



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

## **Decision**

**Appellant:** Timothy Conlon  
**Representative:** Cynthia Murphy

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (449953) dated February 4, 2022  
(issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference  
**Hearing date:** August 31, 2022  
**Hearing participants:** Appellant  
Appellant's representative  
Appellant's witness

**Decision date:** September 12, 2022  
**File number:** GE-22-829

## Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has not 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 disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] T.C. is the Claimant in this case. The Claimant worked as a delivery driver for a diaper company. The employer put the Claimant on an “*Infectious Disease Emergency Leave*” on July 9, 2021 because he did not comply with the vaccination policy at work.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he was dismissed from his job due to his own misconduct.<sup>4</sup>

[5] The Claimant disagrees because he was dismissed from his job two days after he was told about the policy. He says it was not wilful misconduct. He argues that there were no complaints about his work performance, no reprimands about his conduct and employer failed to reasonably accommodate him.

## Matters I have to consider first

### **This case was previously adjourned**

[6] This case was first scheduled to be heard by videoconference on June 1, 2022.<sup>5</sup>

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

<sup>2</sup> See record of employment at GD3-17 to GD3-18 and GD14-3 to GD14-4.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-16.

<sup>4</sup> See reconsideration decision at GD3-25 to GD3-26; the Commission said that an initial notice of the decision was not sent to the Claimant at GD4-1.

<sup>5</sup> See notice of hearing at GD1-1 to GD1-5.

[7] At the hearing date on June 1, 2022, I explained that the Tribunal had a separate process for *Canadian Charter of Rights and Freedoms* (Charter) cases and indicated that we previously sent the Claimant's legal representative information about that process.<sup>6</sup> This was done in response to the written submissions submitted by the Claimant's legal representative about the Charter.<sup>7</sup>

[8] The Claimant's legal representative confirmed that she had received the Charter information sent by the Tribunal.<sup>8</sup> She also acknowledged that she had prepared some Charter submissions and explained that she was not raising a Charter argument in relation to the *Employment Insurance Act* (EI Act)<sup>9</sup> and/or *Employment Insurance Regulations* (EI Regulations).<sup>10</sup>

[9] I decided to adjourn the matter in order to review and consider whether the argument did raise a Charter issue connected to the *EI Act* and/or *EI Regulations*.<sup>11</sup> I also considered the Claimant's request to expedite the hearing date and rescheduled it based on their availability.

[10] The case was then rescheduled to be heard on July 25, 2022.<sup>12</sup> However, it did not proceed on that date and had to be adjourned again due to exceptional circumstances and technical issues experienced by the Claimant.<sup>13</sup>

[11] The Claimant asked to have another expedited hearing date because of his financial circumstances. The hearing was scheduled to the next available date on August 31, 2022 by videoconference. I note that I experienced some brief technical

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<sup>6</sup> See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, s. 7; The Charter process information was emailed to the Claimant's representative on May 31, 2022.

<sup>7</sup> See GD8-1 to GD8-10.

<sup>8</sup> See GD9-1 to GD9-3.

<sup>9</sup> See *Employment Insurance Act*, S.C. 1996, c. 23, s. 31.

<sup>10</sup> See *Employment Insurance Regulations*, SOR/96-332 and Claimant's submissions at GD8-1 to GD8-10.

<sup>11</sup> See GD11-1 to GD11-3.

<sup>12</sup> See notice of hearing at GD13-1 to GD13-3.

<sup>13</sup> He was unable to get his audio working, but the video was functioning, as well the Claimant's representative was not in attendance.

issues at the start of the hearing, however they were resolved with assistance from the Tribunal's IT department. As a result, the hearing proceeded on August 31, 2022.

### **An interlocutory decision was issued before the hearing**

[12] On June 10, 2022, I issued an interlocutory decision confirming that the appeal would proceed by regular merit appeal, and not the Tribunal's Charter appeal process.<sup>14</sup> The Claimant was not challenging the constitutional validity, applicability or operability of any provision of the *EI Act*, *EI Regulations* or Part 5 of the *Department of Employment and Social Development Act*<sup>15</sup>. As such, I noted that would not be making any legal findings or determinations on the Charter issues raised in the Claimant's submissions.

### **I asked the Commission for more information**

[13] The Claimant's legal representative wrote to the Tribunal before the hearing took place. She said that there was a second record of employment (ROE) not contained in the file.<sup>16</sup> I wrote to the Commission before the hearing to ask them to provide the Claimant with a copy of the second ROE.<sup>17</sup>

[14] The Commission responded and provided a copy of an interim ROE that they created for the Claimant on September 14, 2021.<sup>18</sup> That response was shared with the Claimant in advance of the hearing.

## **Issue**

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

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<sup>14</sup> See interlocutory decision at GD12-1 to GD12-4.

<sup>15</sup> See *Department of Employment and Social Development Act*, S.C. 2005, c. 34.

<sup>16</sup> See GD7-1 to GD7-3 and section 32 of the *Social Security Tribunal Regulations*.

<sup>17</sup> See GD10-1 to GD10-3.

