



Citation: *HE v Canada Employment Insurance Commission*, 2022 SST 1285

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

Decision

Appellant: H. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (466009) dated April 27, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: September 14, 2022

Hearing participant: Appellant

Decision date: October 7, 2022

File number: GE-22-1802

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because she lost her job due to her own misconduct.

Overview

[3] The Claimant worked as an Information Governance Officer and was employed by X. On September 20, 2021, the employer implemented a mandatory Covid-19 vaccination policy (the policy). The Claimant did not want to comply with the policy by being vaccinated, and asked to be exempt from the vaccination requirement for religious reasons. But the employer denied her exemption request.

[4] Starting on November 8, 2021, the Claimant was placed on an unpaid leave of absence because she failed to submit proof she had received two doses of a Covid-19 vaccine, as required by the policy. On January 7, 2022, she was dismissed because she remained non-compliant with the policy.

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that she was suspended – and subsequently dismissed – from her job due to her own misconduct¹ and could not be paid any EI benefits².

¹ See the March 16, 2022 decision letter at GD3-89.

² 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. It does not matter whether the Record of Employment says suspension or leave of absence. Where an employer unilaterally places an employee on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment if the reason for the unpaid leave is due to misconduct. In the present case, the Commission determined that the reason for the Claimant's unpaid leave of absence (namely, her failure to comply with the employer's mandatory vaccination policy) was misconduct and, therefore considered her separation from employment between November 8, 2021 and January 7, 2022 to be a suspension.

Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. Since the Commission determined that the reason the Claimant was terminated from her employment on January 7, 2022 was due to her own misconduct, she has been disqualified from EI benefits from that date. The combined effect of these decisions is that the Claimant cannot be paid any EI benefits on her claim starting from November 8, 2021.

[6] The Claimant asked the Commission to reconsider. She admitted she was suspended and then dismissed for non-compliance with the policy, but stated she was opposed to being vaccinated for religious reasons and the employer should have accommodated her by allowing her to continue working from home. She also said her union filed a grievance on her behalf. The Commission was not persuaded, and maintained the disqualification on her claim. She appealed that decision to the Social Security Tribunal (Tribunal).

[7] I must decide whether the Claimant lost her job due to her own misconduct³. To do this, I have to look at the reason for her suspension and dismissal, and then determine if the conduct that caused her job loss 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 the policy. She knew she could be suspended and then dismissed from her job by making this choice – and that’s what happened. The Commission says these facts prove the Claimant lost her job due to her own misconduct, which means she cannot receive EI benefits.

[9] The Claimant disagrees. She says she made a personal choice not to be vaccinated for religious reasons, and that following her conscience shouldn’t be considered misconduct. She also says the employer should have accommodated her request for a religious exemption, and that the policy violated the collective agreement and went beyond the provincial health directive. She expects financial support because she has paid into the EI program and the employer acted in bad faith and in a way that caused her undue hardship.

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

³ That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term “misconduct” for EI purposes is discussed under Issue 2 below.

Preliminary Matter

[11] The Commission has made 2 decisions on the Claimant's claim. In addition to refusing to pay EI benefits because the Claimant lost her employment due to her own misconduct, the Commission also decided that she was not entitled to EI benefits from November 8, 2021 to March 11, 2022 because she did not prove her availability for work. The Claimant appealed both decisions to the Tribunal, and two appeal files were established: GE-22-1802 (misconduct) and GE-22-1895 (availability).

[12] The two appeals were heard together on September 14, 2022. A separate decision on the availability issue has been rendered in GE-22-1895.

[13] This is the misconduct decision.

Issue

[14] Was the Claimant suspended and then dismissed from her job at X because of her own misconduct?

Analysis

[15] To answer this question, I have to decide two things. First, I have to determine why the Claimant was suspended and subsequently dismissed from her 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 and subsequently dismissed from her job?

[16] The Claimant was suspended – and subsequently dismissed – from her job because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[17] The employer told the Commission that⁴:

- All employees were informed on August 30, 2021 that a mandatory Covid-19 vaccination policy would be introduced, and that they would be required to have at least one dose by October 1, 2021 and a second dose by November 1, 2021.
- A further E-mail was sent on September 22, 2021 as a reminder about the policy and providing more information.
- There was a process for considering exemptions.
- The Claimant requested a religious exemption, but it was not granted.
- The Claimant failed to provide proof of vaccination by the deadlines in the policy.
- She was placed on an unpaid leave of absence after missing both vaccination deadlines, and was told she would be terminated if she was still not in compliance with the policy by January 3, 2022.

