



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1005

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

## Decision

**Appellant:** S. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (458101) dated March 10, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** July 28, 2022

**Hearing participant:** Appellant

**Decision date:** July 30, 2022

**File number:** GE-22-1074

## 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.<sup>1</sup>

## Overview

[3] The Claimant worked as a Registered Nurse at a hospital. The employer put the Claimant on a mandatory and unpaid leave of absence and then dismissed her because she did not comply with the covid19 vaccination policy at work.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission first decided that the Claimant was not entitled to receive EI benefits because she voluntarily left her employment.<sup>4</sup> After the Claimant filed her appeal, the Commission instead argued that she was suspended and lost her employment due to her own misconduct.<sup>5</sup>

[5] The Claimant disagrees and argues that the employer's policy was illegal and vaccination for covid19 was not mandated in Canada.<sup>6</sup> She says that she should be entitled to get EI benefits after paying EI premiums for many years.

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

<sup>2</sup> See record of employment at GD3-31.

<sup>3</sup> See application for benefits at GD3-3- to GD3-18 and renewal application at GD3-19 to GD3-30.

<sup>4</sup> See initial decision at GD3-35 and reconsideration decision at GD3-51 to GD3-52.

<sup>5</sup> See Commission's representations at GD4-1 to GD4-12.

<sup>6</sup> See appeal forms at GD2-1 to GD2-19.

## Matter I have to consider first

### What is the legal issue?

[6] The Commission first decided that this case was a “voluntary leave”<sup>7</sup> case, but they changed their position after the Claimant’s appeal was filed.<sup>8</sup> They now say it is a “misconduct” case.<sup>9</sup>

[7] At the hearing, the Claimant confirmed that she did not voluntarily leave her job, but it was her employer that imposed the mandatory and unpaid leave of absence. She agreed that the legal issue she disputes is misconduct.

[8] If the reason for the Claimant’s separation from her employment is not clear, I can decide whether it is based on voluntary leaving or misconduct. Both of these issues result in not being entitled to EI benefits (this is called a “disqualification” to EI benefits).<sup>10</sup>

[9] Since both parties agree, I accept that that the legal issue to be decided is misconduct

### Issue

[10] Was the Claimant suspended and dismissed from her job because of misconduct?

### Analysis

[11] Claimants who lose their job because of misconduct or who voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>11</sup>

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<sup>7</sup> See section 29 of the EI Act.

<sup>8</sup> See initial decision at GD3-35 and reconsideration decision at GD3-51 to GD3-52.

<sup>9</sup> See Commission’s representations at GD4-1 to GD4-12.

<sup>10</sup> See *Canada (Attorney General) v. Easson*, A-1598-92 and section 30 of the EI Act.

<sup>11</sup> Section 30 of the *Employment Insurance Act* (EI Act).

[12] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>12</sup>

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

### **Why did the Claimant stop working?**

[14] I find that the Claimant was put on a mandatory and unpaid leave of absence on October 15, 2021 because she did not comply with the employer's covid19 vaccination policy. The Claimant was not permitted to return to work

[15] The mandatory and unpaid leave of absence was only supposed to be for two weeks, however it was extended to allow the Claimant time to see a specialist.

[16] I also find that the Claimant was dismissed from job on December 8, 2021 because she did not comply with the employer's covid19 vaccination policy.

[17] This is consistent with the Claimant's testimony, record of employment, notice of unpaid leave letter, termination letter and discussions between the Commission and Claimant, as well as the employer.<sup>13</sup>

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

[18] The employer implemented a "*Covid19 Immunization*" (policy) effective September 7 2021. A copy of the policy is included in the file.<sup>14</sup>

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<sup>12</sup> 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.

<sup>13</sup> See GD3-31; GD2-11 to GD2-12; GD3-14 to GD3-15; GD3-38 and GD3-40.

<sup>14</sup> See policy at GD3-44 to GD3-49.

[19] The policy states that its purpose is to outline organization expectations for covid19 immunization of employees, staff, board appointed professional staff, contractors, volunteers and students.<sup>15</sup>

[20] The policy requires that staff obtain their first covid19 vaccine dose by September 7, 2021 and proof of full vaccination against covid19 by October 15, 2021.<sup>16</sup>

[21] The policy also provided an exemption from the policy for medical reasons.<sup>17</sup> It requires that staff provide written proof of a medical reason, by either a physician or a nurse practitioner that sets out the person cannot be vaccinated against covid19 and the effective time period.

[22] The Claimant testified that she previously complied with the employer's direction to do rapid testing for covid19, however she was not willing to get vaccinated for covid19 and did not want to disclose her vaccine status. While she agrees that she did not comply with the employer's policy, she explained that she has many reasons for not complying.

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

[23] The Claimant testified that the policy was communicated to her around August or September 2021. She heard about the policy memo posted online at work.

[24] The employer told the Commission that staff were notified on September 3, 2021 about the policy.<sup>18</sup>

[25] I find that the policy was communicated to the Claimant by September 3, 2021.

