



Citation: *RE v Canada Employment Insurance Commission*, 2022 SST 1542

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

Decision

Appellant: R. E.

Respondent: Canada Employment Insurance Commission
Representative: Joshua Toews

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (454439) dated March 8, 2022
(issued by Service Canada)

Tribunal member: Paul Dusome

Type of hearing: Teleconference
Hearing date: September 7, 2022
Hearing participant: Appellant

Decision date: September 16, 2022
File number: GE-22-1086

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and then lost her job because of misconduct (in other words, because she did something that caused her to be suspended, then to lose her job). This means that the Claimant is disentitled and disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended, then dismissed from her job. The Claimant's employer said that she was suspended then let go because she did not comply with a mandatory COVID-19 vaccination order (the Order) from the Provincial Health Officer (PHO).

[4] The Claimant doesn't dispute that this happened. She says that her non-compliance with the Order is not misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant was suspended and lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled and disqualified from receiving EI benefits.

Matter I have to consider first

The Claimant raised a challenge under the *Canadian Charter of Rights and Freedoms* (Charter)

[1] The Claimant relied in part on the Charter in her appeal disputing the Commission's decision. She filed a Charter Challenge Notice as permitted. That Notice allows for a preliminary assessment of whether there are sufficient grounds to have this

¹ Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits. Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

appeal proceed as a Charter challenge. This requires the Claimant to show two things. First, identify a specific provision of the EI legislation as violating the Charter. Second, raise the outline of a constitutional argument. If the Claimant was successful in her Notice, this appeal would be treated as involving a challenge to the *Employment Insurance Act* under the Charter. Such a challenge requires extensive evidence and legal submissions, as well as notice to the 14 Attorneys General in Canada, who are then allowed to participate in the appeal. The appeal would also be assigned to a different member of the Tribunal, who is designated to handle Charter appeals.

[6] After assessing the Claimant's Notice, and the submissions made by the Commission, I issued a written decision that the Notice did not meet the requirements to raise a constitutional issue in this appeal. This appeal continues as a regular appeal, without dealing with the Charter.

Issue

[7] Was the Claimant suspended, then dismissed because of misconduct?

Analysis

[8] To answer the question of whether the Claimant suspended, then dismissed because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended, then dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended, then dismissed?

[9] I find that the Claimant was suspended, then dismissed because she did not take the COVID vaccine as required by the mandatory Order.

[10] The Claimant does not dispute that was the reason for the suspension and dismissal. The Claimant conceded in testimony that this was the reason. I see no evidence to contradict that non-compliance with the Order was the reason. I find that the Claimant was suspended then dismissed for non-compliance with the Order.

Is the reason for the Claimant's suspension then dismissal misconduct under the law?

[11] The reason for the Claimant's suspension then dismissal is misconduct under the law.

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

[13] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.⁵

[14] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.⁶

[15] The above factors for establishing misconduct for EI purposes apply to both suspension and dismissal.

[16] The Commission says that there was misconduct because all four of the factors in the misconduct definition have been met. The Claimant's non-compliance was wilful. She knew that if she was not vaccinated by a certain date, she could not continue to work. That impaired her ability to carry out her duties. She knew the consequences of non-compliance: suspension then dismissal. Her non-compliance caused the suspension and dismissal.

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[17] The Claimant says that there was no misconduct because the mandate compelling taking the vaccine violated her religious faith. She was willing to agree to alternative efforts to keep herself and others safe, such as periodic testing. She had caught COVID, and recovered. She therefore has natural immunity. There were serious side effects from the vaccine.

[18] I find that the Commission has proven that there was misconduct, because it has proven the four factors that comprise misconduct for EI purposes.

– **Findings of fact relating to the issue of misconduct**

[19] The Claimant worked as a registered nurse for a provincial health authority. The province's PHO had issued the Order imposing a mandatory COVID-19 vaccination policy on all health care providers and all health care workers. The Order required that employees be fully vaccinated against COVID by October 25, 2021, or take steps toward being fully vaccinated by November 14, 2021. Another requirement of the Order was that the employer could not permit unvaccinated employees to work. The employer was required to comply with the terms of the Order. There was no evidence that the employer had its own separate vaccination policy. The employer did interpret the Order to authorize the suspension or dismissal of staff who did not comply with the mandatory vaccination requirement in the Order. The employer suspended then dismissed the Claimant for non-compliance with the Order. The Order provided for an exemption from vaccination on medical grounds only. The Claimant did not apply for an exemption. She did not receive the COVID vaccination.

