Citation: *AZ v Canada Employment Insurance Commission*, 2022 SST 1327

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (472216) dated May 31, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of shearing:	Teleconference
Shearing date:	September 29, 2022
Shearing participant:	Appellant
Decision date:	October 13, 2022
File number:	GE-22-2285

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, then dismissed from her job because of misconduct (in other words, because she did something that caused her to be suspended and dismissed from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits from November 4, 2021, to January 31, 2022, and is disqualified from receiving EI benefits from February 1, 2022, onwards.[1]

Overview

[3] The Claimant was suspended, then lost her job. The Claimant's employer said that she was suspended and let go because she did not comply with the employer's mandatory COVID-19 vaccination policy (Policy).

[4] The Claimant doesn't dispute that this happened. She does dispute that her conduct amounts to misconduct. She disputes the validity of the Policy and the denial of an exemption under the Policy on religious grounds.

[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 from receiving EI benefits during the period of her suspension (November 4, 2021, to January 31, 2022) and disqualified from receiving EI benefits after her dismissal on February 1, 2022.

Issue

[6] Did the Claimant lose her job because of misconduct?

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[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.

Analysis

[7] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended then dismissed from her job?

[8] I find that the Claimant was suspended then dismissed from her job because she did not comply with the employer's mandatory COVID-19 vaccination policy.

[9] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant was aware of the requirements of the Policy to be vaccinated or exempted. She was aware of the deadline for complying. The employer did not accept her request for an exemption on religious grounds. The Claimant did not get the vaccination. As a result, the employer first suspended, the dismissed her.

[10] The Claimant doesn't dispute that this happened. She testified that there was no other reason for the dismissal. She does dispute that her conduct amounts to misconduct. She does dispute the validity of the Policy and the denial of an exemption under the Policy on religious grounds.

[11] I find the employer suspended then dismissed the Claimant for not complying with the Policy requirements. The Claimant does not dispute that her not taking the vaccine was the reason she was suspended, then dismissed. There is no evidence before me of any other reasons for the employer's actions.

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

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

[13] 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 she law.[4]

[14] 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]

[15] 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]

[16] The Commission says that there was misconduct because it has proven the factors set out above in the definition of misconduct for EI purposes. The misconduct applies to both the suspension and the dismissal.

[17] The Claimant says that there was no misconduct for EI purposes because her response to the Policy did not amount to misconduct. She contests the validity of the Policy on a number of grounds. She contests the employer's denial of her request for an exemption on religious grounds.

[18] I find that the Commission has proven that there was misconduct, because it has proven the factors set out in the preceding paragraphs: wilfullness; impairment of carrying out duties to employers; awareness of the consequences of not complying with the Policy; and non-compliance causing the suspension and dismissal.

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[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.

[19] The Claimant raised a number of grounds for contesting the validity of the Policy. The Tribunal does not have the jurisdiction (legal authority) to deal with a number of these grounds. I will proceed to deal under the following three subheadings with findings of fact, the ruling on the misconduct issue, and the Claimant's grounds that lie outside the Tribunal's authority to consider when deciding the misconduct issue.

– **Findings of fact**

[20] The Claimant worked as a unit clerk in a hospital. She worked on-site, at a nursing station in the birthing centre. She interacted primarily with the nurses at the centre. She did not go to patients' rooms.

[21] In August 2021, the province's Chief Medical Officer of Health announced Directive 6, which required hospitals in the province to have a mandatory COVID-19 vaccine policy. The employer created the Policy in response to the Directive. The Claimant testified that she had not seen a copy of the Policy. She had received a number of emails and letters from the employer, starting in August 2021. The email of August 25, 2021, set a deadline of September 26th for staff to provide the employer with proof of vaccination. Subsequent emails delayed the date for compliance. Exemptions on medical or human rights grounds could be requested. The final date for compliance was set at November 4, 2021, by which date staff had to receive and provide proof of the first dose of the vaccine. Failure to do so would result in being put on an unpaid leave of absence effective that date. The employer had sent three notices to the Claimant between October 15 and November 1, 2021, to remind her of the deadline, of exemption, and of the unpaid leave of absence for failure to comply.

