



Citation: *TP v Canada Employment Insurance Commission*, 2023 SST 123

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

Decision

Appellant: T. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (Record ID: 461650) dated March 25, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: February 7, 2023

Hearing participant: Appellant

Decision date: February 8, 2023

File number: GE-22-3545

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 “Care Aid” at X (the employer)². In September 2021, the employer instituted a mandatory Covid-19 vaccination policy (the policy) requiring all employees to be fully vaccinated by October 12, 2021 “if they wanted to continue working”³.

[4] The Claimant was advised of the policy. But she did not want to be vaccinated with a Covid-19 vaccine. On October 13, 2021, she told the employer that she objected to the Covid-19 vaccines for religious and safety reasons. She also said that mandatory vaccination for Covid-19 was not required by her collective agreement. But the employer said no exemptions or accommodations would be offered to the Claimant. She declined to disclose her vaccination status. Since she had not provided proof she was vaccinated by the October 12, 2021 deadline, the employer placed her on an unpaid leave of absence starting from October 13, 2021⁴.

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 The Claimant testified that she worked as a Care Aid at this particular long-term care facility for 14 years, providing personal care and other support services for seniors.

³ The employer did not provide a copy of the policy. But the Claimant testified that this is what it said.

⁴ See Record of Employment at GD3-15.

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that she was separated from her employment due to her own misconduct⁵, and this meant she could not be paid any EI benefits⁶.

[6] The Claimant asked the Commission to reconsider. She said she made a personal choice not to get vaccinated against Covid-19 for religious reasons. She also said the vaccines are unsafe, and that mandatory vaccination against Covid-19 is not a requirement of her collective agreement. She argued she has paid into the EI program for many years and is entitled to receive EI benefits.

⁵ The Commission's February 8, 2022 decision letter says the Claimant is not entitled to EI benefits because she lost her employment on October 11, 2021 as a result of her misconduct (see GD3-22). But the Record of Employment said the Claimant was on a leave of absence and the Claimant told the Commission that the employer put her on a leave of absence (see GD3-17 and GD3-18). The employer also told the Commission that the Claimant was put on unpaid leave for not being vaccinated (see GD3-20). So I don't understand why the decision letter says she lost her employment.

Nor do I understand why the Commission continued to refer to the Claimant as having been dismissed in the reconsideration decision (at GD3-29), when the Claimant reiterated that she was put on leave in her reconsideration interview (see GD3-27).

At the hearing, the Claimant testified that she is on a continuing unpaid leave and has not been dismissed from her employment. She was confused and concerned about why the Commission is treating her as terminated.

I find that the Commission made an administrative error when it did not correct the reconsideration decision and referred to the Claimant's "dismissal" from her job. The reconsideration decision letter should have said the Claimant's "actions led to the **suspension** of her employment".

I will correct the Commission's administrative error and consider the reason for the separation from employment to be an unpaid leave of absence. But this correction doesn't change the effect of the Commission's decision – it just means there is a different reason why the Commission says the Claimant is not entitled to EI benefits.

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 the employer's mandatory vaccination policy) was misconduct and, therefore her separation from employment would be considered a suspension.

⁶ 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.

[7] The Commission maintained the disentitlement on her claim, and she appealed that decision to the Social Security Tribunal (Tribunal)⁷.

[8] 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.

[9] 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. 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 benefits⁸.

[10] The Claimant disagrees. She says she should not be punished for exercising her privacy rights and her right to bodily autonomy. She made a personal choice not to disclose her vaccination status, but she was willing to wear a face mask and submit to rapid testing. She argues she has the right to receive 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 needs financial assistance.

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

Issue

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

⁷ At first, the Claimant’s appeal was summarily dismissed by a member of the Tribunal’s General Division. But the Claimant appealed the summary dismissal to the Tribunal’s Appeal Division and won. The Appeal Division said her appeal should not have been summarily dismissed and returned the appeal to the General Division to be heard by a different member. I am that different member and this is my decision on the merits of the Claimant’s appeal.

⁸ See footnote 3 above.

Analysis

[13] 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?

[14] The Claimant was suspended because she refused to provide proof she was fully vaccinated against Covid-19 as required by the policy, and did not have an approved exemption.