[20] The documentary evidence in support of the Order, and of its contents, is incomplete. There is no copy of the Order. There is a five-page Guideline from the provincial Ministry of Health, about the process of applying for an exemption from vaccination. It is dated October 8, 2021, but deals only with the exemption process. The only ground for requesting exemption was "that the health of the person would be seriously jeopardized if the person were to comply with the Order." The criteria for satisfying those grounds were extremely stringent. There is no copy of the employer's written COVID policy, if it had one. There is a letter dated October 15, 2021, from the

employer to all employees. Only the first page of this letter is present. That page states the deadline of October 25 to receive at least one dose of the vaccine in order to continue working. That page warns that if an employee has not received the first dose of the vaccine before October 26th, “You will not be permitted to work, on-site or remotely”. There is an email from the employer to the Claimant, dated October 26, 2021, containing a letter to her dated October 22, 2021. The letter provides an important update about mandatory vaccinations. It refers to the Order from the PHO on September 13, 2021, requiring all employees in the health sector to be fully vaccinated against COVID by October 26, 2021. It refers to an update to the Order on October 14, 2021, allowing staff to continue working if they received the first dose of the vaccine by October 25th, received the second dose within 28 to 35 days after the first dose, and continued to follow preventive measures until seven days after receipt of the second dose. The letter stated that unless staff are vaccinated as required by the Order, or have an approved or pending medical exemption, they will not be able to work from October 26, 2021, onward. It further stated, “If you do not receive Dose 1 during the period of unpaid leave your employment will be terminated.” The last document is the November 22, 2021, letter terminating the Claimant’s employment. The Claimant provided all of those documents to the Commission. The only input from the employer was a conversation the Commission had with the employer’s Labour Relations Assistant. That input was stating the reason for termination set out in the termination letter, that is, non-compliance with the Order regarding mandatory vaccination.

[21] In the absence of a written policy from the employer, I find that the employer’s policy consisted of the Order, and the employer’s interpretation of the Order relating to leave of absence and termination of employment.⁷

[22] The Claimant was aware of the Order. She had read it, but was unsure when. The Order did not say anything about termination of employment. Prior to October,

⁷ The Order required an employer to not permit unvaccinated staff to work after October 25, 2021, unless the staff member complied with the requirements for getting both doses before that date, or at least one dose by November 14, 2021. The employer interpreted that to mean leave of absence starting October 25th, and termination after November 14, 2021. If unvaccinated staff cannot be permitted to work under the Order, then leave of absence or dismissal are logical extensions of not being permitted to work.

there was nothing in writing from the employer about vaccination. There was information that the employer recommended being vaccinated, but nothing about consequences for not being vaccinated. There was word that the vaccine might be mandatory. Management at the hospital was not sure whether employees would be dismissed for non-compliance. Her manager expressed that uncertainty in a meeting with her before the October 25th deadline. She understood from the employer's letter of October 15, 2021, that she would not be allowed to work or be at the hospital if she did not have the first dose by October 25th. Her manager confirmed that to her in a meeting the Friday before October 26th. At that same meeting, the manager did tell the Claimant that there was the possibility of being terminated from her job. She did receive the employer's letter dated October 22, 2021, by email on October 26th. She did read it. She thought that termination of employment was an idle threat or a scare tactic. Co-workers, and some managers, thought it an idle threat. That was based on the hospital being very short-staffed. The hospital had at times been at 125% of capacity prior to COVID. The pandemic only worsened that, due to increased intake and staff absences from illness or stress.

[23] The Claimant did not request an exemption from the vaccination requirement. She felt she did not have valid medical grounds for an exemption. There was nothing allowing an exemption on religious grounds. She did not receive the COVID-19 vaccine.

– **Ruling on misconduct**

[24] The Commission has proven the four factors that make up misconduct for EI purposes.

[25] First, the non-compliance with the mandatory vaccination requirement was wilful. The Claimant's decision not to take the vaccine was conscious, deliberate and intentional. She made the choice based on her religious faith. The Claimant said that her conduct was not wilful or malicious. It was founded on her faith. Malice is not part of the EI definition of misconduct, as noted above. With respect to being founded on her faith, the Claimant was presented with a dilemma: from one side, pressure to take

the vaccine to keep her job; from the other side, pressure to abide by the tenets of her faith. The Claimant resolved the dilemma by choosing one side over the other. Despite opposing pressures, she made the intentional, deliberate and conscious choice to side with her faith, and to refuse the vaccine. That meets the definition of wilfulness.

