

BRIEFING NOTE

June 6, 2022

Government denial of EI benefits to employees fired for failure to get the Covid-19 vaccine

By: Cynthia A. Murphy, Barrister & Solicitor

The Justice Centre for Constitutional Freedoms (“Justice Centre”) is a Canadian legal organization and federally registered charity that defends citizen’s fundamental freedoms under the *Canadian Charter of Rights and Freedoms* through pro bono (free) legal representation and through educating Canadians about a free society. The Justice Centre has been doing this since 2011.

The Government of Canada is disallowing employment insurance (“EI”) benefits to persons who have been fired or suspended from their employment for not getting the Covid-19 vaccines (the “Policy”). Service Canada and the Canada Employment Insurance Commission (the “Commission”) are insisting that unvaccinated employees have been suspended due to their own “misconduct” and consequently have denied them benefits under s. 31 of the *Employment Insurance Act*.

This Policy is not in accordance with the jurisprudence, including from the Supreme Court of Canada. The bar for proving misconduct is a high one. In cases where misconduct is found, the employees’ misconduct was frequent or they were conducting illegal activities on the work premises even though they had received several warnings. The conduct must be so serious as to constitute a breach of the employment agreement. Not every incident of misconduct constitutes “cause” for dismissal (*Metropolitan Hotel and H.E.R.E., Loc 75 (Bellan)(Re)* 2002 Canlii 78919 (ONCA)). The employee must be “guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties” (*R v Arthurs, Ex Parte Port Arthur Shipbuilding Co.* [1967] 2 O.R. 49-73).

A simple refusal to get a Covid-19 vaccine is not illegal activity and does not suffice as willful misconduct, particularly when an employer has not offered to accommodate an employee who refuses to disclose their status or to get vaccinated.

Employers are required to accommodate the medical conditions or sincerely-held religious beliefs of employees that prevent them from receiving Covid-19 vaccines.

Further, section 7 of the *Charter* requires government to respect employees’ rights to bodily autonomy, including the right to receive—or not receive—particular medical interventions, such as the Covid-19 vaccines.

Section 7 states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” There are many decisions in superior courts affirming this right. In *Fleming v Reid*, 1991 CarswellOnt 1501 (at para 41), the court stated “the right is so entrenched in the traditions of

our law as to be ranked as fundamental and deserving of the highest protection.” The Supreme Court of Canada stated in *AC v Manitoba (Director of child and Family Services)*, 2009 SCC 30 cited the Morgentaler case, stating “[Liberty], properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance”. And further citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 that: “liberty is engaged where state compulsions or prohibitions affect important and fundamental life choices”.

The Government’s current Policy to deny EI benefits to those who lost their jobs for not getting the Covid-19 vaccines is not in line with the caselaw in this area. Rather, it is arbitrary.

The purpose of the *Employment Insurance Act* is to enable someone who involuntarily loses their employment to receive benefits which the employee’s EI premiums paid for, in part. The Policy position taken by Service Canada and the Commission in labelling a simple refusal to get a COVID-19 vaccination as “misconduct” is “...inconsistent with the objective of the enabling statute or the scope of the statutory mandate.” *Hudson’s Bay Company ULC v. Ontario (Attorney General)* (Div. Ct., 2020) at p. 37.

Denying EI benefits to employees fired for being unvaccinated is being used to advance a political agenda. Even discretionary administrative and government decisions cannot be arbitrary and must conform to the *Charter*: see *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 117. By acting without a basis in law and in violation Canadians’ *Charter* rights, Service Canada and the Commission are acting outside their jurisdiction and their actions are *ultra vires*. The Government’s denial of EI benefits to Canadians fired for not taking the Covid-19 vaccines is without legal jurisdiction and therefore null and void.