



Citation: *KM v Canada Employment Insurance Commission*, 2022 SST 1605

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

Decision

Appellant: K. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (460934) dated March 15, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: August 25, 2022

Hearing participant: Appellant

Decision date: August 28, 2022

File number: GE-22-1275

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 because of misconduct (in other words, because he did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] K. M. is the Claimant in this case. The Claimant worked as a supply cart aide at a hospital. The employer put the Claimant on an unpaid leave of absence on October 15, 2022 because he 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 he was suspended due to his own misconduct.⁴

[5] The Claimant disagrees because the employer's policy violated his rights.⁵ His employer also wrongfully denied his religious exemption request.

Matters I have to consider first

The hearing went by teleconference instead

[6] This case was scheduled for a videoconference.⁶ At the hearing, the Claimant asked to proceed by teleconference instead.

¹ See section 32 of the *Employment Insurance Act* (EI Act).

² See record of employment at GD3-14 to GD3-15.

³ See application for EI benefits at GD3-3 to GD3-13.

⁴ See initial decision at GD3-65 to reconsideration decision at GD3-73 to GD3-74.

⁵ See appeal forms at GD2-1 to GD2-7.

⁶ See Claimant's email to the Tribunal dated May 3, 2021.

The Claimant had a second employer that is not part of this file

[7] At the hearing, the Claimant explained that he worked for two hospitals on a part-time basis (Employer #1 and Employer #2).

[8] In this case, Employer #1 put the Claimant on a mandatory and unpaid leave of absence from the hospital.⁷ However, the Claimant explained that around the same time he was also working Employer #2 and was dismissed from that employment shortly after for the same reason (non-compliance with the employer's vaccination policy).

[9] The Claimant said that he talked to a Service Canada agent who told him they were relying only on Employer #1. However, there is not record of that discussion in the file. As well, there are no other documents or discussions with the Commission about Employer #2. I note that the reconsideration decision in the file only identifies Employer #1.⁸

[10] Therefore, I find that the only issue in dispute is the Claimant's employment with Employer #1 and the alleged misconduct resulting in an unpaid leave of absence.⁹ This means that I will not be making any decisions about the Claimant's dismissal with Employer #2.

Issue

[11] Was the Claimant suspended from his job because of his own misconduct?

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.¹⁰

⁷ See record of employment for Employer #1 at GD3-14 to GD3-15.

⁸ See reconsideration decision at GD3-73 to GD3-74.

⁹ See section 112 of the EI Act and 113 of the EI Act.

¹⁰ See section 30 of the EI Act.

[13] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹¹

[14] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹²

[15] To answer the question of whether the Claimant was suspended 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?

[16] I find that the Claimant was put on a mandatory and unpaid leave of absence effective October 16, 2021 because he did not comply with the employer's covid19 vaccination policy. This is consistent with the Claimant's testimony, record of employment and discussion with the Commission, etc.¹³

[17] In my view, the Claimant's mandatory and unpaid leave of absence is similar to a suspension. The leave of absence was not taken voluntarily. The Claimant's work badge was deactivated and he was not permitted to return to work.

What was the employer's policy?

[18] The employer implemented a "*Covid19 Vaccination*" (policy) effective September 24, 2021. A copy of the policy is included in the file.¹⁴

¹¹ 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.

¹² 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

¹³ See record of employment at GD3-14 to GD3-15; GD3-57 to GD3-58 incorrectly notes November 15, 2021.

¹⁴ See policy at GD3-20 to GD3-27; it refers to version 3.

[19] The purpose of policy is to outline vaccination requirements as part of a broader covid19 prevention and control strategy aimed at protecting patients, families, staff members.¹⁵ It says that the hospital must comply with Directive 6.¹⁶

[20] The policy requires employees to be fully vaccinated or provide proof of a medical exemption or other human rights exemption enumerated in the Ontario's *Human Rights Code*.¹⁷

[21] In one email communication the employer wrote that employees needed to obtain their first dose of Moderna by September 17, 2021 or first dose of Pfizer by September 24, 2021.¹⁸

[22] The employer then sent several email communications to employees that outlined the date to be fully vaccinated, October 15, 2021.¹⁹

Was the policy communicated to the Claimant?

[23] The employer told the Commission that the policy was first communicated to existing employees on August 19, 2021 after Directive 6 was in effect. This email communication was the first time that the employer announced the mandatory vaccination requirement for all existing staff.²⁰ However, previous email communication recommended vaccination for unvaccinated staff.²¹

[24] The Claimant testified that the employer communicated the policy to him sometime in September 2021. He remembered receiving emails to his work account from the Chief Executive Officer (CEO). This is also consistent with his previous discussion with the Commission.²²

¹⁵ See GD3-21.

