Citation: *LF v Canada Employment Insurance Commission*, 2023 SST 652

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (500258) dated September 22, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	February 27, 2023
Hearing participant:	Appellant
Decision date:	March 7, 2023
File number:	GE-22-3658

Decision

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

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

Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because he did not comply with its mandatory COVID-19 vaccination policy (Policy).

[4] The Appellant doesn't dispute that he was let go from his job because of the Policy. He says that misconduct has not been proven. He complied with the Policy based on his religious beliefs and freedoms.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

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

Analysis

[7] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Why did the Appellant lose his job?

[8] I find that the Appellant lost his job because he did not comply with the employer's mandatory COVID-19 vaccination policy (Policy).

[9] The Appellant lost his job. The Appellant's employer said that he was let go because he did not comply with the Policy.

[10] The Appellant doesn't dispute that he was let go from his job. The allegation of misconduct is untrue and unproven. He states that he has been an exemplary employee. He complied with every request under the Policy. He did so under his religious/creed rights/freedom.

[11] The Appellant did not comply with the Policy. He did request an accommodation on religious grounds. The employer rejected the request. The Appellant requested an extension of the vaccination deadline to allow him to get an approved single-dose COVID-19 vaccine which would be available shortly. The employer did not grant that request. The Appellant had not received a COVID-19 vaccine by the deadline. The employer dismissed him for non-compliance with the Policy.

Is the reason for the Claimant's dismissal misconduct under the law?

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

[13] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] The Appellant 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.[4]

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] See *Attorney General of Canada v Secours*, A-352-94.

[14] There is misconduct if the Appellant 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.[5]

[15] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.[6]

[16] The Commission says that there was misconduct because the Appellant's decision not to take the vaccine was wilful. He was aware of the possible consequences of not getting vaccinated. Complying with the Policy was a condition of employment. By not complying he had breached a duty owed to the employer. The non-compliance was the cause of the dismissal. The Tribunal does not have jurisdiction to rule on the claims of the experimental status or effectiveness of the vaccine, or on the claim that the Policy is coercive.

[17] The Appellant says that there was no misconduct because the allegation of misconduct is untrue and unproven. The employer's decision to dismiss him was unjust and arbitrary. The Policy was coercive. He states that he has been an exemplary employee. He complied with every request under the Policy. He did so under his religious/creed rights/freedom. The vaccine is experimental and has not been proven.

[18] I find that the Commission has proven that there was misconduct, because it has proven all four of the elements in the EI definition of misconduct: wilfulness; breach of duty owed to the employer; knowledge of the consequences of non-compliance; and the cause of the dismissal. The Appellant raised a number of issues that are not relevant to the EI definition of misconduct. They are relevant to areas outside the Tribunal's jurisdiction. I will deal with those issues in the reasons below.

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

Facts

[19] The Appellant was a bus driver for a major city's transportation system. He had daily contact with members of the public taking the bus. He had worked full-time hours throughout the pandemic, observing the employer's guidelines for masking, sanitizing and distancing. He complied with testing when the employer offered it. He had only missed a few days of work during the pandemic.

[20] The employer created a COVID-19 mandatory vaccination policy effective September 7, 2021. The Policy applied to all employees. All employees had to read and understand the requirements and obligations under the Policy. All employees had to confirm their vaccination status by September 20, 2021. If an employee did not have two doses of the vaccine by that date, they had to get the first dose by September 30th, and the second dose by October 30th. Alternately, for a single-dose vaccine such as Johnson & Johnson, the employer had to receive that dose by September 30, 2021. Employees not having the required doses by September 20th had to complete a mandatory education session about the benefits of vaccination. The employer did extend the deadlines. The final deadline for being fully vaccinated was extended to November 20th, then to December 30, 2021.

[21] The Policy referred to full vaccination as a precondition of employment. Then the Policy referred to employees being expected to comply with the Policy as a condition of employment.

[22] The Policy provided for accommodation for employees who were unable to receive the vaccine due to a *Human Rights Code* protected characteristic. The employee had to request the accommodation and provide written documentation to support the request. The employer would decide if the employee had proven their request. Those employees granted accommodation had to comply with additional prevention measures including negative test results and self-isolation if exposed to COVID.

