Citation: *JR v Canada Employment Insurance Commission*, 2022 SST 1759

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. R.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (462770) dated April 12, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	
Decision date:	September 23, 2022
File number:	GE-22-1694

[1] The Claimant (who is the Appellant in this appeal) worked as an Assistant Foreperson for the X (X). He was placed on an unpaid leave of absence and later dismissed from his job because he failed to comply with the employer's mandatory Covid-19 vaccination policy (the policy).

[2] He applied for regular employment insurance (EI) benefits, but the Commission (who is the Respondent in this appeal) said he was suspended from his job – and ultimately lost his job – due to his own misconduct. This meant he could not be paid any EI benefits.

[3] The Claimant asked the Commission to reconsider its decision. He admitted he was put on an unpaid leave of absence and later terminated from his job for non-compliance with the policy. He said he made a personal choice not to be vaccinated for medical and religious reasons, but the employer denied his request for an exemption to the mandatory vaccination requirement. He believes the employer could have accommodated his request for an exemption, and that he should receive EI benefits because he has paid into the EI program for years.

[4] The Commission maintained that he could not be paid EI benefits. The Claimant appealed that decision to the Social Security Tribunal (Tribunal).

Issue

[5] I must decide whether the appeal should be summarily dismissed.

The law

[6] The law says I **must** dismiss an appeal summarily (which means without a hearing) if the appeal has no reasonable chance of success[1]. This means I must consider whether it is plain and obvious on the record that the appeal is bound to fail[2].

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[1] This requirement is set out in section 53(1) of the *Department of Employment and Social Development Act*.
[2] To do this, I must ask whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing: see *Mishibinijima v. Canada (Attorney Genera) 2007 FCA 36*.

[7] The Tribunal's own regulations say that before summarily dismissing an appeal, I must give the Claimant notice in writing and allow a reasonable period of time to make submissions[3].

[8] On August 19, 2022, the Claimant was advised of my intention to summarily dismiss his appeal (GD07). He was given until September 22, 2022 to make detailed written submissions explaining why his appeal had a reasonable chance of success.

[9] The Claimant responded by filing the additional documents at GD10[4].

[10] I am summarily dismissing his appeal because it has no reasonable chance of success. These are the reasons for my decision.

Analysis

[11] The law says a claimant cannot be paid EI benefits if they are suspended from their employment due to their own misconduct[5] ***or*** if they lose their employment because of their own misconduct[6].

[12] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[7]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[8] (or shows a wilful disregard for the effects of their actions on the performance of their job).

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[3] This requirement is set out in section 22 of the *Social Security Tribunal Regulations*.
[4] The Commission was not asked to respond to the GD10 documents, but did so anyway (at GD11). I have not considered the Commission's response, as it was not made available to me until after the expiry of the September 22, 2022 deadline.
[5] Where an employer chooses to place an employee on leave without pay rather than imposing a suspension or termination, the unpaid leave of absence will be considered the equivalent of a suspension *if the reason for the leave is considered misconduct*. In the present case, the Commission determined that *the reason* for the Claimant's unpaid leave of absence (namely, his non-compliance with the employer's mandatory vaccination policy following the denial of his exemption request) was misconduct and, therefore considered his separation from employment to be a suspension. Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension.
[6] This is set out in section 30(2) of the EI Act.
[7] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[8] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

[13] The Claimant doesn't need to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law[9].

[14] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being dismissed because of it[10].

[15] The Commission has to prove the Claimant lost his job due to misconduct[11]. It relies on evidence it obtains from the employer and the Claimant to do so.

[16] The undisputed evidence in the appeal file shows that:

a) the employer implemented a mandatory Covid-19 vaccination policy in response to the Covid-19 pandemic[12]. The policy was intended to protect health and safety in the workplace, and it applied to all X employees[13].

b) the Claimant was informed of the policy and given time to comply with it[14].

c) the Claimant refused to comply with the policy when he failed to provide proof of vaccination the deadlines set out in the policy[15].

