



Citation: *RD v Canada Employment Insurance Commission*, 2022 SST 1349

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

Decision

Appellant: R. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (463860) dated April 12, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: September 13, 2022

Hearing participant: Appellant

Decision date: September 20, 2022

File number: GE-22-1505

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because he was suspended from his job due to his own misconduct¹.

Overview

[3] The Claimant worked as a crew facility technician for X (the employer). At the time of his suspension, the employer was a subcontractor on a project for another corporation, X. The Claimant worked on this project. On October 14, 2021, X instituted a mandatory Covid-19 vaccination policy, although the employer did not. X's policy required everyone working on the project to be fully vaccinated against Covid-19 – *or on an approved medical or religious exemption* – by November 15, 2021. If they did not comply with the policy, they would not be allowed to work on the project after November 15, 2021.

[4] The Claimant was advised of the policy. He did not want to comply with the policy by being vaccinated, so he asked for an exemption on religious grounds². The employer forwarded his exemption request to X, who denied it. Since the Claimant was neither vaccinated nor granted an exemption by the November 15, 2021 deadline, the employer placed him on a temporary leave of absence without pay.

¹ That is, misconduct as the term is used for purposes of employment insurance (EI) benefits. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.

² The Claimant asked for an accommodation based on his religious beliefs so that he could be exempted from X's COVID-19 vaccination requirements. His request was first made on November 1, 2021 by E-mail (at GD3-31); and then formally on November 9, 2021, when he completed a Religious Accommodation (Covid-19) Request Form (at GD3-32 to GD3-33).

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that he was suspended from his job due to his own misconduct³. This meant he could not be paid any EI benefits⁴.

[6] The Claimant asked the Commission to reconsider. He admitted that the employer was a subcontractor of X, and that he worked on the project that fell under X's mandatory Covid-19 vaccination policy. But he argued that the employer should have accommodated him by allowing him to work from home⁵. The Commission was not persuaded, and maintained the disentitlement on his claim. He appealed that decision to the Social Security Tribunal (Tribunal).

[7] I must decide whether the Claimant was suspended from his job due to his own misconduct. To do this, I have to look at the reason for his suspension, and then determine if the conduct that caused his suspension is conduct the law considers to be "misconduct" for purposes of EI benefits.

[8] The Commission says the Claimant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with it after his request for an exemption was denied. He knew he would be placed on an unpaid leave of absence by making this choice – and that's what happened. The Commission says these facts prove the Claimant was suspended due to his own misconduct, which means he cannot receive EI benefits.

[9] The Claimant disagrees. He says he made a personal choice not to be vaccinated for religious reasons, and argues that he should have been accommodated

³ Where an employer chooses to place an employee on leave without pay rather than imposing a suspension or termination, the unpaid leave of absence will be considered the equivalent of a suspension *if the reason for the leave is considered misconduct*. In the present case, the Commission determined that the reason for the Claimant's unpaid leave of absence (namely, his non-compliance with X's mandatory vaccination policy following the denial of his exemption request) was misconduct and, therefore considered his separation from employment to be a suspension.

⁴ Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension.

⁵ See Supplementary Records of Claim at GD3-99 and GD3-101. But see also employer's statements in Supplementary Record of Claim at GD3-102, and X's statements in E-mail at GD3-26 re: Claimant's ability to work from home.

with an exemption on that basis. He also says the employer failed to follow its own accommodation process, and that the denial of his request for accommodation was a violation of his Human Rights.

[10] I agree with the Commission. These are my reasons.

Preliminary Matters

[11] I initially considered summarily dismissing the Claimant's appeal.

[12] The law says I **must** dismiss an appeal summarily (which means without a hearing) if the appeal has no reasonable chance of success⁶. This means I must consider whether it is plain and obvious on the record that the appeal is bound to fail⁷.

[13] The Tribunal's own regulations say that before summarily dismissing an appeal, I must give the Claimant notice in writing and allow a reasonable period of time to make submissions⁸.

[14] On July 12, 2022, the Claimant was advised of my intention to summarily dismiss his appeal (GD08). He was given until August 5, 2022 to make detailed written submissions explaining why his appeal had a reasonable chance of success.

[15] After reviewing the Claimant's response (GD09), I decided **not** to summarily dismiss his appeal, and elected to hold a hearing instead in order to clarify the Claimant's evidence and submissions. The hearing was held by teleconference on September 13, 2022.

