Citation: *FA v Canada Employment Insurance Commission*, 2022 SST 1753

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (464266) dated May 16, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Decision date:	October 31, 2022
File number:	GE-22-2127

Decision

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

[2] The Claimant has made no arguments and provided no evidence that would let me allow his appeal.[1]

[3] This means the Claimant is disentitled from receiving employment insurance (EI) benefits.

Overview

[4] The Claimant's employer adopted requiring its employees to be fully vaccinated for COVID-19 by January 31, 2022. The Claimant remained unvaccinated by the deadline and was placed on an unpaid leave of absence effective February 14, 2022.

[5] 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.

[6] The Claimant disagrees with the Commission's decision. He says as a Muslim being forced into any medical treatment goes against his beliefs. The Claimant attached to his appeal a Fatwa which outlines all the reasons why his employer should have accepted his request for religious exemption.

Matters I have to consider first

– **The employer is not an added party**

[7] Sometimes the Tribunal sends a 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.

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

[8] 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, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

– The Tribunal gave notice of its intention to summarily dismiss the appeal

[9] 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.[2]

[10] Tribunal staff sent a letter to the Claimant on October 4, 2022. In this letter, I explained why I was considering summarily dismissing the appeal. I asked the Claimant to respond to the letter by October 17, 2022.

[11] The Claimant did not respond to my letter.

– The Claimant was not on a voluntary leave of absence

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

[13] There is no evidence in the appeal file to show the Claimant agreed to taking a period of unpaid leave from his employment beginning on February 14, 2022.

[14] 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 who is suspended from their job due to their misconduct is not entitled to benefits (emphasis added).[4]

[15] The evidence shows it was the Claimant's conduct, of not complying with the employer's policy, led to him not working. I am satisfied that the Claimant's circumstances, that of being placed on an unpaid leave of absence for failing to comply

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[2] See Section 22, *Social Security Tribunal Regulations*
[3] See section 32 of the EI Act
[4] Section 31 of the EI Act

with the employer's policy, can be considered as a suspension for the purposes of the EI Act.

Issue

[16] I must decide whether the appeal should be summarily dismissed.

Analysis

[17] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.[5]

[18] 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 suspended you and / or dismissed you.[6]

[19] Specifically, section 31 of the EI Act says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

> (a) the period of suspension expires;
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> (b) the claimant loses or voluntarily leaves their employment; or,
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> (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

[20] The Commission says it concluded the Claimant's refusal to comply with the company's policy constituted misconduct within the meaning of the EI Act because he was aware of the policy and aware of the consequences of non-compliance. Despite this, the Commission says, the Claimant made the wilful and deliberate decision to not comply with the employer's policy.

[21] In his appeal to the Tribunal, the Claimant wrote that being forced to participate in any medical treatment goes against his beliefs as a Muslim. He quoted "There is no

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[5] Section 53(1), *Department of Employment and Social Development Act* (DESD Act)
[6] Sections 30 and 31 of the EI Act

doubt the refusal of medical treatment, placing one's reliance on Allah and acceptance of what He decrees, is among matters endorsed by the revealed law." The Claimant attached a Fatwa to his appeal which, he wrote, outlines all the details why his religious exemption should have been accepted by his employer and the reason for his appeal of the Commission's reconsideration decision.

[22] The appeal file shows the Claimant completed an application for EI benefits on February 20, 2022. The Claimant indicated he was on a leave of absence because of "Unlawful LOA."

[23] The appeal file has a letter to the Claimant from his employer dated February 14, 2022. The letter says the Claimant was previously notified that as part of the employer's plan to return to more normal operations all employees who had not attested to being fully vaccinated by January 31, 2022 would be placed on an unpaid leave of absence. The letter stated the Claimant was also told that since he had not attested to being fully vaccinated he was required to start the COVID-19 vaccination process and show that he had received a first dose of the vaccine by December 10, 2021 and had an appointment booked for the second dose. The letter noted the Claimant had not sent proof of vaccination or an appointment to the employer. As a result, the employer was placing the Claimant on an unpaid leave of absence from February 14, 2022 until May 1, 2022.

[24] The appeal file has an undated letter to the employer "RE: Request for Exemption from Mandatory Covid Vaccine." The letter is from an expert in Islamic Law, writing on behalf of the Claimant who is seeking "a religious accommodation from the mandatory Covid-19 vaccines." The letter explains the religious basis for the request.

[25] The appeal file shows the employer replied to the Claimant's request for exemption on February 17, 2022. The employer did not grant the exemption. The letter says, "as with all employees covered by [employer's] vaccination policy who do not have a valid exemption you are required to comply with it". The letter goes on to say, "Based on this decision [not granting the exemption], you are expected to comply with [employer's] Vaccination Policy."

[26] The appeal file has a copy of the employer's discretionary leave policy and the Claimant's collective bargaining agreement. The appeal file shows the Claimant has filed grievances against the employer's refusal of his religious exemption request and being placed on an unpaid leave of absence.

