



Citation: *TH v Canada Employment Insurance Commission*, 2022 SST 1655

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

Decision

Appellant: T. H.
Representative: P. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (463121) dated March 21, 2022
(issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: July 21, 2022

Hearing participants: Appellant
Appellant's Witness

Decision date: August 11, 2022

File number: GE-22-1295

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost his job because of misconduct (in other words, because he did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) regular benefits.¹

Overview

[3] T.H. is the Claimant in this case. The Claimant worked as a Bus Operator for over 20 years. The employer put the Claimant on a mandatory and unpaid leave of absence and then dismissed him because he did not comply with their covid19 vaccination policy at work.² The Claimant then applied for *Employment Insurance* (EI) regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he was suspended and then dismissed due to his own misconduct.⁴

[5] The Claimant disagrees with the Commission's decision for many reasons, including that the employer wrongfully dismissed him, the policy was illegal and the employer did not accommodate him.⁵ As well, he has health concerns about the covid19 vaccine.

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. Section 31 of the EI Act says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

² See records of employment at GD3-15 to GD3-18.

³ See application for benefits at GD3-3 to GD3-14.

⁴ See initial decision at GD3-68 to GD3-69 and reconsideration decision at GD3-78 to GD3-79.

⁵ See appeal forms at GD2-1 to GD2-125.

Matters I have to consider first

The hearing was expedited

[6] This case was first scheduled to be heard on August 31, 2022.⁶ The Claimant contacted the Tribunal and asked to expedite his hearing due to financial hardship. As a result, it was expedited and rescheduled to July 21, 2022 to accommodate his particular circumstances.⁷

The Claimant's Representative became a Witness instead

[7] The Claimant had identified his colleague/union representative as his "representative" in his appeal forms.⁸

[8] At the beginning of the hearing, the Claimant explained that his colleague would provide information about what happened at work and how he was approved for EI benefits. Because of this, the Claimant decided that his colleague was better suited as a Witness so that he could testify at the hearing.

The Claimant submitted a document after the hearing

[9] At the hearing, the Claimant read a letter that the employer gave to him in October 2021 after he met with his supervisor. He submitted a copy of the letter after the hearing.⁹ I accepted the letter because it was relevant to the case. A copy was shared with the Commission.

Issue

[10] Was the Claimant suspended and did he lose his job because of misconduct?

⁶ See GD1-1 to GD1-5.

⁷ See GD1A-1 to GD1A-3.

⁸ See GD2-7.

⁹ See GD11-1 to GD11-3.

Analysis

[11] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.¹⁰

[12] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹¹

[13] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹²

[14] To answer the question of whether the Claimant was suspended and lost his job 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?

[15] I find that the Claimant was put on a mandatory and unpaid leave of absence on November 21, 2021 because he did not comply with the employer's covid19 vaccination policy.

[16] I acknowledge the Claimant's argument that the unpaid leave of absence was non-disciplinary in nature based on their collective agreement at work. However, I note that the unpaid leave of absence was not taken voluntarily by the employee. It was mandatory and imposed by the employer for not complying with their policy.

¹⁰ See section 30 of the EI Act.

¹¹ See section 31 of the EI 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.

¹² 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

[17] In my view, this is similar to a suspension because the Claimant was not allowed to return or continue working. I also note that employer told the Commission that non-compliance would lead to a “suspension” without pay.¹³

[18] I also find that the Claimant was dismissed from his job on December 31, 2021. This is consistent with the Claimant’s testimony, the records of employment and other documentation in the file.¹⁴

What was the employer’s policy?

[19] The employer implemented a “*Covid19 Mandatory Vaccination*” (policy) effective September 7, 2021. A copy of the updated¹⁵ policy is included in the file.¹⁶

[20] The policy says its purpose is take every precaution reasonable in the circumstances for the protection of the health and safety of workers, in accordance with their obligations under the *Occupational Health and Safety Act*, from the hazard of covid19”.¹⁷

[21] The policy requires employees to obtain their first covid19 vaccine dose by September 30, 2021. Employees must then disclose their vaccination status by October 6, 2021. Employees are required to obtain their second covid19 vaccine dose by November 20, 2021.¹⁸

[22] The policy says that vaccination for covid19 is a precondition to employment.

[23] The employer spoke to the Commission and told them employees previously had to be “fully vaccinated” by October 15, 2021. However, they said the deadline was

¹³ See GD3-70.

¹⁴ See GD3-15 to GD3-18.

¹⁵ This policy was updated on October 15, 2021; see GD3-75.

¹⁶ See policy at GD3-72 to GD3-75.

¹⁷ See GD3-72.

¹⁸ For a two dose vaccine series.

extended to the end of October 2021 and again extended to November 20, 2021 after the union filed an injunction in court.¹⁹

[24] The policy also states that employees may request accommodation based on a protected ground under Ontario's *Human Rights Code*²⁰.

Was the policy communicated to the Claimant?

[25] The employer told the Commission that the policy was communicated to employees when the CEO issued a memo on September 1, 2021.²¹

[26] The Claimant testified that he did not receive a company memo on September 1, 2021, but that the policy was first communicated to him around September 7, 2021. He actually saw a copy of the memo posted on the wicket at work. It contained a summary of the policy. He spoke to his supervisor about it around the same time.

