Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 783

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (482264) dated June 21, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	November 17, 2022
Hearing participant:	Appellant
Decision date:	March 7, 2023
File numbers:	GE-22-2346

Decision

[1] The appeal is dismissed. The Tribunal disagrees with J. W.

[2] The Commission has proven that he lost his job for misconduct.

Overview

[3] The Appellant J. W. was a long-time and well-regarded employee of a federally regulated company. He lost his job on November 26, 2021.

[4] His employer told him in his termination letter that he was let go because he went against one of its policies: he did not undergo twice-a-week Rapid Testing as required under the company's COVID-19 policy and protocols.

[5] The Appellant doesn't dispute that this happened. He agrees that he chose not to perform the tests and it was clear to him that this went against his employer's policy.

[6] The Commission decided that because J. W. lost his job for intentionally breaching one of his employer's policies, he lost his job due to misconduct. The Commission decided that the Appellant was disqualified from receiving EI benefits.

[7] The Appellant says that he had always been a dedicated and model employee during the more than two decades that he had worked for his employer. He says he always provided excellent service, never had any complaints against him and worked long hours and gave up vacations during the early months of the COVID-19 pandemic to help his employer.

[8] He also says that he has paid into the EI program for his whole working life and that his decision not to undergo medical procedures and share private health information should not prevent him from receiving the support he deserves now that he needs it.

[9] My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

Matter I had to consider first

I heard two appeals at the same hearing.

[10] J. W. was terminated from his job on November 26, 2021 for not complying with his employer's COVID-19 policy. He applied for EI benefits on December 23, 2021 and listed the reason for his dismissal as being "due to a vaccine mandate policy."

[11] In the application for benefits, he also indicated that he had decided, of his own initiative, to start a year long part-time training program not long after he lost his job. The program's courses ran Monday through Saturday. He indicated that he was only available for work in the evenings due to this school schedule.

[12] The Commission denied his application for benefits on April 1, 2022. They determined that J. W. had lost his job as a result of his own misconduct. He asked that the decision be reconsidered by the Commission, but they upheld their decision.

[13] They advised the Appellant of their decision on June 21, 2022 and he appealed that decision (the Misconduct Determination) to this Tribunal.

[14] The Commission also considered whether J. W. was available for work during the period of his claim.

[15] The Commission determined on June 22, 2022 that he was not and that he was disentitled from receiving benefits for this reason.

[16] The Appellant disagreed with the Commission on this finding as well. He asked the Commission to reconsider that finding (the Availability Determination).

[17] The Commission upheld their decision on the Availability Determination and told J. W. in a letter September 15 2022 that they were maintaining their position that he was disentitled to benefits for being unavailable for work. He started a second appeal with this Tribunal regarding this Availability Determination on October 7, 2022.

[18] The Appellant has appealed two different decisions about two different questions with the Tribunal. However, as the member assigned to both files, I ordered that the two appeals be heard together.

[19] The hearing for both appeals occurred on November 17, 2023.

Issues

[20] In these reasons, I am deciding on the question in dispute in J. W.'s first appeal to the Tribunal: Did the Appellant lose his job for a reason the EI Act considers to be misconduct?

[21] I have prepared separate reasons in J. W.'s other appeal.

Analysis

[22] The law says that you can't get EI benefits if you lose your job because of misconduct.[1]

[23] To answer the question of whether J. W. lost his job because of misconduct, I have to decide two things:

- First, I have to determine the reason that the Appellant was dismissed.
- Then, I have to determine whether the *Employment Insurance Act* considers that reason to be misconduct.

Why was J. W. terminated from his job?

[24] I find that J. W. lost his job because he failed to undergo mandatory COVID-19 rapid testing as required by his employer's COVID-19 Policy.

[25] J. W. testified at the hearing that he had declined to disclose his vaccination status to his employer. His employer's COVID-19 policy and protocols required that all

[1] See sections 30 of the Act.

employees who refused to disclose their vaccination status had to participate in rapid testing using nasal swabs twice a week and had to upload those results to the employer's portal.

[26] The Appellant had many questions about the safety of the nasal swab tests and the privacy implications of uploading his medical test results to the company portal. He asked his employer to answer his questions about these concerns.

[27] The Appellant says that he did not get satisfactory answers from his employer regarding his concerns and so did not engage in the testing and reporting requirements.

[28] He says that he didn't *refuse* to comply with the policy, he just didn't have his questions answered. He did not have enough information, he says, to enable him to consent to the policy.

[29] He does not deny, however, that he *failed to follow* the policy. He confirms that he did not undergo testing and therefore did not provide any test results to his employer. He knew that these actions were required of him under the policy and he did not do them.

[30] The Commission agrees that this was the reason he lost his job: he failed to comply with his employer's policy.

[31] I find, therefore, that the reason the Appellant lost his job was because he did not comply with his employer's COVID-19 policy.

Is the reason he lost his job misconduct?

[32] The Appellant's failure to comply with his employer's COVID-19 testing and reporting requirements is misconduct under the EI Act.

[33] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's actions amount to misconduct under the Act. The Act sets out the legal test

for misconduct. In some circumstances, for example, the term "misconduct" refers to the employee's violation of an employment rule.

[34] Where the Commission takes the position that a worker seeking benefits has engaged in misconduct, the Commission bears the burden of proof. It has to prove this on a balance of probabilities. In J. W.'s case, this means that the Commission has to show that it is more likely than not that he lost his job because of misconduct.[2]

[35] I have to focus on what J. W. did or didn't do and whether his conduct amounts to misconduct under the EI Act. I can't make my decision based on other laws.

