



Citation: *LY v Canada Employment Insurance Commission*, 2022 SST 1308

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

## Decision

**Appellant:** L. Y.  
**Representative:** M. Y.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (478195) dated June 6, 2022  
(issued by Service Canada)

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**Tribunal member:** Raelene R. Thomas  
**Decision date:** September 1, 2022  
**File number:** GE-22-2229

## Introduction

[1] The Claimant worked in a health care facility.<sup>1</sup> Her employer introduced a policy requiring all employees provide proof of full vaccination against COVID-19.<sup>2</sup> The Claimant requested an exemption to vaccination. Her employer refused her request. The Claimant did not get vaccinated and was placed on leave from her employment and later dismissed because she did not comply with the policy.<sup>3</sup> The Commission refused to pay the Claimant employment insurance (EI) benefits because she lost her employment due to her misconduct.<sup>4</sup>

## Matters I have to consider first

### The employer is not an added party

[2] Sometimes the Tribunal sends the 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.

[3] 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.

## Issue

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

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<sup>1</sup> In this decision, the Appellant is called the Claimant and the Respondent is called the Commission.

<sup>2</sup> The policy defined fully vaccinated as receiving two doses of two-dose vaccine or one dose of a one-dose vaccine and having received the final dose at least 14 days ago. See page GD3-27. All page numbers are from the appeal file.

<sup>3</sup> See page GD3-38.

<sup>4</sup> See pages GD3-32 and GD3-40.

## The law

[5] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[6] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.<sup>5</sup>

[7] 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;

(b) the claimant loses or voluntarily leaves their employment; or,

(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

[8] Section 30(1) of the *Employment Insurance Act* (EI Act) says that a claimant is disqualified from receiving EI benefits if they lost their employment because of their misconduct

## Evidence

[9] The appeal file shows the Claimant completed an application for EI benefits on December 7, 2021.<sup>6</sup>

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<sup>5</sup> The Tribunal sent a notice of its intention to summarily dismiss this appeal to the Claimant on August 8, 2022. She was given until August 23, 2022 to make submissions. See GD6. The Claimant's representative made a submission on August 19, 2021. See GD7.

<sup>6</sup> See pages GD3-3 to GD3-26 for the application for EI benefits and page GD3-23 for the date of application.

[10] The appeal file has an amended Record of Employment (ROE) issued for the Claimant on December 15, 2021.<sup>7</sup> The ROE shows the reason for issuing as Dismissal or Suspension and the last day for which the Claimant was paid was November 23, 2021.

[11] A representative of the employer spoke to a Service Canada officer on June 6, 2022.<sup>8</sup> The representative confirmed the Claimant was terminated from her employment because she did not get the mandatory COVID-19 vaccine that was required of all employees. The employer told the officer it announced the COVID-19 vaccination policy on October 6, 2021. The policy stated that employees who were not vaccinated by November 15, 2021 would be placed on an unpaid leave. The employer told the officer it revised the policy on November 15, 2021 stating that if employees remained unvaccinated by December 21, 2021 they would be terminated. The employer said it met individually with employees. The employer told the officer it did have accommodations for medical reasons. The Claimant submitted a note but it did not meet the employer's medical accommodation exemption. The employer told the officer that diabetes was not on its list for medical exemptions.

[12] The Claimant spoke to a Service Canada officer on June 6, 2022.<sup>9</sup> The Claimant told the officer she was terminated without cause because of her employer's vaccination policy. She said she discussed vaccination with her doctor who told her she would have an inflammatory reaction and her blood sugar levels would be affected. She asked her doctor for an exemption but he was not able to give her one as he had to follow public health guidelines. The Client told the officer she chose not to be vaccinated as she felt the risk of taking an experimental vaccine outweighed the benefits. She felt her employer had other options not to terminate her.

[13] The appeal file has a copy of the employer's COVID-19 Vaccination Policy.<sup>10</sup> The policy was issued on September 7, 2021 and applied to all employees. It required

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<sup>7</sup> See page GD3-30

<sup>8</sup> See page GD3-38

<sup>9</sup> See page GD3-39

<sup>10</sup> See pages GD3-27 to GD3-29

all employees to declare their vaccination status and provide proof of full vaccination against COVID-19 or written proof of a medical exemption. The policy stated that individual who have not provided evidence of a first dose of the vaccine by November 25, 2021 will be placed on an unpaid leave of absence. It goes on to state that if evidence of Dose 1 is not provided by December 3, 2021, employment will be terminated.