[18] The employer issued a Record of Employment stating the Claimant was on a leave of absence from November 6, 2021 and terminated effective January 7, 2022 for refusing to comply with the mandatory vaccination policy (GD3-23).

[19] The Claimant does not dispute any of this. She told the Commission that she was placed on unpaid leave and then dismissed because her employer said she was not in compliance with the policy after her religious exemption was denied⁵.

[20] I therefore find that the Claimant was suspended – and subsequently dismissed – from her job because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

⁴ See Supplementary Records of Claim at GD3-25 and GD3-92. See also the employer's documents, discussed in paragraph 28 below.

⁵ See Supplementary Records of Claim at GD3-65.

Issue 2: Is the reason for the suspension and subsequent dismissal misconduct under the law?

[21] Yes, the reason for the Claimant's suspension and subsequent dismissal is misconduct for purposes of EI benefits.

[22] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional⁶. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful⁷ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[23] The Claimant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct under the law⁸.

[24] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties towards the employer and there was a real possibility of being suspended and dismissed because of it⁹.

[25] The Commission has to prove the Claimant was suspended and then dismissed from her job due to misconduct¹⁰. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

Evidence from the Employer

[26] The employer's statements are set out in paragraph 17 above.

[27] The employer provided a list of the policy-related documents it sent to the Claimant (at GD3-64).

⁶ See *Mishibinjima v. Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v. Secours*, A-352-94.

⁹ See *Mishibinjima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁰ 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 her job because of misconduct.

[28] The employer also provided copies of the following documents:

- a) the employer's August 30, 2021 E-mail to staff announcing the decision to extend a mandatory vaccination policy to all employees (at GD3-62), which included the following statement:

“All staff will be required to provide proof of a first Covid-19 vaccination dose no later than October 1, 2021. Confirmation of both first and second doses is required no later than November 1, 2021. Individuals with valid medical or other human rights-based exemptions will be considered for appropriate accommodation within the policy.”

- b) the Covid-19 Vaccination Policy approved by the employer on September 20, 2021 (at GD3-52 to GD3-57).
- c) the employer's September 22, 2021 E-mail to all staff sharing the policy (at GD3-58), which includes the following statement:

“All Regional staff, students and volunteers – whether working onsite or working from home – are required to provide proof of at least a first Covid-19 vaccination dose approved by Health Canada or the World Health Organization (WHO) no later than October 1, 2021. Confirmation of a full series of vaccination doses received is required to be submitted to X no later than November 1, 2021 to ensure the best protection possible against Covid-19.”

- d) the employer's October 7, 2021 E-mail advising the Claimant had failed to provide proof of at least a first Covid-19 vaccination dose by the October 1, 2021 deadline and was now considered non-compliant with the policy (at GD3-49), which includes the following statement:

“Failure to comply with the policy in any way, including but not limited to failure to disclose your vaccination status, failure to complete the mandatory education session by the required date or to take steps to become fully vaccinated as outlined above following completion of the mandatory education session, may lead to discipline, up to and including termination.” (GD3-50)

- e) the employer's October 19, 2021 E-mail to the Claimant with a Final Warning to become compliant with the policy by no later than November 1, 2021 or face disciplinary action (at GD3-47).
- f) the employer's November 1, 2021 E-mail advising the Claimant her exemption request has been denied (at GD3-45), which includes the following statement:

“As your exemption has not been approved, you are expected to comply with the mandatory vaccination policy and be fully vaccinated.”

- g) the employer's November 5, 2021 E-mail re: Disciplinary Action: Unpaid Leave of Absence issued to the Claimant (at GD3-42), which includes the following statements:

“You are receiving this email because you have not submitted proof of a full Covid-19 vaccine series by the November 4, 2021 deadline.

To date, you have received several reminders via email and X, including a final warning and disciplinary letter to comply with X's Covid-19 Vaccination Policy.

As a result of your continued non-compliance, effective November 8, 2021, you are hereby placed on an unpaid LOA.” (GD3-42)

and

“If proof of a full Covid-19 vaccine series is not received by January 3, 2022, your employment will be terminated January 5, 2022.” (GD3-43)

- h) FAQs page posted by the employer on the Employee Portal (at GD3-34 to GD3-40), including the following answer to the question, ‘What will happen if I refuse to be vaccinated and do not have a valid exemption?’:

“Employees who continue to be non-compliant have received disciplinary letters placing them on an unpaid leave effective Monday, November 8, 2021.

