



Citation: *RF v Canada Employment Insurance Commission*, 2022 SST 1657

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

## Decision

**Appellant:** R. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (455872) dated March 3, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference

**Hearing date:** July 7, 2022

**Hearing participant:** Appellant

**Decision date:** July 26, 2022

**File number:** GE-22-960

## 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 not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] R.F. is the Claimant in this case. He worked in a hospital as a decision support consultant.<sup>2</sup> The employer dismissed him because he did not comply with the employer's covid19 vaccination policy.<sup>3</sup> The Claimant then applied for EI regular benefits.<sup>4</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his own misconduct.<sup>5</sup>

[5] The Claimant disagrees because the covid19 vaccine is experimental and he was wrongfully dismissed by the employer.<sup>6</sup> The Claimant says that the policy says he would be put on an unpaid leave and not dismissed. He also lost his income and is living off his savings.

## Issue

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

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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> See record of employment at GD3-21.

<sup>3</sup> See termination letter at GD3-47 to GD3-48.

<sup>4</sup> See application for benefits at GD3-3 to GD3-20.

<sup>5</sup> See initial decision at GD3-26 to GD3-27 and reconsideration decision at GD3-53 to GD3-54.

<sup>6</sup> See notice of appeal forms at GD2; GD2A; GD2B.

## 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.<sup>7</sup>

[8] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>8</sup>

[9] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>9</sup>

[10] 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.

### Why did the Claimant stop working?

[11] I find that the Claimant was dismissed from his job effective October 22, 2021 because he did not comply with the employer's covid19 policy.

[12] This is consistent with Claimant's testimony, his record of employment and employer's, the Claimant's discussion with the Commission and termination letter in the file.<sup>10</sup>

### What was the employer's policy?

[13] The employer implemented a "*Covid19 Vaccination Program* (policy) effective September 3, 2021. A copy of the policy is included in the file.<sup>11</sup>

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<sup>7</sup> Section 30 of the *Employment Insurance Act* (EI Act).

<sup>8</sup> See section 31 of the Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

<sup>9</sup> See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer to qualify for EI benefits.

<sup>10</sup> See GD3-21; GD3-23; GD3-25 and GD3-47 to GD3-49.

<sup>11</sup> See policy at GD3-32 to GD3-34; GD3-47.

[14] The employer wrote that they are committed to ensuring a safe and healthy environment and recognize the importance of immunization for staff and affiliates.<sup>12</sup> The policy says that they support the public health recommendations for all staff and affiliates to receive the covid19 vaccines unless medically contraindicated.

[15] Employees must complete a covid19 vaccination e-learning program. The policy also requires that employees provide documentation for all required covid19 vaccination doses by October 21, 2021.<sup>13</sup>

[16] The policy provides accommodation for medical exemption or other exemption under "Human Rights".<sup>14</sup> Employees must provide valid documentation for an exemption.

[17] The Claimant testified that he did complete the covid19 vaccination education program, but he did not want to comply with the requirement to be fully vaccinated for his own reasons.

### **Was the policy communicated to the Claimant?**

[18] I find that the policy was communicated to the Claimant on August 31, 2021. This is not disputed between the parties.

[19] The Claimant testified that at the end of August 2021, the Chief Executive Officer (CEO) of the hospital sent an email to employees to introduce the vaccine policy. It mandated that all employees be vaccine for covid19.

[20] The Claimant also said that he had a copy of the policy from the intranet at work.

[21] This is consistent with the termination letter sent by the employer to the Claimant and the employer's discussion with the Commission.<sup>15</sup>

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<sup>12</sup> See GD3-32.

<sup>13</sup> See GD3-32.

<sup>14</sup> See GD3-32.

<sup>15</sup> See termination letter at GD3-47 to GD3-49; GD3-23.

## **What were the consequences of not complying with the policy?**

[22] The policy says that staff and affiliates who are deemed not vaccinated per the policy will not be accommodate and not allowed to report to work. They will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated.<sup>16</sup>

[23] The policy also says that a “ failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests may result in discipline, up to and including termination of employment or revocation of privileges.<sup>17</sup>

[24] The employer told the Commission that they met with the Claimant on October 13, 2021 to confirm that he understood the policy and requirements.<sup>18</sup> The Claimant told them he had no intention of being vaccinated and as a result, the employer told him that he was being dismissed as of October 22, 2021.

[25] The Claimant testified that he did not know he would be dismissed for not complying with the policy. Specifically, he thought that he would be put on an unpaid leave of absence and eventually called back to work. However, he agreed that after the October 13, 2021 meeting, he understood that he was being dismissed on October 22, 2021 for his conduct.

## **Is there a reason the Claimant could not comply with the policy?**

[26] As noted above, the policy provided for exemption and accommodation for medical reasons or other Human Rights Code reasons.<sup>19</sup>

[27] The Claimant testified that he applied for an exemption from the policy based on creed on September 22, 2021, but it was not approved by the Employer.

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<sup>16</sup> See GD3-33.

<sup>17</sup> See GD3-33.

<sup>18</sup> See GD3-23.

<sup>19</sup> See GD3-32.

