



Citation: *BI v Canada Employment Insurance Commission*, 2022 SST 1791

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

Decision

Appellant: B. I.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (461854) dated April 14, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: September 14, 2022

Hearing participant: Appellant

Decision date: October 7, 2022

File number: GE-22-1754

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 not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] B. I. is the Claimant in this case. The Claimant worked as a videographer. The employer dismissed him on December 1, 2021 because he did not comply with their vaccination policy at work.² After his dismissal, the Claimant applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his own misconduct.⁴

[5] The Claimant disagrees with the employer's vaccination policy because the employer did not accommodate him.⁵ He explained that he has heart palpitations and medical concerns about getting the covid19 vaccine.

Matter I have to consider first

There are two files

[6] This file was heard with another related Tribunal file because it involved the same Claimant.⁶ However, separate decisions were issued because the legal issues were different.

¹ See section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving EI benefits.

² See records of employment at GD3-18 to GD3-22.

³ See application for EI benefits GD3-20 to GD3-21.

⁴ See initial decision at GD3-25 to GD3-26 and reconsideration letter at GD3-71 to GD3-72.

⁵ See notice of appeal forms at GD2-1 to GD2-15 and GD2A1-1 to GD2A-2.

⁶ See Tribunal file GE-22-1752.

Issue

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

Analysis

[8] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.⁷

[9] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.⁸

[10] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.⁹

[11] To answer the question of whether the Claimant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant stop working?

[12] I find that the Claimant was dismissed on December 1, 2021 because he did not comply with the employer's policy that required him to provide proof of vaccination for covid19.¹⁰

[13] This is consistent with the Claimant's testimony, records of employment, discussions between the Claimant and the Commission, etc.¹¹

⁷ Section 30 of the *Employment Insurance Act (EI Act)*.

⁸ See section 31 of the *EI Act*; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

⁹ See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

¹⁰ See termination letter at GD3-62 to GD3-63.

¹¹ See records of employment at GD3-18 to GD3-21; GD3-23 and GD3-29.

What was the employer's policy?

[14] The employer implemented a "*Covid19 Vaccination Policy*" (policy) effective October 12, 2021.¹² A copy of the policy is included in the file.¹³

[15] The policy states that its purpose is to "provide and maintain a workplace that is safe and free of known hazards, we have adopted this COVID-19 vaccination policy to safeguard the health of our employees and their families, our customers and visitors, and the community from covid19".¹⁴

[16] The policy requires employees to provide their proof of their vaccination status for covid19 by November 30, 2021 to the employer.¹⁵

[17] There is an exception in the policy available to employees who work 100% fully remote and do not need to go into the office.¹⁶

[18] The policy also provided for reasonable accommodation and exemption from the policy based on a medical reason, a sincerely held religious belief or any other applicable characteristic that is protected under legislation.¹⁷

Was the policy communicated to the Claimant?

[19] The Claimant testified that the policy was communicated to him. He remembered first receiving an email from the employer in late September 2021. The email provided a hyperlink to the policy, which he reviewed.

[20] I note that the file contains a copy of an email dated September 29, 2021.¹⁸ The CEO of the company sent employees an email noting that effective September 29, 2021, all employees are required to be fully vaccinated. It states that all employees

¹² See GD3-36.

¹³ See policy at GD3-35 to GD3-42.

¹⁴ See GD3-36.

¹⁵ See GD3-36.

¹⁶ See GD3-41.

¹⁷ See GD3-37.

¹⁸ See GD3-43 to GD3-45.

must update their vaccination status no later than November 30, 2021, regardless of their vaccination status.

[21] As well, there were other CEO emails sent out to employees on October 25, 2021, November 11, 2021 and November 23, 2021.¹⁹

[22] Accordingly, I find it more likely than not, that the policy was first communicated to the Claimant on September 29, 2021 by email.

What were the consequences of not complying with the policy?

[23] The policy says that employees who do not comply with the policy may be placed on unpaid leave until their employment status is determined by the human resources department.²⁰

[24] The policy also says that any employee that fails to comply with the requirements will be subject to corrective action up-to and including termination.²¹

[25] The employer told the Commission that the Claimant was aware that failure to get fully vaccinated by December 1, 2021 could lead to termination of the employment contract.²²

[26] The Claimant testified that he knew about the December 1, 2021 deadline to disclose his vaccination status for covid19. He knew that would be terminated if he did not comply with the policy. His supervisor told him about the termination. He also knew that if he had expressed an intention to comply with the policy, then a leave of absence would have been possible, instead of a dismissal.

