



Citation: *MN v Canada Employment Insurance Commission*, 2022 SST 961

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

Decision

Appellant: M. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (459053) dated March 3, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: August 17, 2022

Hearing participant: Appellant

Decision date: August 23, 2022

File number: GE-22-998

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] M.N. is the Claimant in this case. The Claimant worked as a palliative care coordinator for a health organization. The employer put the Claimant on an unpaid leave of absence and then dismissed because she did not comply with the covid19 vaccination policy at work.² The Claimant then applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended and lost her employment due to her own misconduct.⁴

[5] The Claimant disagrees because she does not want to get vaccinated and has a right to decline a medical treatment and has privacy concerns.⁵ The employer wrongfully terminated her. She argues it was not misconduct.

Matters I have to consider first

A pre-hearing conference (PHC) was held

[6] I held a pre-hearing conference by teleconference on May 6, 2022 to discuss the scheduling of the hearing date.⁶ Only the Claimant attended.

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

² See records of employment at GD3-15 and GD3-17.

³ See application for EI benefits at GD3-3 to GD3-14.

⁴ See initial decision at GD3-97 to GD3-98 and reconsideration decision at GD3-105 to GD3-106.

⁵ See appeal forms at GD2-1 to GD2-10.

⁶ See PHC at GD8-1 to GD8-3 and GD14-1 to GD14-3.

[7] At the PHC, the Claimant explained that she preferred to have an afternoon hearing. She asked for an in-person hearing, but in the alternative, she said that a videoconference would be acceptable. She also asked for the hearing to be “confidential”.

[8] On May 16, 2021, I issued an “Interlocutory Decision” and decided that the hearing would proceed by videoconference instead.⁷ I also decided to deny the Claimant’s request for a confidentiality order. The reasons are set out in the Interlocutory Decision.

The Claimant asked to read a written statement at the hearing

[9] At the hearing, the Claimant said that she had prepared a written statement that would address the facts of the case and her arguments. She asked to read her statement during her testimony. A copy of the written statement has been included in the file.⁸

The Claimant submitted documents after the hearing

[10] The Claimant referred to the employer’s covid19 vaccination policy at the hearing. However, the file did not appear to contain a complete copy of the policy, so the Claimant submitted a copy to the Tribunal after the hearing.⁹ It was added to the file and a copy was shared with the Commission.¹⁰ The Commission also sent in additional submissions and it was shared with the Claimant.¹¹

Issue

[11] Was the Claimant suspended and did she lose her job because of misconduct?

⁷ See Interlocutory Decision at GD18-1 to GD18-5.

⁸ See Claimant’s written statement at GD20-470 to GD20-488.

⁹ See GD3-75; GD3-77; GD3-78.

¹⁰ See policy at GD23-2 to GD23-5

¹¹ See GD24-1 to GD24-2.

Analysis

[12] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.¹²

[13] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹³

[14] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹⁴

[15] To answer the question of whether the Claimant was suspended and 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 did the Claimant stop working?

[16] I find that the Claimant was put on an unpaid and mandatory leave of absence on October 4, 2021 and then dismissed her on October 31, 2021 because she did not comply with the employer's covid19 vaccination policy.

[17] This is consistent with the leave of absence and termination letters in the file, the record of employment and Claimant's testimony.¹⁵

[18] I note that the Claimant was not permitted to continue working from October 1, 2021. She was locked out of the system. In my view, the unpaid leave of absence is

¹² Section 30 of the *EI Act*.

¹³ See section 31 of the *EI Act*; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

¹⁴ See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

¹⁵ See unpaid leave letter at GD3-84 and termination letter dated November 1, 2021 at GD3-49 to GD3-50; record of employment at GD3-15.

similar to a suspension because it was mandatory and imposed on the Claimant.¹⁶ Even though she wanted to continue working, the employer did not permit her.

What was the employer's policy?

[19] The employer implemented a "*Home and Community Care Support Services Covid19 Vaccination Policy*" (policy) effective September 7, 2021.¹⁷

[20] The policy states that the employer recognizes the importance of the health and safety of its employees and are committed to the prevention of covid19 exposure and transmission of infection to employees, patients, caregivers, volunteers, visitors and residents through the implementation of its covid19 vaccination policy as required by Directive 6.¹⁸

[21] The policy also provided exemption for medical reasons and human rights grounds in accordance with Ontario's *Human Rights Code*.¹⁹

[22] The policy requires that employees declare their vaccination status by selecting one of four responses. You can find the four options listed in the "vaccination reporting submission" included in the file.²⁰

[23] If an employee selects the fourth option "*I am unable to be vaccinated at this time on human rights ground (includes religious grounds: documentation acceptable to the employer is required)*".²¹ Then the employee must participate and complete the employer prescribed covid19 education e-learning module called "*making an informed decision regarding the covid19 vaccine*".