[28] On October 5, 2021, the Claimant said that the employer emailed him denying his request. A copy of this email is in the file.<sup>20</sup>

[29] At the hearing, the Claimant explained that he is Catholic and pro life. He did not raise those points with his employer because they were not considering religious exemptions. He included some supporting documents.<sup>21</sup>

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

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

[31] 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.<sup>24</sup>

[32] 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 let go because of that.<sup>25</sup>

[33] 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>26</sup>

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

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<sup>20</sup> See GD3-46.

<sup>21</sup> See GD6-1 to GD6-3; GD3-44 to GD3-45.

<sup>22</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>23</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>24</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>25</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>26</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[35] First, I find that the policy was communicated to the Claimant and was aware of the deadline date to comply. The Claimant had time to comply with the policy.

[36] Specifically, the evidence shows that the policy was communicated to him on August 31, 2021 and he had a copy of it on the intranet at work. He was required to comply with the policy by October 21, 2021, but chose not to comply. Even after the meeting with his employer on October 13, 2021, he chose not to comply.

[37] Second, I find that the Claimant willfully chose to not to comply with the policy for his own personal reasons.

[38] I was not persuaded by the Claimant's argument that his actions were not wilful because he was unable to give his informed consent to take the vaccines.<sup>27</sup> I accept that he did not have wrongful intent and had personal reasons for making his decision.<sup>28</sup> However, his actions were still wilful because he consciously chose to breach the employer's policy, which I find is misconduct under the law.

[39] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>29</sup>

[40] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to a dismissal.

[41] The evidence shows that the Claimant was told at a meeting on October 13, 2021 that he would be dismissed on October 22, 2021 for not complying with the policy.

[42] If the Claimant had intended to comply with the policy, he could have told his employer at that meeting and made efforts to do so before October 22, 2021, or asked for an extension if available.

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<sup>27</sup> See GD12-1 to GD12-4.

<sup>28</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>29</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[43] The reason he was dismissed was because he told his employer at the October 13, 2021 meeting that he did not intend to comply with the policy. I note that he continued working until October 21, 2021 and was dismissed effective October 22, 2021.<sup>30</sup>

[44] I was not persuaded by the Claimant's argument that the consequences in the policy only provided for an unpaid leave of absence, and not a dismissal.

[45] I reviewed the policy in the file and it says that staff who are unvaccinated will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated.<sup>31</sup> However, towards the end of the policy, it discusses rapid tests and adds that a failure to comply with the terms of the policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline, up to and including termination of employment or revocation of privileges.

[46] I find that the policy did identify termination as a possible consequence. It states that a failure to comply with the terms of policy might result in discipline, up to and including termination of employment. In my view, that includes any of the terms in the policy. I do not think that termination of employment was limited to rapid testing breaches only. I also note that the employer interpreted their policy as including termination of employment. The termination letter in the file says that the policy provided that a failure to comply may result in discipline up to and including termination of employment.<sup>32</sup>

[47] Fourth, I find that the Claimant has not proven he was exempt from the policy. While he submitted an exemption from the policy based on creed, it was not accepted by the employer.

[48] The *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human*

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<sup>30</sup> See GD3-47 to GD3-49.

<sup>31</sup> See GD3-33.

<sup>32</sup> See GD3-48.



*Rights Code*<sup>33</sup> as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.<sup>34</sup>

[49] Lastly, 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 when they introduced the policy. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duties to the employer.

[50] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.<sup>35</sup> In this case, it was not involuntary because it was the Claimant's actions that led to his dismissal.

### **What about the Claimant's other arguments?**

[51] The Claimant argued that the Commission was biased because the employer failed to return the Commission's telephone calls and they ruled against the Claimant.<sup>36</sup> I was not persuaded by this argument because the Commission has provided evidence and submissions to support their rationale for making their decision.<sup>37</sup>

[52] The Claimant also raised other arguments and filed evidence to support his position, including some of the following:<sup>38</sup>

- a) He was wrongfully dismissed by the employer
- b) The employer failed to accommodation him and did not provide him with alternatives

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<sup>33</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>34</sup> See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at [https://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates).

<sup>35</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>36</sup> See GD8-1 to GD8-11;

<sup>37</sup> See GD4-1 to GD4-8; GD7-1 to GD7-2; GD10-1 to GD10-2; GD13-1 to GD13-2; GD16-1 to GD16-7.

<sup>38</sup> See GD8-1 to GD8-11; GD9-1 to GD9-10; GD11-1 to GD11-4; GD12-1 to GD12-4; GD14-1 to GD14-3; GD15-1 to GD15-54 and GD16-1 to GD16-7.

- c) There was no informed consent
- d) It was a breach of the Canadian Bill of Rights and his human rights
- e) The employer changed the terms of his employment
- f) Vaccination was not a bona fide occupational requirement
- g) He had safety concerns about an experimental vaccine
- h) He was already working remotely
- i) Other employees have been approved for EI benefits

[53] Tribunals have 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, but whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing their employment.<sup>39</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[54] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with these particular arguments.

[55] I note that the Claimant mentioned he had initiated a legal action against his employer and it was recently resolved in mediation.

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<sup>39</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

## **Conclusion**

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

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

[58] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section