



Citation: *MH v Canada Employment Insurance Commission*, 2022 SST 1107

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

Decision

Appellant: M. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (478267) dated June 7, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: September 28, 2022

Hearing participant: Appellant

Decision date: September 30, 2022

File number: GE-22-2352

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because he was suspended from his job due to his own misconduct¹.

Overview

[3] The Claimant worked as a courier for X (X). On September 15, 2021, X instituted a mandatory Covid-19 vaccination policy (the policy). The policy required all employees to be fully vaccinated by January 10, 2022. If an employee did not comply with the deadlines in the policy, or obtain an approved exemption from vaccination prior to January 10, 2022, they would be placed on an unpaid leave of absence.

[4] The Claimant was advised of the policy. He did not want to comply by being vaccinated, so he asked the employer to approve him for a medical exemption to the mandatory vaccination requirement. But the employer refused to do so. Since the Claimant did not attest to being fully vaccinated or obtain an exemption by the January 10, 2022 deadline, the employer temporarily suspended him for failing to comply with the policy².

¹ That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term “misconduct” for EI purposes is discussed under Issue 2 below.

² The Claimant disputes that he was suspended. He says he was put on an unpaid leave of absence (see GD3-19 and GD3-57). I note that the ROE issued by the employer (at GD3-17) and the statements given to the Commission by the employer indicate that X suspended the Claimant from his employment after his last paid day on January 8, 2022 (see GD3-20 and GD3-37). But the final warning letter to the Claimant (at GD3-40) states that he would be placed on an unpaid leave of absence until he complied with the policy, as does the final policy update about rapid antigen testing ending on January 7, 2022 (at GD3-51). I accept the Claimant’s submission that the employer placed him on an unpaid leave of absence, but nothing turns on this distinction for purposes of EI benefits (see footnote 4 below).

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that he was suspended from his job due to his own misconduct³. This meant he could not be paid any EI benefits⁴.

[6] The Claimant asked the Commission to reconsider its decision. He admitted he was put on an unpaid leave of absence for non-compliance with the policy. But he said he considers his personal medical information to be private and confidential, and believes the requirement to disclose his vaccination status is a violation of his Human Rights and other rights. He also said the policy violated his collective agreement, as well as various domestic and international laws.

[7] The Commission maintained that he could not be paid EI benefits. The Claimant appealed that decision to the Social Security Tribunal (Tribunal).

[8] I must decide whether the Claimant was suspended from his job due to his own misconduct. To do this, I have to look at the reason for his suspension, and then determine if the conduct that caused his suspension is conduct the law considers to be “misconduct” for purposes of EI benefits.

[9] The Commission says the Claimant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with it after the employer refused to approve his request for an exemption. He knew he would be placed on an unpaid leave of absence by making this choice – and that’s what happened. The Commission says these facts

³ See the March 25, 2022 decision letter at GD3-22.

⁴ Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. It does not matter that the Claimant says he was not suspended but placed on an unpaid leave of absence. Where an employer unilaterally places an employee on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment if the reason for the unpaid leave is due to misconduct. In the present case, the Commission determined that the reason for the Claimant’s unpaid leave of absence (namely, his failure to comply with the employer’s mandatory vaccination policy) was misconduct and, therefore considered his separation from employment to be a suspension.

prove the Claimant was suspended due to his own misconduct, which means he cannot receive EI benefits⁵.

[10] The Claimant disagrees. He says he made a personal choice not to be vaccinated for medical and religious reasons. He also says the policy was illegal and violated numerous of his rights, and argues he has the right to be paid EI benefits because the employer forced him to go on unpaid leave when there was no shortage of work and he wanted to work.

[11] I agree with the Commission. These are my reasons.

Preliminary Matters

[12] I initially considered summarily dismissing the Claimant's appeal.

[13] The law says I **must** dismiss an appeal summarily (which means without a hearing) if the appeal has no reasonable chance of success⁶. This means I must consider whether it is plain and obvious on the record that the appeal is bound to fail⁷.

[14] The Tribunal's own regulations say that before summarily dismissing an appeal, I must give the Claimant notice in writing and allow a reasonable period of time to make submissions⁸.

