



[TRANSLATION]

Citation: *CM v Canada Employment Insurance Commission*, 2022 SST 1098

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

## Decision

**Appellant:** C. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (453927) dated February 2, 2022 (issued by Service Canada)

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**Tribunal member:** Leanne Bourassa

**Type of hearing:** Videoconference

**Hearing date:** March 29, 2022

**Hearing participant:** Appellant

**Decision date:** May 3, 2022

**File number:** GE-22-552

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant, X.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was placed on leave without pay (suspended from her job). She applied for EI benefits. The Commission accepted the employer's reason for placing the Claimant on leave. It decided that the Claimant was suspended because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[4] The Claimant doesn't dispute that she went against her employer's new vaccination policy. But she says that she should not be disqualified from receiving benefits, since she disagrees with the reason given—misconduct. She asked the Commission to reconsider her application. It again denied her benefits.

[5] The Commission says that the Claimant was aware of the rules, the deadlines, and the consequences of refusing to comply. She still deliberately refused to comply. This refusal is why she was suspended. This means that she lost her job because of misconduct, possibly for as long as she didn't comply.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

## **Matter I have to consider first**

### **The employer isn't a party to the appeal**

[6] Sometimes, the Tribunal sends a letter to the appellant's former employer, asking whether it wants to be added as a party to the appeal. In this case, the Tribunal sent the employer such a letter. The employer didn't reply to the letter.

[7] To be a party to this appeal, the employer has to have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, since there is nothing in the file that suggests that my decision would impose legal obligations on the employer.

### **Issue**

[8] Did the Claimant lose her job because of misconduct?

### **Analysis**

[9] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant placed on leave without pay?**

[10] I find that the Claimant lost her job because she refused to follow the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*.

[11] The Commission says that the Claimant deliberately refused to follow the employer's policy by refusing to get vaccinated and to disclose her vaccination status.

[12] On November 2, 2021, the employer sent the Claimant a letter confirming that she hadn't followed the policy yet. She had missed the October 29, 2021, deadline for attesting to her vaccination status. Additionally, she was told that she would have to

attend a training session on the benefits of COVID-19 vaccination and that she would have to get vaccinated before November 15, 2021. The letter also explains that, if she didn't get a first dose of vaccine by November 15, 2021, she would be placed on administrative leave without pay until she followed the policy.

[13] A second letter from the employer, dated November 10, 2021, confirms that the Claimant still hadn't disclosed her vaccination status and, as a result, was going against the policy. For this reason, she was placed on administrative leave on November 15, 2021, until she followed the policy. The leave without pay would be reviewed if her vaccination status changed.

[14] I note that the Record of Employment issued by the employer also explains that the Claimant was on leave for not following the employer's vaccination policy.

[15] I find that the Claimant was suspended from her job because she didn't disclose her vaccination status before October 29, 2021, as required by her employer's policy.

### **Is the reason for the Claimant's suspension misconduct under the law?**

[16] The reason for the Claimant's leave without pay is misconduct under the law.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>4</sup>

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

[18] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go (in this case, placed on leave) because of that.<sup>5</sup>

[19] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.<sup>6</sup>

[20] The Commission says that there was misconduct because the Claimant deliberately refused to follow the employer's policy. She had been told about the rules, the deadlines, and the consequences of refusing to comply. She still chose to go against the policy.

[21] The Claimant says that there was no misconduct for several reasons, including the following:

- There wasn't a conflict with her employer.
- Her employer breached her employment contract.
- The policy was an unjustified job requirement.
- There was no free and informed consent.
- The employer violated the Constitution.
- She was entitled to protection from government overreach.
- Medical experiments require consent.
- The meaning of the word "misconduct"

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- Her entitlement to EI benefits

[22] To address the arguments efficiently, I will first consider the Commission's findings, and then I will consider the Claimant's points. When looking at the Claimant's multiple arguments, I will simplify them and combine some of them to deal with them together in a logical way.

– **The Commission has shown that there was misconduct under the law**

[23] I find that the Commission has shown that the behaviour that led to the Claimant's suspension is misconduct under the law.

[24] The Commission says that the Claimant made a deliberate decision to go against her employer's policy even though the facts of the case show that she had been told not only about the rules and deadlines, but also about the consequences of refusing to comply. The suspension is the direct result of her deliberate refusal to follow the policy.

[25] Although the Claimant has submitted multiple documents and arguments to justify her reasons for not getting vaccinated or disclosing her vaccination status as required, her evidence doesn't show that she didn't know of the policy or know the consequences of not complying. Also, she doesn't allege that she met the criteria of the policy by attesting to her vaccination status or getting vaccinated.

[26] In fact, the Claimant testified that the employer had announced the policy in a general email including information about the policy. There were a few emails about this with the same message, namely that employees who had questions could talk to their doctor. The Claimant says that she went to her manager to find out whether the policy applied to everybody. According to the Claimant's testimony, it wasn't clear whether employees who didn't comply would be placed on leave. With the deadline approaching, and without more details, the Claimant was waiting for a letter containing more information.