[26] Second, the Claimant was aware that there was a real possibility of being suspended or let go because of her non-compliance with the vaccination requirement. The evidence shows that the employer initially did a poor job of communicating to the staff the requirements of the Order, and the requirements relating to leave of absence and termination of employment based on its interpretation of the Order. The definite date for the employer communicating the possibility of a leave of absence was the emailed October 15, 2021, letter to all employees. The Claimant received, read and understood that letter. The letter was clear. If an employee had not received the first dose of the vaccine before October 26th, "You will not be permitted to work, on-site or remotely..." A manager had warned the Claimant about suspension in their meeting the Friday before the leave of absence started. The Claimant was aware by October 15, 2021, at the latest that she would be suspended.

[27] In relation to termination of employment, the evidence of the possibility of dismissal is initially ambiguous. There was nothing in evidence from the employer respecting termination until its letter to the Claimant dated October 22, 2021, but emailed to her on October 26th, when she was already suspended. That letter was clear: "If you have not received Dose 1 by October 25, you will be placed on an unpaid leave of absence from October 26, 2021, until November 14, 2021. If you do not receive Dose 1 during that period of unpaid leave your employment will be terminated." That statement contradicts her testimony that she had not been warned about the possibility of dismissal. The letter continued with the steps necessary to become fully vaccinated in order to preserve her employment. Initially, staff and some managers thought that termination of employment was an idle threat, a scare tactic. The Claimant also testified that she did not know for sure that she would be fired until November 22nd, when it happened. On October 26th, the employer placed the Claimant on an unpaid leave of absence. At that point, the Claimant should have known that termination of

employment for failing to take the vaccine was a real possibility, not an idle threat. She found herself on an unpaid leave of absence. She was told the steps needed to preserve her job, and the deadline of November 14th for taking the first step. She was told the consequence of failing to take that first step by November 14th: termination of employment. She should have known by October 26, 2021, at the latest that dismissal was a real possibility.

[28] Third, the Claimant knew or should have known that her non-compliance could get in the way of carrying out her duties toward her employer. It would be obvious to the Claimant that if she was suspended or dismissed, she would not be allowed at the hospital, and so she could not carry out any of her duties toward the employer. In addition, the employer was required under the Order to ensure that staff were vaccinated. Not being vaccinated as required was a breach of a duty owed to the employer. It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.⁸ The Claimant testified that her ability to carry out her employment duties was not impaired. Her work performance was not affected, she had great work relations, and she was willing to take other precautions to protect patients and co-workers, so that she presented no more of a health hazard than vaccinated staff. Those are valid points to make. But they overlook the fact that under the Order, she could not be present in the hospital to carry out her duties. Her personal abilities may not have been affected. But her ability to go to work to carry out her duties was suspended, then ended. It was her non-compliance that got in the way of carrying out her duties toward her employer. Had she complied, she would have continued working.

[29] Fourth, the Claimant's non-compliance with the vaccine requirement was the cause of her being suspended, then dismissed. She conceded this in her testimony.

[30] In ruling on the misconduct issue, I have not addressed a number of the reasons the Claimant advanced in support of her appeal. She said that there was no

⁸ *Canada (Attorney General) v Bellevance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

misconduct because the mandate compelling taking the vaccine violated her religious faith. She was willing to agree to alternative efforts to keep herself and others safe, such as periodic testing. She had caught COVID, and recovered. She therefore has natural immunity. There were serious side effects from the vaccine.

– **Response to the Claimant’s reasons that have not been addressed in the ruling**

[31] In assessing these reasons, the starting point of the analysis is the limited authority of the Tribunal in deciding EI appeals. Unlike the superior courts, the Tribunal does not have wide-ranging jurisdiction or authority to deal with most factual or legal issues that may be presented to it. The General Division EI Section of the Tribunal only has jurisdiction to deal with a specific reconsideration decision made by the Commission.⁹ In relation to an appeal from that specific decision, the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.¹⁰ That limits what the Tribunal can do in EI matters to reviewing decisions the Commission makes under the *Employment Insurance Act* and its regulations. The Tribunal General Division EI section has to work within that framework.

[32] I do not have the jurisdiction to decide whether the Claimant has natural immunity to COVID because she caught the virus and recovered. Nor do I have the authority to decide how effective the vaccines may be, or whether there are serious side effects from the vaccine. So I cannot rule on whether the vaccine confers immunity on those who take it, or whether there is no proof that the vaccine works, or whether there is no proof that the Claimant presented a risk of spreading COVID to others. The Claimant’s remedy for these matters lies with the courts.

