



Citation: *AJ v Canada Employment Insurance Commission*, 2022 SST 937

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

## Decision

**Appellant:** A. J.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (453776) dated February 8, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** June 15, 2022

**Hearing participant:** Appellant

**Decision date:** June 24, 2022

**File number:** GE-22-832

## 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 put on an unpaid and mandatory leave absence or suspended from her job because of misconduct. This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] A.J. is the Claimant in this case. She worked as a paralegal for a law firm. The employer put the Claimant on a mandatory and unpaid leave of absence because she did not comply with their covid19 vaccination policy at work.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits for a few different reasons.<sup>4</sup>

[5] The Claimant disagrees because the policy was not legal. She did not want to get vaccinated for covid19 for her own reasons.<sup>5</sup> She argues that the employer failed to accommodate her. As well, she was not required to be vaccinated for covid19 when she was hired.

## Matters I have to consider first

### The legal issue

[6] The Commission first decided that the Claimant stopped working because she voluntarily took a leave from her job on November 15, 2021 without just cause.<sup>6</sup> On

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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.

<sup>2</sup> See GD3-43 to GD3-45.

<sup>3</sup> See application for benefits at GD3-3 to GD3-14.

<sup>4</sup> See initial decision at GD3-19 and reconsideration decision at GD3-58 to GD3-59.

<sup>5</sup> See notice of appeal at GD2-1 to GD2-16.

<sup>6</sup> See initial decision at GD3-19; a voluntary period of leave without just cause is located in section 32 of the *Employment Insurance Act* (EI Act).

reconsideration, the Commission maintained that she voluntarily left her job without just cause or lost her job because of misconduct.<sup>7</sup> In their submissions to the Tribunal, the Commission wrote that the Claimant voluntarily took a period of leave from her employment without just cause.<sup>8</sup>

[7] I wrote to the Commission before the hearing took place to clarify the legal issue and which section in law they were relying on.<sup>9</sup> The Commission replied back before the hearing took place and said that the issue should have been considered as a suspension for misconduct instead of a voluntary leave of absence because the leave was initiated by the employer.<sup>10</sup> A copy of their reply was shared with the Claimant.

[8] I acknowledge that whether the case is misconduct or voluntary leave, both result in disentitlement or disqualification to EI benefits.<sup>11</sup> The Commission and Claimant appear to agree that the mandatory unpaid leave of absence was initiated by the employer for a failure to comply with their vaccination policy. There is no evidence to suggest that the Claimant voluntarily chose to take a leave of absence.

[9] Therefore, I find that the issue to be decided is whether the Claimant was suspended due to her own misconduct.<sup>12</sup>

### **Documents sent to the Claimant**

[10] The Claimant contacted the Tribunal a few days before the hearing because she could not locate some of the file documents, specifically GD3 and GD4.<sup>13</sup> At the Claimant's request, the Tribunal sent them to her on June 13, 2022. This was two days before the hearing.

[11] At the hearing, I apologized to the Claimant for the Tribunal's failure to send these documents because they should have been sent to her in March 2022. Given

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<sup>7</sup> See reconsideration decision at GD3-58; this is in section 30 of the EI Act.

<sup>8</sup> See section 32 of the *EI Act*.

<sup>9</sup> See letter at GD8-1 to GD8-3.

<sup>10</sup> See GD9-1; the Commission relies on section 30 and section 31 of the EI Act.

<sup>11</sup> See section 30 of the *EI Act*.

<sup>12</sup> See section 31 of the *EI Act*.

<sup>13</sup> See GD3-1 to GD3-59 and GD4-1 to GD4-11.

that, I gave her the option to adjourn the case so that she had more time to review the documents.<sup>14</sup>

[12] The Claimant explained that she had enough time to read the file documents and was prepared to proceed with her case. As a result, the case was heard on the scheduled date June 15, 2022.

### **The Claimant sent documents after the hearing**

[13] At the hearing, the Claimant said that she had copies of emails with her employer discussing whether there could be an acceptable arrangement for her. Since they were not part of the file and relevant, I allowed the Claimant to submit them after the hearing.<sup>15</sup> The emails were added to the file and shared with the Commission.

### **Issue**

[14] Why is the Claimant no longer working? Is it misconduct based on the *Employment Insurance Act*?<sup>16</sup>

### **Analysis**

[15] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>17</sup>

[16] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits. 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.<sup>18</sup>

[17] As well, a Claimant who voluntarily takes a period of time from their employment without just cause is not entitled to receive EI benefits unless they resume their

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<sup>14</sup> See paragraph 11(1) of the *Social Security Tribunal Regulations*.

<sup>15</sup> See email thread at GD10-1 to GD10-7.

<sup>16</sup> See *Employment Insurance Act*, S.C. 1996, c. 23.

<sup>17</sup> Section 30 of the *Employment Insurance Act (Act)*.

<sup>18</sup> See section 31 of the Act.

employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer.<sup>19</sup>

### **Why is the Claimant no longer working?**

[18] I find that the Claimant was put on a mandatory and unpaid leave of absence effective November 15, 2021 because she did not comply with the employer's vaccination policy (policy). In my view, this similar to a suspension because she was not permitted to continue working at home or return to work. She had to return her equipment and remote access was removed.

[19] This is consistent with the record of employment and the employer's letter to the Claimant about her leave of absence effective November 15, 2021.<sup>20</sup>

### **What was the employer's policy?**

[20] The employer implemented a vaccination policy effective on September 21, 2021.<sup>21</sup> It applies to all employees, including those working from home.