[15] On August 29, 2022, the Claimant was advised of my intention to summarily dismiss his appeal (GD07). He was given until September 12, 2022 to make detailed written submissions explaining why his appeal had a reasonable chance of success.

⁵ Section 31 of the EI Act (and see footnote 4 above).

⁶ This requirement is set out in section 53(1) of the *Department of Employment and Social Development Act*.

⁷ To do this, I must ask whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing: see *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36.

⁸ This requirement is set out in section 22 of the *Social Security Tribunal Regulations*.

[16] After reviewing the Claimant's responses (GD08 and GD09), I decided **not** to summarily dismiss his appeal, and elected to hold a hearing instead to clarify the Claimant's evidence and submissions. That hearing was held on September 28, 2022.

[17] This is my decision on the merits of the Claimant's appeal.

[18] Prior to the hearing, the Claimant filed additional evidence with the Tribunal (at GD11 and GD12), which he referred to and relied on at the hearing. This additional evidence was shared with the Commission, although not until after the hearing had taken place. However, the Commission has advised the Tribunal that it had no additional representations in response to this evidence. I have therefore considered GD11 and GD12 as part of the evidence in the Claimant's appeal.

Issue

[19] Was the Claimant suspended from his job because of his own misconduct?

Analysis

[20] To answer this question, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Claimant suspended from his job?

[21] The Claimant was suspended because he refused to provide proof of vaccination as required by the policy and did not have an approved exemption.

[22] The employer told the Commission that⁹:

⁹ See Supplementary Records of Claim at GD3-20 and GD3-37, and the employer's documents at GD3-40 and GD3-43 to GD3-

- On September 15, 2021, a new Covid-19 vaccination policy was introduced under the employer's "Covid-19 Safer Workplaces Policy"¹⁰, which required employees to provide proof they were fully vaccinated against Covid-19¹¹.
- All employees were informed of the policy and the mandatory requirement to be fully vaccinated by a **final** deadline of December 31, 2021¹².
- Employees were allowed to do weekly Covid-19 tests up to January 10, 2022 so that they could continue working up to that final deadline if they were not going to get vaccinated.
- But the employer terminated the weekly testing alternative after January 10, 2022¹³.
- The Claimant asked for an accommodation for medical reasons, but the employer denied it. The employer decided the Claimant did not provide sufficient medical evidence to support his request to be exempt from the vaccination requirement.
- The Claimant was advised he required more proof to support his claim that he was not able to get vaccinated for medical reasons.

¹⁰ The employer provided the Commission with a copy of the policy (at GD3-43 to GD3-48), the Vaccination status verification process (at GD3-49, which required employees to attest to their vaccination status online) and the Pre-shift notification of the policy on September 15, 2021 (at GD3-50).

¹¹ To be considered fully vaccinated, an employee was required to have received 2 doses of an approved Covid-19 vaccination (see "Definitions" in the policy, at GD3-44).

¹² See warning letter at GD3-40. According to the employer's policy update (at GD3-51), there was a policy transition period from November 1 to December 31, 2021 to allow employees to conduct the education component and become fully vaccinated. During this time, employees who were not fully vaccinated – or attested to their refusal to be vaccinated – were required to undertake twice-weekly Covid-19 rapid antigen testing in order to attend work.

¹³ On December 7, 2021, the employer issued a policy update advising that rapid antigen testing would end January 7, 2022 and employees who were not vaccinated by January 10, 2022 would be placed on unpaid leave of absence (see GD3-51).

- Between October 2021 and December 2021, the employer issued multiple warnings to the Claimant about the need to be fully vaccinated by the December 31, 2021 deadline or be placed on unpaid leave starting on January 10, 2022¹⁴.
- On January 10, 2022, the Claimant was placed on unpaid leave because he failed to provide proof he was fully vaccinated or further medical evidence to support his medical exemption accommodation request¹⁵.

[23] The employer issued a Record of Employment for the Claimant (at GD3-17), indicating he was suspended from his employment¹⁶ and that his last paid day of work was January 8, 2022.

[24] The Claimant initially told the Commission¹⁷ that he believed he had submitted all the information necessary to be exempt from the vaccine requirement, and was unaware the rapid testing would end by January 10, 2022. But he did not dispute any of the employer's statements about the introduction of the policy or the events around it. He said he made a personal decision not to abide by the policy, knowing there was a possibility of losing his job.

