



Citation: *TP v Canada Employment Insurance Commission*, 2022 SST 1775

**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 (462322) dated April 5, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Decision date: August 8, 2022

File number: GE-22-1630

Introduction

[1] The Claimant's employer adopted a policy requiring all employees to be fully vaccinated against COVID-19 by October 31, 2021.¹ The Claimant requested an exemption to vaccination from her employer but was denied. She remained unvaccinated by October 31, 2021 and her employer placed her on a leave of absence because she was not in compliance with its policy.² The Commission looked at the reason the Claimant was not working and decided she was suspended due to her own misconduct.³ Because of this, the Commission disentitled the Claimant from receiving employment insurance (EI) benefits.

Matters I have to consider first

The employer is not an added party

[2] Sometimes the Tribunal sends the Claimant's 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.

[3] 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 Claimant was not on a voluntary leave of absence

[4] Sometimes it is difficult to decide whether a claimant has voluntarily taken a period of leave from a job or whether the employer suspended the claimant. The evidence might be unclear. In those cases, I may consider the evidence and decide

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

² See page GD3-21. All page numbers are from the appeal file.

³ See pages GD3-41 and GD3-57

whether the claimant has voluntarily taken a period of leave from their job or if they were suspended from their job due to their own misconduct.⁴

[5] In reaching my decision, I must have regard to the circumstances that existed at the time the Claimant stopped working.⁵

[6] The employer issued a Record of Employment (ROE) stating the reason for issuing was a leave of absence.⁶ The ROE has the box “unknown” checked under the statement “Expected Date of Recall.”

[7] The Commission determined that the Claimant was suspended from her job due to her own misconduct.

[8] The Claimant submitted in her appeal to this Tribunal and, in her reply to the Tribunal’s Notice of Intention to Summarily Dismiss her appeal, she never agreed to a leave of absence.⁷

[9] 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.⁸

[10] I do not see any evidence in the appeal file to show the Claimant agreed to taking a period of leave from her employment beginning on October 31, 2021. I also do not see any evidence that the Claimant and her employer established a date for her to return to work at the time she stopped working on October 31, 2021.

[11] 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).⁹ The

⁴ The Federal Court of Appeal explains this principle in *Canada (Attorney General) v. Desson*, 2004 FCA 303

⁵ *Canada (Attorney General) v. Lamonde*, 2006 FCA 44

⁶ See page GD3-15

⁷ See GD2 and GD7

⁸ See section 32 of the EI Act

⁹ See section 31 of the EI Act

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

Issue

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

The law

[13] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[14] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.¹⁰

[15] Section 31 of the *Employment Insurance Act* (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;
- (b) the claimant loses or voluntarily leaves their employment; or,
- (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.

¹⁰ The Tribunal sent a notice of its intention to summarily dismiss this appeal to the Claimant on July 8, 2022. She was given until July 25, 2022 to make submissions. See GD9. The Claimant made a submission on July 25, 2022, see GD10

Evidence

[16] The appeal file shows the Claimant completed an application for EI benefits on November 10, 2021.¹¹

[17] The Claimant spoke to a Service Canada officer on January 4, 2022.¹² She told the officer she was working from home and was placed on leave. The Claimant told the officer she requested a spiritual exemption to COVID-19 vaccination but was denied. The Claimant told the officer that all employees were sent an email on August 25, 2021, about the new policy, vaccine mandate and requirement to be fully vaccinated by October 31, 2021 or be placed on unpaid leave for six months. She said that the situation would be evaluated in six months and she could face termination if she does not comply with the policy.

[18] The Claimant provided Service Canada with a copy of an email from her employer dated August 25, 2021 with the subject "Mandatory Vaccination for all Employees."¹³ The email notes that on August 13 [2021] the federal government announced that vaccinations would be mandatory for those working in federally regulated industries, which included the employer. The email states the employer "will now require all employees to be fully vaccinated by a government approved vaccine by October 31st without exception, except under our Duty to Accommodate obligations." An employee would be considered fully vaccinated 14 days after receiving the second dose of 2-dose series vaccine.

