



Citation: *NE v Canada Employment Insurance Commission*, 2022 SST 733

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

## **Decision**

**Appellant:** N. E.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (462091) dated April 4, 2022  
(issued by Service Canada)

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**Tribunal member:** Leanne Bourassa

**Decision date:** June 3, 2022

**File number:** GE-22-1269

## Introduction

[1] The Appellant's employer instituted a policy requiring all employees to be vaccinated against COVID-19 or to submit to twice weekly rapid testing. The Appellant did not comply with the testing protocol. He was placed on an unpaid leave of absence by his employer. He applied for Employment Insurance (EI) benefits. The Respondent denied his claim for benefits, saying that was not entitled to benefits because he had been suspended as a result of his misconduct.

[2] The Appellant asked for this decision to be reconsidered. The Respondent did not change their decision, except to say the disentitlement would only apply for the period of October 25, 2021 to November 26, 2021, because the Appellant had returned to work.

## Issue

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

## The law

[4] 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.

[5] 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.

[6] Subsection 31 of the *Employment Insurance Act* states that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until the period of suspension expires, they lose or voluntarily leave their employment or they have accumulated enough insurable hours of employment in another job to qualify for benefits

## Evidence

[7] The file before me includes a copy of the employer's vaccination policy. This policy, entitled "COVID-19 Vaccination Policy" was issued September 1, 2021 and includes the following information:

- The employer expects all employees to be fully vaccinated against COVID-19 by October 15, 2021, subject to exceptions;
- Where vaccines are available and a staff member remains unvaccinated, the staff member will be required to disclose in writing the reason for not being vaccinated (e.g. medical ground or other statutory protected ground.);
- In the case of a staff member who had chosen not to be vaccinated other than for medical or protected ground, the circumstances will be reviewed and actions necessary to protect workplace health and safety will be taken, up to and including restricting the individual's access to the workplace, placing the individual on an unpaid leave of absence, laying the employee off from work, reducing the employee's hours of work and/or otherwise modifying or terminating their contract of employment;
- Any staff member who was not fully vaccinated would be required to comply with all screening protocols deemed appropriate by the employer, including the passing of rapid antigen or other testing that may be administered each workday, or any other period determined by the employer;
- If a staff member provides a medical or other valid reason based on statutorily protected grounds, an appropriate accommodation plan will be developed or implemented if possible;
- The employer will determine whether the reason for the failure to vaccinate is valid on an individual basis;

- There is not guarantee that a staff member who does not receive recommended doses of vaccination will be able to continue active employment in their current position, or at all, regardless of the reason;
- The employer will not guarantee work to any staff member who refuses to provide proof of being fully vaccinated to a client of the employer who requires such proof in order to access their premises;
- Staff failing to follow the Policy may be subject to disciplinary action up to and including termination of employment.

[8] The employer provided the Respondent with a copy of an email message sent to all employees dated September 9, 2021. This message refers to a company wide meeting held that day and includes a copy of the COVID-19 Vaccination Policy. The policy was also to be posted in the business and employee portals and sent to employees via the same email at which they received their paycheques.

[9] The employer provided the Appellant with a letter dated October 21, 2021, a copy of which is in the file. In this letter, the employer says that:

- The policy was rolled out on September 9;
- Communications after that date provided information about the application of the policy;
- Under this policy, all employees are provided with the choice of either submitting proof of vaccination by October 15, 2021 or submitting to twice weekly COVID-19 rapid testing;
- Employees who do not comply with either are placed on unpaid leaves of absence;
- The Appellant had not provided any proof of vaccination;
- He has indicated he would not provide twice weekly testing;
- He is therefore placed on an unpaid leave of absence immediately;
- The leave would end when he agreed to comply with the requirements of the policy as long as the policy was in place.

[10] There are two Records of Employment on file. The first, issued October 27, 2021 says the Appellant was dismissed. The second, issued January 6, 2022, says it is an amended version of the first. It now says that the Appellant was on a leave of absence.

[11] On his application for benefits, filed on October 25, 2021, the Appellant said that his was dismissed or suspended. He said that this was because of his refusal to submit to updated COVID-19 Vaccination policy, which would have compromised personal and deeply held religious belief.

[12] The Respondent submitted notes of conversations held with the Appellant's employer. The employer said that the Appellant was put on a leave of absence because he refused to comply with the vaccination policy. The policy was communicated to all employees at a meeting on September 9, 2021. It required all employees to be vaccinated by October 15, 2021 or to adhere to taking a rapid test every second day as of October 15. On October 15, 2021, the Appellant refused both options. He did not explain why. On October 19, 2021 and October 21, 2021, he failed to submit testing results. On October 21, 2021, he was placed on an unpaid leave of absence. He returned to work on November 29, 2021 as he agreed to do the rapid testing.

[13] The Respondent also submitted notes of conversations with the Appellant. They note that the Respondent said he attended the September 9, 2021 meeting and received the policy by email. He knew that if he did not comply with the policy he could be terminated. He confirmed that he would not be vaccinated and that he did not do the tests on October 19, 2021 or October 21, 2021. He was aware there was no exemption from the policy for religious reasons. He had returned to work and was doing rapid testing.

## **Submissions**

[14] The Appellant submitted that he was dismissed for refusing to be coerced into medical procedures that violated his deeply and sincerely held religious beliefs. The procedures were not in his employment contract and were irrelevant to his job duties.

Neither he nor his employer called his separation from employment a suspension and no claims were made that he committed misconduct.

