



Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 1152

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

Decision

Appellant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (459442) dated April 4, 2022
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Decision date: August 26, 2022

File number: GE-22-1460

Introduction

[1] The Claimant works in a long-term care home.¹ Her employer adopted a policy requiring all employees to show proof of vaccination or have an approved exemption from vaccination based on human rights grounds or for medical reasons.

[2] The next day the provincial ministry of health issued a directive that the employer was required to implement and incorporate in its policy. The ministry required all employees to show proof of vaccination against COVID-19 or have an approved medical exemption by November 15, 2021. Exemptions based on human rights grounds were not considered to be compliant with the policy.

[3] The Claimant did not get vaccinated and did not submit a medical exemption request. The Claimant's employer put the Claimant on an unpaid leave of absence because she did not comply with the policy.² The Commission refused to pay the Claimant employment insurance (EI) benefits because she lost her employment due to her misconduct.³

Matters I have to consider first

The employer is not an added party

[4] 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.

[5] 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.

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

² See page GD3-63. All page numbers are from the appeal file

³ See pages GD3-29 and GD-78

The Claimant was not on a voluntary leave of absence

[6] In the context of the *Employment Insurance Act* (EI Act), a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date agreed upon between the claimant and the employer.⁴

[7] The Claimant wrote in her appeal to the Tribunal she did not stop working willingly. There is no evidence in the appeal file to show the Claimant agreed to taking a period of leave from her employment beginning on November 15, 2021 so I accept this as fact.⁵

[8] 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).⁶ The evidence shows it was the Claimant's conduct, of refusing to be vaccinated 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

[9] I must decide whether the Claimant's appeal should be summarily dismissed.

The law

[10] 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.

⁴ See section 32 of the EI Act

⁵ See page GD3-63.

⁶ See section 31 of the EI Act

[11] 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.⁷

[12] 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;
- (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.

Evidence

[13] The appeal file shows the Claimant completed an application for EI benefits on November 22, 2021.⁸

[14] The appeal file has a Record of Employment (ROE) issued for the Claimant on November 12, 2021.⁹ The ROE shows the reason for issuing as Leave of Absence. The last day for which the Claimant was paid was November 12, 2021.

[15] The Claimant spoke to a Service Canada officer on January 4, 2022.¹⁰ She told the officer she was on a leave of absence because she did not follow the vaccination policy mandated by the ministry of health. Her employer's vaccination policy was communicated to her in early October [2021]. She had until October 15, 2021 to be fully vaccinated or to hand in an exemption attestation for human rights or medical reasons. She said her employer accepted her human rights exemption request. The next day

⁷ The Tribunal sent a notice of its intention to summarily dismiss this appeal to the Claimant on July 22, 2022. She was given until August 5, 2022 to make submissions. See GD6. The Claimant made a submission on August 4, 2022. See GD7.

⁸ See pages GD3-3 to GD3-15 for the application for EI benefits. The date of application is on page GD3-13.

⁹ See page GD3-16

¹⁰ See page GD3-21

after the employer announced its policy, the ministry mandated vaccination for all employees by November 12, 2021 or be placed on a compulsory leave of absence. The Claimant told the officer the ministry would not accept any exemptions so she did not provide an exemption to the ministry.

[16] In the same conversation, the Claimant told the officer she had been off work due to illness until two weeks before she was placed on leave for non-compliance with the policy. The Claimant told the officer “she discussed the medical exemption with the doctor, he said he could write one for her but it would be thrown out of the window because they are not accepting any form of medical exemption and she did not end up following up with that.” The Claimant told the officer that she chose not to be vaccinated because she was diagnosed with anxiety and panic disorder four years ago and the thought of being vaccinated is giving her panic attacks because she has seen what it has done to other people, residents of the long-term care facility and co-workers. She said her main basis for not taking the vaccine is because of the adverse effects on other people.

[17] A representative of the employer spoke to a Service Canada officer on January 7, 2022.¹¹ She told the officer the employer’s corporate policy was communicated to the Claimant on September 10, 2021. The corporate policy required proof of receiving a first dose of the COVID-19 vaccine by September 29, 2021 and a second dose by November 1, 2021 or provide an exemption based on medical or human rights. The Claimant’s exemption for human rights was inline with the employer’s corporate policy.

[18] In the same conversation, the employer’s representative explained that the provincial government’s ministry of health policy was communicated to the Claimant on October 1, 2021. There was a change in the directive that employees working in long-term care homes should provide proof of vaccination by November 15, 2021 or provide a medical contraindication form completed by a physician. The Claimant did not provide proof of vaccination or submit the medical contra indication form. As a result, the

¹¹ See page GD3-22

Claimant was unable to work in a long term care home and was placed on a leave of absence on November 15, 2021.¹²

[19] The appeal file has a copy of the employer's updated COVID-19 Immunization Policy.¹³ The employer's policy refers to a directive issued by the Minister of Long-Term Care on October 1, 2021. The employer's policy states that all employees are required to show proof of having received the full series of a COVID-19 vaccine by November 15, 2021, or written proof of a valid medical contraindication to receiving the COVID-19 vaccine provided by a physician or registered nurse on the form attached to the policy.

