Citation: *ZF v Canada Employment Insurance Commission*, 2022 SST 1245

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Z. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (469175) dated May 19, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Decision date:	October 26, 2022
File number:	GE-22-2044

Decision

[1] The appeal is summarily dismissed because it has no reasonable chance of success.

[2] The Claimant has made no arguments and provided no evidence that would let me allow the appeal.[1]

[3] This means the Claimant is disentitled from receiving employment insurance (EI) benefits.

Overview

[4] The Claimant's employer adopted a COVID-19 Vaccination Policy requiring all employees to achieve full vaccination status by November 19, 2021. The policy allowed for exemption to vaccination for medical or human rights grounds. The Claimant's employer placed the Claimant on an unpaid leave of absence effective November 20, 2021 because the Claimant indicated they had not received the first dose of the COVID-19 vaccine and, the employer concluded, they would not be fully vaccinated by the deadline.

[5] The Commission accepted the employer's reasons as to why the Claimant was no longer working. It decided the Claimant was suspended from their job because of misconduct. Because of this, the Commission disentitled the Claimant from receiving EI benefits.

[6] The Claimant disagrees with the Commission's decision. The Claimant says that they were permitted to work after the policy was announced, were never spoken to about the policy or its implications for non-compliance and they received no reminders of the deadline to be fully vaccinated in order to meet the policy's requirements. The Claimant questioned how serious the employer was about the policy and was under the impression the employer would work with them to allow them to remain employed.

[1] In this decision, the Appellant is called the Claimant and the Respondent is called the Commission

Matters I have to consider first

– The employer is not an added party

[7] Sometimes the Tribunal sends a claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[8] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

– The Tribunal gave notice of its intention to summarily dismiss the appeal

[9] Before I summarily dismiss an appeal, I have to give the Claimant notice in writing. I have to allow the Claimant a reasonable period to make arguments about whether I should summarily dismiss the appeal.[2]

[10] Tribunal staff sent a letter to the Claimant on October 3, 2022. In this letter, I explained why I was considering summarily dismissing the appeal. I asked the Claimant to respond to the letter by October 14, 2022.

[11] The Claimant responded to my letter on October 12, 2022. I have taken the Claimant's response into consideration in reaching my decision.

– The Claimant was not on a voluntary leave of absence

[12] In the context of the *Employment Insurance Act* (EI Act), a voluntary period of leave requires the agreement of the employer and the claimant. It also must have an end date that is agreed between the claimant and the employer.[3]

[13] There is no evidence in the appeal file to show the Claimant agreed to taking a period of leave from their employment beginning on November 20, 2021.

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[2] See Section 22, *Social Security Tribunal Regulations*
[3] See section 32 of the EI Act

[14] The section of the law on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits (emphasis added).[4]

[15] The evidence shows it was the Claimant's conduct, of refusing to comply with the employer's policy, led to their not working. I am satisfied that the Claimant's circumstances, that of being placed on an unpaid leave of absence for failing to comply with the employer's policy, can be considered as a suspension for the purposes of the EI Act.

Issue

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

Analysis

[17] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.[5]

[18] The law says that you can't get EI benefits if you lose your job because of your own misconduct. This applies whether the employer has suspended you and / or dismissed you.[6]

[19] Specifically, section 31 of the EI Act says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

> (a) the period of suspension expires;
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> (b) the claimant loses or voluntarily leaves their employment; or,
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> (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

[4] Section 31 of the EI Act
[5] Section 53(1), *Department of Employment and Social Development Act* (DESD Act)
[6] Sections 30 and 31 of the EI Act

[20] The Commission submits that the Claimant was put on an administrative leave without pay due to their own misconduct. It says the Claimant's behaviour satisfies the definition of misconduct. It was, the Commission says, conscious and intentional and the Claimant knew or ought to have know that the consequences included being placed on unpaid leave.

[21] In their appeal to the Tribunal, the Claimant wrote there was confusion between the policy and the covering email that accompanied the policy. The policy was sent to all employees by email on October 7, 2021. The Claimant says the policy wording said "effective October 7, 2021 all employees … prior to attending the [employer's] premises, must provide proof that they are fully vaccinated against COVID-19 by providing proof of all required doses of a COVID-19 vaccine as approved by Health Canada." The Claimant noted, though not in the policy, the email indicated that "employees must be fully vaccinated by November 19th [2021]." The Claimant called the General Manager to ask if the Claimant should come into work the next day given that the Claimant did not meet the policy requirements. The GM told the Claimant to come to work the next day.

