



Citation: *EL v Canada Employment Insurance Commission*, 2022 SST 1156

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

## Decision

**Appellant:** E. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (466101) dated April 29, 2022 (issued by Service Canada)

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**Tribunal member:** Teresa M. Day

**Type of hearing:** Teleconference

**Hearing date:** September 27, 2022

**Hearing participant:** Appellant

**Decision date:** September 28, 2022

**File number:** GE-22-1656

## Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because she was suspended from her job due to her own misconduct<sup>1</sup>.

## Overview

[3] The Claimant worked as a retail sales associate for X (X). On October 1, 2021, X instituted a mandatory Covid-19 vaccination policy (the policy). The policy required all employees to provide proof they had received a first dose of a Covid-19 vaccine by October 15, 2021 and a second dose by November 15, 2021. If an employee did not comply with the deadlines in the policy, or obtain an approved exemption from vaccination prior to October 15, 2021, they would be subject to discipline up to and including termination.

[4] The Claimant was advised of the policy. She did not want to comply with the policy by being vaccinated, so she asked her doctor to sign her medical exemption form. But her doctor refused to do so. Since the Claimant was neither vaccinated nor granted an exemption by the October 15, 2021 deadline, the employer put her on a temporary leave of absence without pay.

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that she had stopped working by voluntarily taking a leave of absence from her job on October 17, 2021 without just cause<sup>2</sup>. This meant she could not be paid any EI benefits.

[6] The Claimant asked the Commission to reconsider. She denied that she left her job voluntarily without cause. She said that by implementing the policy, the employer

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<sup>1</sup> 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.

<sup>2</sup> See the March 11, 2022 decision letter at GD3-25.

forced her to “take the vaccine or leave” (GD3-29). When she decided not to get vaccinated because of health concerns, the employer put her on “infectious disease leave” (GD3-29) after her last day of work on September 17, 2021. The Commission maintained the disentanglement on her claim – but changed the reason for the disentanglement to “suspension from employment”<sup>3</sup>.

[7] The Claimant appealed that decision to the Social Security Tribunal (Tribunal).

[8] I must decide whether the Claimant was suspended from her job due to her own misconduct. To do this, I have to look at the reason for her suspension, and then determine if the conduct that caused her 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 her doctor refused to sign off on her request for an exemption. She knew she would be placed on an unpaid leave of absence by making this choice – and that’s what happened. The Commission says these facts prove the Claimant was suspended due to her own misconduct, which means she cannot receive EI benefits<sup>4</sup>.

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<sup>3</sup> See the April 29, 2022 reconsideration decision letter at GD3-43.

At GD4-3, the Commission acknowledged that a clerical error was made in that letter because it says the original decision was maintained – but referred to it as a decision on suspension from employment – not voluntary leave. The Commission explained that the reconsideration decision letter should have read that the decision regarding the Claimant’s leave of absence had been modified and determined that she was suspended from her employment due to misconduct. I agree with the Commission’s submissions that I can correct this clerical error and consider the original decision (namely, that the Claimant was disentitled to EI benefits for voluntarily taking a leave of absence without just cause) to have been rescinded and replaced on reconsideration with a decision that the Claimant was disentitled to EI benefits because she was suspended from her employment due to her own misconduct.

<sup>4</sup> Where an employer chooses to place an employee on leave without pay rather than imposing a suspension or termination, the unpaid leave of absence will be considered the equivalent of a suspension *if the reason for the leave is considered misconduct*. In the present case, the Commission determined that the reason for the Claimant’s unpaid leave of absence (namely, her non-compliance with X’s mandatory vaccination policy following the denial of her exemption request) was misconduct and, therefore considered her separation from employment to be a suspension. 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.

[10] The Claimant disagrees. She says she made a personal choice not to be vaccinated for medical reasons. She also says that she has the right to be paid EI benefits because the employer forced her to go on leave when there was no shortage of work and she wanted to work.

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

## **Issue**

[12] Was the Claimant suspended from her job because of her own misconduct?

## **Analysis**

[13] To answer this question, I have to decide two things. First, I have to determine why the Claimant was suspended from her 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 her job?**

[14] The Claimant was suspended because she refused to be vaccinated as required by the policy and did not have an approved exemption.

[15] The employer told the Commission that<sup>5</sup>:

- X has a mandatory vaccination policy that was issued to employees advising they would have to be vaccinated in order to continue working<sup>6</sup>.
- Employees were informed that if they were not vaccinated by October 15, 2021, they would be placed on leave without pay until they were vaccinated.
- The Claimant worked until the deadline and was then placed on leave without pay because she had not been vaccinated.

