

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

Decision

Appellant:

S. M.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (462548) dated April 6, 2022
(issued by Service Canada)

Tribunal member:

Catherine Shaw

Decision date:

September 6, 2022

File number:

GE-22-1543

Introduction

[1] The Claimant lost her job for not getting the COVID-19 vaccination. Her employer implemented a policy that required employees to get vaccinated or have an approved exemption. The Claimant wasn't vaccinated by the deadline, so the employer put her on an unpaid leave of absence (suspension) and later dismissed her.

[2] The Commission decided the Claimant couldn't be paid EI benefits because she was suspended and later dismissed due to her misconduct. The Claimant asked the Commission to reconsider this decision because she had valid concerns about the vaccine's safety. She had tried to get a medical or religious exemption from the employer's policy, without success.

[3] The Commission maintained its decision because the Claimant was aware of the employer's requirement that she be vaccinated, she knew that failing to comply with the policy would cause her lose her job, and she made the choice not to comply. The Claimant has appealed this decision to the Tribunal.

Issue

[4] I must decide whether the appeal should be summarily dismissed.

Analysis

[5] I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.¹

[6] The law says that claimants who are dismissed from their job because of misconduct are disqualified from receiving benefits.²

¹ Section 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states this requirement.

² See section 30 of the *Employment Insurance Act*.

[7] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.³

[8] On September 7, 2021, the Claimant's employer put in place a policy that required all of its employees to be fully vaccinated or have an approved exemption by October 15, 2021.⁴ Employees who did not comply with the policy were subject to disciplinary action up to and including unpaid leave of absence (suspension) and termination of employment.⁵

[9] The Claimant said she was aware of the policy and the consequences of not being vaccinated. She knew that failing to comply meant that she could not continue working.⁶

[10] The Claimant didn't want to be vaccinated for several reasons. Her child had a serious adverse reaction to the first dose of the COVID-19 vaccine and the Claimant had concerns about the safety of being vaccinated.⁷ She also had religious objections to getting the vaccine.

[11] The Claimant spoke to her doctor about getting a medical exemption, but the doctor wasn't able to provide her documentation to support an exemption. She asked the employer for an exemption to the policy for religious reasons,⁸ but the employer denied her exemption request.⁹

³ See section 31 of the *Employment Insurance Act*.

⁴ See GD3-47 to GD3-53.

⁵ See GD3-51.

⁶ See GD3-9 and GD3-60.

⁷ See GD3-60.

⁸ See GD2-12 to GD2-16.

⁹ See GD2-17 to GD2-18.

[12] On October 16, 2021, the Claimant was placed on an unpaid leave of absence (suspension).¹⁰ She was dismissed on October 29, 2021.¹¹

[13] For there to be misconduct under the *Employment Insurance Act*, the Commission has to show that the Claimant engaged in wilful conduct that she knew or reasonably should have known could get in the way of carrying out her duties to her employer and that there was a real possibility of being let go because of that.¹²

[14] Wilful conduct means that the conduct was conscious, deliberate, or intentional.¹³ The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.¹⁴

[15] Before summarily dismissing an appeal, the Tribunal must send written notice to the Claimant and allow her time to make submissions.¹⁵

[16] Given that the evidence on record shows that the Claimant chose not to comply with the employer's mandatory vaccination policy and she was aware she could lose her job for that choice, the Tribunal sent notice of its intention to summarily dismiss this appeal on August 4, 2022.¹⁶ The Claimant provided additional submissions, which I have considered in this decision.¹⁷

[17] From the evidence on file, I see that the employer put in place a policy that required the Claimant to be vaccinated against COVID-19, or to have an approved exemption. The Claimant was notified of this policy. She was told that she would lose her job if she did not comply with the policy.

[18] I understand that the Claimant asked for an exemption to this policy. But, the employer didn't accept her exemption request. The Claimant knew that she was not

¹⁰ See GD3-28.

¹¹ See GD3-26.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

¹⁵ Section 22 of the *Social Security Tribunal Regulations*

¹⁶ See GD6.

¹⁷ See GD7.

exempted from the employer's mandatory vaccination policy. Regardless, she chose not to comply with the policy.

[19] The Claimant said that this policy wasn't in place when she was hired. The employer could have offered other accommodations, such as rapid testing, rather than requiring her to get vaccinated.

[20] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[21] The Claimant also argued that the employer's policy violated her rights under the *Canadian Charter of Rights and Freedoms* (Charter).

[22] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is just one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[23] These laws are enforced by different courts and tribunals.

[24] The Social Security Tribunal (SST) is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[25] But the SST is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights.¹⁸ This is beyond our jurisdiction. Nor is the SST allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

¹⁸ The Charter is not applicable because it only applies to government's actions.

[26] The Claimant may have recourse to her claims that the employer's policy violated her rights. But, she must raise that issue with the correct court or tribunal.

[27] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.¹⁹

[28] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified.²⁰

[29] The Claimant was not vaccinated and did not have an approved exemption. She was not in compliance with the employer's policy. And, at the time she was let go, she had no intention to become compliant. There is no evidence or testimony she could provide in a hearing that would change that.

[30] It is plain and obvious on the face of the record that the appeal is bound to fail.²¹ As a result, I find that this appeal has no reasonable chance of success. Accordingly, the law requires that I dismiss it.²²

Conclusion

[31] I find that the appeal has no reasonable chance of success; so, the appeal is summarily dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

¹⁹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FCA 1281

²¹ The Federal Court of Appeal used this language to describe the test for summarily dismissing an appeal in *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

²² See section 22, *Social Security Tribunal Regulations*