[19] The email said the employer required that employees report their vaccination status with proof of vaccination no later than September 8 [2021]. The email states, "failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination, except for those who qualify for an exemption."

¹¹ See pages GD3-3 to GD3-14 for the application for EI benefits. See page GD-13 for the date of application.

¹² See page GD3-18

¹³ See pages GD3-24 to GD3-27

[20] The Claimant provided a copy of her employer's COVID-19 policy to Service Canada.¹⁴ The policy is effective September 10, 2021. It required employees to provide their vaccination status by September 8, 2021. Those employees who were not vaccinated were expected to receive a first dose of the COVID-19 vaccine by September 8, 2021 and second dose by October 16, 2021. Proof of vaccination had to be recorded in the employer's vaccination status reporting tool by October 30, 2021.

[21] The policy stated employees who failed to be vaccinated, report their vaccination status and did not upload proof of vaccination by that date would be considered non-vaccinated and in non-compliance with the policy. Employees who were not in compliance with the policy were prohibited from entering any employer workplace, considered unable to fulfill their duties (including those who usually worked from home), placed on unpaid leave without benefits for six months after which their continuing employment relationship would be reassessed and ineligible for certain employment privileges.

[22] The employer's policy stated employees with medical, religious or other reasons based on prohibited grounds of discrimination that prevented them from being vaccinated could apply for accommodation in accordance with the employer's Duty to Accommodate obligations and existing policies and procedures.

[23] The Claimant provided a copy of her request for exemption to vaccination.¹⁵ Her requests for exemption and accommodation include a Statement of Religious Belief and Conscience Affidavit in which she affirms that the disclosure of private medical information, testing and immunization against COVID-19 conflict with her sincerely held religious belief integral to her faith and with her conscience. The Claimant further affirmed she did not consent to share her medical information or to receive medical interventions and she invoked her rights and protections under the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms* (Charter) constitutional

¹⁴ See pages GD3-32 to GD3-36

¹⁵ See pages GD3-23, GD3-27, GD3-28, GD3-30, and GD3-31

protections prohibiting any demand, coercion or act to cause her compliance with any COVID-related vaccine mandate, policy or protocol.

[24] The Claimant sent Service Canada a copy of an email to her from the Workplace Accommodation Office dated November 18, 2021.¹⁶ The email states the Claimant's request for exemption from the vaccination policy on October 31, 2021 and additional documentation that she provided. The email goes on to say the Claimant's request was respectfully denied and as such, she was in non-compliance with the vaccination policy. The email states, "Employees, other than those who have been granted an exemption in accordance with the policy, who are unwilling to comply with the policy have the option of remaining in [the employer's] employ though they will be placed on a leave of absence effective October 31, 2021, in accordance with and as more fully described in the policy."

Submissions

[25] In her appeal to the Tribunal, the Claimant submitted her employment contract does not contain a forced mandatory vaccination and she has paid into the EI fund for the entirety of her career hence meeting the criteria. She stated questions to her employer about the vaccine remain unanswered. The Claimant described her union's lack of representation. She stated her employer's actions contravened many laws. The Claimant's appeal included arguments on the application of the Charter, the Canadian Bill of Rights, the Genetic Non-Discrimination Act (Bill S-201) to the circumstances related to her suspension from work. The Claimant also provided quotes from court decisions and the Digest of Benefit Principles in support of your position.¹⁷

[26] With her appeal to the Tribunal the Claimant provided:

International Covenant on Civil and Political Rights, the *Genetic Non-Discrimination Act* (Bill S-201), the *Bill of Rights*, the Nuremberg Code, excerpts

¹⁶ See pages GD3-21 and GD3-22

¹⁷ See GD2

from the *Criminal Code of Canada* and the *Canadian Human Rights Act*, and the *Personal Information Protection and Electronic Documents Act*,

Farber v. Royal Trust Co, 1 SCR 846, *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 25, *Ruel v. Air Canada*, 2022 ONSC 1779, Canada Umpire Benefits (CUB) 23617 (Sulaiman), CUB 26597 (Edward and Langlois),

articles related to the COVID-19 vaccine, reports from Pfizer and the Food and Drug Agency detailing adverse events, a letter from Health Canada to an individual other than yourself, an interim order from Health Canada

articles related to the conviction of a former Nazi guard, and

notices she sent to her employer, her union's statement on mandatory vaccination in the workplace, an email from her employer concerning reporting vaccination status, and an excerpt from her collective agreement.¹⁸

[27] The Claimant also sent two further submissions to the Tribunal.