[25] The Claimant provided the Commission with a copy of the final warning letter he received on December 9, 2021, which stated that on January 10, 2022, he would be

¹⁴ The employer provided some examples (summarized in the Supplementary Record of Claim at GD3-57), including the October 8, 2021 Pre-shift note at GD3-53. See also the warning letter issued to the Claimant on November 24, 2021 for failing to complete the rapid antigen tests required to continue working (see GD3-41).

¹⁵ By letter dated January 19, 2022 (at GD3-42), the Claimant was advised that the request for accommodation and additional information he provided dated December 15, 2021 was insufficient to confirm a medical contraindication to Covid-19 vaccination and, therefore, his request for accommodation remained declined.

¹⁶ Expected date of recall was checked as "Unknown".

¹⁷ See Supplementary Record of Claim at GD3-21.

found in violation of the policy requirement to be fully vaccinated and placed on an unpaid leave of absence until he met that requirement¹⁸.

[26] During the reconsideration interview¹⁹, the Claimant told the Commission that the employer pushed the vaccination deadline back 3 times, and he kept doing the rapid testing. Then he worked the first week of January 2022 with no rapid testing required before he was placed on unpaid leave²⁰. He also said that he objects to be vaccinated for medical and religious reasons²¹, and clarified that he requested a religious exemption from the employer. But he did not dispute any of the employer's statements about the introduction of the policy or the events around it. He repeated that he made a personal decision not to abide by the policy.

[27] At the hearing, the Claimant's testified that:

- He was informed of the mandatory vaccination policy in September 2021, but the rules and the deadlines "kept changing".
- He didn't want to be vaccinated or attest to his vaccination status, so he kept working and doing the rapid testing.
- He tried for an exemption, but it wasn't granted – although the employer didn't officially notify him until after he was placed on unpaid leave.
- When he showed up to work on January 10, 2021, he was "locked out", and that's when he knew the rapid testing was over.
- He still decided not to attest to his vaccine status, so he was put on unpaid leave.

¹⁸ A copy of the December 9, 2021 final warning letter is at GD3-33.

¹⁹ See Supplementary Record of Claim at GD3-57 to GD3-59.

²⁰ According to the employer, the rapid testing ended on January 7, 2022 and all employees not vaccinated by January 10, 2022 were placed on unpaid leave (see December 7, 2021 policy update at GD3-51).

²¹ He said his medical objection was "tied to" his religious objection (at GD3-58).

[28] I find the evidence shows the Claimant was suspended from his employment because he did not provide proof of vaccination as required by the policy or have an approved exemption by the January 10, 2022 deadline.

Issue 2: Is the reason for his suspension misconduct under the law?

[29] Yes, the reason for the Claimant's suspension is misconduct for purposes of EI benefits.

[30] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional²². Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful²³ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[31] The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law²⁴.

[32] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended because of it²⁵.

[33] The Commission has to prove the Claimant was suspended from his job due to misconduct²⁶. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

[34] The Claimant submits he made a personal choice not to be vaccinated for medical and religious reasons. He says the policy was illegal and violated numerous of

²² See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

²³ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

²⁴ See *Attorney General of Canada v. Secours*, A-352-94.

²⁵ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

²⁶ The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost his job because of misconduct.

his rights, and he argues he has the right to be paid EI benefits because the employer illegally forced him to go on unpaid leave. I do not agree.

[35] The evidence from the employer is set out under Issue 1 above.

[36] At the hearing, the Claimant said there are 9 reasons why his refusal to comply with the policy should not be considered misconduct²⁷. He testified in detail about each of these reasons and highlighted the extensive written submissions he submitted prior to the hearing. I will summarize his testimony and submissions according to the headings he referred to:

- a) The policy violated both the Genetic Non-Discrimination Act and the Canadian Charter of Rights and Freedoms.
 - “Rapid tests are a form of genetic testing”. As a federally regulated employee, he has the right to refuse genetic testing.
 - He has filed a complaint against the employer under the Genetic Non-Discrimination Act.
- b) The policy was not necessary because the Immunization Report from the Government of Canada on the Corona Virus that came out in April 2022 said there was no risk of severe infection or death by the end of 2021.
 - The health risks from Omicron were less severe, so there was no need for mandatory vaccination by the policy deadline.
 - And the “government’s own report” shows that the Immunization Act could not be interpreted to require compulsory immunization.
- c) The policy violated the UNESCO Declaration of 2005.