Staff placed on unpaid leave may return to work prior to January 3, 2022 if they submit proof of full vaccination. Regular testing will be required

during the 14-day period following their second dose. **If proof of a full vaccination series is not received by January 3, 2022, non-compliant employees will be terminated, effective January 5, 2022.**" (GD3-34)

- i) the employer's January 7, 2022 Termination Email issued to the Claimant (at GD3-31), which includes the following statement:

"Despite allowing you additional time to submit proof of a full Covid-19 vaccine series beyond the deadline date of November 1, 2021, you continue to be non-compliant with the Policy as of the date of this letter. X views this as insubordination and a fundamental breach of the employment relationship. As a result, your employment with X is terminated."

Evidence from the Claimant

[29] The Claimant told the Commission she submitted a request for a religious exemption in late October and it was denied during the first week of November¹¹. She provided a copy of her October 22, 2021 exemption request (GD3-83 to GD3-88). She also said she had Covid in 2020 and believes she has a natural immunity to the virus; and that she felt it was unnecessary for her to be vaccinated because she was working from home and had permission from her supervisor to continue working from home indefinitely.

[30] The Claimant also provided the Commission with her notes from the November 16, 2021 Step 3 meeting for her grievance, the employer's grievance decision (GD3-77), and a portion of her collective agreement¹². According to the Claimant's notes, after the denial of her exemption request, she told the employer that she had to follow her conscience and would not get vaccinated with the Covid-19 vaccine.

¹¹ See Supplementary Record of Claim at GD3-65.

¹² These documents are at GD3-67 to GD3-88.

[31] During the reconsideration process, the Claimant again set out the basis for her request for a religious exemption and her objections to the policy and the employer's conduct¹³.

[32] In her Notice of Appeal, the Claimant set out 5 reasons why she believes the loss of her employment "was not a result of misconduct" (at GD2A-5):

- 1) There was no final incident or breaking point that could be construed as misconduct. The policy breached her collective agreement by going beyond Health Directive #6.
- 2) Her refusal to be vaccinated had no adverse effect on her job performance. She was never told she needed to be vaccinated to perform her job, and there was never a health risk in the workplace because she worked remotely.
- 3) She didn't breach the employer-employee relationship. She acted in good faith by submitting an exemption request. It was the employer who acted in bad faith by denying her exemption request.
- 4) There was no wilfulness on her part because she was guided by her conscience and religious leaders.
- 5) The "real reason" for her dismissal is to "increase the uptake in vaccination", which was beyond the provincial mandate and a breach of her collective agreement. The policy and "extreme disciplinary measures imposed" were "grossly disproportionate to its purpose of ensuring a safe workplace".

[33] At the hearing, the Claimant stated that she was relying on the evidence and submissions in her Notice of Appeal (GD2A and GD2B) and the additional documents

¹³ See GD3-93 to GD3-96.

she filed at GD11. I had read this voluminous material in advance of the hearing, and I have considered it in making this decision.

[34] To avoid repetition, I will now set out the parts of Claimant's testimony that were not a reiteration of what she had already said in her appeal materials.

[35] The Claimant testified that:

- The Commission should have "evaluated" the employer's actions and considered whether they were "malicious and capricious" and may have led to the conduct of hers that the Commission has labeled misconduct.
- She "counted on" the personal assurances of her immediate manager that she could carry on working from home.
- She applied for a religious exemption and fully expected it would be granted.
- She was "shocked" by her suspension.
- Her union immediately said they would grieve it.
- Her boss said, 'don't worry, go through the grievance process'.
- She is aware that "the police" changed their mandatory vaccination policy and "exceptions were made for contractors working off site". Her employer should have done the same thing.
- The non-compliance clause in the policy is "standard" in all of the employer's documents, but this was "the first time in X" that it was ever enforced.
- The employer was "capricious and malicious" during the grievance process.
- She had been working from home and her manager assured it she could continue to do so indefinitely. So she could have been accommodated.

