Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 1635

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (460525) dated March 9, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Decision date:	September 29, 2022
File number:	GE-22-1512

Decision

[1] The Claimant's appeal is summarily dismissed because it has no reasonable chance of success.[1]

[2] The Claimant has made no arguments and provided no evidence that would let me allow his appeal. The Commission has proven the Claimant was suspended from his job because of misconduct. The Claimant knew of employer's vaccination policy requirements, the consequences for non-compliance and he failed to comply.

[3] This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits for the period of the suspension.

Overview

[4] The Claimant's employer placed him on a leave of absence from his job. The Claimant's employer said the Claimant was put on a leave of absence because he did not comply with its vaccination policy.

[5] The Claimant worked for a city. The Claimant's employer adopted a policy requiring its employees to provide proof they were fully vaccinated against COVID-19 by January 3, 2022. The policy included a process to request accommodation for medical or religious grounds. The Claimant did not request an accommodation, did not get vaccinated by the required date and was placed on a leave of absence from his job.

[6] The Commission accepted the employer's reasons as to why the Claimant was no longer working. It decided the Claimant was suspended from his job because of misconduct. Because of this, the Commission disentitled the Claimant from receiving EI benefits.

[7] The Claimant disagrees with the Commission's decision. He argues that the employer's policy was unreasonable, does not accord with the collective agreement and contravenes a number of domestic provincial and federal statutes as well as several

[1] In this decision, the Appellant is called the Claimant and the Respondent is called the Commission.

international laws and conventions to which Canada is a signatory and adherent. Because of this, he says that he was under no compulsion to abide by the policy, therefore, there was no misconduct on his part.

Matters I have to consider first

– **The Commission made one reconsideration decision**

[8] The Tribunal has the authority to hear appeals of the Commission's reconsideration decisions.[2] In his appeal to the Tribunal, the Claimant said that he received a decision dated March 9, 2022 from the Commission. He said that Tribunal staff told him this was a new decision, not a reconsideration and to contact Service Canada for the reconsideration decision. He did so, but was not sent a reconsideration decision. The Claimant asked the Tribunal to find the reconsideration decision.

[9] The appeal file has a reconsideration decision dated March 9, 2022. In light of the Claimant's request, I asked the Commission to provide any additional reconsideration decisions it had made. The Commission replied there was only one reconsideration decision – the one it made on March 9, 2022. This information was shared with the Claimant.

– **The Claimant did not voluntarily take a period of leave from his job**

[10] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.[3]

[11] In the Claimant's case, his employer initiated the leave of absence because the Claimant did not comply with the employer's policy.

[12] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of leave from his employment. He wrote in his request for reconsideration to Service Canada that the leave was forced upon him by his employer.

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[2] See Section 113, *Employment Insurance Act* (EI Act)
[3] Section 32, EI Act

[13] The section of the law on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant suspended from their job due to their misconduct is not entitled to benefits.[4]

[14] The evidence shows it was the Claimant's conduct, of refusing to comply with the employer's vaccination policy, led to him not working. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension.

– **The employer is not an added party to the appeal**

[15] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[16] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

– **The Tribunal gave Notice of Intention to Summarily Dismiss**

[17] Before I summarily dismiss an appeal, I have to give the Claimant notice in writing. I have to allow the Claimant a reasonable period to make arguments about whether I should summarily dismiss the appeal. [5]

[18] Tribunal staff sent a letter to the Claimant on August 24, 2022. In this letter, I explained why I was considering summarily dismissing her appeal. I asked him to respond to the letter by Tuesday, September 6, 2022.

[19] On Friday, September 2, 2022, the Claimant sent an email to the Tribunal requesting a two-week extension to respond to the Tribunal's notice of intention to

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[4] Section 31, EI Act
[5] Section 22, *Social Security Tribunal Regulations*

summarily dismiss his appeal. The Claimant sent his reply to the Tribunal on September 6, 2022. I have considered the reply in reaching my decision.

