



Citation: *LE v Canada Employment Insurance Commission*, 2022 SST 1489

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

Decision

Appellant: L. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (475086) dated May 11, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: October 5, 2022

Hearing participant: Appellant

Decision date: October 6, 2022

File number: GE-22-1807

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant worked as a Project Associate for Bell Canada (Bell). Bell instituted a mandatory Covid-19 vaccination policy (the policy) requiring all employees to be fully vaccinated by January 31, 2022. If an employee did not comply with the policy, or obtain an approved exemption from vaccination by January 31, 2022, they would be placed on an unpaid leave of absence.

[4] The Claimant was advised of the policy. She did not want to comply with the policy by being vaccinated, so she asked her doctor to provide her with a medical exemption. But her doctor refused to do so. Since the Claimant was neither vaccinated nor granted an exemption by the January 31, 2022 deadline, Bell placed her on an unpaid leave of absence effective February 1, 2022.

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that she was suspended from her job due to her own misconduct². This meant she could not be paid any EI benefits³.

¹ 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.

² See the April 20, 2022 decision letter at GD3-26. 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, her non-compliance with Bell’s mandatory vaccination policy following the denial of her exemption request) was misconduct and, therefore considered her separation from employment to be a suspension.

³ 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.

[6] The Claimant asked the Commission to reconsider. She explained her reluctance to get vaccinated because of health concerns, and how the employer could have accommodated her by allowing her to continue to work at home. The Commission maintained the disentitlement on her claim, and she appealed that decision to the Social Security Tribunal (Tribunal).

[7] I must decide whether the Claimant was suspended from her job due to her own misconduct. To do this, I have to look at the reason for her suspension, and then determine if the conduct that caused her 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 her doctor refused to sign off on her request for an exemption. She knew she 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 her own misconduct, which means she cannot receive EI benefits⁴.

[9] The Claimant disagrees. She says there was no misconduct on her part. She made a personal choice not to be vaccinated for medical reasons. She argues she has the right to be paid EI benefits because the employer forced her to go on leave when she could easily have been accommodated and because she has paid into the EI program for many years and is in need of financial assistance.

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

Issue

[11] Was the Claimant suspended from her job because of her own misconduct?

⁴ See footnote 2 above.

Analysis

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

[13] The Claimant was suspended because she refused to be vaccinated as required by the policy and did not have an approved exemption.

[14] The Claimant told the Commission that⁵:

- She was aware of the mandatory vaccination policy and the consequences.
- All Bell employees were told in October 2021 that they were required to be double-vaccinated by January 31, 2022 or they would be suspended.
- She consulted her doctor, but he said her medical concerns were not on the list of approved health conditions for a medical exemption.
- Her doctor refused to provide her with an exemption.
- She asked her employer if she could continue to work from home and do a rapid test if she needed to go into the office, but they refused her request.
- She previously had Covid and was experiencing “long Covid symptoms”, including lingering chest pains. She was concerned about the potential side-effects of the vaccines, and wanted to wait for a plant-based vaccine to be approved for use.

⁵ See Supplementary Records of Claim at GD3-22, GD3-24, GD3-30, and GD3-34

- She was suspended from her employment on January 31, 2022 for failing to be comply with Bell's vaccination policy⁶.

[15] I accept the Claimant's statements to the Commission. I find that she was suspended from her employment because she refused to be vaccinated as required by the policy and did not have an approved exemption.

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

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

[17] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional⁷. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful⁸ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[18] 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 law⁹.

[19] 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 because of it¹⁰.

[20] The Commission has to prove the Claimant was suspended from her job due to misconduct¹¹. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

⁶ See also January 31, 2022 notification issued by Bell at GD3-35 to GD3-36, which was provided by the Claimant.

⁷ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v. Secours*, A-352-94.

¹⁰ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹¹ 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.

[21] The Claimant says that she made a personal medical decision not to be vaccinated with the Covid-19 vaccine. She says she was always willing to work from home and be tested if she was required to come in to the office, but the employer forced her to take leave from her job even though she wasn't a risk to anyone. She argues that for these reasons, her conduct cannot be considered wilful. I do not agree.

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

- The decision to deny her EI benefits because of misconduct "is wrong".
- Her employer never said she did "anything that could be called misconduct".
- Misconduct is "for doing something wrong at work", but "no one at Bell" told her she'd "committed misconduct". There was no meeting with her manager and union rep, nor was she asked to sign a letter acknowledging an incident – the kind of thing would go in her employment file.
- She was just told she was being placed on unpaid leave for failing to comply with the vaccination policy.
- Her situation was unique.
- She was working full-time from home and was not required to go in to the office when the policy came into effect.
- She offered to be tested if there was any chance she would need to go into the office, but was turned down.
- She sent an E-mail to the employer asking what information was available about the safety of the vaccines and whether Bell would be "liable" if anything happened to her.
- They said it was at her own risk.

