Citation: *MO v Canada Employment Insurance Commission*, 2022 SST 702

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. O.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (459972) dated March 18, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	July 18, 2022
Hearing participant:	Appellant
Decision date:	July 29, 2022
File number:	GE-22-1397

Decision

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

[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.[1]

Overview

[3] The Claimant lost her job in a hospital. She was working from home during the COVID pandemic. The Claimant's employer said that she was let go because she did not comply with a mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says that it isn't the real reason why the employer let her go. The Claimant says that the employer actually let her go because it wanted to make her permanent job position a temporary position, and to avoid paying her severance pay on dismissal.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matters I have to consider first

I will accept the documents sent in shortly before the hearing, but not available at the hearing

[6] The hearing took place at 10am on a Monday morning. The Claimant had submitted further documents to the Tribunal on the previous day, Sunday. Those documents were not available to me electronically at the beginning of the hearing. They consisted of a timeline of events, with references to the GD documents page numbers. She also included two further documents outlining her position. I agreed to accept

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

these documents and to review them in the course of making my decision. The documents sent on Sunday, July 17th were labelled GD13. The Claimant then sent a duplicate copy of GD13, in different order, on July 19th, labelled GD14. She sent further new documents later on July 19th, containing new submissions. I had not agreed to that. I notified her that I would not accept these further new documents, or further documents, and would not review them for the decision.

Suspension in relation to dismissal

[7] In this appeal, the employer suspended the Claimant for a brief period from November 10 to 23, 2021, then dismissed her effective November 23rd. The Commission's decision dated January 25, 2022, dealt with this case as one of dismissal for misconduct on November 10, 2021, not as a suspension for misconduct followed by a dismissal. Its reconsideration decision dated March 18, 2022, confirmed the initial decision. My jurisdiction is limited to dealing with the Commission's actual decision on reconsideration, that is, a dismissal only. Technically, the situation is one of suspension for misconduct (resulting in a disentitlement), followed by dismissal for misconduct (resulting in a disqualification). The outcome of both a disentitlement and a disqualification is the same: denial of EI benefits. The law applicable to misconduct is the same for suspensions and for dismissals. In this appeal, misconduct is found from November 10, 2021, forward. So the outcome is the same: no entitlement to receive EI benefits from that date forward.

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 did the Claimant lose her job?

[10] I find that the Claimant lost her job because she did not comply with the employer's COVID-19 vaccination policy.

[11] The Claimant and the Commission don't agree on why the Claimant lost her job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the vaccine policy required employees to be vaccinated or to be exempted from vaccination, and to provide proof of vaccination to the employer. The Claimant would not disclose any personal health information to the employer.

[12] The Claimant disagrees. The Claimant says that the real reason she lost her job was that the employer actually let her go because it wanted to make her permanent job position a temporary position, and to avoid paying her severance pay on dismissal.

[13] The Claimant provided evidence to support her position. For the change of her position to temporary from permanent, she provided the employer's job posting of her position, dated December 2, 2021. This was shortly after the dismissal of the Claimant on November 23, 2021. The posting was for her job position, and identified as "Temporary Full Time (up to 12 months)". The Claimant testified that her position had been full-time permanent. She also testified that the job posting shows the employer's intent to eliminate her job. That argument does not succeed. Under non-union employment law, the employer could have given notice to the Claimant of a change from permanent to temporary status. Her choice would then be to accept the change, or to leave the job. The employer therefore did not need to dismiss the Claimant to achieve this objective. In addition, the change to temporary status is consistent with the reduction in the Claimant's job functions, as noted in the next paragraph.

[14] For the second reason, avoiding paying severance pay by using COVID as an excuse, the Claimant testified that the employer had been reducing her duties significantly, even prior to the COVID pandemic. The employer had been coercing her about getting the vaccination to the point that she had to take sick leave. The employer

had placed her on a suspension at the end of the day she returned from sick leave on November 10, 2021. Her evidence does show a declining demand for her work function, due to management decisions (such as removing her from project meetings), and to increasing use of machine systems to do much more of the work she had been doing. Her evidence showed her volunteering for a new project, making PDF forms more accessible to persons with disabilities. The employer accepted, and the Claimant took the training approved by the employer. The deadline for the project was December 2021. She completed most of the work on the project by the time she went on sick leave in October 2021. With respect to coercion, the Claimant is referring to the employer's follow up with her in regard to the mandatory vaccination policy dated September 7, 2021. The employer said that she had complied with the prior June 16, 2021, non-mandatory policy. The employer sent all employees a copy of both policies, and follow up Bulletins. The employer provided information sessions and individual communications. This was done to ensure that employees understood the requirements of the policies, and potential consequences of not complying. While the Claimant found this unpleasant, I lack evidence to confirm her statement that this caused her sick leave. Nor do I accept the characterization of the employer's efforts as coercion. The fact that the Claimant was placed on suspension on her return from sick leave is consistent with the September 7, 2021, policy (GD2-309 and GD3-81). That policy required all individuals to declare their vaccination status to the employer by October 20, 2021. Failure to do so would result in suspension or termination of employment. The Claimant went on sick leave on October 12, 2021, and returned to work on November 10, 2021. The employer's letter to the Claimant dated November 2, 2021 (GD2-308) required her to be fully vaccinated before she could return to work. It also stated that leaves would not be extended to allow compliance with the policy. On November 10th, the Claimant had not disclosed her vaccination status to the employer. Her suspension that day is consistent with the September 7th policy. Notwithstanding the November 2nd letter, the suspension letter dated November 10, 2021 (GD2-240) gave the Claimant a last chance to avoid losing her job, by providing proof of receiving the first dose of the vaccine by noon on November 23, 2021. That extension is not consistent with the employer wanting for fire the Claimant.