[22] The Claimant applied for an exemption from the vaccination requirement, based on religious grounds. On October 11, 2021, she submitted the employer's request for exemption form, based on her religious belief as an Orthodox Christian opposed to any medical practices that involved the use of human embryonic tissues or cells. She provided supporting documents from her church. The employer denied the request by letter on October 22, 2021. The employer said that it reviewed the request form, the Policy, Directive 6, and the Ontario Human Rights Commission policy statement on

COVID-19 vaccine mandates and proof of vaccine certificates. The employer determined that the request did not meet the threshold for the requested exemption. The employer told the Claimant verbally that the Russian Orthodox faith was not on the list of religions. The Claimant was unsuccessful in her attempts to contact the human rights authority. Her union is pursuing a grievance over her dismissal based on the Policy.

[23] The employer placed the Claimant on the unpaid leave of absence on November 4, 2021, as she had not provided any proof of vaccination. She remained on this suspension until January 31, 2022. The employer sent her a final letter of non-compliance on January 14, 2022. The letter required that she provide proof of vaccination by January 28, 2022. Failure to do so would result in termination of her employment. The Claimant provided no proof of vaccination by January 28th. The employer dismissed her effective February 1, 2022, by way of a meeting and letter that day.

– **Ruling on misconduct**

[24] Before dealing with the factors that make up misconduct for EI purposes, I will deal with the Claimant's overall submission that her conduct was not misconduct. First, the dismissal for misconduct was being disputed through the union grievance process, and therefore should not be considered as misconduct. This was a case of unjust dismissal. Her actions did not resemble the definition of misconduct in any way.

[25] First, the fact that dismissal for misconduct is being disputed through the grievance process has nothing to do with the EI issue of misconduct. The grievance process determines whether the employer violated the terms of the collective agreement between the employer and the union in dismissing the employee. That process has no authority to rule on the issue of misconduct for EI purposes. A finding in that process that there was no misconduct by the employee does not require the Commission, the Tribunal or the courts to grant EI benefits to the claimant. Those bodies must make their ruling on the basis of the EI misconduct factors.

[26] Second, the Claimant asserts that this is a case of unjust dismissal. Unjust (or wrongful) dismissal has developed under the common law (based on court decisions). That law focuses on whether the employer had just cause (including misconduct) for dismissing the employee. The common law concept of just cause does not apply to the EI concept of misconduct. The common law of wrongful or unjust dismissal uses a different test for misconduct than does the law of employment insurance.[7] The common law and the EI concepts of "just cause" focus on very different contexts. The common law concept asks whether the employer had just cause to dismiss an employee. The EI concept applies only to cases where an employee has voluntarily quit her job. That concept asks whether the employee had just cause to quit the employer. The EI concept of "just cause" does not apply to EI misconduct cases. The role of tribunals and courts in the EI context is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.[8] The Tribunal has to determine whether the claimant's conduct amounted to misconduct within the meaning of the EI Act.[9] It is irrelevant to determine whether dismissal is too severe of a penalty.[10]

[27] Third, the Claimant says that her actions did not resemble the definition of misconduct in any way. That may be correct if she is referring to the common law definition of misconduct. But it is not correct under the EI definition of misconduct.

[28] The Claimant correctly cited the principle that the decision to deny EI benefits for misconduct should not be made solely on the employer's assurance or subjective appreciation of events.[11] In reviewing the evidence relating to the factors of misconduct, I will show that the ruling is based on more than the employer's assurance or subjective appreciation of events.