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[9] See *Attorney General of Canada v. Secours*, A-352-94.
[10] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[11] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost his job because of misconduct.
[12] The employer provided the Commission with a copy of the policy, starting at GD3-25. The original deadlines in the policy were extended, as the employer explained at GD3-23.
[13] See GD3-25 to GD3-27 for the purpose of the policy and who was subject to it.
[14] The Claimant told the Commission that he received a written copy of the policy on October 9, 2021. In his Notice of Appeal, the Claimant said he was on a medical leave of absence when he received a letter from X about the policy on October 9, 2021, advising that all employees had to be "double vaccinated (2 doses of approved Covid-19 vaccinations) by December 30, 2021" (GD2-6).
[15] The Claimant told the Commission that he received 3 warning letters about the requirement to provide proof of vaccination before being suspended on November 21, 2021 and terminated on December 31, 2021 (see GD3-19 and GD3-51).

d) the Claimant made a conscious, deliberate and intentional choice not to be vaccinated[16]. This made his refusal to comply with the policy wilful.

e) he knew his refusal could cause him to be placed on an unpaid leave of absence and eventually lose his job[17].

f) his refusal to comply with the policy was the direct cause of his unpaid leave of absence[18] and subsequent dismissal[19].

[17] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[20]. The undisputed evidence in the appeal file similarly supports a conclusion that the Claimant's wilful refusal to comply with the policy (by providing proof of vaccination by the given deadlines) was misconduct under the EI Act.

[18] The Claimant argues that the employer did not take his mental state into consideration with "their vaccination mandate" and that "they discriminated in what I was going through" (GD2-6). He also says that he was a dedicated, hard-working employee

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[16] See the Claimant's Religious Exemption Request dated September 30, 2021 (at GD3-71 to GD3-74), which the Claimant said the employer denied (see GD3-67). See also the Claimant's Notice of Appeal at GD2-6, where he refers to his concerns with vaccination due to medical and family history considers. And see also the Claimant's Statements to the Commission (at GD3-76) that his doctor was not willing to write him a note for a medical exemption and that his specialist said it was safe for him to have the vaccine. He told the Commission he didn't agree with the doctors and that it's his personal choice not to be vaccinated.

[17] The Claimant told the Commission that he received a warning letter in October stating that effective November 21, 2021, employees who were not vaccinated would be immediately placed on an unpaid absence up to December 30, 2021; and another warning letter dated November 26, 2021 stating that employees who remained unvaccinated would have their employment terminated for cause (see GD3-51). See also GD3-45 for the explanation of how the X Mandatory Vaccination Policy applied to employees like the Claimant who were on sick leave and short-term disability when the policy came into effect. The policy required such employees to be fully vaccinated by November 20, 2021; then starting November 21, 2021, non-compliant employees would be placed on an unpaid leave; and then those who chose to remain non-compliant would be terminated effective December 31, 2021.

[18] See Employer's statements at GD3-21. See also Claimant's statements at GD3-51, his Request for Reconsideration at GD3-65, and his Notice of Appeal at GD2-6.

[19] See Employer's statements at GD3-21. See also Claimant's statements at GD3-51, his Request for Reconsideration at GD3-65, and his Notice of Appeal at GD2-6.

[20] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

for almost 21 years, and that this should also have been taken into consideration under the policy.

[19] But the employer's conduct is not the issue on this appeal. It's not the Tribunal's role to decide if the employer acted fairly or if the penalty for non-compliance with the policy was too severe[21]. Nor is it open to the Tribunal to decide if the policy violated the Claimant's rights[22]. The Claimant is free to make these arguments before the appropriate adjudicative bodies and seek relief there.

[20] It is also not enough to pay into the EI program. If a claimant has lost their employment due to their own misconduct, they will be disqualified from EI benefits regardless of how many years they have contributed to the program.

[21] The Claimant submitted a doctor's note (at GD10-2) describing the medical issues he is facing and asking that he be provided with EI benefits or other financial assistance in light of his circumstances. I am sympathetic to the serious health issues the Claimant is dealing with, and I acknowledge the dire financial circumstances he is experiencing.

[22] But I can only consider whether the Claimant's actions that led to his suspension and termination were misconduct under the EI Act.

[23] There is no evidence the Claimant could present at a hearing that would change the facts listed in paragraph 16 above. And if I accept these facts as true, there is no argument the Claimant could make that would allow me to conclude anything *other than* that he was suspended – and later dismissed – from his employment due to his own misconduct, and cannot be paid EI benefits as a result.

[24] This means his appeal has no reasonable chance of success.

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[21] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that the questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum.
[22] These questions are best left to the provincial Human Rights tribunals and/or the Canadian Human Rights Tribunal.

[25] Since it is plain and obvious to me on the record that the Claimant's appeal is bound to fail, I must summarily dismiss his appeal.

Conclusion

[26] The appeal has no reasonable chance of success and is, therefore, summarily dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section