[15] The Claimant repeatedly told the Commission that the employer put her on unpaid leave because she is not vaccinated and did not comply with the policy⁹.

[16] The employer confirmed that the Claimant was suspended from her job because she was not vaccinated and did not comply with the policy¹⁰.

[17] In her Notice of Appeal, the Claimant said she was put on an unpaid leave of absence because she chose not to disclose her medical information.

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

- She exercised her rights to privacy and bodily autonomy and refused to provide proof of vaccination by the deadline in the policy.
- In a meeting with the employer, she read a letter she prepared that explained her reasons for not getting vaccinated, but the employer would not make an exception for her.
- She refused to disclose her vaccination status or provide proof of vaccination, so the employer told her she was no longer permitted to come to work.

⁹ See Supplementary Record of Claims at GD3-17, GD3-18, and GD3-27.

¹⁰ See Supplementary Record of Claim at GD3-20.

[19] The evidence shows the Claimant was suspended from her employment (prevented from working) because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[20] **Issue 2: Is the reason for her suspension misconduct under the law?**

[21] Yes, the reason for the Claimant's suspension 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 intentional¹¹. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful¹² (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 law¹³.

[24] There is misconduct if the Claimant knew or **ought to 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 it¹⁴.

[25] The Commission has to prove the Claimant was suspended from her job due to misconduct¹⁵. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

[26] The Claimant repeatedly told the Commission that she did not want to get vaccinated because of her religious beliefs and because she doesn't think the Covid-19 vaccines are safe. She also said the policy was contrary to her collective agreement.

¹¹ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹² See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

¹³ See *Attorney General of Canada v. Secours*, A-352-94.

¹⁴ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁵ 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.

She further said she was always willing to mask and be rapid tested, but the employer forced her to take leave from her job instead.

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

- In September 2021, the employer sent an e-mail to all employees saying that a mandatory vaccination policy was being put into effect and everyone had to provide proof of vaccination with 2 doses by October 12, 2021 “if they wanted to continue working”.
- She had no intention of getting vaccinated.
- She “didn’t know” what would happen after October 12, 2021 if she failed to provide proof she was fully vaccinated.
- She continued to come to work and rapid test before her shifts, just as she had been doing before the e-mail.
- No one from the employer came and talked to her about the policy or the consequences. There was only the e-mail.
- When she finished her shift on October 11, 2021, she checked the schedule that was posted and saw that she was supposed to be back at work on Thursday and Friday (October 14 and 15, 2021)¹⁶.
- She “didn’t know” her failure to provide proof of vaccination by October 12, 2021 would cause her to be suspended. She thought she would be allowed to continue to wear a mask on the job and rapid test before her shifts.
- But after her October 11th shift, the employer called her to set up a meeting on October 13, 2021 to discuss the policy and the need for her to provide proof of vaccination.

¹⁶ The Claimant referred to the documents she submitted at RGD3-2 and RGD3-4, which show her name on the rosters for October 14th and 15th respectively.

- She prepared a letter with her reasons why she was unwilling to get vaccinated or disclose her vaccination status. She wrote about her religious beliefs and objections to the Covid-19 vaccines, and explained how the policy was not part of the collective agreement that governed her employment¹⁷.
- She read the letter to the employer at the October 13th meeting. She thought the employer would make an exception for her because she'd been working there for 14 years without any issues or concerns about her performance, and because she never once got sick herself despite working through the height of the pandemic and "every single outbreak" in the long-term care facility.
- But the employer refused to make an exception for her.
- She asked to be accommodated with tasks that were "not under the vaccine mandate", but the employer "said 'No'".
- At the October 13, 2021 meeting, she understood that she would not be allowed to continue working if she didn't provide proof she'd received 2 doses of a Covid-19 vaccine.
- She believed this was "coercion", but it didn't change her personal decision.
- She still refused to disclose her vaccination status.
- The employer told her she would be placed on an immediate unpaid leave.
- She was very stressed and depressed after that.
- She has the right to choose what she puts into her body and she chooses not to take "an experimental vaccine" that "does not work to stop the spread of Covid".

¹⁷ The Claimant referred me to the Conditions of Employment re Vaccination and Inoculation of the collective agreement she filed at GD2-18. She testified that taking an "experimental vaccine" is not part of her employment contract.