[20] The Claimant was notified by letter on September 9, 2022 that his request for an extension to September 16, 2022 was granted. The Clamant was advised that if he considered his reply of September 6, 2022 to be complete, to notify the Tribunal. Otherwise, he would have until September 16, 2022 to amend or add to his reply submissions. As of date of writing this decision, no further response has been received from the Claimant.

Analysis

[21] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.[6]

[22] No reasonable chance of success means it is obvious that the appeal is bound to fail, no matter what argument or evidence the Claimant might present at a hearing.[7]

[23] The law says that you can't get EI benefits if you lose your job because of your own misconduct. This applies whether the employer has fired you or suspended you.[8]

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

[25] Misconduct is not defined in the EI Act. The legal test for misconduct is set out in case law.[9] The case law says that there will be misconduct where the conduct of a claimant is wilful - where the acts which led to the dismissal were conscious, deliberate

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[6] Section 53(1) of the *Department of Employment and Social Development Act*

[7] In coming to this interpretation, I am relying on the following: *YA v Minister of Employment and Social Development*, 2022 SST 83; *LB v Minister of Employment and Social Development*, 2021 SST 773; *BB v Canada Employment Insurance Commission*, 2020 SST 951; *DV v Minister of Employment and Social Development*, 2020 SST 977.

[8] Sections 30 and 31 of the EI Act

[9] Case law comes from decisions made by the courts.

or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.[10]

[26] The conduct of the employer is not a relevant consideration under section 30 of the EI Act. Rather, the analysis is focused on the Claimant's acts or omissions and whether that amounts to misconduct within the meaning of section 30 of the EI Act.[11]

[27] The questions of whether the Claimant's employer violated the Claimant's collective agreement, or contravened the laws, codes, and declarations he has cited in his reply are matters for other forums.[12] I am not making decisions about whether the Claimant has any course of action under his collective agreement or other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act.

[28] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show it is more likely than not the Claimant lost his job because of misconduct.[13]

[29] The Commission says the Claimant was suspended from his employment as a result of his own misconduct. It says he was informed of the employer's policy regarding COVID-19 vaccination and was informed that failure to comply with the policy would result in loss of employment. The Commission says that by choosing not to adhere to the employer's COVID-19 vaccination policy, the Claimant chose not to prevent his unemployment situation. It says his actions were conscious and intentional, and taken in full knowledge that they would result in a loss of employment. The Commission says in this way the Claimant's actions leading to the loss of employment satisfy the definition of misconduct.

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[10] *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36.
[11] *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107
[12] *Canada (Attorney General) v. McNamara*, 2007 FCA 107
[13] *Minister of Employment and Immigration v. Bartone*, A-369-88.

[30] The Claimant responded to the Tribunal's Notice of Intent to Summarily Dismiss his appeal. In his response, the Claimant provided a time line of events. He argued his employer's policy is unreasonable, does not accord with the collective agreement, which outlines his rights as a union member and employee, and, contravenes a number of provincial and federal statutes, as well as several international laws and conventions to which Canada is a signatory and or adherent.

[31] With respect to the timeline of events, the Claimant stated that his employer implemented a mandatory vaccination policy requiring all its "employees to receive two does of an experimental COVID-19 vaccine by January 3, 2022." He also stated that on or about April 8, 2022 his employer rescinded its policy and he was invited to return to work shortly thereafter.

[32] With respect to the Commission's submissions, the Claimant stated that the employer's policy is not reasonable, his actions did not constitute misconduct, and his temporary suspension constituted discrimination on prohibited grounds, was both unlawful and wrong and that these factors are relevant to his appeal.

