Citation: *BH v Canada Employment Insurance Commission*, 2022 SST 1240

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (470557) dated May 17, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Decision date:	October 18, 2022
File number:	GE-22-1902

Decision

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

[2] The Claimant has made no arguments and provided no evidence that would let me allow his appeal. The Commission has proven the Claimant was suspended from his job because of misconduct. The Claimant knew of employer's vaccination policy requirements, the consequences for non-compliance and he failed to comply.

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

Overview

[4] The Claimant's employer adopted a mandatory COVID-19 vaccination policy. All employees were required to be fully immunized for COVID-19 by December 1, 2021. Exceptions based on verified medical or religious reasons could be allowed.

[5] The Claimant applied for an exemption based on religious grounds. The employer denied his request for an exemption. The Claimant remained unvaccinated and was suspended without pay.

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

[7] The Claimant disagrees with the Commission's decision. He says he has never experienced an incident of "misconduct" while working for his employer. The Claimant says he followed the policy by asking for a religious exemption. He says, the fact that the company denied his request for exemption and suspended him without pay due to him not complying with what is possibly a human and employment rights violation to

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

take an experimental medical procedure without his fully informed consent is unprecedented. He says that to be accused by his employer and now Service Canada of misconduct for not complying with a mandatory experimental medical procedure is in his mind an egregious over-reach given his own personal work history and work ethic notwithstanding that his religious beliefs/rights which he believes have also been violated in this case. The Claimant believes that there is misconduct on the part of his employer and that Service Canada is perpetuating that misconduct by denying him EI benefits.

Matters I have to consider first

– The employer is not an added party

[8] 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.

[9] 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

[10] 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]

[11] Tribunal staff sent a letter to the Claimant on September 21, 2022. In this letter, I explained why I was considering summarily dismissing his appeal. I asked him to respond to the letter by October 5, 2022.

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[2] Section 22, *Social Security Tribunal Regulations*

[12] The Claimant responded to my letter and I have considered his response in reaching my decision.

Analysis

[13] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.[3]

[14] 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.[4]

[15] 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.[5]

[16] 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]

[17] To answer the question of whether the Claimant was suspended from his job because of misconduct, 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 law considers that reason to be misconduct.

[18] Misconduct is not defined in the EI Act. But the courts have come to a settled definition about what the term means.

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[3] Section 53(1) of the *Department of Employment and Social Development Act*
[4] 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.
[5] The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.
[6] Sections 30 and 31 of the *Employment Insurance Act* (EI Act)

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[7] Misconduct also includes conduct that is so reckless that it is almost wilful.[8] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[9]

[20] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[10]

[21] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[11] A deliberate violation of the employer's policy is considered to be misconduct.[12]

[22] The conduct of the employer is not a relevant consideration under section 30 of the EI Act. Rather, the analysis is focused on the Claimant's acts or omissions and whether that amounts to misconduct within the meaning of section 30 of the EI Act.[13]

[23] The questions of whether the Claimant's employer violated the provincial human rights code, the labour code or constructively dismissed the Claimant are matters for other forums.[14] I am not making decisions about whether the Claimant has any course of action under the provincial human rights code or any other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act.

[24] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the

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[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[9] See *Attorney General of Canada v Secours*, A-352-94.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314
[12] 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
[13] *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107
[14] *Canada (Attorney General) v. McNamara*, 2007 FCA 107

Commission has to show it is more likely than not the Claimant was suspended and from his job because of misconduct.[15]

[25] The Commission says it concluded the Claimant's refusal to be vaccinated as per the employer's mandatory policy constitutes misconduct within the meaning of the EI Act because the Claimant was aware of the policy and understood that failure to comply could lead to the termination of his employment. It says there is a direct correlation between the Claimant's refusal to comply with the vaccination policy and the suspension of his employment. The Commission says the Claimant's refusal to comply with the policy is wilful and deliberate and therefore proves misconduct within the meaning of the EI Act.

[26] In his appeal to the Tribunal, the Claimant wrote that he had always followed and complied with the employer's policy and had never been accused or reprimanded for misconduct except for this "one" instance. He followed the company's policy that allowed him to request an exemption based on religious grounds. He wrote that once his religious exemption request was denied, he was placed in the awkward position of either denying his religious beliefs by accepting the mandatory medical procedure to keep his employment, or, sticking to his religious beliefs, and accepting the fact that his non-compliance with the policy, was possibly going to result in discipline up to and including termination. The Claimant wrote that being accused of misconduct by his employer and Service Canada was an egregious overreach given his work history and work ethic notwithstanding his religious beliefs/rights which he believes have also been violated in this case. The Claimant believes that there is misconduct on the part of his employer and that Service Canada is perpetuating that misconduct by denying him EI benefits.

[27] In his reply to the Tribunals' Notice of Intention to Summarily Dismiss the appeal, the Claimant wrote that he did not abandon his job because his employer participated in constructive dismissal on December 22, 2021. The Claimant wrote that he did not deliberately or with wanton disregard his employer's COVID-19 policies as they

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[15] *Minister of Employment and Immigration v. Bartone*, A-369-88.

pertained to exterior health and safety matters. He argued had rapid testing been required of him to perform his duties he most likely would have participated even though the process was highly invasive, biased and selective. The Claimant stated that it was only when the company imposed an internal safety measure that went against his bodily autonomy that he asked for alternative measures, which in his case included submitting a religious exemption request, which was denied with a form letter.