¹⁶ See section 31 of the *EI Act*.

¹⁷ See policy at GD23-2 to GD23-5.

¹⁸ See GD23-3 and Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act*, Service Providers in accordance with the *Home Care and Community Services Act, 1994*, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006*, and Ambulance Services within the meaning of the *Ambulance Act, R.S. O. 1990, c. A. 19*.

¹⁹ See *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁰ See vaccination reporting submission at GD3-76.

²¹ See GD23-3.

[24] In this case, the Claimant said that she selected the fourth option in September 2021, but explained that she answered under duress. She felt her information was personal medical information and protected by privacy laws.²²

Was the policy communicated to the Claimant?

[25] The Claimant testified that the policy was communicated to staff by email on September 2, 2021 and a reminder email was sent on September 7, 2021.²³ This is consistent with a telephone discussion she had with the Commission.²⁴

[26] Accordingly, I accept that the policy was first communicated to the Claimant on September 2, 2021.

What were the consequences of not complying with the policy?

[27] The policy says that “employees who fail to comply with this policy and/or the requirements of Directive 6 will be subject to progressive discipline up to and including an unpaid leave and/or termination.”²⁵

[28] The Claimant told the Commission that the employer informed staff that they would undergo progressive discipline or face termination if they did not have their first covid19 vaccine dose by October 1, 2021.

[29] The Claimant testified that she was placed on an involuntary leave of absence effective October 4, 2021 and was officially disconnected from work on October 1, 2021. The employer then asked her to comply with the policy by October 15, 2021 stating that “until compliance is reached you will remain on an unpaid leave of absence and be subject to further discipline up to an including termination”.²⁶ As she did not comply with the policy, she was then terminated on October 31, 2021.

²² See GD20-471 and GD3-76.

²³ See GD20-471.

²⁴ See GD3-20; GD3-71 to GD3-72; GD3-73 to GD3-74.

²⁵ See GD23-4.

²⁶ See GD20-473.

Is there a reason the Claimant could not comply with the policy?

[30] The policy provided for exemption for medical reasons and human rights grounds in accordance with Ontario's *Human Rights Code*.²⁷

[31] The Claimant testified that she submitted an exemption in September 2021 based on creed. However, her exemption request was denied by the employer around September 30, 2021 because they said it was not based on an enumerated ground under Ontario's *Human Rights Code*.²⁸

[32] The day following the exemption denial, on October 1, 2021, the employer emailed the Claimant and told her that she was in violation of the policy as exemption had not been approved and decided to not proceed with vaccination.²⁹

Is it misconduct based on the law – the *Employment Insurance Act*?

[33] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.³¹

[34] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.³²

[35] 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 let go because of that.³³

²⁷ See Human Rights Code, R.S.O. 1990, c. H.19.

²⁸ See GD20-472.

²⁹ See GD20-472.

³⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³² See *Attorney General of Canada v Secours*, A-352-94.

³³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[36] The Commission has to prove that the Claimant was suspended and 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 was suspended and lost her job because of misconduct.³⁴

[37] I find that the Commission has proven that there was misconduct for the following reasons.

[38] First, I find that the policy was communicated to the Claimant and she was aware of the deadline dates to comply. The Claimant also had enough time to comply with the policy.

[39] Specifically, the policy was first communicated to the Claimant on September 2, 2021 and September 7, 2021 by email.³⁵ Her exemption request based on creed was submitted shortly thereafter and it was refused on September 30, 2021.³⁶ As of October 1, 2021, the Claimant was aware of the exemption denial and knew that she had to comply with the policy.

[40] Second, I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons. After she was denied her exemption request, she intentionally refused to comply with the policy and that refusal was wilful.

[41] This was a deliberate choice she made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.³⁷

[42] I was not persuaded by the Claimant's argument that it was not wilful misconduct because while she did not have wrongful intent, it was still misconduct. I generally accept that the employer can choose to develop and impose policies at the workplace.

³⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

³⁵ See GD3-71 to GD3-74.

