



Citation: *RT v Canada Employment Insurance Commission*, 2023 SST 1204

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

# Decision

**Appellant:** R. T.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (531365) dated September 12, 2022 (issued by Service Canada)

---

**Tribunal member:** Kristen Thompson

**Type of hearing:** Videoconference

**Hearing date:** February 2, 2023

**Hearing participant:** Appellant

**Decision date:** February 3, 2023

**File number:** GE-22-3393

## 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 disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

[6] The Claimant says that vaccination wasn't part of his employment contract when he was hired. He says that he works from home and lives in a remote part of the country, away from coworkers. He says that the vaccine is ineffective and unsafe. He says that there isn't a direct correlation between his employment and his conduct of refusing the vaccine.

## Issue

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

---

<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disentitled from receiving benefits.

## Analysis

[8] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>2</sup>

[9] 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?

[10] I find that the Claimant lost his job because he went against his employer's vaccination policy.

[11] The Claimant doesn't dispute this happened.

[12] The Commission says that the Claimant lost his job because he went against his employer's vaccination policy.

[13] I find that that the Claimant lost his job because he went against his employer's vaccination policy.

### Is the reason for the Claimant's suspension misconduct under the law?

[14] The reason for the Claimant's suspension is misconduct under the law.

[15] 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 Claimant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

---

<sup>2</sup> See sections 30 and 31 of the Act.

[16] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> 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.<sup>5</sup>

[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.<sup>6</sup>

[18] The law doesn't say I have to consider how the employer behaved.<sup>7</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>8</sup>

[19] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>9</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] The Commission has to prove that the Claimant 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 lost his job because of misconduct.<sup>10</sup>

---

<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See section 30 of the Act.

<sup>8</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the Claimant was aware of the policy
- the Claimant understood that not following the policy would lead to his suspension
- the Claimant's refusal to follow the policy is wilful and deliberate
- there is a direct correlation between the Claimant's refusal to get vaccinated and his suspension

[22] The Claimant says that there was no misconduct because:

- vaccination wasn't part of his employment contract when he was hired, relying on another case of this Tribunal<sup>11</sup>
- he works from home, away from coworkers, and refusing vaccination doesn't negatively impact his coworkers
- the vaccine is ineffective and unsafe
- there isn't a direct correlation between his employment and his conduct of refusing the vaccine

[23] The Claimant testified that he didn't get vaccinated.

[24] The Claimant says that the employer's policy required him to be fully vaccinated against COVID-19 by March 31, 2022. He says that if an employee is not vaccinated, they were place on a three-month suspension as of April 1, 2022. He says that employees were to be dismissed at the end of the leave if they still didn't follow the policy.

---

<sup>11</sup> See *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

[25] The Claimant says that he was provided with a copy of the written policy in the fall of 2021. He says that his employer gave him plenty of warnings about its requirement to get vaccinated and about the consequence of not following the policy.

[26] The Claimant says that he voiced his concerns about the vaccine with the employer. He says he told the employer that he works on the other side of the country and could continue to work safely and effectively from home. He says he didn't hear back from his employer.

[27] The Claimant says that asking for a medical or religious exemption to the policy was not necessarily applicable to his circumstance.

[28] The employer wrote to the Claimant in letter dated April 1, 2022. It said:

- the Claimant will be put on an unpaid leave of absence, from April 1, 2022, to June 30, 2022
- he was required to show proof that he received a first dose of the vaccine by January 28, 2022, and a second dose by March 4, 2022
- he didn't prove he was vaccinated
- if he becomes fully vaccinated during his leave, the employer may allow him to return to work prior to the end of the leave<sup>12</sup>

[29] The Claimant says that he was supposed to be dismissed at the end of the leave of absence. However, on June 30, 2022, his employer told him that he should make plans to return to work. He says that he has been back at work since July 11, 2022, and he continues to work for the employer.

---

<sup>12</sup> See GD2-9 and 10.

[30] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that required full vaccination against COVID-19
- the employer told the Claimant about what it expected of its employees in terms of getting vaccinated
- the Claimant testified that he was aware of the policy and its consequences
- the Claimant testified that he received warnings about the policy and its consequences
- the employer gave a suspension letter to the Claimant to communicate what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

[31] The Claimant relies on another decision of this Tribunal, which said that an employee's failure to follow an employer's mandatory vaccine policy didn't amount to misconduct. However, the Federal Court recently said that this case doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.<sup>13</sup> I'm also not bound by other Tribunal decisions and will not follow it. This is because the question of whether an employer can unilaterally change the Claimant's employment agreement isn't for me to decide. I note that the Claimant may have other legal options available to him.

---

<sup>13</sup> See *Anthony Cecchetto v Attorney General of Canada*, 2023 FC 102 at paragraph 43.

### **So, did the Claimant lose his job because of misconduct?**

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

[33] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

### **Conclusion**

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

[35] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section