[15] For the above reasons, I find that the Claimant lost her job because she did not comply with the employer's COVID-19 vaccination policy.

The Claimant's legal arguments in support of her appeal

[16] It is obvious from the documents filed with the Tribunal that the Claimant had done extensive research into statutes and court decisions to support her position that her actions were not misconduct. I will review these arguments before ruling on whether the Commission has proven its case for misconduct.

[17] The starting point of the analysis is the limited authority of the Tribunal in deciding EI appeals. Unlike the superior courts, the Tribunal does not have wide-ranging jurisdiction or authority to deal with all legal issues that may be presented to it. The General Division EI Section of the Tribunal only has jurisdiction to deal with a specific reconsideration decision made by the Commission.[2] In relation to an appeal from that specific decision, the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.[3] That limits what the Tribunal can do in EI matters to reviewing decisions the Commission makes under the *Employment Insurance Act* and its regulations. The Tribunal General Division EI section has to work within that framework. The Tribunal's authority to decide any question of fact or law necessary for the disposition of the appeal is similarly limited.[4] Many of the arguments advanced by the Claimant are outside the jurisdiction of the Tribunal, as reviewed below.

[18] The Claimant expressly stated that she was not invoking the *Canadian Charter of Rights and Freedoms*. (GD2-16) I will therefore not deal with the Charter in this decision.

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[2] *Employment Insurance Act,* sections 112 and 113.
[3] *Department of Employment and Social Development Act*, section 54(1).
[4] *Department of Employment and Social Development Act*, section 64.

– **Specific remedies the Claimant requested**

[19] In her Notice of Appeal (GD2-29), the Claimant requested that the Tribunal do a number of things that it has no power to do. They are: to remove allegations of wrongdoing by the Claimant from the employer's file; order the employer to give the Claimant severance pay; and order the employer to compensate her for the unpaid suspension and all financial and health-related damages experienced as a result of the harmful mandates that contravened many laws under which she is protected.

[20] The Tribunal has no authority to make such orders against an employer. The Tribunal's authority to make orders is limited as set out above. The Claimant's remedy to seek those results is in the courts.

– **The employer's COVID policy is illegal and unreasonable**

[21] The Claimant has constructed a number of arguments from her research into the law. Some of the arguments misinterpret the particular law in question. Some misapply the law to circumstances the particular law was never intended to cover. Overall, looking at all the Claimant's arguments, the underlying assumption is that if the employer has violated any law, or if the Commission has disregarded applicable laws, then she is not guilty of misconduct and cannot be denied EI benefits. That assumption is not correct. In cases of a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration.[5] If an employer has violated a law outside the EI program, that is (with one exception noted at the end of this paragraph) a matter for a different authority than the Commission or the Tribunal. This will be pointed out in reviewing individual laws the Claimant relies on. If the Commission has disregarded EI law in making its decision whether to grant benefits, then the Tribunal has the legal authority to deal with that. A claimant must meet the qualifying criteria to be eligible to receive EI benefits. If she fails to satisfy those criteria, or meets the conditions to be disentitled or disqualified from benefits, then she will not

[5] *Paradis v Canada (Attorney General)*, 2016 FC 1282.

receive EI benefits. It is only when the *Employment Insurance Act* or regulations make specific reference to other laws that those laws are relevant to eligibility for EI benefits. An example is the reference to other laws in the context of just cause for voluntarily leaving a job.[6] Those references only apply to cases in which the claimant has voluntarily quit her job, and the issue is whether she will be disqualified from EI benefits because she quit without just cause. Those references do not apply to cases involving misconduct.

[22] With respect to any argument that the employer's policy is unreasonable, the Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.[7]

Federal statutes

[23] The Claimant begins with the *Criminal Code of Canada* (Code). She relies principally on s. 25(1) of the *Code*. (GD2-18) She argues that everyone (including her employer) who is involved in law enforcement is brought under federal jurisdiction by virtue of s. 25(1). Therefore, the *Canadian Bill of Rights* (Bill) applies to her employer. The employer in enforcing its COVID policy must adhere to the Bill. The Commission must also abide by the Bill (I will deal with the Commission in the discussion of the Bill below). She therefore has the benefit of the rights protected by the Bill. This argument misinterprets and misapplies the Code.

