

**REPRESENTATIONS OF THE COMMISSION TO THE SOCIAL SECURITY
TRIBUNAL-EMPLOYMENT INSURANCE SECTION**

Issue under appeal:

The claimant is appealing the Commission's decision resulting from his request for reconsideration under Section 112 of *the Employment Insurance Act* (the Act) regarding a disentitlement imposed pursuant to section 31 of the Act for having been suspended from his employment by reason of his own misconduct. The relevant sections of the legislation are attached.

Summary of relevant facts:

An initial claim for employment insurance benefits was established effective November 21, 2021. The claimant stated he was on a leave of absence with the employer Bank of Canada for reasons related to the vaccination policy (GD3-3 to GD3-17).

For the issue in dispute, only the relevant pages of the application for benefits have been included in the reconsideration file.

The employer issued a record of employment on November 26, 2021 stating the last day paid as November 19, 2021 and the reason for issuing the record being 'leave of absence' (GD3-18 to GD3-19).

The above-mentioned record of employment was later on amended on June 09, 2022. The last day for which the claimant was paid and the reason for separation remained unchanged (GD3-20 to GD3-21).

The Commission was not able to reach the employer for fact-finding (GD3-22).

In a conversation with the Commission, the claimant stated he was on an unpaid leave of absence with his employer. The claimant does not believe the covid19 policy is reasonable, as the claimant had been working from home. The claimant was denied a medical exemption. The employer unilaterally imposed the vaccination policy. The claimant was aware of the policy, which was communicated to employees on October 06, 2021 (GD3-23 to GD3-25).

The Commission notified the claimant that his suspension from his employment was by reason of his own misconduct. Consequently, a disentitlement under section 31 of the Act was imposed from November 22, 2021 (GD3-26).

The claimant was advised of the decision (GD3-27).

The claimant made a request for reconsideration of the Commission's decision to disentitle him from benefits. In support of his request for reconsideration, the claimant stated,

- His employer implemented a mandatory vaccination policy on October 06, 2021 requiring all employees to be vaccinated or request a medical, religious, and human rights accommodation.
- The claimant submitted a request for accommodation on November 12, 2021 for medical, religious, and human rights reasons.
- On November 19, 2021, the claimant was denied his request for accommodation.
- On November 22, 2021, the claimant was placed on an unpaid leave without benefits.

The claimant argues, his rights to freedom of conscience, freedom of religion, and freedom of life, liberty, and security of the person have been violated by the employer's vaccination policy. The claimant also finds the policy a danger to health and safety and discriminatory based on age and sex. Therefore, the claimant does not believe that taking the vaccination should be considered a reasonable alternative to going on a leave of absence.

The claimant's doctor declined to provide the claimant with a medical exemption note as the claimant did not meet the criteria for such an exemption. (GD3-28 to GD3-39).

The Commission was unable to contact the employer (GD3-40).

The claimant submitted numerous documents related to the health and safety risks of taking the covid19 vaccine, employer's vaccination policy, accommodation request, and appeal related documents (GD3-44 to GD3-857).

Covid19 Vaccination Policy states employees were required to be fully vaccinated against covid19 by November 22, 2021 or have a legitimate accommodation in place. Non-compliant employees were to be placed on a leave of absence as of November 22, 2021 (GD3-324 to GD3-326).

In a conversation with the Commission, the claimant was advised that after reviewing all information the decision was being modified from 'leave of absence – no just cause' to 'suspension – misconduct proven' (GD3-41).

The Commission's decision:

Following the claimant's request for reconsideration, the Commission maintained the decision with modification stating the claimant was not entitled to benefits because he lost his job due to misconduct (GD3-42 to GD3-43).

The claimant's appeal:

The claimant disputes the Commission's decision because the claimant argues; his rights to freedom of conscience, freedom of religion, and freedom of life, liberty, and security of the person have been violated by the employer's vaccination policy. The claimant also finds the policy a danger to health and safety and discriminatory based on age and sex. Therefore, the claimant does not believe that taking the vaccination should be considered a reasonable alternative to going on a leave of absence [GD2 (volume 1-9)].