[21] The policy requires that employees report their vaccination status by October 4, 2021. Employees had to be fully vaccinated for covid19 by October 15, 2021 to work in the office, but it was extended to November 15, 2021.<sup>22</sup>

[22] The policy allows for employees to ask for an accommodation and exemption based on a protected ground of discrimination under provincial human rights legislation.<sup>23</sup>

[23] The Claimant testified that initial deadline to be fully vaccinated was October 15, 2021, but it was extended to November 15, 2021. She was not permitted to work in the office from October 15, 2021, but that she could work from home until November 15,

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<sup>19</sup> See section 32(1) and 32(2) of the *EI Act*.

<sup>20</sup> See record of employment at GD3-15 and leave of absence letter GD3-43 to GD3-45.

<sup>21</sup> See policy at GD3-39 to GD3-40.

<sup>22</sup> See supplementary record of claim at GD3-17; see email at GD10-5.

<sup>23</sup> See GD3-40.

2021 and either pursue a medical exemption or reconsider receiving the covid19 vaccine.<sup>24</sup>

### **Was the policy communicated to the Claimant?**

[24] The Claimant agrees that the policy was communicated to her by email. She also prepared a written timeline from September 21, 2021 to December 1, 2021 that shows the policy was communicated to her.<sup>25</sup> This is also consistent with the employer's statement to the Commission.<sup>26</sup>

### **What were the consequences of not complying with the policy?**

[25] The policy says that employees who do not provide proof of vaccination and who have not been granted an exemption, will be subject to measures, as deemed appropriate by the Employer, necessary to protect the health and safety of all members.<sup>27</sup>

[26] The employer's email to the Claimant says that she if does not either obtain a medical exemption or provide proof of covid19 vaccination by the extended deadline of November 15, 2021, then she will be put on an unpaid leave of absence.<sup>28</sup>

[27] The evidence shows that the employer put the Claimant on a mandatory and unpaid leave of absence from November 15, 2021.<sup>29</sup>

[28] The Claimant agrees that she knew she would be put on an unpaid leave of absence for not complying with the policy. However, she was hopeful that her employer would accommodate and allow her to continue to work from home.

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<sup>24</sup> See GD10-1 to GD10-7.

<sup>25</sup> See timeline at GD3-25 to GD3-29.

<sup>26</sup> See supplementary record of claim at GD3-17.

<sup>27</sup> See GD3-40.

<sup>28</sup> See GD10-7.

<sup>29</sup> See GD3-43 to GD3-45.

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

[29] The Claimant agreed that she knew the policy provided for an exemption and accommodation. She explained that she did not request a medical exemption because she did not have a medical reason to ask for one.

[30] However, the Claimant did ask the employer for an exemption and accommodation by email.<sup>30</sup> She wrote to the employer and told them she does not feel comfortable to consent to the mandate and policy. She also acknowledged that vaccine hesitancy was not a valid reason for requesting an exemption of accommodation.<sup>31</sup>

[31] The employer told the Commission that the Claimant did not ask for an exemption.<sup>32</sup>

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

[32] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>33</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>34</sup>

[33] The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>35</sup>

[34] 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 suspended or let go because of that.<sup>36</sup>

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<sup>30</sup> See email dated October 4, 2021 at GD3-41.

<sup>31</sup> See GD3-40; GD3-41; GD3-56.

<sup>32</sup> See supplementary record of claim at GD3-56.

<sup>33</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>34</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>35</sup> See *Attorney General of Canada v Secours*, A-352-94.

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

[35] The Commission has to prove that the Claimant was suspended 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 because of misconduct.<sup>37</sup>

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

[37] First, I find that the Claimant willfully and consciously chose to not comply with the employer's vaccination policy. The Claimant knew about the policy and the deadline to comply. She was permitted to work from home for a month and given an extension to comply by November 15, 2021, but chose not to comply for personal reasons.

[38] Second, the policy provided for exemption on the basis of a protected ground of discrimination under provincial human rights legislation along with proof of the protected ground. The policy states that vaccine hesitancy is not a valid reason for requesting an exemption and accommodation.<sup>38</sup>

[39] I acknowledge that the Claimant emailed her employer to ask for an exemption and accommodation because of her concerns about the vaccine. However, it seems that the employer did not consider her request on the basis of vaccine hesitancy. Because of this, I find that the Claimant has not proven that she was exempt from the employer's policy.

[40] Third, I was not persuaded by the Claimant's argument that the vaccine requirement was not a condition of employment. I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. So, this became a condition of the Claimant's employment and she breached the policy when she chose not to comply.

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<sup>37</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>38</sup> See GD3-40.



[41] I do not find that the Claimant was being forced to vaccinate, but she had a choice. She chose to not get vaccinated for personal reasons and this led to an undesirable outcome, a mandatory unpaid leave of absence or suspension.

[42] 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 which is insured against must be involuntary.<sup>39</sup> In this case, it was not involuntary because the Claimant chose not to comply with the employer's policy for personal reasons and knew that her conduct would eventually lead to an unpaid leave of absence or suspension.

### **What about the Claimant's other arguments?**

[43] The Claimant raised some other arguments about her case including the following:

- a) She may have been discriminated against on the basis of genetic characteristics and for not getting vaccinated
- b) Arguments about the vaccine's efficacy
- c) The employer's vaccine policy was not reasonable
- d) The employer did not have the authority to mandate the vaccine, it was not legal
- e) The employer could have accommodated her and made an exception
- f) The employer later advertised her job as a remote position, etc.

[44] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide whether the employer breached her employment rights by putting her on an unpaid leave of absence.

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<sup>39</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

[45] The court has said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>40</sup>

[46] The Claimant's recourse is to pursue this action in court, or any other Tribunal that may deal with these particular matters.

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

[47] Based on my findings above, I find that the Claimant was put on an unpaid leave of absence or suspended because of misconduct.

### **Conclusion**

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

[49] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>40</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.