[16] This is my decision on the merits of his appeal.

⁶ This requirement is set out in section 53(1) of the *Department of Employment and Social Development Act*.

⁷ To do this, I must ask whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing: see *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36.

⁸ This requirement is set out in section 22 of the *Social Security Tribunal Regulations*.

Issue

[17] Was the Claimant suspended from his job because of his own misconduct?

Analysis

[18] To answer this question, 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 *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Claimant suspended from his job?

[19] The Claimant was suspended because he refused to be vaccinated after his request for a religious exemption was denied, as required by the policy applicable to all individuals on the project he was working on.

[20] The employer told the Commission that:

- The Claimant was placed on an employer-initiated unpaid leave of absence due to non-compliance with X's vaccination policy⁹.
- X is the employer's client. X is itself a contractor of the Government of Canada, and adopted the federal government's policy regarding vaccination¹⁰. As a sub-contractor of X, the employer had to follow all of X's policies in order to be compliant on their work sites¹¹.
- This meant that every one of the employer's employees working on the project, excluding those who had approved medical or religious exemptions, was required to be fully vaccinated against Covid-19 by November 15, 2021¹².

⁹ The employer provided the Commission with a copy of X's Interim Covid-19 Mandatory Vaccination Policy, which was issued on October 14, 2021 (at GD3-22 to GD3-25).

¹⁰ See paragraph 1 Policy and Purpose of the Interim Covid-19 Mandatory Vaccination Policy (at GD3-22).

¹¹ See paragraph 2 Scope and Applicability of the interim Covid-19 Mandatory Vaccination Policy (at GD3-22).

¹² See Applicable dates (at GD3-26).

- The Claimant worked on the project and was subject to this policy.
- On November 9, 2021, after his request for an exemption was denied by X, the employer sent the Claimant a letter reminding him that he had to be fully vaccinated by November 15, 2021 in order to have “continued access the project site”¹³.
- The letter said the Claimant would be placed on a leave of absence without pay, effective November 15, 2021, because his accommodation request was “denied by the client” and, therefore, he was not “able to perform work on the federal X site”¹⁴.
- The letter also said that if the Claimant became fully vaccinated, he was to notify the employer of his intent to return to work a minimum of 14 days in advance of his planned return date¹⁵.
- As of January 19, 2022, the Claimant was still on the unpaid leave of absence¹⁶.

[21] The Claimant does not dispute any of this.

[22] He told the Commission that¹⁷:

- He was placed on temporary leave by his employer because they will not allow him to work without being vaccinated.
- He was aware of the mandatory vaccination policy governing the work site, and clearly understood he would be suspended without pay if he was not vaccinated – or on an approved exemption – by the November 15, 2021 deadline.

¹³ See GD3-34.

¹⁴ See GD3-34.

¹⁵ See GD3-34.

¹⁶ See GD3-53.

¹⁷ See GD3-54

- He asked for a religious exemption, but they would not hear it.

[23] At the hearing, the Claimant testified that:

- The employer didn't have a vaccination policy. Instead, the employer directed the employees who worked on the client's project to follow the client's vaccination policy.
- The employer issued a memo about this on October 19, 2021¹⁸. He received this memo.
- He worked on the client's project and understood that the employer was adopting X's policy (a copy of which was attached to the memo) for everyone on this project.
- He asked for a religious exemption, but it was denied.
- He does not want to be vaccinated for religious reasons.
- After the vaccination deadline passed, he was put on an unpaid leave of absence.
- He has not returned to work.

[24] I find that the evidence shows the Claimant was suspended from his employment because he refused to be vaccinated after his request for a religious exemption was denied, as required by the policy governing his employment.

Issue 2: Is the reason for his suspension misconduct under the law?

[25] Yes, the reason for the Claimant's suspension is misconduct for purposes of EI benefits.

¹⁸ It can be found at GD3-87.

[26] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional¹⁹. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful²⁰ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[27] The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law²¹.

[28] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended because of it²².

[29] The Commission has to prove the Claimant was suspended from his job due to misconduct²³. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

[30] The Claimant submits that he followed the employer's policies and directions to request an accommodation, so his conduct cannot be considered wilful²⁴. I do not agree.

Evidence from the Employer

[31] The October 19, 2021 memo issued by the employer (at GD3-87) states that:

- The employer "remains committed to adhering to client requirements" regarding mandatory Covid-19 vaccination policies.