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<sup>15</sup> See GD3-44.

<sup>16</sup> See GD3-45.

<sup>17</sup> See GD3-45.

<sup>18</sup> See GD3-40.

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

[26] The policy says that failing to comply with the policy will result in an unpaid leave for up-to 14 days.<sup>19</sup>

[27] The policy also says that further non-compliance may lead to termination of employment, loss of privileges, termination of a contract, or a similar action appropriate to the individual's association with the hospital.

[28] The employer spoke to the Commission and said that staff were told if they did not comply with the requirement to be fully vaccinated by October 15, 2021, they would be put on a mandatory and unpaid leave of absence and then terminated on November 1, 2021.<sup>20</sup>

[29] The Claimant testified that she did not know non-compliance with the policy would lead to a mandatory and unpaid leave of absence and dismissal. Since the policy was illegal in her view, she expected that things would pass over. So, she was surprised when they put her on a mandatory and unpaid leave of absence on October 25, 2021 and then terminated on December 8, 2021.

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

[30] The employer told the Commission that the Claimant did not any submit proof of exemption status.<sup>21</sup>

[31] The Claimant testified that she tried to obtain a medical exemption because she has an autoimmune disorder. She spoke with her doctor, who declined to give her a medical exemption note.<sup>22</sup> However, her doctor did refer her to an allergist. The employer then agreed to extend her two week unpaid leave of absence so she could be assessed by the specialist.

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<sup>19</sup> See GD3-46.

<sup>20</sup> See GD3-40.

<sup>21</sup> See GD3-40.

<sup>22</sup> See GD2-9 to GD2-10

[32] The Claimant spoke with an allergist over the telephone around early December 2021. The allergist told the Claimant that they only test for one ingredient from the covid19 vaccine and that she would need to show an allergic reaction to it. The report from the allergist was released and this led to her dismissal on December 8, 2021.<sup>23</sup>

[33] As a result, the Claimant did not submit a request to the employer for a medical exemption because she did not have a medical note.

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

[34] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>24</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>25</sup>

[35] 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 his behaviour to be misconduct under the law.<sup>26</sup>

[36] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of suspended or let go because of that.<sup>27</sup>

[37] The Commission has to prove that the Claimant was suspended and lost his 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 his job because of misconduct.<sup>28</sup>

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

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<sup>23</sup> See GD2-14 to GD2-15.

<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>25</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>26</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[39] 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.

[40] Specifically, the Claimant knew that she had to be fully vaccinated for covid19 by October 15, 2021. A copy of the policy was available to her at work.

[41] Second, I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons. 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.<sup>29</sup>

[42] I was not persuaded by the Claimant's argument that refusing a vaccine is not wilful misconduct. I accept that she did not have wrongful intent, but she still made a conscious choice to breach the employer's policy for her own personal reasons.

[43] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to a mandatory and unpaid leave of absence and dismissal.

[44] I was not persuaded by the Claimant's argument that she did not think it would happen. The consequences were outlined in the policy.<sup>30</sup> As well, she was provided with a letter dated October 15, 2021 when her unpaid leave of absence began, and it said that dismissal would occur on November 1, 2021 if she did not comply.<sup>31</sup>

[45] Fourth, I find that the Claimant has not proven she was exempt from the policy. While she did make efforts to obtain a medical note from her doctor and allergist, they did not provide her with one. So, she never submitted an exemption request to the employer.

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<sup>29</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>30</sup> See GD3-45.

<sup>31</sup> See GD2-11 to GD2-12.



[46] 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*<sup>32</sup> 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.<sup>33</sup>

[47] Lastly, I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer is a hospital and they imposed a vaccination policy because of the covid19 pandemic and in response to “Directive 6”.<sup>34</sup> This means that vaccination for covid19 became a condition of her employment when they introduced the policy. 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.

[48] 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.<sup>35</sup> In this case, even if the Claimant paid EI premiums, her loss of employment was not involuntary because it was her actions that led to the dismissal.

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

[49] The Claimant raised other arguments to support her position. Some of them included the following:

- a) The employer’s policy was illegal and it violated the collective agreement
- b) Vaccination is not mandatory in Canada
- c) The employer failed to accommodate her and provide her with alternatives

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<sup>32</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>33</sup> 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](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates).

<sup>34</sup> See The Chief Medical Officer of Health introduced Directive 6. Public hospitals were required by law to comply with Directive 6.

<sup>35</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

- d) The hospital overstepped Directive 6 when they implemented the policy
- e) The covid19 vaccine was experimental and she doesn't know all the ingredients
- f) There was no informed consent
- g) The employer coerced her
- h) There are safety risks with the covid19 vaccine
- i) She was terminated without cause

[50] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>36</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[51] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments. I note that the Claimant has already filed a grievance with her union, but there is no update yet.<sup>37</sup>

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<sup>36</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>37</sup> See GD2-13; GD2-16 to GD2-19.

## **Conclusion**

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

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

[54] This means that the appeal is dismissed.

Solange Losier  
Member, General Division – Employment Insurance Section