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<sup>5</sup> See Supplementary Record of Claim at GD3-35.

<sup>6</sup> The employer provided the Commission with a copy of the policy (see GD3-40 to GD3-41).

- The Claimant is on what the employer calls “infectious disease leave”.

[16] The Claimant does not dispute any of this.

[17] She told the Commission that<sup>7</sup>:

- She was informed in early October that she had until October 15, 2021 to receive a first dose of a Covid-19 vaccine.
- She does not wish to get the vaccine.
- She asked her doctor to complete a medical exemption request form so she would be exempt from the mandatory vaccination requirement in the policy.
- But her doctor refused to sign it.
- The employer told her that she was being put on a leave of absence because she wasn’t vaccinated and did not comply with the policy.

[18] At the hearing, the Claimant testified that:

- She was advised at the beginning of October 2021 that she “had 2 weeks to get vaccinated”.
- She immediately got the forms from the employer and made an appointment to see her family doctor to get her medical exemption request form signed.
- But her family doctor refused to sign her form, and told her “not to be concerned” about the vaccine.
- Her family doctor said she could contact her cardiologist if she wanted to, but her cardiologist couldn’t see her for another 6 months, so she didn’t pursue it.

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<sup>7</sup> See Supplementary Records of Claim at GD3-23 and GD3-33.

- On October 17, 2021, the employer verbally advised her that it was her last day of work because she wasn't vaccinated. The employer told her she was being placed on "infectious disease leave".

[19] I find that the evidence shows the Claimant was suspended from her employment because she refused to be vaccinated as required by the policy and did not have an approved exemption.

## **Issue 2: Is the reason for her suspension misconduct under the law?**

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

[21] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional<sup>8</sup>. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful<sup>9</sup> (or shows a wilful disregard for the effects of their actions on the performance of their job).

[22] The Claimant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct under the law<sup>10</sup>.

[23] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties towards the employer and there was a real possibility of being suspended because of it<sup>11</sup>.

[24] The Commission has to prove the Claimant was suspended from her job due to misconduct<sup>12</sup>. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

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<sup>8</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

<sup>10</sup> See *Attorney General of Canada v. Secours*, A-352-94.

<sup>11</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>12</sup> 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 her job because of misconduct.

[25] The Claimant says that she made a personal medical decision not to be vaccinated with the Covid-19 vaccine. She says she was always willing to work and it was the employer who forced her to leave her job, so her conduct cannot be considered wilful. I do not agree.

[26] At the hearing, the Claimant testified that:

- The mandatory Covid-19 vaccination policy was issued to all employees “at the beginning of October” 2021.
- The policy said she had 2 weeks to get vaccinated or she could face discipline up to and including termination.
- The employer told her she was being put on an unpaid leave of absence after her last day of work on October 17, 2021 because she was not vaccinated and did not comply with the policy.
- She tried to get a medical exemption before the deadline, but her family doctor refused to sign it.
- “But it’s my body. It’s my health.”
- She is concerned about the safety of the Covid-19 vaccines because she has a “heart condition”, so she decided not to get vaccinated.
- Even after her family doctor wouldn’t sign her exemption request form, and even after she found out that she couldn’t get in to see her cardiologist for another 6 months, she still decided not to get a Covid-19 vaccine.
- She made a personal decision not to be vaccinated.
- She made this decision knowing it would mean she would be placed on an unpaid leave of absence after the October 15, 2021 deadline for the first dose.
- “In Canada, the vaccine was never mandatory.”

- She doesn't understand how her company can force her to be vaccinated in order to work.
- And now she's back at work.
- After 7.5 months of unpaid leave, she received a phone call from the employer to come back to work – even without being vaccinated against Covid-19.
- She doesn't understand how it was **not** OK for her to work 7.5 months ago, but now it is OK for her to work.
- How does the employer have the right to do this in a country where the vaccines were not mandatory?
- She had the right to EI benefits for those 7.5 months of unpaid leave because it was the employer who forced her to go on that leave. She didn't want to do it – she wanted to work.

[27] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accepted the Claimant's request for an exemption based on her personal medical decision, or whether the penalty of being placed on an unpaid leave of absence on was too severe<sup>13</sup>. The Tribunal must focus on the conduct that caused the Claimant to be suspended and decide if it constitutes misconduct under the EI Act.

[28] I have already found that the conduct which led to the Claimant's suspension was her refusal to be vaccinated in accordance with the employer's workplace policy in response to the Covid-19 pandemic.

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

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<sup>13</sup> See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.