¹⁹ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

²⁰ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

²¹ See *Attorney General of Canada v. Secours*, A-352-94.

²² See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

²³ The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost his job because of misconduct.

²⁴ See GD9-7.

- The employer's client, X, implemented a mandatory vaccination policy effective Oct. 14, 2021, and required all employees, contractors, sub-contractors, and visitors to adhere to it.
- The employer expected all of its employees, contractors, sub-contractors and visitors to adhere to the same policy.
- Any employee requiring accommodation due to a medical or other protected ground was responsible for requesting accommodation in accordance with the employer's Reasonable Accommodation policy.
- Accommodation requests would be dealt with on a case-by-case basis and handled in accordance with applicable human rights legislation.

[32] X's policy addressed the issue of accommodation for individuals who cannot be vaccinated. It said:

"The Company is committed to a workplace free from unlawful discrimination and harassment in accordance with the *Canadian Human Rights Act*. The Company will accommodate Covered Individuals on the basis of protected human rights grounds up to the point of undue hardship.

Covered individuals seeking accommodation are required by law to participate in the accommodation process, including, but not limited to, providing information to establish the existence of a protected ground and related restrictions. The Company may require reasonable proof of the existence and applicability of a protected ground under the *Canadian Human Rights Act*.

To discuss accommodation, eligible Covered Individuals should contact their immediate manager or Human Resources." (GD3-90)

[33] The employer told the Commission that it would **only** move forward with a Reasonable Accommodation request under its policy and process **if** the exemption request was first approved by the client²⁵.

[34] X did not approve the Claimant's exemption request²⁶.

[35] The employer's legal counsel advised it to put all accommodation requests forward to the client, as it was bound by the client's policy²⁷.

[36] It was the client's policy that determined whether an accommodation request was accepted or not, and depending on the client's decision, the employer would either look into accommodation or prepare the Leave of Absence letter. This was the employer's practice on all of its sites.

[37] The employer told the Claimant that accommodations can only be approved by the client, who declined his. The employer also directed the Claimant to reach out to his union rep because the employer does not have authority to approve accommodations²⁸.

Evidence from the Claimant

[38] The Claimant submits that his refusal to be vaccinated after his exemption request was denied is not misconduct because the employer didn't follow its own accommodation process and policy.

[39] He says that if the employer had acted properly, he would have been granted a religious accommodation instead of being put on an unpaid leave of absence.

[40] At the hearing, he testified that:

²⁵ See GD3-53. The employer also said that the type of accommodations that would be made would depend on the client's requirements and the employee's position within the company, and that each exempted employee's situation would be reviewed on a case by case basis.

²⁶ See GD-26.

²⁷ See E-mail at GD3-28.

²⁸ See GD3-36.

- The employer didn't follow its own accommodation process, as it is described in paragraph 3 of the October 19, 2021 memo (at GD3-87).
- Instead, they forwarded his accommodation request to X to decide.
- He filled out X's form (at GD3-32 to GD3-33), as the employer requested. The employer took it to X, but X "shut it down" and didn't take the accommodation request process any further.
- There was no interaction to determine whether his Human Rights accommodation request was reasonable or not.
- X referred to the Ontario Human Rights Tribunal website to say his request for accommodation was not valid – but he believes that website actually says the opposite – namely, that he should have been accommodated for religious reasons.
- Also, his situation is governed by the Canadian Human Rights Commission – not the provincial Human Rights body.
- The employer's own accommodation policy required "more discussion" and a "proper process".
- If there had been a dialogue, as he suggested on his form²⁹, it would have been clear that (a) he was making a Human Rights-based request for accommodation, and (b) he met the requirements for approval of his request to be exempt from vaccination on religious grounds.

²⁹ At Question 7, the form asks if there is any other information that the employee believes will assist in the consideration of the religious accommodation request. The Claimant answered: "Such a deep and personal topic will surely need further communication." (GD3-33).