[28] The first additional submission corrected a mistake in a list of laws the Claimant stated the employer's policy was breaching, and a submission on the application of the UNESCO Universal Declaration on Bioethics and Human Rights, the Nuremberg Code, and the International Covenant on Civil and Political Rights apply to the circumstances surrounding the Claimant's suspension.¹⁹

[29] The second additional submission posed questions to the Tribunal Member and referred to sections of the EI Act.²⁰

[30] The Claimant replied to the Tribunal's Notice to Summarily Dismiss her appeal.²¹ In her reply, the Claimant requested that she be provided with the evidence and/or documents in support of the allegation made by either her employer or the Commission

¹⁸ See GD2

¹⁹ See GD6

²⁰ See GD7

²¹ See GD10

that she stopped working voluntarily, or if the reasons have changed to misconduct, by whom and on what grounds. The Claimant argued that the Federal Court of Appeal has determined that the Commission bears the burden of proving a claimant lost their employment by reason of their own misconduct. The Claimant explained her previous submissions to the Tribunal were her pointing out that before arriving at conclusions of the sort the EIC has requires many legal aspects to be considered. The Claimant says the legal test is simple: Does the company policy breach, per example, the Nuremburg Code, the IPCCR treaty and everything else mentioned in her previous document. She says it does.

[31] The Claimant goes on to compare the current events to those of the time period of 1939 to 1945. She submits that nowadays every law on informed consent was broken, every collective agreement has been violated to and twisted to fit the oppressor's narrative. The Claimant wrote that she was not far fetching when she included the story of Nazi prison guard recently found guilty of crimes against humanity because he collaborated. She goes on state: "An important question to be asked is, did the people at the EIC participate in a well concerted & orchestrated effort to penalize the unvaxxed?"

[32] The Claimant submitted a quote from the Digest of Benefit Entitlements (Digest) stating that it came from the Tribunal's office.²² The quote relates to an employer requiring an employee to take a leave of absence. The Claimant reiterated her earlier submissions that she did not initiate a leave of absence. The Claimant noted that she has been recalled to work. The Claimant submitted argument in relation to constructive dismissal and the employer's suspension of employees. She referenced several court decisions in this regard. The Claimant submitted her employer made unilateral changes to her employment contract, which she says is a constructive dismissal.

²² The Digest is a policy document of the Canada Employment Insurance Commission. The Tribunal, is an administrative tribunal independent of the Commission and is not bound by the Digest.

[33] The Claimant submits that with respect to her actions being wilful that she cooperated with her employer's policy by requesting an accommodation. She says the employer placed a burden on itself by refusing that request.

[34] The Claimant submits with respect to knowing that her conduct could get in the way of carrying out her duties to the employer "of course I knew, but the fact remains that I cooperated with the employer and their so called policy, by submitting a sincere religious exemption."

[35] The Claimant submits with respect to did she know or ought she to have known there was real possibility of being let go because of not complying with the policy "of course I did and that's why I fully complied with the policy and actively cooperated with the employer."

[36] The Claimant submits with respect to has the alleged misconduct caused the termination of the employment a "categorical no" as there was no termination. She submits there was a shenanigan of leave of absence and that she has been recalled effective July 4, 2022.

[37] The Claimant cites a provincial human rights code and case law with respect to establishing discrimination because of creed and submits an argument with respect to her employer's duty of accommodation.

[38] The Commission made two submissions to the Tribunal.²³ It submits that if an employee wilfully refuses to comply with their employer's mandatory vaccination policy, and there is a clear connection between a claimant's refusal to comply and the suspension, a finding of misconduct can be established. The Commission says in this situation, the Claimant was made aware of the company's mandatory vaccination policy and the consequences of failing to comply. The Claimant confirmed receiving the policy prior to being placed on leave, and was aware of the ramifications of failing to comply.