[22] The Claimant wrote that in October they had two meetings with the GM who asked about the Claimant's current vaccination status. The Claimant wrote that other than these two meetings there was nothing said about the policy or the implications of not complying with the policy. The Claimant wrote they did not receive any reminders of the deadline to be fully vaccinated, specifically on or before the date they would be required to begin the vaccination process in order to meet the policy's requirements.

[23] The Claimant says with no communication about the policy they began to question how serious the employer was about the policy in the Claimant's particular case given that the Claimant was a member of the Senior Management Team who got along well with the GM, senior managers and staff. The Claimant wrote that as a respected member of the team, they expected the employer would work with them to allow them to remain employed, especially given the uncertainty of the situation, the ever-changing nature of the pandemic and the fact they were an employee in good standing with a blemish-free record in the seven years as the employer's Human Resources Generalist.

[24] The Claimant wrote in their appeal to the Tribunal they had expressed to GM their concerns with the policy from a human rights perspective for themselves and in the best interests of the staff and company. The Claimant noted that they were responsible for writing the policy's first draft. The Claimant said the concerns were disregarded.

[25] The Claimant wrote in their appeal to the Tribunal that the leave of absence was atypical in that the employer advised the employer may not have a position open for the Claimant but would do its best to find a position for the Claimant should they decide to get vaccinated in the future. The Claimant says the employer did not offer to accommodate them by working from home or testing regularly. The Claimant says their position has since been filled by the employer.

[26] The Claimant responded to the Tribunal's Notice of Intention to Summarily Dismiss. In the response, the Claimant submitted that they understood that there were four elements of misconduct and the Commission must prove all four to be considered misconduct under the law.

[27] The Claimant wrote the policy's two listed measures for accommodation in the policy were non-exhaustive. The Claimant wrote that aside from other feasible measures for accommodation, the nature of their work role allowed for remote work. The nature of their role did not require them to physically interact with many staff, their role was largely administrative and any interference with their duties to the employer would have been largely minimal. The Claimant submitted that to conclude there were no other options that would allow them to continue performing their duties with no disruption or hardship to the employer is false.

[28] The Claimant noted "dismissal" and "leave of absence" were used interchangeably throughout the appeal file, and submitted that it is necessary to establish which one applied to the alleged misconduct as they cannot be both suspended and terminated. The Claimant submitted that if being placed on a leave of absence was the consequence for not complying then why was the employer not holding their position for a period of time as was standard practice for other leaves?

[29] The Claimant submitted that despite "leave of absence" recorded on the Record of Employment the facts demonstrate they were dismissed. The Claimant submitted that dismissal is not in the employer's policy as a consequence for non-compliance. The Claimant submitted that this additional consequence, along with a lack of adequate notice to comply by the deadline, the employer did not allow the Claimant to make a fully informed decision regarding vaccination. The Claimant wrote that 10 days' notice made it impossible for them to comply with the policy. The Claimant says with their work history, thorough understanding of labour standards and employment law, it is not true to say they knew or ought to have know being let go was a real possibility under these circumstances.

[30] The appeal file shows the Claimant completed an application for EI benefits on November 22, 2021. The Claimant indicated they were on a leave of absence because they were not vaccinated.

[31] The appeal file has copy of the employer's "COVID-19 Mandatory Vaccination Policy" and the covering email. The policy states all employees, program contractors and volunteers are required to be fully vaccinated against COVID-19. Individuals would be considered fully vaccinated 14 days after receiving the second dose of a Health Canada approved two-dose COVID-19 vaccine series. Under the heading "Requirements in Effect Effective October 3, 2021" the policy says effective October 7, 2021 all employees, program contractors and volunteers must provide proof they are fully vaccinated. Proof was to be submitted to the Claimant or the employee's manager. The policy provided for accommodation for employees and volunteers who were unable to be fully vaccinated based on medical reasons or a protected ground of discrimination. Requests for accommodation were to be sent to the Claimant. Under the heading, "Policy Implications" the policy says any employee who does not comply with the Requirements will not be permitted to attend the employer's premises.

[32] The covering email, dated October 7, 2021, has the policy attached, notes that it was approved by the employer and has 5 points listed under key information. Among those points are "the policy is effective October 7, 2021 and employees must be fully vaccinated by November 19th (emphasis in the original).

