



Citation: *RS v Canada Employment Insurance Commission*, 2022 SST 1750

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

Decision

Appellant:

R. S.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (464715) dated May 9, 2022
(issued by Service Canada)

Tribunal member:

Catherine Shaw

Decision date:

September 2, 2022

File number:

GE-22-1741

Introduction

[1] The Claimant lost his job for not complying with his employer's COVID-19 vaccination policy. The policy required employees to be vaccinated against COVID-19 or have an approved accommodation. The Claimant didn't comply with the policy by the deadline. As a result, the employer placed him on an unpaid leave of absence (suspension) and later dismissed him.

[2] The Commission decided the Claimant couldn't be paid EI benefits because he was dismissed due to misconduct. The Claimant asked the Commission to reconsider this decision because he couldn't get vaccinated for religious reasons. He also felt the employer's policy violated his right to the privacy of his medical information.

[3] The Commission maintained its decision because the Claimant was aware of the employer's policy that required him to be vaccinated against COVID-19 or have an approved accommodation. He knew that failing to comply with the policy would cause him to lose his job and he made the choice not to comply. The Claimant has appealed this decision to the Tribunal.

Issue

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

Analysis

[5] I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.¹

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

¹ Section 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states this requirement.

² See section 30 of the *Employment Insurance Act*.

[7] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.³

[8] The Claimant was employed as a pilot. In October 2021, the federal government put in place guidelines that required federally-regulated employees in the transportation sector to be fully vaccinated or have an approved accommodation by October 30, 2021. Employees had to sign a form indicating their vaccination status by September 24, 2021.⁴ Employees who did not indicate their vaccination status would be considered not vaccinated. And employees who were not fully vaccinated and did not have an accommodation from the mandate wouldn't be able to continue working.⁵

[9] The employer sent an email to all employees on September 8, 2021, announcing the mandatory vaccination against COVID-19.⁶

[10] The Claimant was aware of the requirements of the mandate.⁷ He knew that he couldn't continue working if he didn't meet the requirements.⁸

[11] The Claimant didn't want to get vaccinated for religious reasons.⁹ He also felt that the employer asking for his vaccination status violated his right to privacy.¹⁰

³ See section 31 of the *Employment Insurance Act*.

⁴ See GD3-35 to GD3-39.

⁵ See GD3-37.

⁶ See GD3-45 to GD3-46.

⁷ See GD324, GD3-47 and GD3-51.

⁸ See GD3-45 to GD3-46, and GD3-48.

⁹ GD3-42

¹⁰ See GD3-9 to GD3-10.

[12] He asked the employer for an accommodation from the policy on religious grounds.¹¹ But, the employer denied his accommodation request.¹²

[13] The employer sent the Claimant a letter dated October 5, 2021. The letter acknowledges that the Claimant failed to declare his vaccination status by September 24, 2021, and so is in breach of the policy. The employer scheduled a meeting to discuss the Claimant's non-compliance.¹³

[14] The employer suspended the Claimant on November 1, 2021.¹⁴ It sent the Claimant a letter stating that he failed to declare his vaccination status by September 24, 2021. After meeting with the Claimant, the employer has determined that he is wilfully non-compliant with the policy. So, he has been suspended without pay between November 2, 2021, and November 30, 2021.

[15] On November 9, 2021, the Claimant asked the employer again for an accommodation from the policy for religious reasons.¹⁵ The employer responded on November 23, 2021, refusing the Claimant's accommodation request.¹⁶ The employer asks the Claimant to contact the by November 28, 2021, if he intends to comply with the policy. If he doesn't contact the employer by November 28, 2021, he will be dismissed for being non-compliant with the policy.

[16] The Claimant was dismissed on December 1, 2021.¹⁷

[17] For there to be misconduct under the *Employment Insurance Act*, the Commission has to show that the Claimant engaged in wilful conduct that he knew or reasonably should have known could get in the way of carrying out his duties to his employer and that there was a real possibility of being let go because of that.¹⁸

¹¹ See GD3-52, GD3-57, and GD3-58.

¹² See GD3-23.

¹³ See GD3-54.

¹⁴ See GD3-62 to GD3-64.

¹⁵ See GD3-74.

¹⁶ See GD3-83.

¹⁷ See GD3-94 to GD3-96.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[18] Wilful conduct means that the conduct was conscious, deliberate, or intentional.¹⁹ 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.²⁰

[19] Before summarily dismissing an appeal, I must send written notice to the Claimant and allow him time to make submissions.²¹

[20] Given that the evidence on record shows that the Claimant chose not to comply with the employer's mandatory vaccination policy and he was aware he could lose his job for that choice, I sent notice of my intention to summarily dismiss this appeal on August 4, 2022.²² The Claimant provided additional submissions, which I have taken into consideration in this decision.²³

[21] From the evidence on file, I see that the employer required the Claimant to be vaccinated against COVID-19 or have an approved accommodation. The Claimant was notified of this policy. He was told that he would lose his job if he did not comply with the policy.

[22] I understand that the Claimant asked for an accommodation from this policy for religious reasons. But, the employer denied his request. He knew that he did not have an approved accommodation from the requirement to be vaccinated. Regardless, he chose not to comply with the employer's policy.

[23] The Claimant said that the employer's policy wasn't part of his employment contract at the time he was hired. The policy conflicts with his right to privacy. His employer has violated his human rights by trying to force him to get a vaccine to keep his job.

[24] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is just one of

¹⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁰ See *Attorney General of Canada v Secours*, A-352-94.

²¹ See section 22 of the *Social Security Tribunal Regulations*

²² See GD11.

²³ See GD3-13 and GD3-14.

these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[25] These laws are enforced by different courts and tribunals.

[26] The Social Security Tribunal (SST) is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[27] But the SST is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights.²⁴ This is beyond our jurisdiction. Nor is the SST allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[28] The Claimant may have other recourse to pursue his claims that the employer's policy conflicted with his contract or violated his rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

[29] 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.

[30] 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.²⁵

[31] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.²⁶

²⁴ The Charter is not applicable because it only applies to government's actions.

²⁵ See *Paradis v Canada (Attorney General)*, 2016 FCA 1281.

²⁶ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[32] The Claimant chose not to get vaccinated. This refusal was intentional. As such, he was not in compliance with the employer's policy. And, at the time he was let go, he had no intention to become compliant. He was informed that not complying with the policy would result in losing his job. There is no evidence or testimony he could provide in a hearing that would change that.

[33] It is plain and obvious on the face of the record that the appeal is bound to fail.²⁷ As a result, I find that this appeal has no reasonable chance of success. Accordingly, the law requires that I dismiss it.²⁸

Conclusion

[34] I find that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

²⁷ The Federal Court of Appeal used this language to describe the test for summarily dismissing an appeal in *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

²⁸ See section 22 of the *Social Security Tribunal Regulations*