



Citation: *NG v Canada Employment Insurance Commission*, 2022 SST 1780

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

Decision

Appellant: N. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462128) dated April 5, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: August 16, 2022

Hearing participant: Appellant

Decision date: August 18, 2022

File number: GE-22-1359

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because he lost his job due to his own misconduct.

Overview

[3] The Claimant worked as a radiation therapist and was employed by X. On November 12, 2021, the Claimant was suspended for failing to submit proof he received his first dose of a Covid-19 vaccine, as required by the employer's mandatory Covid-19 vaccination policy (the policy). On November 29, 2021, the employer dismissed the Claimant because he remained non-compliant with the policy.

[4] The Claimant applied for EI benefits. The Respondent (Commission) determined that he lost his job due to his own misconduct and imposed a disqualification on his claim. This meant he could not be paid any EI benefits. The Claimant asked the Commission to reconsider. He admitted he was terminated for non-compliance with the policy, but argued that the policy itself was "illegal" because it violated his personal creed, his constitutional and human rights, and the collective agreement governing his employment. The Commission was not persuaded, and maintained the disqualification on his claim. He appealed that decision to the Social Security Tribunal (Tribunal).

[5] I must decide whether the Claimant lost his job due to his own misconduct¹. To do this, I have to look at the reason for his dismissal, and then determine if the conduct that caused his job loss is conduct the law considers to be "misconduct" for purposes of EI benefits.

[6] The Commission says the Claimant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and

¹ Section 30 of the *Employment Insurance Act* (EI Act) says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. This means that *if* the Claimant lost his job because of his own misconduct, he will be disqualified from EI benefits from the start of his claim (which was effective as of November 14, 2021).

deliberate choice not to comply with the policy. He knew he could lose his job by making this choice – and that’s what happened. The Commission says these facts prove the Claimant lost his job due to his own misconduct, which means he cannot receive EI benefits.

[7] The Claimant disagrees. He says he made a personal choice not to be vaccinated because of his creed, and argues the employer should have accommodated him with an exemption on that basis. He also says his termination was “illegal” because it violated his human rights and the collective agreement governing his employment. He thinks he should be paid EI benefits because the employer acted illegally and unreasonably.

[8] I agree with the Commission. These are my reasons.

Issue

[9] Was the Claimant dismissed from his job at X because of his own misconduct?

Analysis

[10] To answer this question, I have to decide two things. First, I have to determine why the Claimant lost his job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why did the Claimant lose his job?

[11] The Claimant was dismissed because he refused to be vaccinated, as required by the employer’s policy.

[12] The employer told the Commission that²:

- The policy went into effect on November 1, 2021.
- Under the policy, the Claimant had until November 12, 2021 to submit proof he had received his first dose of a Covid-19 vaccine. If he failed to provide proof of

² See Supplementary Record of Claim at GD3-26.

his first dose, he would be placed on an unpaid leave of absence for 2 weeks and given time to get his first dose. If he was still unvaccinated by November 26, 2021, he would be terminated.

- The Claimant failed to provide proof of vaccination by November 12, 2021. He was put on leave for 2 weeks without pay starting that day³.
- When the employer met with the Claimant on November 29, 2021, he was still unvaccinated. The Claimant was dismissed for non-compliance with the policy at that time⁴.

[13] The Claimant does not dispute any of this.

[14] At the hearing, he emphasized that his union has grieved his termination⁵, but he acknowledged and agreed that the reason for his dismissal was because he did not comply with the policy requiring all employees to be vaccinated.

[15] I find that the evidence shows the Claimant lost his job because he refused to be vaccinated, as required by the employer's policy.

Issue 2: Is the reason for dismissal misconduct under the law?

[16] Yes, the reason for the Claimant's dismissal is misconduct for purposes of EI benefits.

[17] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional⁶. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful⁷ (or shows a wilful disregard for the effects of their actions on the performance of their job).

³ See also Record of Employment at GD3-22.

⁴ See also Record of Employment at GD3-24.

⁵ The Claimant has been told by his union that the grievance is going to arbitration in September 2022.

⁶ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

[18] The Claimant doesn't have 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 law⁸.

[19] 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 it⁹.