The Commission's position:

A claimant who is suspended from his employment because of his misconduct is not entitled to receive employment insurance benefits until the claimant meets one of the provisions in Section 31 of the Act, which are:

- (a) that the period of suspension expires;
- (b) that the claimant loses or voluntarily leaves the employment; or
- (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

For the conduct in question to constitute misconduct under subsection 30(1) of the Act, it must be willful, deliberate, or so reckless as to approach willfulness. There must also be a causal relationship between the misconduct and the suspension.

The claimant's behaviour demonstrated by evidence constitutes misconduct. The claimant wilfully refused to comply with the employer's mandatory vaccination policy. The employer adopted and communicated a clear mandatory vaccination policy to the claimant. The claimant was aware that failure to comply with the policy could cause a loss of employment. The application of the policy to the claimant was reasonable within the workplace context during the covid19 pandemic. The claimant admits to being aware of the mandatory vaccination policy and the consequences of not complying with it. As such, there is clear causality between the refusal to be vaccinated and the suspension from employment and therefore a finding of misconduct can be established.

In addition, even if a policy was implemented after, the employee was hired; the application of the policy could be viewed as reasonable in the context of the COVID-19 pandemic. The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

In order to qualify for a religious exemption for employment insurance, the claimant must demonstrate that there is a direct link between the refusal of the vaccine and his religion. No link has been established.

The claimant argues that his rights to freedom of conscience, freedom of religion, and freedom of life, liberty, and security of the person have been violated by the employer's

vaccination policy and he is being discriminated against when the employer is requiring him to have taken the covid19 vaccination before they are willing to employ him. Employers implemented mandatory covid19 vaccination policies after the Chief Medical Officer of Health issued directive 6, which was to be followed to protect the health of the people in Ontario. The Chief Medical Officer was of the opinion that there existed an immediate risk to the health of persons anywhere in Ontario. The Chief Medical Officer had taken these actions under section 77.7(1) of the Health Protection and Promotion Act and the employers were obligated to comply with the directive. By doing so, under a government issued directive, the employers are not in violation of the claimant's above-mentioned rights and not acting in any discriminatory fashion; rather they are acting in the interest of public health and safety. The claimant himself is not a medical professional and does not have the expertise to make a medical determination.

In this case, the Commission concluded that the claimant's failure to comply with the employer's vaccination policy constituted misconduct within the meaning of the Act because the claimant was aware of the policy and the consequences of non-compliance. The claimant was given ample time to comply with the policy, however he decided not to comply. Consequently, the claimant is not entitled to employment insurance benefits for the period from November 22, 2021 because after that date the claimant was suspended from employment due to willful misconduct.

The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts, which led to the dismissal, were conscious, deliberate or intentional.

Mishibinijima v. Canada (AG), 2007 FCA 36

In the claimant's case, he was aware of the employer's mandatory policy and the consequences of non-compliance and yet he chose not to comply. As such, the claimant's direct actions led to his dismissal and therefore are considered misconduct.

The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as willful misconduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment.

Canada (AG) v. Lemire, 2010 FCA 314

In the claimant's case, the claimant was well aware that his conduct of non-compliance of the vaccination policy was such that would result in dismissal. By failing to comply with the vaccination policy, the claimant was in breach of a condition of employment and therefore the employer could no longer keep him employed.


Case law has confirmed that a claimant who had been suspended from his employment due to his misconduct was not entitled to benefits during the period of his suspension from employment as provided in section 31 of the Act.

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In the claimant's case, the claimant was suspended from his employment due to his misconduct and therefore not entitled to benefits during the period of his suspension from employment.

Conclusion:

The Commission maintains that the decision complies with the Employment Insurance legislation and is supported by case law. Accordingly, the Commission respectfully requests the Tribunal to dismiss the claimant's appeal.

A handwritten signature in black ink, appearing to read 'Sayra Minhas', with a stylized flourish at the end.

Sayra Minhas
Service Canada Benefits Officer
July 21, 2022

**RELEVANT SECTIONS OF THE EMPLOYMENT INSURANCE ACT AND
REGULATIONS**

Subsection 30(1) of the Act:

(1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment."

Section 31 of the Act:

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.

Section 112 of the Act:

(1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Commission may allow.

(2) The Commission must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).