[20] The updated policy goes on to say any employees not in compliance with the policy will immediately be removed from active duty. A finding of non-compliance would result in corrective and/or disciplinary action including but not limited to coaching or counselling, warning, suspension or leave without pay and termination of employment. No employees will be permitted to work in the [long-term care facility] if they are not in compliance with the policy.¹⁴

Submissions

[21] In her appeal to the Tribunal, the Claimant wrote that at no time did her employer penalize her, she was not suspended, she was placed on a leave of absence. The Claimant stated she did not commit misconduct. Her employer, under its policy, had granted her a human rights exemption to vaccination, on the basis of creed and disability. However, it was the ministry of health's policy, adopted by her employer, that led to her employer placing her on a leave of absence. The Claimant noted that her employer has accommodated her by placing her in another position that does not require her to be vaccinated. The Claimant wrote that she should receive employment insurance benefits that she has paid into for over 40 years.¹⁵ The Claimant attached

¹² See page GD3-36. The employer's representative explained to a Service Canada officer on March 29, 2022 that since the Claimant complied with the employer's policy she was placed on leave rather than dismissed.

¹³ See pages GD3-70 to GD3-77. The policy was updated on October 8, 2021.

¹⁴ See page GD3-74

¹⁵ See page GD2-11

note from her physician dated April 26, 2022, stating that she has been seen for anxiety and panic disorder back to 2018.¹⁶

[22] In reply to the Tribunal's Notice of Intention to Summarily Dismiss her appeal the Claimant submitted that her employer put her off on LOA not by her choice but by the government's decision to make an "untested" vaccine mandatory for employment. She noted that it was her "choice to not take this shot, but in my defence I don't take any shots." The Claimant said that her employer accepted her Ontario Human Rights attestation and has since placed her in a different position within the company. She wrote she did not leave her employ by choice, she was ready willing and capable to perform her duties. The Claimant noted that once staff and residents starting getting the vaccine there had been outbreaks with staff shortages, yet she is the one in the wrong due to her own personal health choice.

[23] The Commission submitted that it concluded the Claimant's decision to not comply with the employer's updated COVID-19 Vaccination Policy constituted misconduct within the meaning of the EI Act. It said the provincial government implemented a policy that stipulated all employees must show proof of double vaccination by November 15, 2021 or provide a contraindication medical form by that date demonstrating they were unable to receive the vaccine due to medical reasons. The Commission said the employer informed the Claimant of this on September 29, 2021 and implemented these changes to their own policy effective October 1, 2021. It noted the updated policy did not allow for religious exemptions. The Commission goes on to say, the Claimant knew as early as September 28, 2021 that she would need to be fully vaccinated or submit a valid medical note in order to maintain her employment. Despite this knowledge, the Commissions says, the Claimant failed to perform either action and, as a result, was suspended from her employment.¹⁷

¹⁶ See page GD2-13

¹⁷ See pages GD4-4 and GD4-5

Analysis

– Matters outside my jurisdiction

[24] It is not my role to determine if the employer's or the ministry of health's actions or policy and the employer's updated policy are reasonable, discriminatory or a violation of the Claimant's collective agreement. There are other venues that can hear and decide these allegations.¹⁸

[25] It is equally not my role to determine the safety or efficacy of the COVID-19 vaccines.

– Matters within my jurisdiction

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

[27] To summarily dismiss the Claimant's appeal, the law says I must be satisfied that his appeal has no reasonable chance of success.¹⁹

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

[29] 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.²⁰

[30] 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.

¹⁸ 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.

¹⁹ See subsection 53(1) of the DESD Act

²⁰ The Tribunal explained this in *AZ v. Minister of Employment and Social Development*, 2018 SST 298.

[31] For the purposes of the EI Act, for me to find misconduct, I would have to see that the Claimant engaged in wilful conduct 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 suspended because of that.²¹

[32] Wilful conduct is conduct that is conscious, deliberate or intentional.²² There does not have to be wrongful intent for behaviour to be misconduct under the law.²³

[33] I have to look at the circumstances that existed at the time the Claimant was suspended from her job.

[34] Under the employer's previous policy, the Claimant was granted an exemption to vaccination on the basis of human rights grounds. After the exemption was granted, the Minister of Long Term Care issued a directive requiring all employees provide proof of being fully vaccinated against COVID-19 by November 15, 2021 unless the employee submitted a medical contraindication form completed by a registered nurse or doctor. The employer had to abide by the directive. The Minister's directive did not allow for human rights grounds exemptions. As a result, the Claimant's exemption, based on human rights grounds granted by her employer under its policy, could no longer be used to exempt her from vaccination. The Claimant did not get vaccinated or submit a medical contraindication form by November 15, 2021. She was aware of the employer's updated policy. She knew that she could be suspended from her job if she did not comply with the policy, and as a result, not be able to carry out her employment duties. There is no evidence that could be presented at a hearing that would change this. It is clear to me that, on the record, the Claimant's appeal has no reasonable chance of success. As a result, I must dismiss the Claimant's appeal.

²¹ This is set out in the Federal Court of Appeal case of *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

²² See *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36

²³ See *Attorney General of Canada v. Secours*, A-352-94

Conclusion

[35] 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