²³ See GD4 and GD8

The Commission says the Claimant was aware of the deadlines and still failed to comply, knowing negative consequences would be a result of such refusal.

[39] The Commission submitted it concluded the Claimant's refusal to comply with company policy constituted misconduct within the meaning of the EI Act because the Claimant was aware of the requirements to comply with the mandatory vaccination policy and chose to refuse to comply with the policy. It says the Claimant was aware that refusing to comply with the policy could result in negative consequences, such as suspension or termination of employment. The Commission says the Claimant was given the choice to comply with the policy, or face the known consequences in failing to comply and still made the choice to refuse to be vaccinated. The Commission submits such a refusal is considered to be misconduct. It says disagreeing with a policy does not absolve one from complying with it.

Analysis

– Matters outside my jurisdiction

[40] It is not my role to determine if the employer's policy or actions were reasonable or in violation of the Claimant's collective agreement, or the laws she cited in her submissions.²⁴

[41] It is equally not my role to determine if the suspension of the Claimant's employment constitutes wrongful or constructive dismissal as that term relates to Canadian employment law and common law. This is because the test for "just cause" as used in those proceedings, is different from the legal test applied when deciding whether misconduct has occurred within the meaning of the EI Act.²⁵

[42] There are other venues where these claims and allegations can be made.

²⁴ 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.

²⁵ The legal test for misconduct within the meaning of the EI Act is explained below. It does not require a determination as to whether suspension and / or dismissal was the appropriate penalty.

[43] It is equally not my role to determine the COVID-19 vaccine's efficacy or safety.

– **Matters within my jurisdiction**

[44] My role is to decide whether the Claimant's appeal of the Commission's refusal to pay her EI benefits should be summarily dismissed.

[45] To summarily dismiss the Claimant's appeal, the law says I must be satisfied that her appeal has no reasonable chance of success.²⁶

[46] The issue is whether it is plain and obvious on the record that the appeal is bound to fail.

[47] 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.²⁷

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

[49] For the purposes of the EI Act, for me to find misconduct, I would have to see that the Claimant engaged in wilful conduct that she knew or should have known could get in the way of carrying out her duties to her employer and she knew there was a real possibility of being let go because of that.²⁸

[50] Wilful conduct is conduct that is conscious, deliberate or intentional.²⁹ There does not have to be wrongful intent for behaviour to be misconduct under the law.³⁰

[51] The employer's policy required that all employees be fully vaccinated by October 31, 2021. Employees could be exempted from vaccination with the employer's approval

²⁶ See subsection 53(1) of the DESD Act

²⁷ The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.

²⁸ This is set out in the Federal Court of Appeal case of *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

²⁹ See *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

³⁰ See *Attorney General of Canada v. Secours*, A-352-94

of their exemption requests. Employees who were not exempted from vaccination, who did not provide proof of vaccination or remained unvaccinated by October 31, 2021, were considered not in compliance with the policy. Non-compliant employees were prohibited from entering any employer workplace, considered unable to fulfill their duties (including those who usually worked from home), placed on unpaid leave without benefits for six months after which their continuing employment relationship would be reassessed and ineligible for certain employment privileges.

[52] The appeal file shows the employer policy was effective September 10, 2021, the policy was announced and summarized in an email to all employees on August 25, 2021. On October 31, 2021, the Claimant requested an exemption to vaccination on the basis of creed. She also wrote to her employer on November 11, 2021. In that letter the Claimant wrote she could not “adhere to this new medical policy.” The employer refused her exemption request.

[53] The Claimant submitted she was aware of the employer’s policy and that she could lose her employment if she did not comply with the policy. The policy explicitly stated that it applied to employees working from home and that those who remained unvaccinated or failed to provide proof of vaccination would be considered unable to fulfill their duties. The Claimant did not provide proof of vaccination. There is no evidence that could be presented at a hearing that would change this. As a result, it is clear to me that, the Claimant’s appeal has no reasonable chance of success. Accordingly, I must dismiss the Claimant’s appeal.

Conclusion

[54] I find the appeal has no reasonable chance of success; therefore, the appeal is summarily dismissed.

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