[24] Section 25 of the Code deals with the protection of persons when they are authorized by law to do anything in the administration and enforcement of the law. If they act on reasonable grounds, they are justified in doing what they are authorized or required to do, and in using as much force as is reasonable for the purpose. The Code deals with the criminal law in Canada. Section 25 deals with persons acting in the

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[6] *Employment Insurance Act*, section 29(c)(iii) and (xi), discrimination under the *Canadian Human Rights Act*, and practices of an employer that are contrary to law, respectively.
[7] *Canada (Attorney General) v Marion,* 2002 FCA 185.

administration and enforcement of the criminal law, and protects them in the use of reasonable force against another person. It does not apply to persons outside the criminal law context. The employer in this case is not administering or enforcing the criminal law in applying its COVID vaccination policy. Section 25 does not apply to the employer in the circumstances of this appeal. Even if section 25 did apply to the employer, it would only be for the purpose of the criminal law. That does not bring the employer under a very broad federal jurisdiction as claimed. Nor does that require that the employer to adhere to the Bill.

[25] The Claimant cites a number of Code offences in her submissions (GD2-42 to 50). Examples are duties related to medical treatment and directing work, criminal negligence, criminal harassment, assaults, hate propaganda, robbery, and extortion. These are only applicable if a person may have committed an offence. That then becomes a matter for the police, prosecutors and the courts to lay and prosecute a criminal charge. The Claimant has not alleged that the employer committed a criminal offence, just that it did not comply with other legal requirements. Even if the employer had committed an offence, that is a matter for the police and the courts. The Tribunal has no jurisdiction in the area of the criminal law.

[26] The Claimant argues that the *Canadian Bill of Rights* (GD2-17 and 35) protects her right to give informed consent for medical procedures and protects her right to privacy. She also has the right to live her life and to keep her personal health information as well as her religious beliefs private. She also relies on the *Statutory Instruments Act*. (GD2-17) This submission misinterprets the Bill, as set out in the next paragraph. The *Statutory Instruments Act* deals only with regulations made under the authority of a federal statute, such as the *Employment Insurance Act.* There are no federal regulations involved in this appeal, so the *Statutory Instruments Act* is irrelevant.

[27] The Bill requires that all federal laws, such as the *Employment Insurance Act*, be interpreted and applied so as not to infringe any of the rights in the Bill. Those rights exist without discrimination by reason of race, national origin, colour, religion or sex.

The Claimant relies on the rights in the Bill to life, liberty and security of the person, and to equality before the law and the protection of the law.

[28] Since the employer's policy is not a federal law, the Bill does not apply to it. That eliminates the Claimant's argument that the employer's policy is a direct violation of the provisions of the Canadian Bill of Rights, and therefore is invalid. With respect to the Commission, the misconduct provisions of the *Employment Insurance Act* do not interfere with the Claimant's rights listed in the Bill, based on discrimination on any of the grounds listed in the Bill. The Claimant did not assert that her rights were ignored based on any of those grounds of discrimination. She did mention religion, in the context of keeping her religious beliefs private. She provided no evidence that would show discrimination on those grounds. Being unvaccinated, or refusing to disclose vaccination status, are not listed grounds of discrimination. In the absence of discrimination, the Bill does not apply to this appeal. The Claimant says that the right to life, liberty and security of the person and the right to equality, protect her right to give informed consent for medical procedures and protect her right to privacy. She provides no evidence or legal authority to show that consent to treatment and right to privacy fall under those Bill rights. The misconduct provisions of the *Employment Insurance Act* are clear. If a claimant is dismissed or suspended for misconduct, they are not entitled to receive EI benefits. There is no room for an interpretation that changes that. The Bill does not assist the Claimant in this situation.

[29] The Bill protects persons from an interpretation of federal law that would take away from them rights they already have, except by due process of law. The misconduct provisions of the *Employment Insurance Act* are clear. If a claimant is dismissed or suspended for misconduct, they are not entitled to receive EI benefits. The criteria for a finding of misconduct have been set out by the courts. A finding of misconduct does not take away a right that the Claimant already has. The Claimant has a right to receive EI benefits only if she meets the qualifying criteria (such as having enough hours of insurable employment), and is not disqualified from receiving benefits for reasons such as misconduct or voluntarily quitting. The Claimant is disqualified from

EI benefits by reason of misconduct. She does not have a right to EI benefits that is being taken away from her. The Bill does not assist the Claimant in this situation.

