



Citation: *RZ v Canada Employment Insurance Commission*, 2022 SST 1767

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

Decision

Claimant:	R. Z.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (469171) dated May 6, 2022 (issued by Service Canada)
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Tribunal member:	Marc-André St-Jules
Type of hearing:	Teleconference
Hearing date:	September 15, 2022
Hearing participant:	Claimant
Decision date:	September 26, 2022
File number:	GE-22-1868

Decision

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

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

Overview

[3] The Claimant lost his job. The Claimant's employer first suspended him on November 1, 2021, and then dismissed the Claimant on January 10, 2022, because he did not comply with the employer's vaccination policy.

[4] The Claimant doesn't dispute that this happened.

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

[6] The Claimant disagrees and says that he did not lose his job because of misconduct. He also argues that the employer does not have the right to know if he is vaccinated or not. Vaccination was not part of his employment contract. He also states that the vaccination policy infringes on his privacy. The Claimant says that he could have worked remotely making vaccination status irrelevant. The Claimant says he was given two days to comply with the policy which is not sufficient time to make an informed decision.

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

Matters I have to consider first

I will accept documents sent in after the hearing

[7] During the hearing the Claimant made reference to an email he sent to the Tribunal on July 12, 2022. I reviewed the file and it was not among the documents available to me. The Claimant was comfortable in discussing the contents of the email and said that he would send it in later.

[8] The hearing proceeded, the contents discussed. It was agreed that if the documents raised any questions, I would send them to the Claimant for comment. The documents were in fact received. As of the decision date, the Commission has not replied to the document.

Issue

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

Analysis

[10] A Claimant who loses his job because of misconduct is disqualified from receiving benefits. This applies whether the employer has fired or suspended you.²

[11] 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?

[12] I find that the Claimant lost his job because he did not comply with the employer's required vaccination policy.

[13] Documents in the file confirm that the Claimant was placed on an unpaid leave of absence as of November 1, 2021. His employment was terminated on January 10,

² Sections 30 and 31 of the *Employment Insurance Act* (Act)

2022, for failure to comply with the employer's vaccination policy. The Claimant confirmed this in testimony.

[14] Given all of the above, I find it is undisputed that the Claimant lost his job because he refused to comply with the employer's vaccination policy.

Is the reason for the Claimant's 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 says that there was misconduct because of the following:

- The Claimant does not dispute that he lost his job because he refused to comply with the employer's vaccination policy.
- The Claimant was given time to follow the policy, then was placed on suspension and finally was terminated.
- The Claimant's behaviour fits the description of misconduct under the Act as it was conscious and intentional.

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.

- The Commission submits that the Claimant did this willingly and voluntarily, and it was foreseeable that the Claimant could lose his job by doing so.
- The Claimant's conduct was intentional and he knew what the consequences might be.
- There is a direct link between the refusal of to comply with the vaccination policy and the loss of the job.⁷

[19] The Claimant says that there was no misconduct because of the following:

- He only had two days after being advised of the policy to disclose his vaccination status. This is not sufficient time to make an informed decision.⁸
- The Claimant could do all the work virtually as done previously.
- The employer has no right to personal health information.
- A person can't be forced into medical procedures. It is against section 7 of the Charter.⁹
- The refusal to disclose personal medical information does not affect his ability to do his work. He could have in fact worked remotely.
- The bar set out for misconduct is very high and it is not met in his case.¹⁰
- The Commission is biased and made factual errors in documenting conversations between himself and the Commission. He always refused to state his vaccination status. The Commission documented that he refused to be vaccinated. The Claimant is saying it is an error and a bias.

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

⁸ GD2-5

⁹ GD6 page 3.

¹⁰ GD6 page 3.

- The Claimant paid Employment Insurance premiums as obligated and lost his employment through no fault of his own. He should be paid EI.

[20] I find that the Commission has proven that there was misconduct. My decision is explained in the following paragraphs.

[21] The employer had a vaccination policy. The policy was distributed to all employees as a whole on September 14, 2021. I agree that this was not the case for the Claimant. The Claimant was on leave until October 4, 2021, and he was not on the email distribution list. I agree that the first proven documented communication addressed directly to the Claimant was October 27, 2021.¹¹ I agree that he was given until October 29, 2021, to comply before the unpaid leave.