[27] The Claimant confirmed that the evidence before the Tribunal includes the employer's email. Contrary to her comments, I find that the message is very clear and specific. It includes the following information:

- The employer's employees have to be vaccinated.
- The requirement applies whether the person is teleworking, working remotely, or working on site in federal government facilities.
- Employees needed to complete their attestation by October 29, 2021.
- The information would be collected in accordance with the *Privacy Act* and the *Policy on Privacy Protection*.
- Anyone who didn't attest to their vaccination status, or was unwilling to be vaccinated, would be placed on administrative leave without pay as of November 15.
- In exceptional cases where someone is unable to be vaccinated due to a prohibited ground under the *Canadian Human Rights Act*, that person may request accommodation.
- Employees who didn't submit their attestation before October 29 were required to attend a training session on the benefits of COVID-19 vaccination.

[28] The Claimant also testified being told by her supervisor that she needed to go online to attest to her vaccination status, since she would be laid off if she didn't do this.

[29] So, the Claimant was aware of the policy and the consequences of not following it. She says she didn't think that her employer would go as far as placing her on leave without pay, especially since she was working from home and didn't have contact with the public. Despite that impression, I find that the Claimant was told about the consequences of refusing to get vaccinated and to disclose her vaccination status. She still chose to refuse to follow the policy.

– **Misconduct in EI**

[30] The Claimant argues that her actions should not be characterized as misconduct or disentitle her to EI benefits. She says that she wasn't at odds with her employer over her work performance or her relationships with her colleagues and managers. She argues that the misconduct relied on by the Commission is inconsistent with the interpretation of the meaning of misconduct set out for EI purposes in the *Digest of Benefit Entitlement Principles*. Lastly, she says that she meets the entitlement criteria for EI benefits.

[31] First of all, the *Employment Insurance Act* specifically says that a claimant who is suspended for misconduct is disentitled to benefits.<sup>7</sup> This disentitlement applies even when the other entitlement criteria are met.

[32] The Claimant argues that, when it disqualified her from receiving benefits, the Commission failed to consider some of the circumstances mentioned in the *Digest of Benefit Entitlement Principles*.<sup>8</sup> I agree with the Commission on this point: The circumstances mentioned are factors to be considered when assessing just cause for voluntarily leaving a job. In this case, the Claimant didn't voluntarily leave her job, and the employment relationship wasn't severed. The circumstances listed aren't relevant to determining whether there was misconduct under the law.

[33] Having a good relationship with your employer and colleagues doesn't rule out being placed on leave or suspended for not complying, and it doesn't prevent the underlying actions from being considered misconduct under the law. In this case, the Claimant wasn't suspended due to personal or professional fault. She was suspended because her choice to go against the policy meant disobeying her employer. Case law

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<sup>7</sup> See section 31 of the *Employment Insurance Act*.

<sup>8</sup> Specifically, she says that the Commission didn't consider that the disciplinary action against her was disproportionate, that her health was adversely affected by her work or working environment, and that she had moral objections to practices contrary to professional ethics.



shows that an employee doesn't have to mean to be doing something wrong for the action to be considered misconduct.<sup>9</sup>

[34] I find that the Claimant's arguments don't rule out misconduct in the context of the *Employment Insurance Act*.

– **The employer's actions**

[35] The Claimant says that the employer's actions should be considered. She says that her employer breached her employment contract and that the policy was an unjustified job requirement. In her view, the employer violated the Constitution by implementing that policy.

[36] When it comes to determining disentitlement from receiving EI benefits because of misconduct, the claimant's conduct is what is relevant. The Commission doesn't have to prove that the employer's policies are reasonable or fair. Also, the Tribunal doesn't have the necessary jurisdiction to decide whether the implementation of the mandatory attestation and vaccination policy is reasonable.

[37] The Claimant hasn't shown how the employer breached her employment contract by imposing a vaccination policy. She hasn't filed into evidence a copy of her employment contract or the collective agreement, which, in her opinion, was violated. In any case, such issues fall outside the Tribunal's jurisdiction. They will have to be dealt with by the relevant entities, such as the union and forums on labour law.

– **The lawfulness of the employer's policy**

[38] The Claimant also challenges the lawfulness of the employer's policy. She says that the policy is unlawful, since it doesn't include free and informed consent for vaccines, and medical experiments require participants' consent. She argues that she is entitled to protection from government overreach.

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<sup>9</sup> See *Attorney General of Canada v Secours*, A-352-94.

[39] I agree that the Claimant has the right not to undergo a medical procedure without her informed consent. Everyone does. But the law doesn't guarantee her a job in a workplace where the employer decided to protect all employees using the best possible methods.

[40] The employer implemented a policy supported by recommendations from the relevant authorities to protect its employees during the COVID-19 pandemic. The policy reflects recognized medical opinions, even though the Claimant doesn't accept them. She has the right to refuse to follow the policy. But that doesn't exempt her from the consequences of not complying.

[41] I find that the Commission has proven that there was misconduct because the Claimant chose not to disclose her vaccination status before October 29, 2021, and not to get vaccinated before November 15, 2021. The employer had a policy about this, and the Claimant was aware of her obligations under the policy, even if she disagreed. On November 2, 2021, she was directly informed of the consequences of not following the policy, namely that she would be placed on administrative leave without pay if she didn't get vaccinated before November 15, 2021. She still chose to refuse the vaccine. The suspension is the direct result of her informed decision not to follow the employer's policy.

### **So, did the Claimant lose her job because of misconduct?**

[42] Based on my findings above, I find that the Claimant lost her job because of misconduct.

### **Conclusion**

[43] I find that the Claimant is disqualified from receiving benefits because she was placed on leave (suspended) for misconduct.

[44] This means that the appeal is dismissed.

Leanne Bourassa  
Member, General Division – Employment Insurance Section