[23] The employer communicated the Policy to employees by email on September 7, 2021, and on posting boards at worksites. The Appellant said he had not received a

copy of the Policy. He thought that the employer should have sent the Policy to individual employees, rather than by mass communication. He was aware of the requirements in the Policy through postings and meetings. He did report his status as unvaccinated on September 20, 2012. He did get further emails from the employer after that about the Policy requirements and accommodation. He did complete the mandatory education session required by the Policy.

[24] The Appellant requested an accommodation from the employer based on his religious faith. He submitted an affidavit dated October 8, 2021, and supporting documents with his request. The employer responded by a letter dated November 9, 2021. The employer did not approve the request. The reason was that the information provided showed a personal preference. That did not meet the requirements in the *Human Rights Code* for an accommodation based on creed. The letter stated that the Appellant had 14 days from the date of the letter to receive his first dose of the COVID-19 vaccine. The Appellant knew that he had to be vaccinated if he did not have the accommodation.

[25] The employer followed up with a letter dated November 19, 2021. The letter stated that unless fully vaccinated by November 20th, he would not be permitted at an employer's work location as of November 21st. He would be placed on paid leave for three days. If he did not provide proof of getting a dose of the vaccine within those three days, he would be placed on unpaid leave. If he did not provide proof of having received the number of doses of the vaccine to be fully vaccinated, his employment would be terminated for cause effective December 31, 2021.

[26] The employer put the Appellant on a leave of absence on November 21, 2021.

[27] The employer communicated the above information respecting unpaid leave to be effective November 21, 2021, and termination of employment to be effective on December 31, 2021, in other letters to the Appellant. There was an undated letter, and letters dated October 27th, and November 21, 2021.

[28] The Appellant objected the mRNA vaccines, based on the name of one of the ingredients. He was willing to take the single dose Johnson & Johnson vaccine. That vaccine had been approved for use but was not available in Canada in the fall of 2021. The Appellant told the employer he was willing to take that vaccine. He was not able to make an appointment until mid-December to get that vaccine in early to mid-January 2022. He asked the employer in late December for an extension of the December 31st deadline. The employer refused.

[29] The employer's letter, dated December 31, 2021, terminated the Appellant's employment for non-compliance with the Policy and violation of the conditions of employment.

The four elements of EI misconduct

[30] I find that the Commission has proven misconduct on the part of the Appellant, for the reasons set out below.

[31] ***Wilfulness.*** The Commission has proven this element. On the subject of wilfulness, the Appellant testified that his action of not being vaccinated was not wilful. He was not trying to create conflict with the employer. He wanted to make an informed decision based on health and religion. That testimony supports that the Appellant's action was wilful, that is, deliberate, conscious, intentional. Delaying taking the vaccine in order to make an informed decision is wilful. The Appellant further testified that the employer had arbitrarily denied a range of choices and took away his options. The employer could have extended the deadline to allow him to be vaccinated in January 2022. Those matters could push the Appellant toward getting the vaccine before December 31, 2021. They could be interpreted as coercive. But they did not take away the Appellant's right and ability to make a decision for himself. He decided not to take the vaccine by December 31, 2021. That decision was wilful.

[32] ***Breach of duty owed to the employer.*** The Commission has proven this element. It is well-established that a deliberate violation of the employer's policy is

considered to be misconduct within the EI definition.[7] The Appellant did violate the Policy in two ways: first by not being vaccinated, and second by not complying with the Policy, thereby breaching a condition of his employment.

Many of the Appellant's arguments focus on the employer's conduct. The issue is not whether the employer was guilty of misconduct by engaging in unjust dismissal; rather, the question is whether the applicant was guilty of misconduct.[8] The Appellant said the Policy was heavy-handed, arbitrary and unjust. It was coercive. He did not understand how the Policy was made without the agreement of his union. He did not know if the collective agreement had a clause dealing with vaccinations. It was the employer who engaged in misconduct. The answer is that the Tribunal does not have the authority to rule on those issues in a misconduct appeal.[9] Nor does the Tribunal have the authority to rule on claims of the vaccine being experimental, or on the vaccine's effectiveness or risks. The Appellant's remedies lie with the courts, not with the Tribunal. Ruling on the merits, legitimacy or legality of a COVID-19 mandate also lies outside the jurisdiction of the Tribunal.[10]