- When he saw X's response, it said he claimed a religious exemption as part of a "religion of one"³⁰. That was an incorrect assumption about his religious views, but he was never asked for more information or invited to respond.
- He did consult his union about the denial of his accommodation request, but they refused to grieve his being put on an unpaid leave of absence. They refused to grieve "anything about Covid-19 policy".
- He understood that X's policy said that if he was not approved for an exemption and remained unvaccinated after November 15, 2021 that he'd be laid off without pay.
- But it didn't occur to him that he wouldn't be approved for a religious exemption.
- He assumed his exemption request would go through the employer's process for accommodations and that he would have been accommodated – or at least have a decision explaining why his request was denied and there would be a process for disputing that. But there was no formal decision issued, and no discussion around why his religious exemption was denied.
- Based on research he has done "after the fact", he believes he should have been accommodated under the employer's policy.
- In June 2022, he filed a complaint against the employer with the Canadian Human Rights Commission.

[41] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accepted the Claimant's request for an exemption or accommodation, or whether the penalty of suspension was too severe³¹. The Tribunal must focus on the conduct that caused the Claimant to be suspended and decide if it constitutes misconduct under the EI Act.

³⁰ See X's response at GD3-26.

³¹ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

[42] I have already found that the conduct which led to the Claimant's suspension was his refusal to be vaccinated after his request for a religious exemption was denied, as required by the policy governing his employment.

[43] The uncontested evidence obtained from the employer and the Claimant allows me to make these additional findings:

- a) the Claimant was informed of the mandatory vaccination policy and given time to comply with it.
- b) his refusal to comply with the policy after his exemption request was denied was deliberate and intentional. This made his refusal wilful.
- c) he knew his refusal could cause him to be suspended from his employment. This means he accepted the potential consequences.
- d) his refusal to comply with the policy was the direct cause of his suspension.

[44] The employer has the right to set policies for workplace safety. And as a sub-contractor, the employer is required to follow all of its client's workplace policies in order to be compliant on their work sites. This naturally includes having the client decide on requests for exemption and/or accommodation.

[45] By adopting X's policy, the employer was exercising its right to establish a policy to protect the health and safety of employees in the workplace during the pandemic.

[46] The Claimant always had the right to refuse to comply with the policy.

[47] But by choosing not to be vaccinated after his exemption request was denied, he made a personal decision that led to foreseeable consequences for his employment.

[48] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act³². My findings similarly support

³² See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

a conclusion that the Claimant's wilful refusal to be vaccinated in accordance with the policy governing his employment constitutes misconduct under the EI Act.

[49] The Claimant says his conduct was not wilful because he followed the employer's policies and directions for requesting an accommodation. This is not a persuasive argument.

[50] The Claimant may have had certain expectations about the accommodation request process, and hoped he would be granted a religious exemption to the mandatory vaccination policy prior to the November 15, 2021 deadline. But this does not diminish the fact that, by November 9, 2021, he knew his exemption request had been declined *and* had received a letter from the employer indicating he would be placed on an unpaid leave of absence if he refused to provide proof of vaccination by the policy deadline. He still chose not to comply with the policy after his exemption request was denied – and this choice makes his conduct wilful.

[51] The Claimant believes he had a "legal right" to a religious exemption (to the mandatory vaccination policy governing his employment) *and* an accommodation that would have allowed him to continue working once the employer's accommodation process was completed³³. He submits that the denial of his exemption request and the insufficient accommodation request process undertaken in his case – violated his human and constitutional rights³⁴. He says the employer failed to ensure that his request (to be identified as a working non-vaccinated employee with a religious exemption) was handled in accordance with applicable Human Rights legislation³⁵. He also says the employer did not treat him in accordance with employment standards legislation³⁶.

[52] I have no authority to decide whether the employer breached any of the Claimant's rights by putting him on a mandatory unpaid leave of absence. Nor do I

³³ See GD9-7.

³⁴ See GD6 and GD9.

³⁵ See GD9-7.

³⁶ See GD9-7.

have authority to decide if the employer's accommodation request process was proper – or whether the employer could have accommodated the Claimant in some other way.

[53] The Claimant's recourse for all of his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.

[54] I therefore make no findings with respect to any of these allegations, and the Claimant remains free to make these arguments before the appropriate adjudicative bodies and seek relief there³⁷.

[55] However, none of the Claimant's arguments (summarized in paragraphs 49-51 above) change the fact that the Commission has proven on a balance of probabilities that he was suspended because of conduct that is considered to be misconduct under the EI Act.

[56] And this means he is disqualified from receiving EI benefits.

Conclusion

[57] The Commission has proven the Claimant was suspended from his employment because of his own misconduct. This means he is disentitled to EI benefits.

[58] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section

³⁷ An example of this is the complaint the Claimant filed against the employer with the Canadian Human Rights Commission.