[30] The Claimant relies on the *Genetic Non-Discrimination Act* as applying to the COVID vaccine. (GD2-19 and 57) The Act prohibits any person from requiring an individual to undergo a genetic test as a condition of continuing a contract (such as an employment contract). That Act also amends the *Canada Labour Code* (to add the above prohibition) and the *Canadian Human Rights Act* (to add refusal to take a genetic test as a prohibited ground of discrimination). The Claimant argues that the employer has required her to undergo a genetic test by requiring her to take a PCR test to determine if she has COVID, and that the test is a condition of her continuing employment. The September 7, 2021, policy required Rapid Antigen Testing only from exempted or accommodated employees. Even assuming that a Rapid Antigen Test is a PCR test and is a genetic test, this does not assist the Claimant. Under the policy she had not claimed or shown an exemption or accommodation from the vaccination requirement. The only remaining requirement under the policy was for her to undergo vaccination and declare her vaccination status to the employer. 'Genetic test' is defined to mean "a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis." The vaccine is not a genetic test because it is not a test, and it does not analyze DNA, RNA or chromosomes. The vaccine is injected into the body. Nothing is taken out of the body for testing. There is no analysis of DNA, RNA or chromosomes. There are no test results from the vaccination that would allow such an analysis. The vaccine simply helps the body resist infection from COVID. This Act does not apply in the circumstances of this appeal. The Claimant would have to pursue this issue through the courts or the Canadian Human Rights Commission.

[31] Based on the review in the previous paragraph, the amendments to the *Canada Labour Code* and to the *Canadian Human Rights Act* need not be reviewed. They simply amended those statutes to add genetic testing to the protections those statutes provide. In addition, the *Canada Labour Code* applies to federally regulated businesses, such as banks, airlines and interprovincial railways or truck lines. The

employer in this case is not a federally regulated business, so that Code does not apply to it.

[32] The Claimant also relied on the *Privacy Act*. (GD3-46) That Act deals with the protection and release of personal information about individuals. The Claimant says that the employer violated that statute by sharing within the employer`s organization her personal information that she had not disclosed her vaccination status. That does not assist the Claimant. The *Privacy Act* only applies to personal information held by the federal government. It does not apply to the employer in this appeal.

[33] The Claimant made brief reference to the *Emergencies Act*, the *Financial Administration Act* (GD3-44), and the *Food and Drugs Act* (GD3-46). On reviewing those brief statements, I find that those Acts are not relevant to this appeal.

Ontario statutes

[34] The Claimant placed the most emphasis on the Ontario *Occupational Health and Safety Act* (OHSA). The argument is as follows. (GD2-13 to 15; GD3-65 and 66; GD6-2 to 4) Under s. 28(3) of the OHSA, “a worker is not required to participate in a prescribed medical surveillance program unless the worker consents to do so.” Under s. 50(1) no employer shall dismiss, suspend, intimidate or coerce a worker because the worker has acted in compliance with the Act. Both of the employer’s COVID policies stated that it would promote a healthy, respectful and safe workplace by implementing programs that meet or exceed all legislative requirements set out in OHSA and other relevant legislation. The employer’s vaccination policy is a medical surveillance program. The Claimant did not consent to participate in that medical surveillance program. The employer suspended and dismissed her, in violation of s. 50(1) of the OHSA. The employer breached its own policy by violating the OHSA. The Commission was wrong to find her in violation of the employer’s policy, when the employer was in breach of its obligations under OHSA, and she was asserting her rights under the OHSA. The Claimant reinforced her argument with references to Ontario statutes that said in the event of a conflict between a provision in those statutes and the OHSA and its regulations, the OHSA and its regulations prevailed. Those statutes are: the *Health*

Protection and Promotion Act, s77.7(1); and the *Emergency Management and Civil Protection Act*, s. 7.2(8). As well, though not mentioned by the Claimant, s. 2(2) of the OHSA states that "Despite anything in any general or special Act, the provisions of this Act and the regulations prevail."

[35] The argument is well constructed, but does not succeed. It hinges on the issue of "a prescribed medical surveillance program". There is no definition of a medical surveillance program in the OHSA. The word "prescribed" is defined in s. 1 of the OHSA as "prescribed by a regulation made under this Act". Since no such program has been prescribed by a regulation under the OHSA, the employer's COVID vaccination policy is not a prescribed medical surveillance program under the OHSA. The absence of the Claimant's consent to the COVID policy is not a breach of s. 28(3) of the OHSA. That eliminates the Claimant's claim that she is in compliance with the OHSA, and therefore protected under s. 50(1) from suspension and dismissal. Even if the Claimant were correct in this argument, her remedy is to file a complaint with the Ontario Labour Relations Board, under s. 50(2) of OHSA. The Tribunal lacks jurisdiction to rule on such a complaint. In addition, the Claimant's argument runs counter to the overall purpose of the OHSA. That purpose is to protect the health and safety of workers in their workplaces. In the context of the COVID-19 pandemic, the protection of workers is best advanced by protective measures against the spread of the virus, such as vaccination, protective equipment and hygiene practices.[8] The Claimant's argument for a right to refuse the vaccine could jeopardize the health and safety or co-workers and of other persons present in the hospital where she works. Her working from home was a temporary measure. It had been extended to January 2022, but the employer would require her to return to the hospital location at some point. Further, OHSA gives no right to hospital workers to refuse work (s. 43(2)(d)) or to engage in bilateral work stoppages due to dangerous circumstances (s. 44(2)(b)) By refusing to comply with the employer's COVID policy, the Claimant was effectively refusing to work, given the clear