[22] The October 27, 2021, letter addressed to the Claimant clearly sets out what would happen to unvaccinated individuals. It says that unpaid leave would start November 1, 2021, and termination would follow on December 1, 2021. The letter says that the unpaid leave is intended to allow for time to comply with the vaccination policy.

[23] In the Claimant's case, he returned to work after a leave on October 4, 2021. He testified that he had access to a work portal where the policy was available to him. He did access the portal in October 2021 at some time. He testified that he does not recall on which date he did so.

[24] The Claimant testified he did discuss the policy with his manager to voice his concerns. The Claimant testified he worked in person quite a bit leading up to his last day. The Claimant added this was especially the case in the last week at work. This was to help his manager prepare if the Claimant had to leave for non-compliance. This suggests the Claimant knew about the policy in advance of the October 27, 2021, letter.

[25] The Claimant testified that the original termination date was to be December 1, 2021, and that was changed to January 10, 2022, to allow for more time to comply with

¹¹ GD2 page 9.

the vaccination policy. The Claimant had as early October 4, 2021 (or shortly thereafter) and until January 10, 2022, to avoid termination.

[26] The Claimant testified that he could have worked remotely. He is arguing that he could have done so to avoid dismissal. The Claimant testified his co-workers who did work remotely were also required to comply with the policy. The Claimant knew that even with remote work, there was still a requirement to be fully vaccinated.

[27] The copy of the policy that is available to me is titled Version 1.0 dated September 14, 2021.¹² It spells out that employees who enter an employer workplace must be vaccinated. It says that non-compliance can lead to unpaid leave or termination. It does not mention that remote workers must also be vaccinated to comply. The Claimant testified that the policy was in fact applicable to all remote workers as well with no exceptions.

[28] The fact that even remote employees are subject to this policy is not for me to rule or enforce. It is not my role to look at an employer's policy to determine if it is appropriate.¹³ I can only look at whether the Claimant's actions amount to misconduct under the law.

[29] I agree that the Claimant is not obligated to disclose his vaccination status. I also agree that employees can't be forced to take a vaccine.¹⁴ I also find that once the employer imposed a vaccination policy, this became a fundamental condition of employment. The employer has a right to manage the day-to-day operations of the workplace. This includes the right to develop and impose policy related to health and safety in the workplace.

[30] I am satisfied that the Claimant's concern is the disclosure of his vaccination status. The Claimant testified he never disclosed his vaccination status. I believe the Claimant when he says he never admitted to the Commission about being unvaccinated. If I am correct, this would be an error in documentation on page 27 of the

¹² GD3 pages 29-31.

¹³ See *Canada (Attorney General) v Caul*, 2006 FCA 251, at paragraph 6.

¹⁴ The Claimant provided many different laws and court decisions to support this. GD-6 page 3.

GD3. This, however, does not change the decision before me today. The policy states that beyond November 1, 2021, employees must prove that they are vaccinated to enter the workplace. I am satisfied that in order to prove that a person is vaccinated, their vaccination status must also be revealed.

[31] The Claimant testified that he did not request any exemptions. It was a non-starter as might involve disclosing health information. Co-workers who did ask for exemptions were refused so he decided not to try for himself.

[32] The Claimant provided a Supreme Court decision in his defence.¹⁵ This decision related to employment law in British Columbia. This case is not relevant to my decision. I have to make my decision based on the Employment Insurance Act and Regulations and related case law.

[33] I agree that the Claimant did not have any wrongful intent in not disclosing his vaccination status. His employer provided him the option to comply and return to work. He worked with his manager leading up to his last day. Nothing in the file or testimony suggests wrongful intent. 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.¹⁶

[34] I find that the Commission has proven that there was misconduct for the following reasons. The employer had a vaccination policy. The Claimant had access to the policy via the employee portal. The Claimant discussed the vaccination policy with his immediate supervisor. The Claimant knew or ought to have known the consequences of not complying with the vaccination policy.

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

¹⁵ GD6 page 3.

¹⁶ See *Attorney General of Canada v Secours*, A-352-94.

Conclusion

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

[37] This means that the appeal is dismissed.

Marc-André St-Jules
Member, General Division – Employment Insurance Section