[20] The Commission has to prove the Claimant lost his job due to misconduct¹⁰. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

[21] At the hearing, the Claimant testified that:

- The mandatory Covid-19 vaccination policy was issued to all employees on November 1, 2021. They had 2 weeks to get vaccinated or they'd be suspended without pay. If they weren't vaccinated after another 2 weeks, they'd be terminated.
- Under this policy, the employer was saying 'get vaccinated or you'll have to leave'.
- His union filed his grievance "right away on November 1st" because it was "denying" his human rights and his Charter rights.
- He made a deliberate and intentional choice not to get the Covid-19 vaccination because of his creed.
- He believes in living a "clean, holistic lifestyle", and avoids all pharmaceutical products.

⁸ See *Attorney General of Canada v. Secours*, A-352-94.

⁹ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁰ 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.

- On November 12, 2021, he was “suspended” for failing to provide proof of vaccination.
- On November 29, 2021, there was a meeting to find out if he had complied with the vaccination requirement. He had not, so the employer said he was “terminated” for failing to be vaccinated as required by the policy.
- He told the employer he had prepared a sworn statement¹¹ explaining his creed, how he follows it in his life, and why he believes the policy requiring him to be vaccinated was a violation of his creed.
- The employer said, ‘give it to us now’ and accepted it as his request for an exemption to the policy. He understood that he had been terminated, but he hoped this might eventually lead to his reinstatement.
- The employer previously accommodated his refusals to be vaccinated.
- For years he had refused to get the hepatitis vaccination, the “MMR” vaccination¹², and the annual flu shot. Instead of complying with the employer’s policy to receive these vaccinations, he was allowed to sign a declaration, wear a mask and sport an identifying sticker letting others know he was unvaccinated.
- He never heard back from the employer about his request for an exemption to the mandatory Covid-19 vaccination policy.
- The employer could easily have accommodated him by allowing him to work from home or continue with the masking and twice-weekly Covid testing he was doing prior to the implementation of the policy.
- But the employer is only accepting medical exemptions, not philosophical or creed exemptions for the Covid-19 vaccination.

¹¹ This can be found at GD3-34.

¹² This is a common short form for the vaccine to protect against measles, mumps and rubella.

- This is not reasonable. He should be given the same accommodations he was given when he refused to get the other vaccinations the employer asked him to get.

[22] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accepted the Claimant's request for an exemption based on his creed, or whether the penalty of termination was too severe¹³. The Tribunal must focus on the conduct that caused the Claimant to be dismissed and decide if it constitutes misconduct under the EI Act.

[23] I have already found that the conduct which led to the Claimant's dismissal was his refusal to be vaccinated in accordance with the employer's workplace policy in response to the Covid-19 pandemic.

[24] The uncontested evidence obtained from the employer, together with the Claimant's testimony at the hearing, are the basis for these additional findings:

- a) the Claimant was informed of the mandatory vaccination policy and given time to comply with it.
- b) his refusal to comply with the policy was deliberate and intentional. This made his refusal wilful.
- c) he knew his refusal could cause him to lose his job. This means he accepted the potential consequences.
- d) his refusal to comply with the policy was the direct cause of his dismissal.

[25] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act¹⁴. My findings similarly support

¹³ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹⁴ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

a conclusion that the Claimant's wilful refusal to be vaccinated in accordance with the policy constitutes misconduct under the EI Act.

[26] The Claimant's hope for reinstatement after his termination on November 29, 2021 does not diminish the fact that he knew he could lose his employment for refusing to provide proof of vaccination and comply with the policy within 2 weeks of being placed on unpaid leave.

[27] The Claimant argues that the employer's policy was illegal, violated the terms of his collective agreement, and violated his human and constitutional rights¹⁵.

[28] I make no findings with respect to the validity of the policy or any violations of the Claimant's rights. He is free to make these arguments before the appropriate adjudicative bodies and seek relief there¹⁶. None of these arguments change the fact that the Commission has proven on a balance of probabilities that he was dismissed because of misconduct under the EI Act.

[29] And this means he is disqualified from receiving EI benefits.

Conclusion

[30] The Commission has proven the Claimant lost his job because of his own misconduct. This means he is disqualified from receiving EI benefits.

[31] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

¹⁵ He said he knew of a recent decision from the Ontario Human Rights Tribunal where an arbitrator ruled the employer should have accepted an exemption based on creed and ordered that the employee be reinstated. He also said he found an article from the "Justice Centre for Constitutional Freedom" which he says "has warned EI that it's illegal to withhold benefits because doing so violates the Charter and because it twists the meaning of the word misconduct" to get to that result.

¹⁶ I note that the Claimant's grievance is continuing to arbitration.