[29] *Wilfulness.* After the employer denied the Claimant's exemption request, she acted in accordance with her religious beliefs by not taking the vaccine. She says that she did not want to lose her job, but felt that she did not have a choice. She was

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[7] *Minott v. O'Shanter Development Company Ltd*., 1999 CanLII 3686, 42 O.R.(3d) 321 (C.A).
[8] *Canada (Attorney General)* v *Caul*, 2006 FCA 251.
[9] *Canada (Attorney General)* v *Marion*, 2002 FCA 185.
[10] *Canada (Attorney General)* v *Secours*, A-352-94; *Canada (Attorney General)* v *Namaro*, A-834-82.
[11] *Crichlow v Canada (Attorney General)*, A-562-97.

presented with a dilemma: take the vaccine and keep her job; or refuse the vaccine (either expressly or passively) and be suspended, then lose her job. She testified that this was not a choice, but was coercion. In the absence of an exemption, the Policy required her to get the vaccine, and to provide proof of vaccination. The Claimant confirmed in her testimony that she did not get the vaccine or provide proof of getting the vaccine. By not getting the vaccine, she made a choice not to comply with the Policy. Her choice with respect to getting vaccinated was intentional, deliberate and conscious. It was wilful for EI purposes.

[30] *Impairment of duty.* The Claimant's testimony was that her capacity to perform all the job duties was not impaired. She could carry on her duties as before, with regular testing and use of PPE. I accept that evidence. What prevented her was the employer being unreasonable in not allowing her to come back to work. In support of that submission, she provided a list of reasons why not being vaccinated did not impede her readiness or physical capacity to work (GD2-30 to 34). That is not a matter that I can rule on. In cases of 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.[12] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or whether 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*.[13] I therefore cannot evaluate the policy for reasonableness (including the reasons the Claimant gave for her readiness and physical capacity not being affected) to make a determination on the issues of whether she was terminated for misconduct. With respect to her capacity to continue working, the performance of services is an essential condition of the employment contract. Where a claimant, through her own actions, can no longer perform the services required from her under the employment contract and as a result loses her employment, that claimant is not

[12] *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[13] *Canada (Attorney General) v Marion,* 2002 FCA 185.

qualified to receive EI benefits.[14] After her suspension, then dismissal, the Claimant could not attend the hospital to perform her work because of the requirements of the Policy. She was completely unable to perform the services under her employment contract, notwithstanding her ongoing capacity to do so. The suspension and dismissal were the result of the Claimant's non-compliance with the Policy. That non-compliance, and the resulting suspension and dismissal based on the non-compliance, are what prevented the Claimant from carrying out her duties.[15] That satisfies this factor in the EI misconduct test.

[31] *Knew or should have known of the possibility of dismissal.* The Claimant was aware of the initial September 26, 2021, deadline for vaccination and proof of vaccination. That deadline changed to November 4, 2021. The employer had sent three notices to the Claimant between October 15 and November 1, 2021, to remind her of the deadline, of exemption, and of the unpaid leave of absence for failure to comply with the requirement of vaccination and proof. The Claimant sought an exemption from the vaccine requirement, but the employer denied it. The evidence is clear that she was aware of that deadline and of the consequence of suspension. The employer did in fact suspend her effective November 4, 2021, with a warning that continued non-compliance with the Policy would result in the end of her employment. On January 14, 2022, the employer wrote to the Claimant with a "Final Notice of Non-Compliance". It stated that failure to submit proof of vaccination by January 28, 2022, "will result in the end of your employment for cause." When she did not comply by the deadline, the employer terminated her employment on February 1, 2022. The Claimant testified that she thought the employer would accommodate her religious belief and exempt her from the vaccine requirement. It was not reasonable for the Claimant to think that in the circumstances. The requirements were clear. The deadlines were clear. The employer denied her request for exemption before suspending her. That suspension would bring home to the Claimant that the employer was serious about enforcing the Policy. The

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[14] *Canada (Attorney General)* v *Wasylka*, 2004 FCA 219; *Canada (Attorney General)* v *Lavallée*, 2003 FCA 255; *Canada (Attorney General)* v *Brissette*, A-1342-92.

[15] *Canada (Attorney General v Tucker),* A-381-85. As the majority said, "to constitute misconduct, the act complained of must have been wilful or at least of such carelessness or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."

employer's letter of January 14, 2022, reinforced that seriousness. It imposed a deadline for submitting proof of vaccination, and stated termination of employment as the consequence of failure to comply. As the Claimant testified, the letter did not include the option of an exemption. The Claimant had requested an exemption, had been denied, so that option was closed. At that point, it was clear to the Claimant that she had to provide proof of vaccination, or be fired. The Commission has proven this factor.