[33] The appeal file shows a representative of the employer spoke to a Service Canada officer on March 4, 2022. The record shows the representative quoted from a letter from the employer to the Claimant dated November 9, 2021. The letter refers to the policy circulated on October 7, 2021. The letter says the Claimant indicated to the manager they had not received the first dose of the COVID-19 vaccine and therefore would not be fully vaccinated by November 19th as was communicated as the deadline for all staff to be fully vaccinated. The letter goes on to say that as per the policy, because the Claimant was not able to meet the full vaccination requirements they would be placed on unpaid leave effective November 20th, 2021.

[34] The appeal file shows the Claimant spoke to a Service Canada officer on February 17, 2022. The Claimant told the officer they were not vaccinated and did not plan on getting vaccinated. The Claimant said their refusal was based on their religious beliefs but they did not request an accommodation from the employer.

[35] It is not my role to determine if the employer's policy or actions were discriminatory, or a violation of the provincial human rights code, labour standards or employment law. There are other forums where these claims can be heard.

[36] I can only look at the circumstances that existed at the time the Claimant stopped working. The Claimant's allegation that they have been replaced by the employer and dismissed is not before me. There are other forums to determine if the termination of the Claimant's employment constitutes wrongful or constructive dismissal as that term relates to Canadian employment law and common law.

[37] My role is to decide whether the Claimant's appeal should be summarily dismissed.

[38] To summarily dismiss the Claimant's appeal, the law says I must be satisfied that the appeal has no reasonable chance of success.[7]

[7] See subsection 53(1) of the DESD Act

[39] No reasonable chance of success means it is plain and obvious that the appeal is bound to fail, no matter what argument or evidence the Claimant might present at a hearing.[8]

[40] The question is **not** whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing.[9]

[41] When I apply the law and the legal tests, I can only conclude that the Claimant's appeal has no reasonable chance for success.

[42] Misconduct is not defined in the EI Act. But, the courts have come to a settled definition about what the term means with respect to the application of the EI Act.

[43] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also includes conduct that is so reckless that it is almost wilful.[11] The Claimant doesn't have to have wrongful intent (in other words, the Claimant doesn't have to mean to be doing something wrong) for their behaviour to be misconduct under the law.[12]

[44] There is misconduct if the Claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended because of that.[13]

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[8] In coming to this interpretation, I am relying on the following: *YA v Minister of Employment and Social Development*, 2022 SST 83; *LB v Minister of Employment and Social Development*, 2021 SST 773; *BB v Canada Employment Insurance Commission*, 2020 SST 951; *DV v Minister of Employment and Social Development*, 2020 SST 977.
[9] The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[45] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[14] A deliberate violation of the employer's policy is considered to be misconduct.[15]

[46] The conduct of the employer is not a relevant consideration when deciding if a claimant has lost their job due to their own misconduct. Rather, the analysis is focused on the claimant's acts or omissions and whether that amounts to misconduct within the meaning of section of the EI Act.[16]

[47] The Commission has to prove the Claimant was suspended from their job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show it is more likely than not the Claimant was suspended from their job because of misconduct.[17]

[48] The employer adopted a policy requiring that effective October 7, 2021, all employees must provide proof they are fully vaccinated for COVID-19.[18] Individuals would be considered fully vaccinated 14 days after receiving the second dose of a Health Canada approved two-dose COVID-19 series. The employer's board approved the policy on October 4, 2021. The policy stated that employees who were not fully vaccinated could not attend the employer's premises. The policy was circulated on October 7, 2021 to all employees as an attachment to an email. The covering email said "employees must be fully vaccinated by November 19th [2021] (emphasis in the original).

[49] After the policy was issued, the Claimant contacted their manager to ask if they should come into work. The manager replied yes. The Claimant said their manager asked them about their vaccination status twice in October. The Claimant was responsible for writing the first draft of the policy and was named in the policy as the

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[14] See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314
[15] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[16] *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107
[17] *Minister of Employment and Immigration v. Bartone*, A-369-88.
[18] This policy said this requirement was in effect effective October 3, 2021.

contact person for accommodation requests. The Claimant did not request an exemption to the vaccination requirement. The evidence tells me the Claimant was aware of the employer's policy and the deadline to be fully vaccinated. The evidence also tells me that the Claimant was aware of the possibility that if they did not comply with the policy they would not be able to enter the workplace and, as a result, not be able to carry out their employment duties. There is no evidence the Claimant could provide that would change these facts. There is no argument the Claimant could make that would lead me to a different conclusion. As a result, it is clear to me that the Claimant's appeal has no reasonable chance of success no matter what arguments or evidence they could bring to a hearing. This means I must summarily dismiss the Claimant's appeal.

Conclusion

[50] I find the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss the Claimant's appeal.

Raelene R. Thomas
Member, General Division – Employment Insurance Section