[27] The appeal file shows a representative of the employer spoke to a Service Canada officer on March 15, 2022. The representative said employees were notified to comply with the mandatory COVID-19 vaccination policy and the deadline to be fully vaccinated was February 1, 2022. The representative said that leave of absence without pay as a consequence for non-compliance with the company vaccination policy was clearly communicated to all employees.

[28] The appeal file shows the Claimant spoke to a Service Canada officer on April 27, 2022. The Claimant explained that his employer introduced a policy that asked all employees to be fully vaccinated by October 31, 2021 or they would have to do extra testing. He said the employer introduced rapid testing over the summer of 2021 but in September 2021 the employer took rapid testing away. The Claimant told the officer he was given a new deadline of February 1, 2022 to be vaccinated and had to have his first dose of the vaccine by mid-December 2021. The officer asked the Claimant if he knew he would be placed on a leave of absence if he did not comply with the vaccination policy. The Claimant replied he was aware and that is why he asked for the religious exemption.

[29] I am not questioning the authenticity of the Claimant's beliefs. It is not my role to decide if the employer's denial of the Claimant's request for an exemption is a violation of the human rights code. It is also not my role to determine if the employer's policy or actions are a violation of the Claimant's collective bargaining agreement or other employer policies.[7] Nothing in my decision prevents the Claimant from bringing these claims to the other tribunals and forums established to hear those claims.

[7] The courts have said that in cases for 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. See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282

[30] My role is to decide whether the Claimant's appeal should be summarily dismissed.

[31] To summarily dismiss the Claimant's appeal, the law says I must be satisfied that the appeal has no reasonable chance of success.[8]

[32] No reasonable chance of success means it is plain and obvious that the appeal is bound to fail, no matter what argument or evidence the Claimant might present at a hearing.[9]

[33] The question is **not** whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that could be presented at a hearing.[10]

[34] When I apply the law and the legal tests, I can only conclude that the Claimant's appeal has no reasonable chance for success.

[35] Misconduct is not defined in the EI Act. But, the courts have come to a settled definition about what the term means with respect to the application of the EI Act.

[36] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it is almost wilful.[12] The Claimant doesn't have to have wrongful intent (in other words, the Claimant doesn't have to mean to be doing something wrong) for their behaviour to be misconduct under the law.[13]

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[8] See subsection 53(1) of the DESD Act
[9] 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.
[10] The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.
[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.

[37] There is misconduct if the Claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended because of that.[14]

[38] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[15] A deliberate violation of the employer's policy is considered to be misconduct.[16]

[39] The conduct of the employer is not a relevant consideration when deciding if a claimant has lost their job due to their own misconduct. Rather, the analysis is focused on the claimant's acts or omissions and whether that amounts to misconduct within the meaning of the EI Act.[17]

[40] The Commission has to prove the Claimant was suspended from 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 was suspended from his job because of misconduct.[18]

[41] The employer adopted a policy requiring all its employees to be fully vaccinated for COVID-19 no later than January 31, 2022. Because the Claimant did not attest to being fully vaccinated he was told he had to start the COVID-19 vaccination process and demonstrate to the employer by December 10, 2021 that he received a first dose of the vaccine as well as his appointment date for a second dose. The Claimant was also told that he was required to send proof of vaccination by January 31, 2022 showing that he received his second COVID-019 vaccine dose or proof of appointment if the second dose was scheduled on or before February 28, 2022. The Claimant did not send proof of COVID-19 vaccination or appointment to his employer as required. As a result, the Claimant was suspended effective February 14, 2022.

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[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314
[16] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[17] *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107
[18] *Minister of Employment and Immigration v. Bartone*, A-369-88.

[42] The Claimant requested an exemption to vaccination for religious reasons. The request is undated. The Claimant told a Service Canada officer that he asked for an exemption because he was aware he could be placed on an unpaid leave of absence if he did not comply with the policy. I recognize the employer advised the Claimant in writing that his exemption request after it wrote to him that he was suspended from his job. In the letter denying the Claimant's request for exemption, the employer wrote "as with all employees covered by [employer's] vaccination policy who do not have a valid exemption you are required to comply with it."

[43] The evidence tells me the Claimant was aware of the employer's policy and the deadline to be fully vaccinated or to have a valid exemption to vaccination. The evidence tells me that the Claimant was not vaccinated by January 31, 2022 and did not have a valid exemption to vaccination by that date. He was aware that if he was not vaccinated or did not have a valid exemption to vaccination he could be suspended (placed on an unpaid leave of absence) for not complying with the employer's vaccination policy and, as a result, not be able to carry out his employment duties. There is no evidence the Claimant could provide that would change these facts. There is no argument the Claimant could make that would lead me to a different conclusion. As a result, it is clear to me that the Claimant's appeal has no reasonable chance of success no matter what evidence or arguments he could bring to a hearing. This means I must summarily dismiss the Claimant's appeal.

Conclusion

[44] 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