



Citation: *EG v Canada Employment Insurance Commission*, 2022 SST 1642

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

Decision

Appellant: E. G.
Representative: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (453324) dated February 17, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference
Hearing date: May 17, 2022
Hearing participant: Appellant

Decision date: June 17, 2022
File number: GE-22-992

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant lost his job for not complying with his employer's vaccination policy. The policy required him to be vaccinated against COVID-19 and to disclose his vaccination status. The Claimant initially refused to disclose his vaccination status. Later, he told his employer that he wasn't vaccinated and didn't intend to get the vaccination. The employer dismissed him as a result.

[4] The Commission decided that the Claimant was dismissed from his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[5] The Claimant says that he shouldn't be forced to disclose his private medical information or to get a vaccination. The employer didn't offer any option other than to be vaccinated and it wasn't required to put in place such a restrictive policy. He has since been restored to his job and the employer has issued a new Record of Employment.

Matter I have to consider first

The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not

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

respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

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

Analysis

[8] The law says that claimants who lose their job because of misconduct are disqualified from receiving benefits.²

[9] 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?

[10] Both parties agree that the Claimant was dismissed because he chose not to comply with the employer's policy that required him to get vaccinated against COVID-19. I see no evidence to contradict this, so I accept it as fact.

[11] The Claimant testified that he has been reinstated in his position as of June 6, 2022, as a result of a grievance through his union. As part of the agreement to return to work, he said the employer has issued a new Record of Employment (ROE).

[12] The Claimant said that the grievance agreement wasn't retroactive and didn't include any consideration for back pay (payment of his wages while he was off work).

[13] The employer issued an ROE on September 21, 2021, which stated the reason for issuing as: dismissal. An amended ROE was issued on May 3, 2022. This ROE states the reason for issuing as: leave of absence.

² See section 30 of the Act.

[14] I think the amended ROE is not relevant to the question of why the Claimant lost his job. Despite the new reason for issuing stated on the ROE, it is a fact that the Claimant had not been on a leave of absence from work since September 15, 2021. He confirmed at the hearing that he was terminated from his job at that time.

Is the reason for his dismissal misconduct under the law?

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

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[17] 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.⁶

[18] 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 was dismissed because of misconduct.⁷

[19] The Commission says that there was misconduct because the Claimant was aware that he was required to comply with the employer's policy to continue working in his job. The Claimant chose not to take the vaccine. In doing so, he willfully made the choice not to comply with the employer's policy.

[20] The Claimant says that there was no misconduct for several reasons.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] First, he wasn't well informed about the policy before it came into effect. He was occupied with work when the employer sent emails notifying staff about the policy. He received these emails but didn't pay them much attention. The employer also held a mandatory meeting announcing the policy, but the Claimant was on vacation that week. A co-worker called him while he was on vacation and told him that the employer had "jumped the schedule ahead on the shots" and that he "had to have them now." When he returned to work, he wasn't able to enter the workplace because he refused to disclose his vaccination status.

[22] Second, the employer's policy went too far in requiring employees to be vaccinated. He says that it wasn't legally required for the employer to put in place such a restrictive policy. Further, the policy didn't offer any other options, such as testing.

[23] Third, he shouldn't have to disclose his private medical information to his employer. He says this is a violation of his privacy and an illegal request.

[24] The Claimant worked as a teacher at a college. In September 2021, the employer put in place a policy that required employees to be vaccinated against COVID-19. Staff were required to have their first vaccination by September 7, 2021, and to be fully vaccinated by late October 2021.⁸

[25] The Claimant testified that he was busy at work in August 2021. He had to move the location of his shop, which took a lot of time. He knew the employer had sent emails about the new vaccination policy but didn't have time to read them. He heard from co-workers that employees would have to be vaccinated or they could lose their job.⁹

[26] After his move was completed in late August 2021, he went on vacation before the school year started. A co-worker called him on the Friday before he returned to work. The co-worker told him that the employer had moved ahead the schedule on the vaccination policy, and that employees had to have them immediately.

⁸ See GD3-51 to GD3-52.

⁹ See GD3-22.