[14] The appeal file has a letter dated September 24, 2021 from the employer to the Claimant.<sup>11</sup> The letter says the correspondence provided by the Claimant does not provide him with any valid exemption. It goes onto to say the employer will be moving forward with its policy and hopes that the Claimant will comply.

[15] In her application for EI benefits the Claimant indicated she was made aware of the employer's policy when she was given a written statement.

## **Submissions**

[16] In her appeal to the Tribunal, the Claimant wrote that her collective agreement had no stipulation with regards to the COVID-19 vaccination.<sup>12</sup> She said that she complied with all vaccines required when she was hired as stated in her employment contract / collective agreement. The Claimant wrote she has filed grievances with her union over the employer's actions. The Claimant submitted that "just cause" or "misconduct" refers to conduct of a serious nature that breaks her contract and this was not the case in her situation. The Claimant wrote that unless government legislation is in place that requires an employer to have its employees vaccinated for COVID-19, a person's refusal to be vaccinated should not amount to just cause / misconduct. She stated that she approached her employer verbally and in writing requesting an accommodation due to her specific health concerns but were refused. The Claimant also said she received a legal opinion that her employer had a duty to accommodate her. She wrote that it was not an unreasonable request for her employer to accommodate her. The Claimant said that other employers, in the same industry

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<sup>11</sup> See page GD3-32

<sup>12</sup> See page GD2

regulated by the provincial government, have accommodated their employees. The Claimant said she was willing to continue working and, since being dismissed she has gained employment elsewhere. The Claimant said her family doctor and a specialist could not guarantee her safety when she asked them. The Claimant stated that she felt the risk of potential complications from the vaccine outweighed the benefits of taking a vaccine that was very new and not even through clinical trials.

[17] In reply to the Tribunal's notice of intention to summarily dismiss her appeal the Claimant's representative submitted that she and the Claimant did not consent to the offer to summarily dismiss the appeal.<sup>13</sup>

[18] The representative submitted that in no way would the Claimant's refusal to follow the vaccination policy put forth by her employer impair the performance duties owed to her employer. Prior to the vaccine the Claimant followed all the protocols, wore a mask, etc. and performed all duties required of her. The representative submitted the Claimant could have continued to do so with or without the COVID-19 vaccine.

[19] The representative submitted the Claimant is not debating the fact that she was made aware of the consequences if she did not follow the vaccination policy. What the Claimant was aware of was there was no order by a federal or provincial government to terminate an employee if they declined to take the COVID-19 vaccine. She wrote that the employer was not ordered to put any vaccine mandate policy in place, by law. It was also not a condition of employment when the Claimant was hired.

[20] The representative submitted that it was my role to prove "misconduct" on the part of the Claimant that would justify the denial of EI benefits.<sup>14</sup>

[21] The representative provided a quote from the Digest of Benefit Entitlement Principles (Digest) in support of her argument.<sup>15</sup> She wrote that the employer may have

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<sup>13</sup> See GD7

<sup>14</sup> The Tribunal does not "prove" misconduct. The Tribunal applies the law and legal tests to a claimant's circumstances to determine if the legal test can be decided in the claimant's favour. In this decision, the legal test for summarily dismissing the appeal is applied to the Claimant's circumstances.

<sup>15</sup> The Digest is a policy document used by Service Canada and the Commission in the delivery of its programs. It is not law and, as such, the Tribunal is not bound by the Digest.

put an illegal or unreasonable vaccine policy in place and informed employees to follow, but the employer did not have the right to terminate employees citing misconduct, if the employee did not breach any terms of their employment contract or collective agreement. The representative stated that in no way did the Claimant's refusal to be coerced into taking the COVID-19 impair the performance of duties owed to her employer.