²⁷ The Claimant listed these 9 reasons in his material at GD12-16, and testified about them in that order.

- According to “international law”, vaccines cannot be compulsory “for an entire population” unless they “eradicate a disease”. Since the Covid-19 vaccines don’t eradicate a disease, “they are illegal”.
- There must also be “informed consent”, and it cannot be said the population was given the information necessary for informed consent.

d) The policy violated X’s Code of Ethics for Employees.

- The employer has a duty to comply with the law and act ethically at all times. There is no law that allows them to set a compulsory vaccination policy.
- They cannot act against “the Labour Code”, nor can they compel him to.
- The union initially said it would file a grievance for him, but they never did. So he has filed a complaint against the union with the Canadian Industrial Relations Board.
- Employees are being put into “segregated” groups, depending on whether they are vaccinated or not. He’s been segregated as non-vaccinated and is being discriminated on the basis of that segregation.
- The employer should have offered him “reasonable accommodation”. He accepted rapid testing, even though “it’s genetic testing and against the law”. Or he could have continued working without rapid testing or being vaccinated, like he did that first week of January 2022.
- The employer has a conflict of interest because the federal government “made money from every citizen that was vaccinated”.
- The employer also contravened the bribery and corruption provisions in the Code of Conduct when it offered employees 3 hours of pay to go and get vaccinated.

e) The policy violated the Charter, and the Handbook for Tribunals²⁸ says the Tribunal must apply the law, including the Charter.

- The Tribunal has both the authority and the responsibility to make decisions about whether the policy violates his Charter rights.
- He knows that “EI agents” and the Tribunal can “overrule” an employer’s decision to terminate, and can say that it was not misconduct. They can approve EI benefits if they disagree with the employer’s characterization of the issue as misconduct.
- In his case, there was no misconduct on his part – it was on the part of the employer. This is because there is nothing in the collective agreement about mandatory vaccination for employees, and neither the employer nor the government has the legal right to force compulsory vaccination. Doing so violates the Charter and international law.
- He is a Christian and his religious beliefs are covered by the Charter. He should have been accommodated, but the employer’s response was just based on “a government employee’s belief about religion”. This is not enough to accurately or fairly assess an exemption request based on religion.
- So the Tribunal must apply the Charter and international law.

f) The policy violated the Nuremberg Code

- There is a known risk of injury or death from the vaccines, which is contrary to the Nuremberg Code.
- The policy also fails to provide for “voluntary consent on humans”, which is required under the Nuremberg Code.

²⁸ At GD9, the Claimant submitted 6 pages from the “Employment Insurance Information Handbook for Employment Insurance Boards of Referees”.

g) The policy is illegal because it was impossible to get an exemption because there were “Gag Orders on Doctors for Exemptions and Informed Consent”

- There was “no informed consent” because doctors were told they could speak honestly or give exemptions.
- His own doctor told him that the government was “overstepping and overreaching” in telling doctors not to give exemptions, and that the government was threatening “their licenses”.
- Now these gag orders are being lifted across Canada and public health officers are getting sued because doctors were not allowed to make independent health decisions.
- There was also no informed consent on the “chemicals within the rapid tests” or what was done with a subject’s DNA from a used rapid test.

h) The policy was not supported by the “Top Chief Epidemiologist in Canada”

- The “top epidemiologist” in Canada said they were not consulted on travel restrictions and lockdowns.
- The government’s decisions were “political”, and not based on “health advise”. X, as a federally regulated employer, went along with these decisions and opted for a mandatory vaccination policy that was “illegal”.

i) The policy was dangerous because of “Nine Laboratory Outbreaks” related to “bio chemicals”

- There is risk of infection and illness from “biohazardous materials” that are being used in labs. Between 2016 and 2021, there have been “9 outbreaks” from biohazardous chemicals and these outbreaks have affected 622 lab workers.