[27] I find that the policy was first communicated to the Claimant by September 7, 2021.

What were the consequences of not complying with the policy?

[28] The policy says that employees who do not comply may be subject to discipline, up-to and including termination.²²

[29] The employer told the Commission that employees were warned that non-compliance would lead to suspension without pay and then termination at the end of December 2021.²³

¹⁹ See GD3-70.

²⁰ See *Human Rights Code*, R.S.O. 1990, c. H.19; GD3-74.

²¹ See GD3-70.

²² See GD3-75.

²³ See GD3-70.

[30] The Claimant testified that he did not know what would happen if he did not disclose his vaccination status to the employer. He did meet with his supervisor around October 26, 2021 and told him that he would not disclose his vaccination status because it was illegal.

[31] After the meeting with his supervisor, the Claimant said that he got a letter dated October 26, 2021, which he submitted to the Tribunal. He got another similar letter on October 28, 2021 from the employer, but he was unable to locate it at the hearing.

[32] The October 26, 2021 letter says that the policy is not optional, it is mandatory.²⁴ It says that if he does not comply with the policy by November 20, 2021, then he will be deemed unable to perform his duties and immediately placed on an unpaid leave of absence. Lastly, it states that if he does not provide proof of two covid19 vaccination doses, then he will be terminated with cause effective December 31, 2021.

[33] Since the Claimant did not comply with the policy by not disclosing his vaccination status and being fully vaccinated, he was put on an unpaid leave of absence effective November 21, 2021 and then dismissed on December 31, 2021.

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

[34] The policy provides for accommodation for employees who are unable to receive the covid19 vaccine and who are not fully vaccinated based on Ontario's *Human Rights Code*.²⁵

[35] The policy requires employees to submit their request and provide written documentation and additional information as requested (i.e. medical documentation) to support their accommodation requests.

²⁴ See GD11-3.

²⁵ See GD3-74.

[36] The employer told the Commission that exemptions for medical, religious and human rights were available.²⁶ However, they noted that only a few medical exemptions were accepted with a valid medical note from a doctor and most religious and human rights submissions were rejected.

[37] The Claimant testified that he was aware the policy provided for medical and religious exemptions. In his view, the employer was not taking employee requests for exemptions seriously. Because of this, he did not ask the employer for a medical and/or religious exemption.

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

[38] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁸

[39] 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.²⁹

[40] 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.³⁰

[41] The Commission has to prove that the Claimant was suspended and/or 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 was suspended or lost his job because of misconduct.³¹

²⁶ See GD3-70.

²⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁹ See *Attorney General of Canada v Secours*, A-352-94.

³⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

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

[43] First, I find that the policy was communicated to the Claimant and he was aware of the deadline dates to comply. The Claimant had enough time to comply with the policy. In particular, there were extensions to the deadlines in the policy while the injunction was being decided by the court.

[44] Specifically, the policy was first communicated to the Claimant around September 7, 2021. He met with his supervisor around October 26, 2021, and the policy was again communicated to him verbally and in writing at that time. He knew what was expected of him.

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

[46] The Claimant made a conscious choice to not comply with the employer's policy because he did not agree with the policy. I acknowledge that he did not have wrongful intent, but it was still misconduct because the employer introduced a policy making vaccination a condition of his employment and he chose not to comply.

[47] 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.³²

[48] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence, suspension and dismissal.

[49] The consequences of non-compliance were communicated to him verbally and in writing on October 26, 2021, specifically unpaid leave of absence and dismissal.

³² See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[50] I acknowledge that the Claimant did not receive a copy of the policy from his employer, but I was not persuaded that he did not know it would lead to his suspension and dismissal. The letter dated October 26, 2021 after the meeting with supervisor clearly says that if he does not comply, he would be put on an unpaid leave of absence and dismissed.³³

[51] I have also considered the employer's discussion with the Commission where they said that employees were warned about the consequences.³⁴

[52] Fourth, I find that the Claimant has not proven he was exempt from the policy. The Claimant confirmed that he did not ask the employer for any exemptions.

[53] 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 Rights Code*³⁵ 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.³⁶

[54] The Claimant's Witness testified that he has the same job and employer as the Claimant. He was approved for EI benefits based on similar circumstances. However, I note there is one distinguishable fact – he had asked his employer for an exemption based on creed, which they rejected. In this case, the Claimant did not ask his employer for an exemption, but simply chose not to comply because he disagreed with the policy.

[55] 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

³³ See GD11-3.

³⁴ See GD3-70.

³⁵ See *Human Rights Code*, R.S.O. 1990, c. H.19.

³⁶ 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.

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 duty to the employer.

[56] 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.³⁷ In this case, it was not involuntary because it was the Claimant's actions that led to his unpaid leave of absence and dismissal.

What about the Claimant's other arguments?

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

- a) The employer wrongfully dismissed him
- b) The employer was not entitled to ask him about his vaccination status
- c) The policy was illegal
- d) The covid19 vaccine has side effects
- e) The employer failed to accommodate him
- f) His rights are being abused by the employer
- g) He was a model employee and did not break any laws

[58] 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.³⁸ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

³⁷ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

³⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[59] 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 his particular arguments.

[60] The Claimant noted that the union has already filed grievances. The date of arbitration is scheduled sometime in August 2022.

Conclusion

[61] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence and dismissal.

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

[63] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section