[8] In the hospital context, Ontario Regulation O.Reg. 67/93 (made under the *Occupational Health and Safety Act)*, s. 9 requires an employer to put into writing measures and procedures for the health and safety of workers to deal with, among other things, the control of infections, and immunization and inoculation against infectious diseases.

outline from the employer of the consequences of non-compliance. That put her in breach of the OHSA.

[36] The Claimant relies on the *Healthcare Consent Act*. (GD3-46) The Claimant cites sections 10 and 11 of the Act, dealing with "no treatment without consent" and "elements of consent". She references three court decisions about informed consent to medical treatment. (GD3-45) Her claim is that the employer is violating this Act by imposing the mandatory vaccination requirement. The problem for the Claimant is that the obligation to obtain consent lies on the health practitioner administering the vaccine, not on the employer. There is no evidence in this case that the employer's managers are health practitioners as defined in the Act, or that they were administering the vaccine. Even if the Claimant's argument were to succeed, the remedy is a complaint to the governing body of the medical profession, or a complaint to police to lay a criminal charge. This argument cannot succeed.

[37] Section 77.7(1) of the *Health Protection and Promotion Act* (GD2-15 and 62), authorizes the Chief Medical Officer of Health, if he is of the opinion that there is or may be an immediate risk to the health of persons in Ontario, to issue a directive to health care entities respecting precautions and procedures to be followed. Pursuant to that authority, the Chief Medical Officer of Health issued Directive 6 on August 17, 2021, with an implementation date of September 7, 2021. (GD2-53) The Directive applies to the employer in this case. The argument of the Claimant is that there was no legal authorization for the employer's September 7, 2021, COVID policy, and it was therefore illegal. (GD2-16 and 27; GD6-10 and 11) The argument fails, as Directive 6 provides legal authorization for that policy. The Directive requires certain precautions and procedures from health care facilities, including hospitals. Such facilities "must establish, implement and ensure compliance with a COVID-19 vaccination policy requiring its employees…to provide", (a) proof of full vaccination, or (b) written proof of a medical reason for not being fully vaccinated, or (c) proof of completing an education session approved by the facility about the benefits of vaccination prior to declining vaccination for any reason other than a medical reason. A facility may remove the option in paragraph (c). The policy must provide that if an employee does not provide

proof of being fully vaccinated, but instead relies on paragraph (b) (or paragraph (c) if applicable), that employee must submit to regular antigen testing. Pursuant to that directive, the employer modified its previous COVID-19 policy, effective September 7, 2021, to require proof of being fully vaccinated, or a medical exemption or other accommodation. It removed the option from the previous policy of completing an education session. The Claimant bolstered her argument by stating that there was no medical emergency at the time of her suspension and dismissal. (GD6-5) She referred to the declaration of an emergency under the *Emergency Management and Civil Protection Act* having been revoked on June 9, 2021. (GD12-11) The end of the emergency under this Act did not revoke or affect the authority of the Chief Medical Officer of Health to issue a directive. That authority rests of that Officer's "opinion that here exists or there may exist an immediate risk to the health of persons anywhere in Ontario". That authority does not rest on the existence of a state of emergency declared under the *Emergency Management and Civil Protection Act*. That Officer had the authority to issue Directive 6 when he did. He explained the reasons for issuing Directive 6 at the beginning of the Directive. (GD2-53)

[38] The *Personal Health Information Protection Act* requires an individual's consent to the collection, use or disclosure of personal health information by a health information custodian. (GD2-22 and 73) The Claimant did not give her consent; therefore the employer is in violation of this Act. The employer may be exempt from this Act with respect to an employee's information not related to providing health care (s. 3(1) 4.(i) and 4(4)). Even if the employer is in violation of this Act, the remedy is a prosecution for an offence under s. 72(1)(a) of the Act. (GD2-23) The Tribunal does not have jurisdiction to prosecute the employer, nor to declare its policy void.

Other submissions

[39] The Claimant relied on the Commission's *Digest of Benefit Entitlement Principles* (Digest). This Digest is not law. It is rather the Commission's interpretation of the law.