<sup>18</sup> See GD14-1 to GD14-3.

## Analysis

[16] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>19</sup>

[17] 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?

[18] I find that the Claimant was more likely than not dismissed from his job on July 9, 2022 because he did not comply with the employer's verbal direction to get vaccinated for covid19.

[19] I acknowledge that there are two ROE's in the file.<sup>20</sup> One of them was an interim ROE first prepared by Service Canada on September 14, 2021.<sup>21</sup> The employer then issued the Claimant's ROE on the same date noting that the Claimant had taken an "Infectious Disease Emergency Leave" (IDEL).<sup>22</sup>

[20] The Commission spoke to the employer because there is a note of their telephone discussion included in the file. They said that the Claimant was not fired, but that he was on an extended IDEL leave until July 2022 since he was delivering medical equipment, as they deemed it was too dangerous to face customers.<sup>23</sup>

[21] I was not persuaded by the employer's statement to the Commission because I preferred the Claimant's testimony about this issue. The Claimant testified that he had not taken an IDEL leave from work because he did not meet any of the requirements. For example, he had not contracted covid19, he was not experiencing a side effect from

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<sup>19</sup> Section 30 of the *Employment Insurance Act* (EI Act).

<sup>20</sup> See GD3-17 to GD3-18 issued September 16, 2021 and GD3-

<sup>21</sup> See interim ROE at GD14-3 to GD14-4.

<sup>22</sup> See record of employment at GD3-17 to GD3-18

<sup>23</sup> See GD3-24.

the covid19 vaccination and he was not in quarantine or isolation.<sup>24</sup> Instead, he argued that his employer told him that if he did not comply, he would have to quit his job, which the Claimant refused to do.

[22] I note that the Claimant never received any written documentation either before or following the employer's verbal direction to be vaccinated for covid19. The employer's ROE says he took an IDEL leave, but that was issued approximately two months after he stopped working.

[23] In my view, the Claimant's assumption that he was dismissed on July 9, 2021 was a reasonable assumption given the facts of this case. In particular, he had only been given two days notice to be vaccinated for covid19, or he was told that he would have to quit. He declined to quit his job and did not meet the requirements for an IDEL leave. Because of that, he understood that he was being terminated from his job on July 9, 2021.

### **The employer's verbal direction**

[24] The Claimant testified the employer told him on July 7, 2021 that he needed to be vaccinated by July 9, 2021.

### **The Claimant's conduct was not willful misconduct**

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>25</sup>

[26] 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.<sup>26</sup>

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<sup>24</sup> See IDEL information at GD6-40 to GD6-61.

<sup>25</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>26</sup> See *Attorney General of Canada v Secours*, A-352-94.

[27] 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 let go because of that.<sup>27</sup>

[28] 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.<sup>28</sup>

[29] I find that the Commission has not proven that there was misconduct for the following reasons.

[30] First, I find that the Claimant's conduct was not wilful, conscious or deliberate misconduct because the policy was only verbally communicated to him on July 7, 2021 and he was expected to comply by July 9, 2021. He was only given two days to be vaccinated for covid19.<sup>29</sup>

[31] In my view, the employer did not provide him with sufficient time to comply with their verbal direction. Instead the employer abruptly dismissed him on July 9, 2021 after providing him with written documentation about an IDEL leave to read.

[32] Second, I find that the Claimant did not know and could not have known the consequences of non-compliance would lead to his dismissal. In fact, the employer told him that if he did not want to comply, he could quit his job. As well, the IDEL leave documents provided to him do not say that he would be dismissed from his employment.

[33] Third, there does not seem to be any written documentation related to the employer's verbal direction in the file. The employer told the Commission that the Claimant was not provided with a written policy.<sup>30</sup> The Claimant said he never received

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<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>29</sup> The Claimant testified that only one dose of covid19 was available at the time.

<sup>30</sup> See GD3-24.

a copy of the policy and did not know the specific contents of the policy, the consequences of not complying or whether he could request an exemption from the policy. He explained that he had medical reasons that may have permitted him to be exempt, but never had a chance to make a request to the employer and did not know if there was a formal policy in place.

[34] I acknowledge that the employer may have the authority to develop and impose policies at the workplace, however employees ought to be given a chance to understand the policy, to know what is required, to have an opportunity to review and/or ask questions and be given enough time to comply.

[35] Lastly, I cannot find that the Claimant's conduct was wilful misconduct in this case. He did not consciously, deliberately, or intentionally breach the employer's verbal direction. Also, his conduct was not reckless. He simply was not provided with enough time to comply and could not have known he would be dismissed for his conduct.

### **What about the Claimant's other arguments?**

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

- a) He had high blood pressure and his employer knew about it
- b) The employer did not accommodate him
- c) The employer changed the terms of his contract
- d) He cannot be forced to undergo a medical and experimental procedure

[37] 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.<sup>31</sup> I have already decided that the Claimant's conduct does not amount to misconduct based on the EI Act.

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<sup>31</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.



[38] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments. I note that the Claimant testified that he recently came to a settlement with his former employer about his case.

## **Conclusion**

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

[40] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section