[32] *Cause of suspension and dismissal.* As found above in paragraph [11], the Claimant's failure to provide proof of vaccination against COVID-19 was the cause for her suspension and dismissal.

– **Submissions the Tribunal has no authority to rule on**

[33] 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 all 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.[16] 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.[17] 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. The Tribunal's authority to decide any question of fact or law necessary for the disposition of the appeal is similarly limited.[18] Many of the arguments advanced by the Claimant are outside the jurisdiction of the Tribunal, as reviewed below.

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[16] *Employment Insurance Act,* sections 112 and 113.
[17] *Department of Employment and Social Development Act*, section 54(1).
[18] *Department of Employment and Social Development Act*, section 64.

[34] The Claimant relies on the *Canadian Bill of Rights* (Bill). The Bill requires that all federal laws, such as the *Employment Insurance Act*, be interpreted and applied so as not to infringe any of the rights in the Bill. Those rights exist without discrimination by reason of race, national origin, colour, religion or sex. The Claimant relies on the rights in the Bill to freedom of religion. Since the employer's policy is not a federal law, the Bill does not apply to it. That eliminates the Claimant's argument that the employer's policy is "a deliberate, intentional and conscious effort to coerce their employees into conduct that is contrary to the Canadian Bill of Rights." With respect to the *Employment Insurance Act,* the Claimant did not assert that her rights were ignored based on any of the above grounds of discrimination. She provided no evidence that would show discrimination on those grounds. Being unvaccinated, or refusing to disclose vaccination status, are not listed grounds of discrimination. In the absence of discrimination, the Bill does not apply to this appeal. The misconduct provisions of the *Employment Insurance Act* are clear. If a claimant is dismissed or suspended for misconduct, they are not entitled to receive EI benefits. The Bill does not assist the Claimant in this situation.

[35] The Claimant relied on the *Canadian Human Rights Act* (CHRA). This federal Act prohibits discrimination on a wide range of grounds, including religion, as highlighted by the Claimant. She focuses on the duty to accommodate up to the point of undue hardship. She states, "My employer and EI agent did not accommodate my request for accommodation based on religious human rights reasons." Neither the Commission nor the Tribunal has the power to order an employer to accommodate a claimant on human rights grounds. The jurisdiction of the Commission and the Tribunal to deal with human rights issues is found in the voluntary leave provisions of the Act.[19] That authority is limited to the CHRA, and to whether there has been discrimination contrary to that Act that gives just cause for quitting a job. That authority does not apply to misconduct issues. So, I cannot deal with those claims as part of the misconduct

[19] *Employment Insurance Act*, section 29(c)(iii).

issue. Any remedy for the Claimant on human rights matters has to be obtained from a human rights tribunal or the courts or through a collective agreement.

[36] In her testimony the Claimant argued that Directive 6 was not a law and did not supersede rights, so the employer's reliance on the Directive did not authorize suspending or dismissing employees. This argument is based on the mistaken belief that the employer's Policy must have an express law that authorizes the Policy and all its requirements. Employers have a wide scope for determining their policies, and deciding on dismissal. The employer has the right to amend its policies. The employee is bound by those amendments. The Claimant said that the vaccine requirement was not part of her collective agreement so that she does not have to comply with it. She does have to comply with the vaccination policy, unless it is declared inoperative by an appropriate authority. The Claimant's remedy is a lawsuit for wrongful dismissal, or a grievance filed through her union. The Tribunal has no authority to exempt the Claimant from the Policy.

So, was the Claimant suspended and dismissed from her job because of misconduct?

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

Conclusion

[38] The Commission has proven that the Claimant was suspended, then dismissed, from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits from November 9, 2021, to January 31, 2022, and is disqualified from receiving EI benefits from February 1, 2022.

[39] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section