[33] The Appellant said that the Policy is unlawful for violating a number of laws. He listed the *Canadian Bill of Rights,* the *Genetic Non-Discrimination Act,* the *Ontario Human Rights Code*, the *Universal Declaration of Human Rights* and the doctrine of paramountcy in Canadian constitutional law. His not following an unlawful Policy was not misconduct. I do not have the authority to address that argument or those reasons. Ruling on the merits, legitimacy or legality of a COVID-19 mandate lies outside the jurisdiction of the Tribunal.[11] That principle applies to prevent the Tribunal from reviewing the correctness of the employer's decision to refuse the Appellant's accommodation request. His remedy for that lies with the human rights tribunal.

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[7] See *Canada (Attorney General) v Bellevance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[8] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v Caul*, 2006 FCA 251; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Cecchetto v Canada (Attorney General)***,** 2023 FC 102.
[11] See *Cecchetto v Canada (Attorney General)***,** 2023 FC 102.

[34] The Appellant also said that the discipline imposed by the employer was too harsh. There was no justification for such harsh discipline. It is not the role of the Tribunal to determine whether the dismissal was justified or was the appropriate sanction.[12]

[35] The Appellant said that he was willing and able to work. He offered to continue working. He had worked during the pandemic and had complied with safety requirements such as masking and testing. That does not help the Appellant. Testing was only available under the Policy to employees who remained unvaccinated due to a substantiated human rights code-related accommodation request. That provision did not apply to the Appellant because his request for accommodation had been refused. The Policy did make compliance with the Policy a condition of employment. Despite the confusion between 'precondition' and 'condition' in the Policy, it was clear that the employer definitely required compliance with the Policy. The employer dismissed the Appellant for non-compliance, totally unrelated to his ability to work.

[36] The Appellant said that he had complied with the Policy. That is only partially correct. He did comply with disclosing his unvaccinated status. He did attend the education session. He did comply with early sanitary measures such as masking and testing. He did request an accommodation which was refused. But he did not comply with the critical requirement of being fully vaccinated by the final deadline of December 31, 2021. His compliance with earlier requirements does not cancel his non-compliance with the most important requirement of the Policy.

[37] The performance of services under the employment contract is an essential condition of employment.[13] By being suspended then dismissed, the Appellant was unable to perform any of his services for the employer. He was in breach of an essential condition of employment.

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[12] See Canada (Attorney General) v Caul, 2006 FCA 251.
[13] See *Canada (Attorney General)* v *Wasylka*, 2004 FCA 219; *Canada (Attorney General)* v *Lavallée*, 2003 FCA 255; *Canada (Attorney General)* v *Brissette*, A-1342-92.

[38] ***Knowledge of consequences.*** The Commission has proven this element, though not without some difficulties. The Policy was silent about the consequences of non-compliance. There was no reference to discipline, leave of absence, suspension or dismissal. That gap was filled by the employer's communications to all staff, and to the Appellant directly, from early September to late November 2021. The letters to the Appellant stated that he had to comply with the Policy, or face a leave of absence, or termination of employment. That was clear. The Appellant confirmed to the Commission that he was aware of the Policy and aware of what the consequences were for not being vaccinated. He also testified that he understood that he would be dismissed on December 31, 2021, for not being vaccinated. That is why he asked for the extension of time to get the Johnson & Johnson vaccine. Without the above evidence, the Commission could not have proven its case.

[39] The Appellant also said that the inclusion of the Johnson & Johnson vaccine in the Policy supported the extension of the deadline past December 31st. I do not see anything in the Policy to support that claim. The fact that the employer had previously extended the deadline for all employees did not create an obligation to grant an extension past the final deadline for one employee.

[40] ***Cause of dismissal.*** The Commission has proven this element. The Appellant lost his job because he did not take the COVID-19 vaccine, as required by the Policy. The Appellant does not dispute this, nor is there any evidence to show some other reason for the dismissal.

So, did the Appellant lose his job because of misconduct?

[41] Based on my findings above, I find that the Appellant lost his job because of misconduct.

Conclusion

[42] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[43] This means that the appeal is dismissed.

Paul Dusome
Member, General Division – Employment Insurance Section