- She did her own research and didn't feel comfortable getting vaccinated. She was very concerned about chest pains she was experiencing.
- She tried to "negotiate" an accommodations to work from home without being vaccinated, because she doesn't meet customers or come into contact with co-workers.
- But it was always a "hard NO" from Bell.
- There was never any attempt to accommodate her, even though there was "no risk".
- Her doctor told her the chest pains were probably just a symptom of "long Covid" and would not give her an exemption.
- She has a child to support and expenses to pay, so she finally decided she would go to a vaccination clinic for her first dose. But when she told the person who was going over her health information about her chest pains, they refused to give her the shot because they said if she was having chest pains, "it was not recommended" that she get vaccinated at that time.
- She explained this to the employer and asked again for accommodation, but it was still "always a hard No".
- When she went back to the vaccination clinic, they said they needed more information from her doctor before they would vaccinate her. She got more information, but all they found was an irregular heart beat which was "nothing that they were concerned about".
- "At the end of the day, I still didn't feel comfortable taking this vaccine because, again, I'm having all these chest pains."
- She didn't have a medical exemption. But she made a personal decision not to get vaccinated because the doctor still couldn't explain why she was having chest pains and there was no way of knowing how the vaccines would affect her.

- She doesn't feel she had enough information about her own medical situation to make the decision – and no one was going to be “liable” if anything happened to her.
- She doesn't believe her situation falls into the EI definition of misconduct.
- She did everything that was required of her “work wise”. The only thing she didn't do was “put something in her body”. This was a personal medical decision, and shouldn't have anything to do with her work – especially since she was just working from home and not putting customers or co-workers at risk.
- “It's not much of a choice if the only choice is take a vaccine or your lose your job or you lose your house.”
- She's worked hard and paid into the EI program for years, yet she's being punished for making a personal medical decision “that was not affecting anyone” but herself.
- She's now been recalled back to work.
- But in the meantime, she's had a lot of financial hardship after being without any income for 6 months. She has family who rely on her to take care of them.
- The whole experience has been “awful” and isolating. She feels like her rights have been taken away and she's been discriminated against.
- Her union is “going after Bell” because there were situations – like hers – where the mandatory vaccination “wasn't necessary”. She doesn't know how long the process will take, but a grievance has been filed on behalf of a group of employees and she's part of that group.

[23] I acknowledge the Claimant's frustration and the financial difficulties she has experienced since being suspended.

[24] However, 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 requests for accommodation based on her personal medical decision, or whether the penalty of being placed on an unpaid leave of absence on was too severe¹².

[25] The Tribunal must focus on the conduct that caused the Claimant to be suspended and decide if it constitutes misconduct under the EI Act.

[26] I have already found that the conduct which led to the Claimant's suspension was her refusal to be vaccinated in accordance with the employer's workplace policy in response to the Covid-19 pandemic.

[27] The uncontested evidence obtained from the employer, together with the Claimant's 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 from her job. This means she accepted the consequences.
- d) her refusal to comply with the policy was the direct cause of her suspension.

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

¹² 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.

[29] By choosing not to be vaccinated after her family doctor refused to provide her with a medical exemption, she made a personal decision that led to foreseeable consequences for her employment.

[30] 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 benefits¹³.

[31] 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 Act¹⁴.

[32] 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.

[33] The Claimant's reinstatement after her suspension does not diminish the fact that she knew she could be suspended for failing to comply with the policy by the January 31, 2022 deadline¹⁵.

[34] The Claimant argues that the employer's policy had the effect of forcing her to choose between working and getting a vaccine that she believed could have a negative

¹³ 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.

¹⁴ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

¹⁵ A claimant may be entitled to receive EI benefits **after** their suspension is over, but they are not entitled to receive EI benefits **during** the period of suspension for misconduct. During the period of the suspension, a claimant carries essentially the same consequences as dismissal for misconduct (*CUB 5182*). This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121, and it means the Claimant cannot receive EI benefits retroactively now that her suspension is over.

effect on her health. She also says the policy violated the collective agreement governing her employment and was discriminatory.

[35] I 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 there¹⁶. None of her arguments change the fact that the Commission has proven on a balance of probabilities that she was dismissed because of misconduct under the EI Act.

[36] And this means she is disqualified from receiving EI benefits.

[37] Finally, it's not enough to have paid into the EI program or to be in need of financial support. If a claimant is suspended from their employment due to their own misconduct, they are not entitled to EI benefits during the period of the suspension – regardless of how many years they have contributed to the program or how difficult their financial circumstances are.

Conclusion

[38] The Commission has proven the Claimant was suspended from her employment because of her own misconduct. This means she is disentitled to EI benefits during the period of the suspension, starting from February 1, 2022.

[39] The appeal is dismissed.

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

¹⁶ I note that the Claimant's union has filed a grievance on her behalf.