¹⁶ See Directive 6 was issued under section 77.7 of the *Health Protection and Promotion Act*.

¹⁷ See GD3-23 and *Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁸ See GD345 to GD3-46.

¹⁹ See various emails at GD3-29 to GD3-31; see GD3-36 to GD3-39; GD3-40 to GD3-41; GD3-43 to GD3-44;

²⁰ See GD3-29 to GD3-31.

²¹ See GD3-32 to GD3-34 and GD3-35.

²² See GD3-57 to GD3-58.

[25] I find it more likely than not, that the policy was communicated to the Claimant by email on August 19, 2021 as stated by the employer. I preferred the evidence from the employer's discussion with the Commission because it was detailed and supported by copies of the emails sent to employees.²³

What were the consequences of not complying with the policy?

[26] The policy says that staff not compliance with the vaccination requirements as of October 15, 2021 will be placed on an unpaid leave of absence.²⁴

[27] As well, the employer wrote in an email to staff that if they do not receive their first dose of covid19 vaccine by September 24, 2021, employees will be placed on an unpaid leave of absence effective October 16, 2021.²⁵ There are also several other employer emails reminding employees about the deadlines and consequences of non-compliance.²⁶

[28] The Claimant testified that he knew the policy would lead to an unpaid leave of absence on October 16, 2021.

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

[29] The policy provided for medical exemption and other permissible exemption based on human rights, including religion/creed or other enumerated ground in Ontario's *Human Rights Code*.²⁷

[30] The employer wrote in an email that the deadline to submit for a request medical or other human rights exemption was September 17, 2021.²⁸ However, they did acknowledge that they would review exemption requests submitted after the deadline.²⁹

²³ See GD3-16 to GD3-17; GD3-29 to GD3-31.

²⁴ See GD3-25.

²⁵ See GD3-47 to GD3-48.

²⁶ See GD3-47 to GD3-48; GD3-49 to GD3-50; GD3-51 to GD3-56.

²⁷ See GD3-23 and *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁸ See GD3-36.

²⁹ See GD3-45.

[31] The Claimant testified he was aware of the exemptions available and asked for a religious exemption, but could not recall the exact date. His request was denied by the employer on November 3, 2021. The Claimant also included some information about his exemption request and denial letter from his employer.³⁰

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

[32] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³¹ Misconduct also includes conduct that is so reckless that it is almost wilful.³²

[33] 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.³³

[34] 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.³⁴

[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 or lost his job because of misconduct.³⁵

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

³⁰ See GD3-61 to GD3-63.

³¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³³ See *Attorney General of Canada v Secours*, A-352-94.

³⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

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

[38] Specifically, the policy was communicated to him by email on August 19, 2021, as well as several other ongoing communications sent by the employer. He knew that he had to be fully vaccinated by October 15, 2021.

[39] Second, I find that the Claimant willfully chose to not to comply with the policy for his own personal reasons. His refusal was intentional because he disagreed with the policy.

[40] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.³⁶

[41] Third, I find that the Claimant knew the consequences of not complying would lead to a mandatory and unpaid leave of absence.

[42] The Claimant agreed that he knew he would be put on a leave of absence effective October 16, 2021 for not complying with the policy. The consequences were communicated to him multiple times by email.

[43] Fourth, I find that the Claimant has not proven he was exempt from the policy either before or after he was already put on the leave of absence. While he asked for a religious exemption, it was denied by the employer. It was not clear when he made his request because the church letter he submitted was undated and the employer's denial email is dated November 3, 2021.³⁷

³⁶ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

³⁷ See GD3-61 to GD3-63.

[44] Lastly, the Claimant was suspended because he refused to comply with the employer's policy which required him to be fully vaccinated for covid19. He was told about the policy and given time to comply. He chose not to comply with the policy for his own reasons. This resulted in his suspension and he knew the consequences of non-compliance.

[45] 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.³⁸ In this case, it was not involuntary because it was the Claimant's actions that led to his suspension.

What about the Claimant's other arguments?

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

- a) The policy violated his rights
- b) His initial work contract did not require him to be vaccinated for covid19
- c) The employer wrongfully denied his religious exemption
- d) He wanted to keep his body free from any agents that might detrimental to his heath
- e) He would have preferred to have been terminated from his employment instead of being put on an unpaid leave of absence
- f) The employer never forced him to be vaccinated for the flu shot, it was optional
- g) He has been living off his savings

³⁸ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

[47] 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.³⁹ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[48] 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.

[49] I note that Claimant did speak with his union and there is a group grievance, but he has not heard any updates yet.

Conclusion

[50] 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.

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

[52] This means that the appeal is dismissed.

Solange Losier
Member, General Division – Employment Insurance Section

³⁹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.