That interpretation does not have the force of law. Commitments to act in a way other than written in law are absolutely void.[9]

[40] The Claimant refers to s. 6.6.2 of the Digest as authority for the statement that a disentitlement under s. 32 of the *Employment Insurance Act* will not be imposed if an employer imposes a period of leave without pay, because it is considered a layoff. (GD2-12, GD6-8) Therefore, she concludes, she is entitled to EI benefits. That does not assist the Claimant. Section 32 of the Act deals with an employee taking a voluntary leave of absence without just cause. For the section to apply, the employer must authorize the leave, and the employer and employee must agree to a date for the employee's return to work. The imposition of leave without pay can be treated as a layoff, as the Digest says. But the Digest fails to mention that it can also be treated as a suspension for misconduct under s. 31 of the Act. That illustrates the principle noted in the previous paragraph that the Commission's interpretation does not have the force of law. Additionally, the Claimant's conclusion that she is entitled to EI benefits because she was laid off is not correct in this situation. Not being disentitled under s. 32 is not the same thing as being entitled to EI benefits. Being entitled to benefits requires meeting the criteria to qualify for benefits, and not being disqualified or disentitled for reasons such as misconduct. In this case, the Claimant has been disqualified from receiving EI benefits because of misconduct. Even if this argument did succeed, it would only apply to the period of the leave of absence, from November 10 to 23, 2021. It would not affect the dismissal effective November 23rd.

[41] The Claimant refers to the first paragraph of s. 7.3.4 of the Digest for the statement that "An employer has the right to establish the rules in an employment relationship, **as long as they comply with any legal requirements** set out by legislation…" (GD6-4 and GD13-28, Claimant's emphasis) The Claimant raises this in relation to the confidentiality of private health information, but it can also apply to her other arguments that have been reviewed above. As noted above, the Claimant's arguments that the employer's COVID policy does not comply with legal requirements

[9] *Granger v Employment and Immigration Commission*, A-684-85, affirmed [1989] 1 S.C.R. 141.

have all failed in proving that the Claimant is entitled to EI benefits. In addition, the Commission's statements in the Digest are not law.

[42] The Claimant says that the Commission failed to answer her request for the "legal and lawfully promulgated legislation that grants [employer] the **legal and lawful authority** to administer and impose medical advice and/or make medical health care choices of my behalf without obtaining my **informed consent** as well as mandating the disclosure of private health information as a new term of employment." (GD2-27; Claimant's emphasis) That argument has been dealt with above in the discussions of Directive 6.

[43] The Claimant cites a Supreme Court of Canada decision a number of times.[10] (GD3-42, 43, 46 and 53) The case involved a private employer, and an individual employment contract. There was no union involved. The employee was charged with a fraud offence unrelated to his work. The employer suspended him without pay. The employment contract was silent on suspension or leave, and on whether it would be without pay. The Supreme court ruled that the employer had the right to suspend the employee based on the criminal charge, but did not have the right to suspend him without pay because there was no express term in the contract authorizing an unpaid leave or suspension. The decision does not support the Claimant's position. The decision deals with the law of employment contracts. It does not deal with EI law. The decision supports the right of the employee to sue in court to be paid for the period of the suspension. It does not support a right of an employee to be paid EI benefits because the employer did not pay the employee during the suspension period.

[44] The Claimant relies on a number of international declarations in support of her submission. (GD3-47) The Tribunal has no jurisdiction to rule on these declarations. The remedy for the Claimant lies with the Canadian courts, or with the relevant international bodies.

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[10] *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55 (CanLII), [2004] 3 SCR 195.

[45] The Claimant also relies on reports that the COVID vaccine has caused deaths and serious injuries. (GD3-47 and 48) The Tribunal has neither the authority nor the expertise to rule on those claims. They cannot be a factor in this decision.

– **The dismissal was illegal**

[46] The Claimant argues that the lack of a signature by the employer on the dismissal letter makes the dismissal illegal. (GD2-28) That is not an accurate statement of the law. This argument fails.

[47] The Claimant argues that Directive 6 does not mandate dismissal. (GD2-16) That is accurate. But neither does the Directive prohibit dismissal or other discipline. That is left to the employer to determine. Directive 6 does not make the dismissal illegal.

[48] The Claimant says that the vaccine mandate and dismissal for non-compliance with a mandate must be expressly authorized by law before an employer can impose it. That is not an accurate statement of the law. Employers have a wide scope for determining their policies, and deciding on dismissal. In this case, Directive 6 did authorize and require the employer to have a COVID-19 policy. An employer can dismiss a non-unionized employee at any time. The employee's remedy is a lawsuit for wrongful dismissal. An employer can dismiss a unionized employee by following the requirements of the collective agreement. The employee's remedy is the grievance procedure under the collective agreement.