[36] I can't decide, for example, whether a worker was constructively or wrongfully dismissed under employment law: the Federal Court has been clear that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's dismissal under that policy was justified or reasonable.[3]

[37] Similarly, I am not allowed to interpret a collective agreement or decide whether an employer breached a collective agreement.[4] The Federal Court has said that workers have other legal avenues to grieve an employer's conduct or to challenge the legality of what the employer did or didn't do.

[38] The Tribunal's jurisdiction is limited to the *Employment Insurance Act*. So, I must focus on the Appellant's behaviour and actions, and whether those behaviours amounted to misconduct.[5]

[39] Case law says that to be misconduct, an Appellant's behaviour has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6]

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[2] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[3] See *Canada (Attorney General) v Marion,* 2002 FCA 185 at paragraph 3
[4] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22
[5] See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[40] The Appellant doesn't have to have wrongful intent. J. W. doesn't have to mean to do something illegal, dangerous or wrong for me to decide his conduct is misconduct.[7]

[41] The case law also says that there is misconduct if the Appellant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended or let go because of that.[8]

The Commission's and the Appellant's positions in this case

[42] The Appellant and the Commission agree on a number of key facts. Almost all of the evidence the parties have brought forward on this appeal is not in dispute. I have reviewed the record (including the Appellant's written statements and attachments, the contents of the Commission's file and the evidence J. W. gave at his hearing) and here is what I find the evidence shows:

- The employer had a COVID-19 policy and communicated that policy to all staff (including the Appellant) in approximately September 2021.[9]
- The Policy required that all employees provide proof that they were fully vaccinated by October 31, 2021.[10]
- The policy permitted employees to apply for an exemption from the policy on medical or religious grounds.
- The Appellant did not request an exemption from his employer on either of these grounds at any time.

[7] See *Attorney General of Canada v Secours*, A-352-94.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] GD3-60
[10] GD3-30

- The policy was updated on November 1, 2021 to introduce interim measures for employees who had not provided proof of vaccination by October 31, 2021.[11]
- That updated policy required, among other things, that:
    i. Employees who had choses not to disclose their vaccination status to the employer needed to self-administer Rapid Antigen Tests to themselves twice per week and
    ii. Employees needed to disclose the results of those RATs to their employer.[12]
- The policy applied to all employees, including the Appellant.
- The Appellant was aware of the policy and of the updated requirements introduced on November 1, 2021.[13]
- He was also aware that failure to follow the testing and reporting protocols "may result in corrective, disciplinary or administrative actions, up to and including termination of employment."[14]
- He did not self-administer Rapid Antigen Tests, nor did he provide test results to his employer.
- On November 18, 2021 the Appellant was warned that his failure to comply with the testing and reporting requirements of the policy would result in "disciplinary measures up to and including termination."[15]
- On November 26, 2021 he lost his job for "his continued failure to follow company directive."[16]

[11] GD3-30
[12] GD3-30
[13] GD3-60
[14] GD3-34
[15] GD3-32
[16] GD3-32

[43] The Commission says that these facts show that the Appellant engaged in misconduct: he consciously and knowingly refused to follow his employer's policy regarding testing and he knew that if he did not follow the policy there was a real chance that he would lose his job.

[44] He chose not to comply with the policy anyway.

[45] The Commission says that this meets the definition of misconduct under the *Employment Insurance Act*.

[46] The Appellant says that the above facts do not amount to misconduct.

[47] He says that the Commission has not provided any legal proof that:

- His employer was allowed to force genetic testing on him
- His employer was allowed to mandate medical treatments on employees
- His employer was allowed to collect private health information from him.

[48] The Appellant says that without proof that the policy was legal, the Commission cannot prove that he did any thing wrong. So, the Appellant says, the Commission has not met their burden of proving that his non-compliance with the COVID-19 testing requirements was misconduct.

I find that the Commission has proven misconduct.

[49] Based on the evidence, I find that the Commission has proven that J. W.'s behaviour amounted to misconduct. It has shown that he:

- knew about the testing policy
- knew that he could lose his job if he didn't follow the testing and reporting policy and
- deliberately and intentionally made a personal decision not to perform the testing

- lost his job because he didn't comply with the testing and reporting policy

[50] As I explained above, I do not have the jurisdiction to decide if the policy was scientifically sound or whether the employer's policy was fair or reasonable. I do not have the authority to make determinations under privacy legislation or the *Canada Labour Code*. I am limited to interpreting and applying the *Employment Insurance Act*. I can't make my decision based on other laws.

[51] The courts have said that employees who believe that they have been wrongfully let go from their job or discriminated against by their employer have other options available to them and can pursue actions against their employer in other forums. Unionized employees have the right to file grievances. These solutions penalize the employer's behaviour rather than having taxpayers pay for the employer's actions through the Employment Insurance regime.[17]

[52] I have applied the EI Act and I find that the Appellant's conscious decision not to comply with his employer's clear testing protocol meets the definition of misconduct.

Conclusion

[53] The Commission has proven that the Appellant lost his job because of misconduct under the EI Act. He isn't entitled to get EI regular benefits.

[54] The appeal is dismissed.

Jillian Evans
Member, General Division – Employment Insurance Section

[17] See *Canada (Attorney General) v. McNamara*, 2007 FCA 107