[27] The Claimant returned to work on September 7, 2021. Before entering the workplace, he was required to fill out a COVID-19 screening questionnaire. The questionnaire asked the Claimant to disclose his vaccination status. The Claimant chose not to do so, and he was prevented from going onto campus.

[28] The Claimant called his manager and told her that he couldn't enter the workplace because he hadn't disclosed his vaccination status. His manager told him to go home and Human Resources (HR) would contact him.

[29] The Claimant had a meeting with an HR representative and his union representative on September 15, 2021. At the meeting, he was asked why he wouldn't disclose his vaccination status. He said that he has medical freedoms and a right to his privacy. But, he testified that he felt he had to disclose his status. So, he informed the employer that he was not vaccinated and had no intention to get the vaccination.

[30] At the meeting, the HR representative asked the Claimant if he was able to work from home instead. The Claimant responded that his job duties didn't allow him to work from home. He's a teacher and had to be on campus to teach.

[31] Following the meeting, the employer sent the Claimant an email. The email stated that the employer was providing him with "one last opportunity to comply with the policy." It stated that the Claimant had to provide confirmation that he had at least one dose of an approved vaccine, along with a written commitment that he would get fully vaccinated according to the terms of the employer's policy. The employer said the Claimant could submit these documents within the next three days and it would consider reinstating him to his position.¹⁰

[32] The Claimant said that he didn't respond to the employer's email. Two weeks later, the employer contacted the Claimant to terminate his employment.

¹⁰ This email is not part of the appeal file, but the Claimant read this email into evidence at the hearing.

[33] I find that the Commission has proven that there was misconduct.

[34] The Claimant was notified about the employer's policy in September 2021. He wilfully and consciously chose not to get the COVID-19 vaccination as required by the policy. It is clear from the evidence that he knew that not complying with the policy could result in him losing his job.

[35] The Claimant said that he wasn't directly told about the employer's vaccination policy. He acknowledged that the employer sent emails about it, but he wasn't paying attention to the emails because of his heavy workload. The employer also held a mandatory meeting to announce the policy, but the Claimant was on vacation at that time. However, the Claimant confirmed that he was aware that the employer was going to put a vaccination policy in place. And he was "warned" by a co-worker that he had to be vaccinated before he returned to work on September 7, 2021.

[36] Furthermore, the Claimant became aware of the requirements after he was prevented from entering the workplace on September 7, 2021. He spoke to his manager, who told him that he couldn't go on campus without disclosing his vaccination status. He had a meeting with the employer on September 15, 2021, during which he was advised that he had to disclose his vaccination status and be vaccinated against COVID-19 to continue working.

[37] Based on this evidence, I'm satisfied that the Claimant was notified about the employer's policy and that not complying with the policy could result in him losing his job.

[38] The Claimant understood that he needed to be vaccinated to continue working. The employer told him this directly in the meeting on September 15, 2021. If he intended to comply with the policy, the Claimant could have communicated that to his employer at that meeting. Instead, the Claimant clearly expressed that he had no intention to get the COVID-19 vaccination.

[39] After the meeting, the Claimant was given a further opportunity to comply with the employer's policy. The employer offered him an extension of time to get his first

dose of the COVID-19 vaccine and write a letter expressing his commitment to be fully vaccinated, as required by the vaccination policy. The Claimant had a choice to comply with the employer's policy at that time, but deliberately chose not to do so.

[40] Based on this evidence, I am satisfied that the Claimant acted willfully when he chose not to comply with the employer's vaccination policy.

[41] The Claimant argued that the employer's policy violated his right to privacy. He shouldn't have to disclose his medical information to his employer. He also submits that the employer's policy went too far in requiring him to be vaccinated. The employer could have offered other options to vaccination, such as testing.

[42] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[43] I understand the Claimant's concerns that the employer's policy did not give him any option other than to get vaccinated. I acknowledge that he disagrees with the employer's policy and feels that the loss of his employment was unjustified. But, I do not have the authority to decide whether the employer breached his rights by dismissing him.

[44] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.¹¹

So, was the Claimant dismissed because of misconduct?

[45] Based on my findings above, I find that the Claimant was dismissed because of misconduct.

¹¹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

Conclusion

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

[47] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section