[33] The Claimant argued that the employer's policy was unreasonable. In support of that argument, he provided several labour arbitration awards where the reasonableness of the employer's policy was considered. He also argued that the rationale upon which the employer's policy relies has been invalidated by myriad evidence. In support of that argument, the Claimant provided: statements from the provincial health officer; excerpts from letters from various doctors written to the University of British Columbia; statements from Canada's chief public health officer and deputy public health officer; quotes from a meeting of the Government of Canada's Standing Committee on Health; a list of actions taken by the University of Toronto; a response from a provincial government to a freedom of information request; an extract from a ruling by Sicily's Court of Administrative Justice; and, reports from the province's Centre for Disease Control.

[34] The Claimant argued the employer's policy contravenes his collective agreement. He said the collective agreement does not provide that vaccination as a condition of employment.

[35] The Claimant argued that the policy is *ultra vires* for contravening law. He said his employer, a city, was operating outside of its statutory authority when it implemented the policy, rendering it of no force and effect which, he said, is the strongest indicator of unreasonableness. Thus, he argued, employees were under no obligation to abide by the policy's terms, meant that misconduct as defined in accordance with the policy cannot be made out.

[36] The Claimant argued the policy violated the following:

- *Health Care (Consent) and Care Facility (Admission) Act*, of British Columbia, RSBC 1996, c. 181
- *British Columbia Human Rights Code*, RSBC 1996, c 210
- *Workers' Compensation Act*, RSBC 2019, c1
- *Canadian Charter of Rights and Freedoms,* s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11
- *Criminal Code of Canada,* RSC 1985, c. C-46
- *Food and Drugs Act, RSC,* 1985, c F-27
- *Canadian Human Rights Act,* RSC 1985, c H-6
- *International Covenant of Civil and Political Rights*
- *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

- The Nuremburg Code (1947), and
- The Helsinki Declaration (2013)

[37] The Claimant explained how he believed the employer's policy violated each of the laws, covenants and conventions he cited. I have read his explanations.

[38] The Claimant concluded his response by stating that his appeal has a reasonable chance for success. He wrote this is because the employer's policy is unreasonable, does not accord with the collective agreement and along with the conduct of his employer, contravenes a number of domestic provincial and federal statutes, as well as a number of laws and conventions to which Canada is a signatory and or an adherent.

[39] The Claimant argued employees are not required to adhere to an unreasonable or unlawful policy. Therefore, he argued, there can be no misconduct for not complying with the policy. He was entitled to EI benefits because no misconduct had taken place. In the alternative, he argued that he should be entitled to EI benefits in accordance with section 31(1) of the EI Act, which states a Claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until the period of suspension expires. He says the employer's policy was rescinded on April 15, 2022 and not only is this indicative of the fact that no misconduct took place, but it also indicates that the period of suspension expired as he was subsequently able to return to work.

[40] I note that Arbitral jurisprudence, such as the awards the Claimant has quoted from, is not applicable to the Claimant's case. This is because in each award the arbitrators are empowered by a collective agreement (as agreed between the parties to that collective agreement) to determine whether a violation of the collective agreement between the employer and the union representing the employees has occurred. The arbitrators are not interpreting and applying the EI Act or the EI Regulations in making their awards. As a result, I do not need to consider arbitral awards when determining

whether the Claimant lost her job due to her misconduct or whether the summarily dismiss the Claimant's appeal.

[41] In addition, I note that the Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified.[14] This means I will not be making a decision on the reasonableness of the employer's policy.

[42] As noted above, I do not have the authority or jurisdiction to determine if the employer's policy or the suspension of the Claimant from his job is a violation of his collective agreement. I also do not have the authority or jurisdiction to determine if his employer's policy is a violation of the laws, covenants or conventions he has cited.

[43] I find that this appeal has no reasonable chance of success. This is because the Claimant was suspended from his job due to his misconduct and there is no argument or evidence he could present that would lead me to a different conclusion.

[44] The appeal file shows me that the Claimant's employer notified all employees about its vaccination policy on October 26, 2021. The policy required that all employees to provide proof of being fully vaccinated against COVID-19 by January 3, 2022. It provided examples of when an employee would have to receive doses of the vaccine to be compliant with the policy.