[22] The representative submitted the Claimant was terminated or dismissed unfairly. She said many other hospital workers have been recalled to work. She asked if it was fair for employers to cite misconduct on the ROE based on any kind of made up policy, contrary to signed employment contracts or collective agreements. Obviously not, the representative wrote, in a union environment. The representative noted that the employer dismissed the Claimant without waiting for the results of the union grievance. That is why the Claimant is appealing – because the employer was not justified to cite misconduct. Nor, do the Claimant and the representative feel that “your Commission has proven misconduct, based on your information.”<sup>16</sup>

[23] The Commission says the Claimant was aware of the vaccine policy and the date by which she needed to comply.<sup>17</sup> She requested an exemption but was refused. The Claimant wilfully refused vaccination knowing this would lead to misconduct, which amounts to misconduct. In the EI context, the Commission says, misconduct means the Claimant did something that she knew would lead to her dismissal.

[24] The Commission submitted it concluded the Claimant's breach of the employer contract, by failing to comply with the COVID vaccination policy, constituted misconduct within the meaning of the EI Act because the Claimant was aware of the policy and that she would be dismissed if she failed the policy. It says she made a wilful choice to remain unvaccinated, which violated the employer policy. The Commission submitted, in the case at hand, the Claimant was aware of the policy and the repercussions if she

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<sup>16</sup> The Social Security Tribunal is an administrative tribunal independent of the Canada Employment Insurance Commission.

<sup>17</sup> See pages GD4-3 and GD4-4

decided not to follow it. It says she ought to have known that her refusal to be vaccinated would result in termination.

## **Analysis**

### **– Matters outside my jurisdiction**

[25] It is not my role to determine if the employer's policy or actions were reasonable or a violation of the Claimant's collective agreement.<sup>18</sup>

[26] There are other tribunals where these claims and allegations can be made and decided.

[27] It is also not my role 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. This is because the test for "just cause" as used in those proceedings, and in arbitrations, is different from the legal test applied when deciding whether misconduct has occurred within the meaning of the EI Act.<sup>19</sup>

[28] It is equally not my role to determine the safety or efficacy of the COVID-19 vaccines.

### **– Matters within my jurisdiction**

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

[30] To summarily dismiss the Claimant's appeal, the law says I must be satisfied that her appeal has no reasonable chance of success.<sup>20</sup>

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<sup>18</sup> The courts have said that in cases for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration. See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282.

<sup>19</sup> The legal test for misconduct within the meaning of the EI Act is explained below. It does not require a determination as to whether suspension and / or dismissal was the appropriate penalty.

<sup>20</sup> See subsection 53(1) of the DESD Act



[31] The issue is whether it is plain and obvious on the record that the appeal is bound to fail.

[32] 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.<sup>21</sup>

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

[34] For the purposes of the EI Act, for me to find misconduct, I would have to see that the Claimant engaged in wilful conduct that she knew or should have known could get in the way of carrying out her duties to her employer and she knew there was a real possibility of being let go because of that.<sup>22</sup>

[35] Wilful conduct is conduct that is conscious, deliberate or intentional.<sup>23</sup> There does not have to be wrongful intent for behaviour to be misconduct under the law.<sup>24</sup>

[36] The employer's policy required that all employees provide proof of full vaccination against COVID-19 or proof of a medical exemption. Employees who had not provided evidence of a first dose by November 25, 2021 were placed on an unpaid leave of absence. If evidence of Dose 1 was not provided by December 3, 2021 employment would be terminated. The Claimant asked for an exemption but was refused. She did not receive the first dose of the vaccine by the required date. The appeal file shows the Claimant, by refusing to get vaccinated, did not comply with the policy. She was aware of the employer's policy. She knew that she could be suspended from her job and later lose her employment if she did not comply with the policy, and as a result, not be able to carry out her employment duties. There is no

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<sup>21</sup> The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.

<sup>22</sup> This is set out in the Federal Court of Appeal case of *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

<sup>23</sup> See *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

<sup>24</sup> See *Attorney General of Canada v. Secours*, A-352-94

evidence that could be presented at a hearing that would change this. It is clear to me that, on the record, the Claimant's appeal has no reasonable chance of success. As a result, I must dismiss the Claimant's appeal.

## **Conclusion**

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

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