³⁶ See exemption denial email at GD3-83.

³⁷ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[43] In this case, the employer developed and imposed a policy because of Directive 6, which was issued by the Chief Medical Officer of Health for the Province of Ontario. Directive 6 has legal force and effect. The employer's policy was consistent with the terms of the Directive 6. However, it was within the employer's discretion to decide whether they wanted to allow employees to do rapid testing, proof of educational session and ultimately the consequences of non-compliance.

[44] So, that means vaccination for covid19 became a condition of the Claimant's continued employment. The Claimant breached the policy when she chose not to comply with it and that interfered with her ability to carry out her duty to the employer.

[45] The Claimant referenced various sections from the *Digest of Benefit Entitlement Principles* (Digest).³⁸ The Digest is not law, but rather they are guidelines for the Commission. I am bound by the law and not the Digest.³⁹

[46] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence/suspension and dismissal.

[47] The consequences are outlined in the policy and were communicated to the Claimant by the employer when she was put on a leave of absence on October 4, 2021 and later terminated on October 31, 2021.⁴⁰ In my view, the Claimant ought to have known that the employer would follow through with the termination, particularly since she was put on a mandatory and unpaid leave of absence.

[48] I was not persuaded by the Claimant's argument that she did not think she would be dismissed because she was protected by the union and collective agreement. At the hearing, the Claimant testified that the union told her they could not interfere with the employer until after they were all terminated. This supports the fact that she was aware she needed to be terminated in order to obtain support from the union.

³⁸ See GD20-477 to GD20-484.

³⁹ See *Canada (Attorney General) v Hudon*, 2004 FCA 22; *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

⁴⁰ See GD3-84.

[49] Fourth, I find that the Claimant has not proven she was exempt from the policy. I accept that she did make a timely request to the employer for an exemption based on creed, but it was denied.⁴¹

[50] I was not persuaded by the Claimant's argument that the employer failed to provide her with a course module about covid19 vaccination as required by the policy, so she could not make an informed decision. The policy states that employees who declare they are unable to be vaccinated based on human rights ground, must participate and complete the employer's prescribed education eLearning module.⁴² The Claimant said she asked for the course, but it was never provided by the employer.

[51] Even if the employer failed to provide her with the course, I note that the Claimant is a nurse and could have taken steps to seek out this information from her medical practitioner. However, the Claimant was already seeking an exemption from the policy based on creed because she could not be vaccinated, so the course may not have changed the outcome. As well, the employer did respond to the Claimant's email suggesting that she speak with her physician or seek out information from public health or other resources.⁴³

[52] The *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*⁴⁴ as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.⁴⁵

⁴¹ See GD20-476; GD3-83.

⁴² See GD23-3.

⁴³ See GD3-89.

⁴⁴ See *Human Rights Code*, R.S.O. 1990, c. H.19.

⁴⁵ See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

[53] Lastly, the purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.⁴⁶ In this case, it was not involuntary because it was the Claimant's actions that led to her suspension and dismissal.

What about the Claimant's other arguments?

[54] The Claimant raised other arguments and filed evidence to support her position. Some of them included the following:

- a) There was no informed consent
- b) Vaccinations are voluntary in Canada
- c) The employer failed to accommodate her exemption request
- d) The employer failed to follow their own policy, by not providing her with the educational course for covid19 vaccination
- e) The employer exceeded the requirements of Directive 6
- f) She was wrongfully put on a leave of absence and terminated
- g) The employer did not follow the collective agreement

[55] The court has already decided that the Tribunal cannot decide whether the Claimant's dismissal or penalty was justified. Rather, the Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.⁴⁷ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

⁴⁶ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

⁴⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[56] I acknowledge the Claimant's additional arguments, legislation and submissions included in the file. In particular, she argues that her exemption based on creed should have been granted by the employer. I do not have the authority to decide that particular argument because the court has said that the Tribunal is not the appropriate forum for the remedy she is seeking.⁴⁸

[57] The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments. At the hearing, the Claimant confirmed a union group grievance was already filed and they are waiting for an arbitration date.⁴⁹

Conclusion

[58] The Claimant had a choice and decided not to comply with the policy for personal reasons and knew the consequences. This led to an undesirable outcome, a mandatory unpaid leave of absence and dismissal.

[59] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

Solange Losier
Member, General Division – Employment Insurance Section

⁴⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

⁴⁹ See GD3-101.