[45] The policy allowed employees to request accommodation under the policy for those individuals who could not be vaccinated for reasons related to a protected ground under the provincial human rights code.

[46] The policy stated that if an employee did not provide proof of being fully vaccinated and either had not requested or was not entitled to an accommodation the employer would review all the circumstances and implement appropriate actions. In the case of employees, such actions might include, but were not limited to, placing the

[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282

employee on an unpaid leave of absence and/or disciplining the employee up to and including termination of their employment.

[47] The appeal file shows me the Claimant spoke to a Service Canada officer on February 18, 2022. He told the officer he was provided with the employer's policy and knew the consequences of the policy. The Claimant said he made the choice not to get vaccinated because he has allergy issues (caused by pollen) and he is scared he would have a reaction to the shot. The Claimant said he had not been to an allergy specialist about the vaccine and had not seen a doctor about the vaccine. He said he also worked at a hospital, talked with nurses and doctors and lots had concerns over the safety of the vaccine and the long term effects. The Claimant told the officer that his union submitted his request for a medical accommodation although the officer clarified and he agreed the union would not submit a request on his behalf with his specific medical details.

[48] The Claimant spoke with another Service Canada officer on March 8, 2022. When asked, he stated he was fully aware of the requirements of the policy, that failure to comply with the policy would cause a loss of employment and failure to comply with the policy would result in him being suspended. The Claimant told the officer that he made a personal choice not to get the COVID-19 vaccine. He said the decision to get the COVID-19 vaccine should be voluntary. When asked, the Claimant said he does not have any intention to get a medical or religious exemption.

[49] The appeal file shows me a representative of the employer spoke to a Service Canada officer on March 8, 2022. The representative confirmed the Claimant was suspended because he failed to comply with the mandatory vaccination policy. He did not request a medical or religious accommodation. The representative said that the Claimant made his stance very clear that he was not going to get the COVID-19 vaccine. The Claimant did not provide any proof of vaccination by the January 3, 2022 deadline and so he was placed on unpaid leave.

[50] The law says that I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.

[51] The Claimant was aware of the employer's policy and the employer's expectation that all employees were required to provide to provide proof of being fully vaccinated against COVID-19 by January 3, 2022. He knew that he would be suspended if he failed to provide proof of being fully vaccinated. He chose not to be vaccinated and made this known to his employer. I accept this evidence as true.

[52] So, I find that the Claimant was suspended from his job because of misconduct. This is because the Claimant's actions led to him not working. He acted deliberately. He knew that his refusal to provide proof that he was fully vaccinated or to get vaccinated was likely to lead him being suspended form his job.

[53] If I accept the facts as true, there is no argument that the Claimant could make that would lead me to a different conclusion. There is no evidence he could provide that would change these facts. As a result, it is clear to me that, on the record, the Claimant's appeal has no reasonable chance of success and his appeal is bound to fail, no matter what arguments or evidence he could bring to a hearing. This means I must summarily dismiss his appeal.

Other matters

[54] I recognize that the Claimant has been called back to work from the suspension because he says that his employer rescinded the policy.

[55] A disentitlement from receiving EI benefits due to being suspended for misconduct ends when the period of suspension expires, the claimant loses or voluntarily leaves their employment, or the claimant accumulates enough hours of work in another job to qualify to receive EI benefits once that employment ends.[15]

[56] The Claimant has not said on what date he returned to work. In my opinion, being recalled to work does not negate the fact that the Claimant was suspended from his job nor does it negate that the suspension was due to his misconduct. As a result, being recalled to his job following the suspension is not determinative of the issue.

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[15] See section 31 of the EI Act

Conclusion

[57] The Commission has proven the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[58] I find the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss his appeal.

Raelene R. Thomas
Member, General Division – Employment Insurance Section