- She's still continuing with the grievance process for both the suspension and termination.
- She also planning to make a "human rights complaint" against the employer for the denial of her religious exemption.
- She feels that the denial of her religious exemption and the failure to abide by the collective agreement was "bullying and harassment" by the employer.
- She was "counting on the collective agreement and the grievance process that the suspension and dismissal was not going to happen".
- She was put on unpaid leave on in early November 2021. In December 2021, the union told her that the "January termination" was "not going to happen" because the union was taking it arbitration and they were "fighting it".
- She was shocked with the termination.
- The employer has "never, ever" suspended or terminated "anyone" for non-compliance with a policy. She knows this because she works in governance for the employer.
- She made a personal decision "for valid religious reasons" not to be vaccinated with the Covid-19 vaccine.
- The "human rights code" says the employer has a duty to accommodate religious beliefs, especially if a person is working from home.

[36] 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 a religious exemption, or whether the penalty of being placed on an unpaid leave of absence and

subsequently dismissed on was too severe¹⁴. The Tribunal must focus on the conduct that caused the Claimant to be suspended and dismissed – and decide if it constitutes misconduct under the EI Act.

[37] I have already found that the conduct which led to the Claimant's suspension was her refusal to be vaccinated in accordance with the policy, after her exemption request was denied.

[38] The uncontested evidence obtained from the employer, together with the Claimant's evidence and testimony at the hearing, allow me to these additional findings:

- a) the Claimant was informed of the policy and given time to comply with it.
- b) her refusal to comply with the policy was deliberate and intentional. This made her refusal wilful.
- c) she knew her refusal to be vaccinated after failing to obtain an approved exemption could cause her to be suspended and then dismissed from her job. This means she accepted the consequences.
- d) her refusal to comply with the policy was the direct cause of her suspension and subsequent dismissal.

[39] The employer has the right to set policies for workplace safety. The Claimant had the right to refuse to comply with the policy.

[40] By choosing not to be vaccinated after her request for a religious exemption was denied, she made a personal decision that led to foreseeable consequences for her employment.

¹⁴ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

[41] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if that personal decision is based on religious beliefs or medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits¹⁵.

[42] These cases are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act¹⁶.

[43] I therefore find that the Claimant's wilful refusal to be vaccinated in accordance with the policy – after failing to obtain an approved exemption by the deadline in the policy - constitutes misconduct under the EI Act.

[44] The Claimant submits that her conduct was not wilful because she followed the employer's policies and directions for requesting an exemption. This is not a persuasive argument.

[45] The Claimant may have had certain expectations about the accommodation request process, and hoped she would be granted a religious exemption to the mandatory vaccination requirement prior to the November 1, 2021 deadline. But this does not diminish the fact that, by November 8, 2021, she knew her exemption request had been denied **and** had received notice from the employer that she was being placed on an unpaid leave of absence and would be terminated if she remained non-compliant by January 3, 2022. She still chose not to comply with the policy after her exemption request was denied – and this choice makes her conduct wilful.

¹⁵ See: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.

¹⁶ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[46] The Claimant believes she had a “legal right” to a religious exemption (to the mandatory vaccination requirement in the policy) *and* an accommodation that would have allowed her to continue working from home. She submits that the employer’s denial of her exemption request and the insufficient accommodation request process undertaken in her case – violated her collective agreement. She also argues that the employer’s policy had the effect of forcing her to choose between working and getting a vaccine that is contrary to her religious beliefs. She says this is “no choice”, and was a violation of her human rights and Canadian law.

[47] But I have no authority to decide whether the employer breached the Claimant’s collective agreement¹⁷ or any of her rights¹⁸. Nor do I have authority to decide if the employer’s accommodation request process was proper – or whether the employer should have accommodated the Claimant. The Claimant’s recourse for her complaints against the employer is to pursue her claims in court or before another tribunal that deals with such matters.

[48] I therefore make no findings with respect to the validity of the policy or any violations of the Claimant’s rights. She is free to make these arguments before the appropriate adjudicative bodies and seek relief there¹⁹.

[49] However, none of the Claimant’s arguments or submissions change the fact that the Commission has proven on a balance of probabilities that she was suspended because of conduct that is considered to be misconduct under the EI Act.

[50] And this means she cannot be paid EI benefits.

¹⁷ This was recently confirmed by the Tribunal’s Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

¹⁸ See footnote 15 above.

¹⁹ I note that the Claimant said her grievance is continuing and that she is planning to make a human rights complaint.

Conclusion

[51] The Commission has proven the Claimant was suspended and subsequently dismissed from her employment because of her own misconduct. This means she is not entitled to be paid EI benefits starting from November 8, 2021.

[52] The appeal is dismissed.

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