[49] Finally, the Claimant relied on the employer's statements in July 2021, that she had complied with the COVID policy, that no further action was required from her, and that she would not be disciplined. (GD2-29) Those statements by the employer were made with reference to the policy of June 16, 2021. (GD2-165, GD3-77) Those statements were made in the context of the Claimant having completed the educational session required in that policy. The employer replaced that policy with a new policy dated September 7, 2021. (GD2-309, GD3-81) The new policy eliminated the educational session option. It required either proof of full vaccination, or proof of a medical exemption from vaccination. The Claimant did not comply with the

requirements of the September 7th policy. The employer's statements in July 2021 were only applicable to the June 16th policy. Those statements have no relevance to the September 7th policy, and give the Claimant no defence from being dismissed.

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

[50] The reason for the Claimant's dismissal is misconduct under the law.

[51] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it is almost wilful.[12] 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.[13]

[52] 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 because of that.[14]

[53] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the Employment Insurance Act.[15]

[54] 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.[16]

[55] The Commission says that there was misconduct because it had proven its case. The Claimant's non-compliance with the COVID policy was wilful. She was aware of the consequences of not complying. The non-compliance caused the dismissal.

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[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[13] See *Attorney General of Canada v Secours*, A-352-94.
[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] *Canada (Attorney General) v Bellevance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 46.)
[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[56] The Claimant says that there was no misconduct because of the numerous unsuccessful arguments that have been reviewed above respecting the legality of the COVID policy. She addressed the four elements of misconduct. (GD6-6 to 13; those pages also raise many of the arguments addressed above. I will not review those arguments here in relation to the elements of misconduct). She did not commit misconduct because she did not voluntarily leave her employment. She did not violate any condition of integrity in the performance of her duties to the employer. Her private medical information and religion/beliefs lie outside the scope of her duties under the employment contract. Her non-disclosure of her private health information does not represent a breach of an express or implied duty arising from the employment contract. Because she worked from home, she presented no risk to others. There was no adverse effect on the employer. Because she did not breach the employer-employee relationship, her conduct did not cause the dismissal.

– **Factual findings**

[57] I find that the Commission has proven that there was misconduct, because the Claimant's non-disclosure of her vaccination status was wilful. That non-disclosure caused her dismissal. That non-disclosure was a breach of her obligations to the employer under the policy, as well as removing her from performing all her job duties. The Claimant was aware in advance of the consequences of non-compliance.

[58] The Claimant worked as a form analyst for a hospital for eight years. She was not a member of a union. Prior to the pandemic, she worked on-site. During the pandemic, she had been authorized to work from home. Initially she had to attend the hospital for one day a week. That changed in July 2021, when she worked entirely from home. Prior to her dismissal, the employer extended the authorization to work from home to January 2022.

[59] On June 16, 2021, the employer put into place a COVID-19 immunization policy. (GD2-165, GD3-77) It applied to all employees. It strongly recommended that all employees receive the COVID-19 vaccine. All persons eligible to receive the vaccine had to complete one of three options: provide proof of vaccination of each dose; submit

a medical exemption form for review; or decline to be vaccinated after completing an annual mandatory learning module on the benefits of vaccination, and the risks of not being vaccinated. The Claimant completed the third option in July 2021. The employer told the Claimant that she had met the requirements of the policy, nothing further would be required from her, and no discipline would be imposed on her.

[60] On August 17, 2021, the Chief Medical Officer of Health issued Directive 6 with an implementation date of September 7, 2021. (GD2-53) On September 7, 2021, the employer replaced the earlier policy with a new one. (GD2-309, GD3-81) Again, it applied to all employees. This time, the policy included those who worked remotely. The recommendation that all employees receive the vaccine was replaced by a requirement that all employees receive the COVID-19 vaccine. All employees were required to declare their vaccination status by October 20, 2021, from the following two options. First, declare that I am fully vaccinated. Second, declare that I am unable to be vaccinated for medical exemption or other accommodation reasons, and have been approved for exemption or accommodation. After October 20, 2021, all employees, unless exempted or accommodated, were required to be fully vaccinated against COVID-19, and to participate in further vaccinations as may be required in the future. The policy stated that an employee's failure to comply with this policy will result in progressive action up to and including termination of employment or suspension.

[61] The Claimant received a copy of both policies. She testified that she did read the September 7th policy. In addition, the employer provided employees, including the Claimant, with ongoing information about the policy by way of Bulletins, emails and group and individual meetings. The Claimant had email discussions with the employer about the September 7th policy, its requirements, and the consequences of non-compliance. (GD2-179, 182 to 193) In many of these emails, the Claimant made it clear that she would not disclose her vaccination status, as it is private.