[28] The Claimant argued the new safety policy pushed a significant change in work duties that included injecting an emergency uses authorized vaccine for the sake or employment. The Claimant argued that his employer participated in undue pressure by an employer on the claimant to leave their employment by constantly harassing unvaccinated employees such as himself to get vaccinated. The Claimant wrote his employer participated in constructive dismissal. He said that his employer substantially changed the terms of his employment contract without his agreement by forcing a vaccination policy. He wrote the number of days of suspension was not stated although there is a 30-day maximum suspension length in the employer's policies. The Claimant took the company's failure to contact him after 30 days to be a dismissal. He was contacted by his employer in March 2022 to come back to work but did not respond on the advice of his lawyer.

[29] In support of his position, the Claimant submitted a letter dated June 6, 2022 from the Justice Centre for Constitutional Freedoms to the Minister of Employment, Workforce Development and Disability Inclusion with an attached briefing note of the same date.

[30] I am not questioning the authenticity of the Claimant's beliefs. As noted above, it is not my role to determine if the employer's refusal of the Claimant's exemption request was a violation of the provincial human rights code or any other laws.[16] It is also not my role to determine if he was constructively dismissed as that term relates to Canadian employment law and common law. This is because the test for "just cause" as used in

[16] 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.

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.[17] There are other Tribunals and venues where the Claimant can pursue these claims.

[31] When I apply the law and the legal tests above, I can only conclude that the Claimant's appeal has no reasonable chance for success. This is because the Claimant lost his job due to his misconduct and there is no argument or evidence he could present that would lead me to a different conclusion.

[32] The appeal file shows me that the Claimant's employer gave notice of a policy on September 23, 2021. The policy was applicable to all employees. It required that effective December 1, 2021 all employees be fully vaccinated for COVID-19. The policy provided for an exemption to the policy for verified medical or religious reasons. After December 1, 2021 rapid testing would not be accepted as an alternative to immunization.

[33] The appeal file shows me that the employer issued a Mandatory Vaccination Policy on September 28, 2021. The policy stated that all employees had to be fully vaccinated by December 1, 2021. Employees who did not provide proof of immunization or were not yet fully immunized or unable to provide proof of approved rapid test results were not permitted at the work site.

[34] The appeal file shows the employer issued flow charts showing the application of the COVID-19 policy to office staff and field office staff, operators, contract operators and PSAs. The flow charts are dated September 28, 2021. The flow charts show that where an employee does not provide proof of immunization they will not be permitted on the company property. The charts also show where an employee did not qualify for an exemption (medical or religious) and refused to provide immunization records or get immunized, disciplinary action processes would be followed.

[17] The legal test for misconduct within the meaning of the EI Act is explained above. It does not require or involve a determination to whether suspension and / or dismissal was the appropriate penalty.

[35] A Frequently Asked Questions (FAQ) document was also issued by the employer on September 28, 2021. The FAQ stated that requests for exemption or a reasonable accommodation had to be submitted by November 15, 2021 and specified the information required for requests based on religious grounds. The FAQ stated that those who choose not to comply will be faced with progressive disciplinary measures on a case by case basis. The FAQ stated that work from home arrangements were temporary and that refusal to disclose vaccination status or to be vaccinated is not an acceptable reason for continuation of work from home.

[36] The appeal file shows me the Claimant submitted an Immunization Exemption form dated November 14, 2021. He requested a religious exemption. The employer denied the request in a letter to the Claimant dated November 23, 2021. The letter asked the Claimant to reconsider his position and "comply with the Policy, which will be strictly enforced with respect to your employment."

[37] The appeal file shows the employer sent the Claimant a letter on December 21, 2021. The letter stated the Claimant was not compliant with the employer's COVID-19 Policy immunization requirements. The employer suspended the Claimant without pay effective December 22, 2021 because he was not compliant with its policy.

[38] The appeal file shows the Claimant spoke to a Service Canada officer on April 5, 2022. He told the officer that it went against his religious beliefs to be vaccinated. He confirmed that he had been warned about needing to be vaccinated. He thought it was around September 23, 2021. The Claimant said that the employer had told the employees in May 2021 that there would be no vaccine mandate but then they changed their minds in September. He said that it was made very clear to him and other employees what would happen if they refused to comply with the COVID-19 vaccination mandate.

[39] The law says that I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.

[40] The Claimant was aware of the employer's policy and the employer's expectation that all employees were required to be fully vaccinated for COVID-19 by December 1, 2021 unless they had an approved exemption to vaccination. The policy FAQ stated that non-compliance would result in progressive discipline. The Claimant applied for an exemption to vaccination. His employer notified him on November 23, 2021 his request for an exemption to vaccination was denied. In that same letter the employer asked the Claimant to reconsider his position and to comply with the policy "which will be strictly enforced with respect to your employment." The Claimant knew that, in the absence of an approved exemption, he would face progressive discipline if he did not comply with the employer's policy. He remained non-compliant with the employer's policy and was suspended without pay on December 22, 2021.

[41] The evidence tells me the Claimant's actions led to him not working. He acted deliberately. He knew that his refusal to provide proof of having received the COVID-19 vaccine, in the absence of an approved exemption to vaccination from his employer, was likely to lead progressive discipline and him not working due to being suspended for not complying with the employer's policy.

[42] If I accept the facts as true, there is no argument the Claimant could make that would lead me to a different finding. There is no evidence that he could provide that would change these facts. As a result, it is clear to me that, the Claimant's appeal has no reasonable chance of success and his appeal is bound to fail, no matter what arguments or evidence he could bring to a hearing. This means I must summarily dismiss his appeal.

Conclusion

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

Raelene R. Thomas

Member, General Division – Employment Insurance Section