Citation: *RN v Canada Employment Insurance Commission*, 2022 SST 731

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (458508) dated March 9, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Decision date:	June 2, 2022
File number:	GE-22-1268

Introduction

[1] The Appellant was a nurse at a public care home. Her employer adopted the parent company's mandatory COVID-19 vaccination policy, applicable to all employees. The Appellant did not want to be vaccinated. Her employer put her on an unpaid leave of absence. When the Appellant applied for Employment Insurance (EI) benefits, the Respondent denied her benefits because she had been suspended because of her misconduct. The Appellant is asking the Tribunal to change that decision.

Issue

[2] The Tribunal must decide whether the appeal should be summarily dismissed.

The law

[3] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[4] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[5] Section 31 of the *Employment Insurance Act* states that a claimant is who is suspended from their employment because of misconduct is not entitled to receive benefits until the period of suspension expires, they lose or voluntarily leave their employment or they have acquired sufficient hours of insurable employment in another job.

Evidence

[6] A copy of the employer's Policy is on file. This Policy called the Covid-19 Immunization Program includes the following information:

- All staff must provide either proof of all doses of a Covid-19 vaccine to be recognized as fully vaccinated, OR written proof of a medical reason for not being vaccinated;

- Staff who do not provide the proof required will not be permitted to work in the long term care homes;

- Employees who fail to comply will be places on Infectious Disease Emergency Leave (IDEL) which is an unpaid leave of absence;

- If the team member continues to be vaccine hesitant, this may lead to additional corrective action up to an including termination of employment.

[7] A copy of a letter addressed to the Appellant, dated September 24, 2021, is in the file. This letter sets out that under the new policy for COVID-19 vaccination, employees must provide proof of vaccination by October 1, 2021. Employees who know they will not be fully vaccinated by October 14, 2021 need to inform their managers by September 27, 2021. Employees who have not received vaccination by October 14, 2021 will be placed on a temporary leave of absence, beginning October 15, 2021, until they are fully vaccinated.

[8] An email message from the Appellant to the Executive Director of the employer company acknowledges the September 24, 2021 letter. The Appellant says that she disagrees with being put on a leave beginning October 15, 2021. Her reasons include that the government requirement is for a there to be a policy, not mandatory vaccination, the home's successful management of the health and safety of the residents, previous directives allowing for education and daily swabbing instead of vaccination and the fact the home is not in an outbreak or in a high risk area.

[9] The file also includes a letter to the Appellant entitled "Re: Unpaid Personal Leave of Absence". This letter says that the Appellant has not yet been fully vaccinated. She does not fall within an exemption under the policy. Her duties require her to be in regular attendance at the workplace. Therefore, effective October 15, 2021, she is being

placed on an unpaid leave of absence. This will be until she achieves fully vaccinated status, or the requirements of the policy are modified to allow her to return to work.

Submissions

[10] The Appellant submitted that she had worked over 30 years and paid into the EI program. She had worked the required number of hours to qualify for benefits. The involuntary leave without pay imposed upon her did not respect her collective agreement. Her right to informed consent was violated by her employer and she did not give consent for her medical information to be released.

[11] The Respondent submitted that the Appellant was suspended from her employment because she failed to comply with the employer's COvid-19 vaccination policy. The policy applied to her and advised that failure to comply would result in an employee being placed on an unpaid leave of absence. The Appellant was aware of the policy and aware of the consequences of non-compliance. She made a willful and deliberate decision not to comply with the employer's

Analysis

[12] The only issue before the Tribunal is whether the Appellant is disqualified from receiving EI benefits because she was placed on a leave of absence (suspended) from her employment because of misconduct.[1]

[13] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[2]

[14] The Respondent has to prove that the Appellant lost her job because of misconduct. The Respondent has to prove this on a balance of probabilities. This

[1] The Appellant has argued that she had sufficient hours of insurable employment to qualify for benefits. That is not disputed by the Respondent. However, a claimant with sufficient hours to qualify may still be disentitled from receiving benefits regardless.
[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.[3]

[15] The evidence already on file shows that the Appellant's employer had a vaccination policy in place that required employees to be vaccinated. The policy also set out the consequences for not providing proof of vaccination. The Appellant does not dispute that she was aware of the policy. Her email message to the executive director shows she had knowledge of the contents of the policy.

[16] Despite her knowledge of the policy, her understanding that there could be consequences for non-compliance, a notice from her employer that she was not in compliance and would face consequences, the Appellant chose not to comply with the policy. This failure lead directly to her termination.

[17] The Appellant was advised by a letter dated May 20, 2022 that the Tribunal was considering a summary dismissal of her appeal. In response to this letter, she provided further arguments that outline the reasons she believes her employer's policy is illegitimate.

[18] In case for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's acts or omissions. The conduct of the employer is not a relevant consideration.[4]

[19] The Appellant argues that she is a tax paying Canadian citizen who has been paying into EI for over 20 years.

[20] Employment insurance is not an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. The Commission has proven that the Claimant lost her job because of misconduct. This means that she does not qualify to receive EI benefits.

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[3] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[4] See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282.

[21] The Appellant also argues that she has a right to the choice of whether or not to be vaccinated. That is true. However, the right to choose does not exempt you from the consequences of your choice. In this case, the Appellant's choice resulted in her failure to comply with her employer's policy. Disagreeing with the policy did not exempt her from facing the consequences of choosing not to comply.

[22] The Appellant's deliberate failure to respect her employer's policy and her knowledge of the policy and its consequences is not in doubt. There is no evidence she could bring that would change those facts. I see no reasonable chance of the Appellant being successful in rebutting the Respondent's demonstration that the reason for her suspension was misconduct. I must therefore dismiss the appeal.

Conclusion

[23] The Tribunal finds that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed.

Leanne Bourassa

Member, General Division – Employment Insurance Section