[27] The Claimant said that he exchanged a few emails with human resources on November 29, 2021 and thought that he would be put on a leave of absence instead,

¹⁹ See GD3-46 to GD3-51.

²⁰ See GD3-36.

²¹ See GD3-38.

²² See GD3-32.

but within hours he was told they would proceed as originally planned with his dismissal.²³

[28] I reviewed the emails exchanged between the Claimant and human resources in response to his request for accommodation.²⁴ The first email says that he can continue working until further notice, so that they could evaluate all the results the following week.²⁵ The second email says that his request for accommodation was denied, but if he intended to be vaccinated, he could be put on a leave of absence instead.²⁶ Alternately, he would be dismissed if he did not want to be vaccinated. The third email said that they will proceed with termination on December 1, 2021 as initially discussed.²⁷

[29] As a result, the Claimant was dismissed from his job on December 1, 2021.²⁸

Is there a reason the Claimant could not comply with the policy?

[30] As noted above, the policy provided reasonable accommodation for medical reasons, a sincerely held religious belief or any other applicable characteristic that is protected under legislation.²⁹ The policy provides for steps for making a request for accommodation.

[31] The Claimant testified that he knew the policy allowed for religious and medical accommodation, but he did not ask the employer for a medical exemption. He really felt anxious when he first heard about the policy. He was scared and had heart palpitations.

²³ See GD3-67 to GD3-69.

²⁴ See GD3-67 to GD3-69.

²⁵ See GD3-68.

²⁶ See GD3-67.

²⁷ See GD3-69.

²⁸ See termination letter at GD3-62 to GD3-63.

²⁹ See GD3-37.

[32] This was consistent with his discussion with the Commission because he told them he had not applied for a medical exemption and was not able to obtain a medical note from his doctor.³⁰

[33] The Claimant testified that he did ask for accommodation under a category called “other” officially on November 29, 2021.³¹ A copy of his accommodation form is included as part of the file.³² That request was denied by employer on the same date, noting that he will need to be vaccinated to continue to be employed.³³

[34] Given the above, it appears that the employer was willing to put him on a leave of absence instead of dismissing him if he planned to be fully vaccinated for covid19.³⁴ Since he did not express an intention to comply and the accommodation request was denied, he was dismissed.

Is it misconduct based on the law – the *Employment Insurance Act*?

[35] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.³⁶

[36] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.³⁷

[37] 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.³⁸

³⁰ See GD3-29.

³¹ He testified that he made his request on November 25, 2021, but it was only sent on November 29, 2021.

³² See GD3-52 to GD3-61.

³³ See GD3-61.

³⁴ See GD3-67.

³⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³⁷ See *Attorney General of Canada v Secours*, A-352-94.

³⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[38] The Commission has to prove that the Claimant was 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 Claimant was lost his job because of misconduct.³⁹

[39] I find that the Commission has proven that there was misconduct for the following reasons.

[40] First, I find that the policy was communicated to the Claimant and he was aware of the deadline dates to comply. The Claimant also had enough time to comply with the policy.

[41] Second, I find that the Claimant willfully and consciously chose to not to comply with the policy for his own personal reasons. He did not agree with the policy, so he chose not to comply with it. This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.⁴⁰

[42] Third, I find that the Claimant has not proven he was exempt from the policy. He applied for accommodation under the category "other", but that was denied by the employer. He did not ask his employer for a medical accommodation.

[43] As well, the Claimant was not a remote worker, so he could not benefit from the exemption available in the policy because he was required to go to work.

[44] Lastly, I find that the Claimant knew or ought to have known the consequences of not complying would lead to his dismissal. The consequences were communicated to him.

³⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁴⁰ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[45] I acknowledge that the Claimant hoped he would not be dismissed after he submitted his accommodation form, but the employer ultimately decided to terminate him because he did not intend to comply with their policy, even at a future date.

[46] I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. So, this became a condition of his employment when they introduced the policy. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duties.

What about the Claimant's other arguments?

[47] The Claimant raised other arguments to support his position. Some of them included the following:

- a) The employer changed the company policy in an unreasonable manner
- b) The employer would not allow him to do covid19 testing at his own expense
- c) The policy was discriminatory
- d) He had to decide whether to comply with the policy, or whether his livelihood would be affected
- e) Unreasonable change in company policy

[48] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.⁴¹ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

⁴¹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[49] I acknowledge the Claimant's additional arguments, but his recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.⁴²

Conclusion

[50] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a dismissal.

[51] The Commission has proven that the Claimant was lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[52] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

⁴² See *Paradis v Canada (Attorney General)*, 2016 FC 1282.