[15] The Respondent submitted that it is undisputed fact that the Appellant failed to adhere to the employer's vaccination policy by October 15, 2021. His unpaid leave was triggered by the employer, so his separation from employment is characterized as a suspension from employment. He caused his own suspension because he was made aware of the policy, including the consequences of non-compliance and he made a personal choice to not adhere to the policy.

## **Analysis**

[16] The only issue before the Tribunal is whether the Appellant is disqualified from receiving EI benefits because he was placed on a leave of absence (suspended) from his employment because of misconduct.<sup>1</sup>

[17] There is misconduct if the Appellant 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 facing consequences because of that.<sup>2</sup>

[18] The Respondent has to prove that the Appellant was placed on leave from his job because of misconduct. The Respondent 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 Appellant was separated from his job because of misconduct.<sup>3</sup>

[19] The evidence already on file shows that the Appellant's employer had a vaccination policy in place that required employees to be vaccinated. If they were not vaccinated, then employees had to submit to take a rapid antigen test every second day, as of October 15, 2021. The policy also set out the consequences for not providing

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<sup>1</sup> 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.

<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

proof of vaccination. This policy was communicated to the employees in several different ways.

[20] The Appellant does not dispute that he was aware of the employer's policy. The Respondent's notes show that the Appellant confirmed he would not be vaccinated. He also disagreed with doing the rapid tests that required swabbing. He did not do the tests on October 19 and October 21, 2021. He knew that he would face consequences for not complying with the policy.

[21] The Appellant argues that the employer's policy was illegal. I see no decision by any legal or other authority saying that this is the case. It is not the Tribunal's role to determine the validity of the employer's policies.

[22] The Appellant also argues that he was subject to coercion to be vaccinated and that the procedures required were not in his employment contract and were irrelevant to his job duties.

[23] 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. Only the Appellant's conduct is relevant to determining if there was misconduct. The conduct of the employer is not a relevant consideration.<sup>4</sup>

[24] In any case, the Appellant has not provided any evidence of his employment contract or his duties and obligations towards his employer. Before the Tribunal, the only obligation in question is compliance with the vaccination/testing policy.

[25] The Appellant argues that his employer did not say that he committed misconduct.

[26] How the employer characterized the conduct is not relevant. Case law says that it is 'misconduct' within the meaning of the EI Act that is relevant when determining if a claimant is entitled to benefits, not necessarily misconduct as defined by the employer.<sup>5</sup>

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<sup>4</sup> See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282.

<sup>5</sup> See *Canada (Attorney General) v. Nguyen*, 2001 FCA 348 at paragraph 5.

Whether or not the employer felt the Claimant's conduct was misconduct, does not answer the question of whether it was misconduct further to the EI Act.

[27] It is not the role of the Tribunal to determine whether the penalty imposed by the employer was the appropriate sanction.<sup>6</sup> I have only to determine if the Claimant's conduct amounted to misconduct.<sup>7</sup>

[28] The Claimant states that he is being discriminated against because of his religious beliefs. He has not elaborated on these religious beliefs and has indicated that it is not appropriate for the Respondent to inquire about them.

[29] I see no evidence that this is the case. The Appellant was put on an unpaid leave not because of the religion he adheres to, but because he did not comply with his employer's policy requiring that those who are not vaccinated submit to rapid testing. If he felt the policy prevented him from practicing his religion, this was something that needed to be discussed with the employer. Being granted an exemption from a policy the employer put in place to protect the health and safety of staff and others is not a right that is protected under the law.

[30] With respect to EI, I see no evidence that the Appellant has been treated differently because of his religion convictions. He has not really explained what his religious convictions are. The EI Act says that any claimant who is suspended from their job because of misconduct is disentitled from receiving benefits. The disentitlement is not imposed only on those of any particular faith.

[31] A claimant has a right to choose not to be vaccinated. However, they are not exempt from the consequences of that choice. In this case, the consequences were that the Claimant was expected to submit to twice weekly rapid antigen tests. The evidence already in the file shows he did not submit to the tests on two occasion. The Appellant told the Respondent he knew there were consequences for not complying with the policy. He made a deliberate choice not to comply anyway. He was suspended because

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<sup>6</sup> See *Canada (Attorney General) v. Caul*, 2006 FCA 251

<sup>7</sup> See *Canada (Attorney General) v. Marion*, 2002 FCA 185



this was a failure to comply with the employer's policy. This is misconduct under the law. So, he is disentitled from receiving EI benefits.

[32] On May 20, 2022, the Tribunal sent a letter to the Appellant advising him of the intention to summarily dismiss this appeal. The Appellant was invited to provide any additional evidence if he felt the record was not complete.

[33] In response to this letter, the Appellant did not provide any new evidence. He submitted that he could not have committed misconduct as he violated no legal company policies which did not directly violate his human rights. He explained his frustrations and anger with the Service Canada, and now with the Tribunal's process and demanded that all money he had ever contributed to EI be returned to him.

[34] The evidence shows the Appellant knew that his employer's policy required that he submit to twice weekly rapid antigen testing. The Appellant knew there were consequences to not submitting to the testing. He disagreed with the policy, so he chose not to do the first two tests. His employer's letter says he was put on an unpaid leave because of that refusal. Those facts show that the Appellant did commit what would be considered misconduct according to the EI Act and the related jurisprudence.

[35] Since there is not evidence that can be brought that would change those facts, the Appellant has not reasonable chance of success.

## **Conclusion**

[36] 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