[62] The Claimant was on sick leave from October 12 to November 9, 2021, returning to work on November 10th. She was suspended at the end of her shift that day. The Claimant continued to sign in and out for work on her computer into January 2022. The

employer wrote to the Claimant on November 2, 2021. (GD2-308) The Claimant did receive the letter, but she was unsure on what date. The letter stated that before returning to work from her leave of absence, she was required to have had two doses of the vaccine, the second one at least 14 days prior to her return to work. No extension of the leave would be granted to allow compliance with the policy. She also had to file her vaccination receipts with the employer. The Claimant provided proof of neither requirement by November 10th. The employer emailed to the Claimant its letter of suspension dated November 10, 2021. (GD2-240) The Claimant was suspended without pay from November 10 to 23, 2021. It gave the Claimant a last chance to comply with the policy. The deadline was November 23rd at noon. She did not comply. The employer delivered an unsigned letter of dismissal dated November 23, 2021, to her home. (GD2-134, GD3-57) The letter ended the Claimant's employment for failure to comply with the September 7th policy, for just cause.

– **Ruling on misconduct**

[63] The Claimant cited three court decisions dealing with the elements of misconduct under EI law.[17] (GD6-7 and 13; GD13-8 and 10 to 13) The quoted portions of those decisions set out the law as outlined above. Overall, the Claimant misinterprets or misapplies the principles of that law to her circumstances. She also relies on the invalid legal arguments discussed above.

[64] *Wilfulness*. The Claimant states that she complied with both policies. That is accurate with respect to the June 16th policy, because she completed the educational component in that policy. The educational component was removed from the September 7th policy. Her compliance with the June 16th policy did not carry over to the September 7th policy. With respect to the September 7th policy, she states that she was compliant because she was not required to comply with the medical surveillance program she had not consented to (OHSA, s. 28(3)) (GD13-7) That argument does not succeed, as reviewed above. The September 7th policy is relevant to the suspension and dismissal of the Claimant. It is clear from the evidence in the emails with the

[17] *Canada (Attorney General) v Brissette, A-1342-92*; *Canada (Attorney General) v Lemire,* 2010 FCA 314; *Mishibinijima* v *Canada (Attorney General)*, 2007 FCA 36.

employer, in her statements to the Commission, and in her testimony, that the Claimant chose not to disclose her vaccination status to the employer. That choice was wilfulness as defined for EI misconduct purposes. The Claimant's claim that there was no wilfulness fails. (GD13-10) It relies on the argument that she complied with the OHSA requirements respecting consent to a medical surveillance program, and the alleged breach by the employer of the OHSA protection against dismissal. That argument has failed.

[65] *Breach of obligation to the employer.* (GD13-11) The Claimant correctly cites a principle that the decision on misconduct cannot be made solely on the basis of the employer's opinion or subjective appreciation of events. She states that she was always fulfilling the conditions of her employment contract. Her performance never suffered and was never questioned. She was capable of performing her work. Her conduct was never negligent or reckless. She fulfilled all the obligations of her employment contract, and did not breach the contract at any point. She concludes that the Commission relied solely on the employer's assurance that she did not follow the COVID policy, rather than investigate it. The argument does not succeed. The employer had the right to enact the COVID-19 policy. Even more, as a hospital, the employer had a legal obligation under Directive 6 to have a policy requiring mandatory vaccination and disclosure (unless exempted or accommodated) or an optional educational program. The employer's September 7, 2021, policy did not include the educational program option. The Claimant stated that she had no obligation to comply with the September 7, 2021, COVID-19 policy because it was not legal, for a number of reasons. As reviewed above, the policy was not illegal for any of the reasons given by the Claimant. It was a legitimate policy based on legitimate reasons during a pandemic. The policy created an obligation on employees to comply with its requirements. The Claimant therefore had an obligation to comply with the policy. The evidence from the Claimant herself is clear and uncontradicted. She refused to disclose her vaccination status to the employer. That is the misconduct alleged in this case. Her wilful refusal to comply with the policy was a breach of an obligation owed to the employer. Additionally, she knew that a suspension or dismissal would prevent her from performing all of her duties owed to the employer.

[66] *Awareness of consequences of non-compliance.* The Claimant stated that she did not know that she would be suspended or dismissed. (GD13-13 to 14) That was based on her belief that the policy was not legal. That belief was wrong. In the face of the many warnings from the employer about the consequences of non-compliance with the policy, the Claimant remained non-compliant. I find that she knew she faced suspension or dismissal for non-compliance with the policy.

[67] *Non-compliance caused the dismissal.* The Claimant stated that her dismissal was for reasons other than non-compliance with the COVID policy. There was no causal link based on OHSA (GD6-3). I have reviewed that reason above. I also found that the non-compliance with the policy was the cause of her dismissal.

[68] The Claimant argued that s. 49(2) of the *Employment Insurance Act* applies to her situation. (GD13-6) That section provides that in cases of misconduct, the benefit of the doubt is to be given to the claimant where the evidence on each side is evenly balanced. The claimant should therefore win her appeal. That section does not apply in this appeal. The evidence, as found above, is not evenly balanced. The evidence proves on the balance of probabilities all four elements of misconduct.

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

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

Conclusion

[70] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[71] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section