reasonable amount of time to wait for the Claimant to resend the documents. Since he hasn't sent readable copies of these documents, I can't give them any weight here.

## **Issue**

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

## **Analysis**

[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 lost his job because he went against his employer's mandatory COVID-19 vaccination policy.

[12] The Claimant and the Commission agree on why the Claimant lost his job. The Claimant's employer told the Commission that the Claimant was let go for going against their mandatory COVID-19 vaccination policy.<sup>4</sup> The Claimant also says that he was let go for this reason.<sup>5</sup>

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

[13] The reason for the Claimant's dismissal is misconduct under the law.

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<sup>3</sup> GD8-1 to GD8-5.

<sup>4</sup> GD3-19.

<sup>5</sup> GD3-17, GD3-20, GD3-58.

[14] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>7</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>8</sup>

[16] 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>9</sup>

[17] The law doesn't say I have to consider how the employer behaved.<sup>10</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>11</sup>

[18] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>12</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

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<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>8</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>10</sup> See section 30 of the Act.

<sup>11</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[19] 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>13</sup>

[20] The Commission says that there was misconduct because the Claimant knew about his employer's mandatory COVID-19 vaccination policy and knew he could be let go for going against it, but decided to go against it anyway.<sup>14</sup>

[21] The Claimant says that there was no misconduct because his employer treated him unfairly by violating the terms of his original contract and his right to privacy.<sup>15</sup> He also says he didn't actually think he would be let go for going against their policy.

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

[23] I find the Claimant committed the actions that led to his dismissal, as he agrees that he went against his employer's mandatory COVID-19 vaccination policy.

[24] I further find the Claimant's actions were intentional as he made a conscious decision not to follow his employer's mandatory COVID-19 vaccination policy.

[25] The Claimant told the Commission and testified that he knew about his employer's policy, and although he couldn't recall when he was initially made aware of it, he knew it was before November 2021.<sup>16</sup> He also told the Commission and testified that he knew the deadline to follow his employer's policy was November 20, 2021, which they had extended several times.<sup>17</sup>

[26] The Claimant also told the Commission and testified that he didn't get vaccinated for personal reasons and didn't request a medical or religious exemption from his

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<sup>13</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>14</sup> GD4-3.

<sup>15</sup> GD3-53 to GD3-56.

<sup>16</sup> GD3-58.

<sup>17</sup> GD3-58.

employer's policy.<sup>18</sup> He testified that he didn't see the need to get an exemption because he was exercising his rights to not get vaccinated.

[27] The Claimant told the Commission and testified that he didn't think his employer's policy was fair because it violated the original terms of his employment contract and his right to privacy. He also told the Commission and testified that he should have been given an option to take a COVID-19 test every day instead of being let go.<sup>19</sup>

[28] I understand that the Claimant feels his employer's policy wasn't fair. But unfortunately, as mentioned above, I can't decide whether an employer's conduct, including their policies, is fair or reasonable when looking at the issue of misconduct. I can only look at the Claimant's actions in relation to what the law says about misconduct. It is clear in this case that the Claimant made a conscious decision to go against his employer's mandatory COVID-19 vaccination policy by refusing to get vaccinated.

[29] I also find the Claimant knew or should have known that going against his employer's mandatory COVID-19 vaccination policy could lead to him being let go.

[30] The Claimant told the Commission and testified that his employer gave him several verbal and written warnings about following their policy before he was let go.<sup>20</sup>

[31] The Claimant testified that he got a letter from his employer before he was let go that described what would happen to employees who didn't follow their policy. He read the letter as part of his testimony. I told him he could submit it as evidence too, but he didn't end up doing that.

[32] The Claimant testified that his employer's letter said if he didn't get vaccinated by October 30, 2021, he risked being unavailable for work. He testified that it said that effective November 21, 2021, employees who hadn't received a second vaccine dose

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<sup>18</sup> GD3-20, GD3-58.

<sup>19</sup> GD3-58.

<sup>20</sup> GD3-17, GD3-20.

would be placed on an unpaid leave of absence and be given up to December 30, 2021 to follow the policy. He testified that it also said that effective December 31, 2021, employees who remained unvaccinated would be terminated with cause.

[33] Even though the Claimant said the above letter didn't have a date, I conclude that it must have been sent to employees before October 30, 2021 since that is the earliest date mentioned in the letter.

[34] I note that the Claimant's employer introduced a mandatory COVID-19 vaccination policy on September 7, 2021. They updated the policy on October 15, 2021 to extend the deadline for employees to receive two vaccine doses to November 20, 2021. Any employees who didn't follow that deadline would be placed on unpaid leave on November 21, 2021 and be let go on December 31, 2021.<sup>21</sup>

[35] I note that the revised dates mentioned above are the same as the dates the Claimant said were in the letter his employer sent him. I have also already found that the Claimant received the letter before October 31, 2021, as mentioned above. So, I conclude that it's very likely that the Claimant received the letter on or around the date his employer updated their policy (October 15, 2021).

[36] I also note that the Claimant's employer sent out another email to employees on November 17, 2021. The email reiterated that the final date to follow their policy was November 20, 2021, and that those who didn't would be placed on leave on November 21, 2021 and be let go on December 31, 2021.<sup>22</sup>

[37] The Claimant also told the Commission that his employer called him on November 19, 2021 to say he wouldn't be able to come into work after November 20, 2021 because he hadn't followed their policy.<sup>23</sup>

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<sup>21</sup> GD3-51 to GD3-52.

<sup>22</sup> GD3-53 to GD3-56.

<sup>23</sup> GD3-58.

[38] The Claimant testified that he knew he could be let go if he went against his employer's policy, but didn't think it would actually happen because they kept extending their deadline for employees to get vaccinated.

[39] I believe the Claimant when he says he thought he would be able to keep his job. But this doesn't mean he also couldn't have still known that he could be let go. In other words, it was entirely possible for him to believe both of these things at the same time, especially as he confirmed that he knew about his employer's mandatory COVID-19 vaccination policy and the consequences of not following it, as mentioned above.

[40] While I understand that the Claimant didn't think he would be let go for going against his employer's policy, I find that the evidence shows that he should have known that he could be let go.

[41] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he refused to follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being let go.

### **So, did the Claimant lose his job because of misconduct?**

[42] Based on my findings above, I find that the Claimant lost his job because of misconduct.

### **Conclusion**

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

[44] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section