- She has the right to make personal medical choices free from coercion. She also has the right to keep her medical information private.
- She shouldn't be punished for exercising her rights.
- She was willing to mask and do rapid testing. This should have been enough because she was never sick and never missed work by following these measures.
- But now she's not allowed to even enter her healthcare workplace or do her job.
- She "did everything right" and "nothing wrong" and "didn't violate" her collective agreement. She doesn't understand why the BC Ministry of Health can say she "can't be at her job?"
- At the October 13, 2021 meeting, she understood she would be placed on an unpaid leave of absence if she did not provide proof she was fully vaccinated.
- But she refused to be coerced into following a policy that came into effect after 14 years of working at her job and was not part of her collective agreement.
- Now she can't even get EI benefits after many years of paying into the EI program. EI is supposed to be there to help people in times like this.
- She has her hours and should be getting her money – not questioned about her religious beliefs. She's ready, willing and able to work, but the employer is preventing her from "even entering the building". She meets the test for EI, but if she can't claim it, why has the government been deducting EI premiums from her pay?
- It's not a fair outcome. It really feels like she's being punished.

[28] I acknowledge the Claimant's disappointment at not receiving EI benefits after being suspended.

[29] However, it is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accommodated the Claimant with masking and rapid testing, or whether the penalty of being placed on an unpaid leave of absence on was too severe¹⁸.

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

[31] I have already found that the conduct which led to the Claimant's suspension was her failure to provide proof of vaccination in accordance with the employer's workplace policy in response to the Covid-19 pandemic.

[32] The uncontested evidence obtained from the employer and the Claimant, together with her testimony at the hearing, allows me to make 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 failure to provide proof of vaccination would cause her to be suspended from her job¹⁹. This means she accepted the consequences.

¹⁸ 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.

¹⁹ The Claimant testified that the employer's September 2021 e-mail said all employees had to be fully vaccinated by October 12, 2021 if they wanted to continue working. But she argued that she was never "verbally told" she would be put on unpaid leave if she didn't comply with the policy until the meeting with the employer on October 13, 2021. This is not an exculpatory argument for 2 reasons.

First, the legal test says there will be misconduct if the Claimant knew **or ought to have known** that non-compliance with the policy could cause her to be separated from her employment. I have no hesitation in finding that she **ought to have known** from the September 2021 e-mail that if she wasn't fully vaccinated by October 12, 2021 she would no longer be working. She chose to disregard the plain meaning of the e-mail and assumed the employer would make an exception for her or provide accommodations. The fact that her assumption proved incorrect does not diminish the information communicated in the e-mail, namely that she had to get vaccinated or she would not be allowed to work.

d) her refusal to comply with the policy was the direct cause of her suspension.

[33] The employer has the right to set policies for workplace health and safety. The Claimant had the right to refuse to comply with the policy. By choosing not to be vaccinated and provide proof of vaccination, she made a personal decision that led to foreseeable consequences for her employment.

[34] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if a claimant's 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 health and safety policy is considered wilful and will be misconduct for purposes of EI benefits²⁰.

[35] The Appeal Division decisions 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 Act²¹.

[36] I therefore find that the Claimant's wilful refusal to provide proof of vaccination in accordance with the policy – in the absence of an approved exemption – constitutes misconduct under the EI Act.

[37] The Claimant has not been terminated from her employment and could resume her duties upon being vaccinated²². But this does not diminish the fact that, at the October 13, 2021 meeting, she knew she would be suspended for failing to comply with the policy and still refused to do so.

Second, it didn't make a difference to the Claimant's conduct. She testified that once she became aware that she would be suspended if she didn't comply with the policy, she still refused to disclose her vaccination status or provide proof of vaccination.

²⁰ 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.

²¹ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

²² See Supplementary Record of Claim at GD3-20.

[38] 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 was "experimental" and could have a negative effect on her health. She says the policy violated her collective agreement and many of her rights.

[39] 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 there²³. None of her arguments change the fact that the Commission has proven on a balance of probabilities that she was suspended because of conduct that constitutes misconduct under the EI Act. And this means she is not entitled to receive EI benefits while she is suspended.

[40] 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

[41] 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.

[42] The appeal is dismissed.

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

²³ This would include filing a grievance under her collective agreement.