[33] The Claimant says that she was willing to agree to alternative efforts to keep herself and others safe, such as protective equipment and periodic testing. Employers have wide-ranging authority to make policies for their employees. As noted above, the

⁹ *Employment Insurance Act*, sections 112 and 113.

¹⁰ *Department of Employment and Social Development Act*, section 54(1).

employer was compelled to follow the Order as its own policy, with the addition of leave of absence and dismissal as interpretations of the Order's requirement that the employer not permit unvaccinated staff to continue working. The employee is bound by those policies. The employer also has the right to amend policies. That right answers the Claimant's argument that the vaccine requirement was not part of her initial contract so that she does not have to comply with it. She does have to comply with the vaccination policy. 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. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.¹¹

[34] The Claimant says that the employer should have accommodated her by allowing her to continue working with protective equipment and frequent testing for COVID. It is not the role of the Tribunal to modify the employer's policy. The Tribunal's jurisdiction is to rule on the individual appeals it hears, within the context of the EI law. That jurisdiction does not extend to passing judgment on the broader application of employers' policies or contract terms. I cannot rule that an employer should have done something different in its policies. Nor does that jurisdiction extend to giving a ruling that would alter an employer's policy, or by extension, a PHO Order. The Claimant is implicitly asking the Tribunal to modify the Order's term that unvaccinated employees are not permitted to work, and the employer's interpretation respecting suspension and dismissal. The amendment would change the prohibition of the unvaccinated from working, to allow unvaccinated employees to continue working subject to the use of protective equipment and regular negative COVID tests. I cannot do that.

[35] The Claimant bases her main argument on her religious faith. She says that her religious reasons should be accepted. Her faith does not impair her ability to do her job. Her belief is not misconduct. It was wrong to focus on her, and not on the employer. She was not disobeying the employer, she was asking for an exemption based on religious faith. She was not willing to create a breach between herself and God by

¹¹ *Canada (Attorney General) v Marion*, 2002 FCA 185.

taking the vaccine. It is her faith that has been used to deny her EI benefits. That is wrong. The Commission erred in failing to taking her religion into account in making its decision.

[36] The first three items (her ability to do her job, there was no misconduct, it was wrong to focus on her and not on the employer) have been dealt with in the preceding paragraphs. With respect to not disobeying the employer, and asking for an exemption based on faith, the evidence does not support that. The Order (which legally the employer had to enforce) required that she be vaccinated, she was not vaccinated, therefore she disobeyed the employer. With respect to asking for an exemption based on faith, she did not seek any exemption from the employer at any time. She did discuss her faith with the employer. She only raised the exemption issue with the Commission, and now with the Tribunal. This does not succeed, because the Claimant is asking the Tribunal to amend the Order to include an exemption on religious grounds. As noted above, the Tribunal does not have the authority to amend the Order.

[37] The main part of the Claimant's argument is that the Commission's decisions are illegal, and contrary to the Supreme Court of Canada's statements on religious freedom. She was not willing to create a breach between herself and God by taking the vaccine. It is her faith that has denied her EI benefits. The Commission erred in failing to taking her religion into account in making its decision. The Commission's decisions are illegal, and contrary to the Supreme Court of Canada's statements on religious freedom. That argument does not succeed. The argument hinges on a quote from a Supreme Court of Canada decision.¹² The quote is the following:

One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or

¹² *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295. Though this argument appears in the Claimant's Charter Challenge Notice (GD9-6), it is relevant to the Claimant's argument in this non-Charter appeal.

the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

The quote sets out a broad understanding of religious freedom that is initially supportive of the Claimant's position. But the last sentence qualifies that broad understanding with the words "such limitations as are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others". In the case of the COVID pandemic, the Claimant's religious freedom is subject to limitations, such as the Order, to protect public safety, order and health, and to protect the rights and freedoms of others.

So, was the Claimant suspended, then dismissed because of misconduct?

[38] Based on my findings above, I find that the Claimant was suspended, then dismissed because of misconduct.

Conclusion

[39] The Commission has proven that the Claimant was suspended, then dismissed because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits for the period of her suspension, from October 26 to November 19, 2021, and is disqualified from receiving EI benefits starting November 21, 2021.

[40] This means that the appeal is dismissed.

Paul Dusome
Member, General Division – Employment Insurance Section