



Citation: *NM v Canada Employment Insurance Commission*, 2022 SST 1094

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

Decision

Appellant: N. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (461498) dated March 24, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Decision date: September 2, 2022

File number: GE-22-1423

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 the employer's policy was too restrictive and the employer denied her requests for exemption to the policy.

[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

[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:

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*.

- 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.⁴ Employees were required to provide proof of their vaccination by September 9, 2021. The policy states that employees who do not comply with the policy will be subject to discipline up to and including unpaid leave and termination.⁵

[9] The employer sent the policy to its staff by email on September 2, 2021, and September 7, 2021.⁶

[10] 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.⁷

[11] The Claimant didn't want to be vaccinated for several reasons. She asked the employer for an exemption to the policy on human rights grounds,⁸ and for medical⁹ and religious reasons.¹⁰

[12] The Claimant refused her exemption requests.¹¹ It sent the Claimant letters on September 26, 2021, October 1, 2021, and October 26, 2021, advising the Claimant that she was required to comply with the policy by September 30, 2021.¹² And if she

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

⁴ See GD3-34 to GD3-37.

⁵ See GD3-36.

⁶ See GD3-41 and GD3-49.

⁷ See GD3-9.

⁸ See GD3-46.

⁹ See GD3-38 and GD3-588.

¹⁰ See GD3-52, GD3-589, and GD3-591

¹¹ See GD3-10, GD3-39, GD3-41.

¹² See GD3-44 and GD3-53.

was still not in compliance with the policy by October 31, 2021, she would be dismissed from her employment.¹³

[13] On October 1, 2021, the Claimant was placed on an unpaid leave of absence (suspension).¹⁴ The employer sent her a letter dated October 26, 2021, confirming that she was placed on unpaid leave because she did not have a valid exemption and did not meet the requirements of the policy.

[14] The Claimant was dismissed on November 1, 2021.¹⁵

[15] 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.¹⁶

[16] Wilful conduct means that the conduct was conscious, deliberate, or intentional.¹⁷ 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.¹⁸

[17] Before summarily dismissing an appeal, I must send written notice to the Claimant and allow her time to make submissions.¹⁹

[18] 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, I sent notice of my intention to summarily dismiss this appeal on July 18, 2022. The Claimant provided additional submissions, which I have considered in this decision.²⁰

¹³ See GD3-41.

¹⁴ See GD3-19.

¹⁵ See GD3-41.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *Attorney General of Canada v Secours*, A-352-94.

¹⁹ Section 22 of the *Social Security Tribunal Regulations*

²⁰ See GD6 and GD9.

[19] 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.

[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] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.²¹

[22] The Claimant said that she did not choose not to comply, she tried to comply with the policy but the employer unreasonably denied her exemption requests.²²

[23] Even though the Claimant says that she didn't refuse to comply with the policy, the Claimant had to provide proof of vaccination or proof of an approved exemption to comply with the employer's policy. Her actions of not providing the proof of vaccination or having an approved exemption put her in non-compliance with the policy. If the Claimant intended to comply with the policy, she could have communicated that to her employer and asked for an extension of time to do so.

[24] I understand that the Claimant asked for exemptions to this policy. But, the employer didn't accept her exemption requests. The Claimant knew that she was not exempted from the employer's mandatory vaccination policy. Regardless, she chose not to comply with the policy.

²¹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²² See GD9.

[25] 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.²³

[26] 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.

[27] It is plain and obvious on the face of the record that the appeal is bound to fail.²⁴ As a result, I find that this appeal has no reasonable chance of success. Accordingly, the law requires that I dismiss it.²⁵

Conclusion

[28] 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

²³ See *Paradis v Canada (Attorney General)*, 2016 FCA 1281

²⁴ 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.

²⁵ See section 22, *Social Security Tribunal Regulations*