- There is evidence that the Covid-19 vaccines contain biohazardous chemicals that are inherently dangerous to humans.
- He provided his “conscientious objection” to “pharmaceuticals” and should have been accommodated.

[37] At the end of his testimony, the Claimant stated:

- He didn’t want to be vaccinated or attest to his vaccination status.
- He tried for an exemption, but it was not granted.
- He wasn’t sure he’d be placed on an unpaid leave of absence, but understood it was a possibility.
- He didn’t think the employer would “follow through”.
- He hoped the policy would change and that the employer would allow rapid testing to continue.
- When that didn’t happen, he still decided to accept the unpaid leave of absence rather than get vaccinated or attest to his vaccine status.

[38] It is not the Tribunal’s role to decide if the employer’s policy was reasonable or fair, or whether the employer should have accepted the Claimant’s request for an exemption based on his personal decision, or whether the penalty of being placed on an unpaid leave of absence on was too severe²⁹. The Tribunal must focus on the conduct that caused the Claimant to be suspended and decide if it constitutes misconduct under the EI Act.

²⁹ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

[39] I have already found that the conduct which led to the Claimant's suspension was his failure to provide proof of vaccination as required by the policy or obtain an approved exemption by the January 10, 2022 deadline.

[40] The uncontested evidence obtained from the employer, together with the Claimant's testimony at the hearing, allow me to these additional findings:

- a) the Claimant was informed of the mandatory vaccination policy and given time to comply with it.
- b) his refusal to comply with the policy was deliberate and intentional. This made his refusal wilful.
- c) he knew his refusal to be vaccinated and provide proof of same, after failing to obtain an approved exemption could cause him to be suspended from his job. This means he accepted the consequences.
- d) his refusal to comply with the policy was the direct cause of his suspension.

[41] The employer has the right to set policies for safety in the workplace.

[42] The Claimant always had the right to refuse to comply with the policy.

[43] But by choosing not to be vaccinated (and, as a result, failing to provide proof of his fully-vaccinated status) after his exemption request was declined, he made a personal decision that led to foreseeable consequences for his employment.

[44] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act³⁰. My findings similarly support a conclusion that the Claimant's wilful refusal to be vaccinated in accordance with the policy – after failing to obtain an approved exemption by the deadline in the policy - constitutes misconduct under the EI Act.

³⁰ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[45] The Claimant believes he had a “legal right” to refuse to be vaccinated and attest to his vaccination status. He believes the employer should have accommodated his request for an exemption and submits that the denial of his exemption request violated his human and constitutional rights. He says the policy – and the consequences for non-compliance with the policy – violated his collective agreement, the employer’s Code of Conduct, and various other international and domestic laws.

[46] But I have no authority to decide whether the employer breached the collective agreement or any of the Claimant’s human or constitutional rights by putting him on a mandatory unpaid leave of absence for failing to comply with the policy. Nor do I have authority to decide if the employer’s accommodation request process was proper – or whether the employer could have accommodated the Claimant in some other way.

[47] The Claimant’s submission that the Tribunal has jurisdiction to declare the policy to be contrary to the Charter is not accurate. The Tribunal is allowed to consider whether a provision of the EI Act or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter. But the Tribunal is **not** allowed to consider whether an action taken by an employer violates a claimant’s Charter rights. Nor is the Tribunal 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.

[48] The Claimant’s recourse for all of his complaints about the policy and the employer’s actions is to pursue his claims in court or before another tribunal that deals with such matters.

[49] I therefore make no findings with respect to any of these allegations, and the Claimant remains free to make these arguments before the appropriate adjudicative bodies and seek relief there³¹.

³¹ The Claimant testified he has already filed several complaints with other bodies over the cessation of his employment.

[50] However, none of the Claimant's arguments (summarized in paragraphs 36, 37 and 45 above) change the fact that the Commission has proven on a balance of probabilities that he was suspended because of conduct that is considered to be misconduct under the EI Act.

[51] And this means he is disqualified from receiving EI benefits.

Conclusion

[52] The Commission has proven the Claimant was suspended from his employment because of his own misconduct. This means he is disentitled to EI benefits during the period of the suspension, starting from January 9, 2022.

[53] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section