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

[30] The employer has the right to set policies for workplace safety. The Claimant had the right to refuse to comply with the policy.

[31] By choosing not to be vaccinated after her family doctor refused to provide her with a medical exemption, she made a personal decision that led to foreseeable consequences for her employment.

[32] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act<sup>14</sup>. 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 medical exemption by the deadline in the policy - constitutes misconduct under the EI Act.

[33] The Claimant's reinstatement 7.5 months after her suspension does not diminish the fact that she knew she could face discipline up to and including termination for refusing to provide proof of vaccination and comply with the policy by October 15, 2021.

[34] The Claimant argues that the employer's policy had the effect of forcing her to choose between working and getting a vaccine that she believes would have a negative effect on her health. She says the policy did not comply with Canadian law.

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<sup>14</sup> See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[35] I make no findings with respect to the validity of the policy or any violations of the Claimant's rights. She is free to make these arguments before the appropriate adjudicative bodies and seek relief there<sup>15</sup>. None of her arguments change the fact that the Commission has proven on a balance of probabilities that she was suspended because of misconduct under the EI Act.

[36] And this means she is disqualified from receiving EI benefits.

### **Issue 3: The Overpayment**

[37] At the hearing, the Claimant said that her main concern is repaying the overpayment on her claim.

[38] She testified that:

- She received 3 weeks of regular EI benefits and then the payments stopped because the Commission said she was "not eligible" for EI benefits.
- But then the Commission decided to start paying her again and gave her a lump sum.
- And now the Commission is saying she has to repay everything they gave her – over \$4,000<sup>16</sup>.
- She had the right to EI benefits during her unpaid leave of absence because the employer "forced" her to go on leave.
- She never wanted to stop working. She was always available to work. But the employer sent her away.
- It will be very hard for her to repay the overpayment. It's a lot of money for her.

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<sup>15</sup> I note that the Claimant's grievance is continuing to arbitration.

<sup>16</sup> A Notice of Debt issued to the Claimant for \$4,733.00 can be found at GD3-26 to GD3-28.

- It's not right the Commission wants it back because she had the right to EI benefits.

[39] I acknowledge the Claimant's concerns about the large overpayment debt she now faces. I note that the Commission tried to explain what caused the overpayment and apologized to her for how her claim was administered<sup>17</sup>.

[40] I acknowledge the Claimant's frustration at how her claim has been handled. But I do not have jurisdiction to write-off the overpayment.

[41] There are two reasons for this.

[42] First, the law says that a decision to write-off any amount owing to the Commission is expressly excluded from the reconsideration process<sup>18</sup>. Since my jurisdiction is limited to decisions that have been properly reconsidered by the Commission<sup>19</sup>, the issue of the Appellant's overpayment is not something I can consider on this appeal.

[43] Second, I do not have any discretion to waive, forgive, void or write-off the overpayment – no matter how compelling the Appellant's arguments may be. The law simply does not empower me to relieve the Appellant from liability for the overpayment<sup>20</sup>, and I cannot ignore the law, even if the outcome seems unfair<sup>21</sup>.

[44] I do, however, take this opportunity to provide the following information:

- a) The Claimant must first explicitly ask the Commission to write-off this debt. If the Commission refuses to do so and the Claimant wishes to formally appeal the

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<sup>17</sup> See GD3-42.

<sup>18</sup> Section 112.1 of the EI Act.

<sup>19</sup> Sections 24 and 30 of the *Social Security Tribunal Regulations* limit the Tribunal's jurisdiction to decisions of the Commission that have been reconsidered under section 112 of the *Employment Insurance Act*.

<sup>20</sup> Sections 43 and 44 of the EI Act establish that a claimant is liable for an overpayment of EI benefits and must repay any EI benefits they received but were not entitled to.

<sup>21</sup> See *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141

Commission's refusal to write-off the overpayment, she must proceed to the Federal Court of Canada, which has exclusive jurisdiction over this issue<sup>22</sup>.

- b) If repayment of the overpayment will cause the Claimant financial hardship, she can contact the Debt Management Call Centre of Canada Revenue Agency and enquire about a repayment schedule and/or applying for debt relief<sup>23</sup>.

## **Conclusion**

[45] The Commission has proven the Claimant was suspended from her employment because of her own misconduct. This means she is disentitled to EI benefits during the period of the suspension, starting from October 18, 2021.

[46] The appeal is dismissed.

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

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<sup>22</sup> *Canada (AG) v. Villeneuve*, 2005 FCA 440.

<sup>23</sup> The phone number is 1-866-864-5823.