



Citation: *MV v Canada Employment Insurance Commission*, 2022 SST 1636

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

Decision

Appellant: M. V.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (478347) dated May 31, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: November 2, 2022

Hearing participant: Appellant

Decision date: November 29, 2022

File number: GE-22-2090

Decision

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

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

Overview

[3] M.V.S. is the Claimant in this case. She worked as a clerk for the public service in X. The employer put the Claimant on an unpaid leave of absence and dismissed her because she did not comply with the covid19 vaccination policy at work.² The Claimant then applied for EI regular benefits.³

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

[5] The Claimant disagrees because she does not want to share medical information with the employer because it is private and confidential information. She also has other concerns about the policy.

Matters I have to consider first

The Claimant submitted additional documents

[6] At the hearing, the Claimant referenced several letters and other related documents to support her case. I asked the Claimant to submit all of the documents she talked about so they could be added to the file and I could review them.

¹ See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

² See record of employment at GD3-17 to GD3-18.

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

⁴ See initial decision at GD3-38 to GD3-39 and reconsideration decision at GD3-46.

[7] The Claimant submitted the following documents to the Tribunal. I have briefly summarized the documents:⁵

- a) Email dated November 1, 2021 about vaccination for public service
- b) Step 3 transition template and communicable disease plan
- c) Public service workplace transition guidance to Step 3's restart plan – July 1, to September 7 (projected)
- d) October 20, 2021 public service mask order for all areas of the province
- e) Frequently Asked Questions (FAQ's) document
- f) April 26, 2022 letter – recommendation for dismissal
- g) Email dated November 18, 2021 sent to Ethics Advisor Citizens Services
- h) January 18, 2022 letter – final warning letter covid19 vaccination – unvaccinated
- i) May 6, 2022 letter – notice of termination of employment
- j) November 15, 2022 letter to union
- k) November 23, 2022 letter – leave of absence without pay –covid19 vaccination – unvaccinated
- l) October 28, 2021 email from union
- m) Letter – the law concerning consent

[8] I wrote to the Claimant to confirm whether she had submitted all of the documents she intended. The Claimant wrote back confirming that she did.⁶ All of the above documents were also sent to the Commission. They did not provide a response.

⁵ See documents submitted by the Claimant at GD6-1 to GD6-16 and GD7-1 to GD

⁶ See letter dated November 16, 2022 at GD8-1 to GD8-3 and GD11-1 to GD11-3; see Claimant's response at GD9-1.

I asked the Commission for more information after the hearing

[9] The Claimant wrote to the Tribunal explaining that she could not obtain a copy of her amended Record of Employment (ROE) from Service Canada.⁷ She says that the separation code on the ROE had been changed, so it was relevant to her appeal. She asked the Tribunal to assist her in obtaining this document.

[10] I wrote to the Commission and asked them to provide a copy of the Claimant's amended ROE.⁸ The Commission wrote back advising that the employer used code "N" as "leave of absence" but after fact finding the Commission changed the code to "M" to reflect cases where there is a "dismissal or suspension".⁹ Their response was also sent to the Claimant.

Issue

[11] Was the Claimant suspended and dismissed from her job due to misconduct?

Analysis

[12] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.¹⁰

[13] To answer the question of whether the Claimant was suspended and lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant 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 an unpaid leave of absence from her job on November 24, 2021 until she was terminated on May 6, 2022.

⁷ See Claimant's email dated November 16, 2022 at GD12-1.

⁸ See GD10-1 to GD10-3 and section 32 of the *Social Security Tribunal Regulations*.

⁹ See Commission's response at GD13-1.

¹⁰ See sections 30 and 31 of the Act.

[15] The reason for her unpaid leave of absence and dismissal was because she did not comply with the employer's covid19 vaccination policy. Specifically, she was required to be fully vaccinated for covid19 and disclose her vaccination status to the employer. This is consistent with the unpaid leave letter and dismissal letter in the file.¹¹

[16] The Claimant raised concerns about the ROE code change by the Commission. However, I find that it was within the Commission's discretion to change the code from "N" to "M" after their fact-finding. There was no evidence to support that this was a voluntary leave of absence (code N) because the Claimant testified that the unpaid leave was imposed on her by the employer. The Claimant did not have a choice and could not continue working. Therefore, the dismissal or suspension (code M) was the applicable one for this particular case.

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

[17] The *Employment Insurance Act* (Act) does not say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

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

[19] 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.¹⁴

¹¹ See unpaid leave letter dated November 23, 2021 at GD7-21 to GD7-22 and termination letter dated May 6, 2022 at GD7-8.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

[20] 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 and let go because of that.¹⁵

[21] The law does not say I have to consider how the employer behaved.¹⁶ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹⁷

[22] I have to focus on the Act only. I cannot make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.¹⁸ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[23] The Commission has to prove that the Claimant was suspended and lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended and lost her job because of misconduct.¹⁹

[24] In response to a *Provincial Health Order* in X, the employer implemented a covid19 vaccine policy (policy) effective November 1, 2021. A copy of that policy and web link to the policy is included in the file.²⁰

[25] It says that the purpose of the policy is to promote the health and safety of employees in the workplace through covid19 vaccinations. It also says that the policy will define conditions and expectations for employees, contractors and others in the workplace to disclose their vaccination status and to be vaccinated.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See section 30 of the Act.

¹⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁰ See policy at GD3-20 to GD3-23 and GD3-24 to GD3-28.

[26] Some of the relevant sections of the policy say (emphasis added is mine):

- a) Effective November 8, 2021, all employees must provide proof of full vaccination
- b) Proof of vaccination can be requested by a manager at any time **on or after November 8, 2021**
- c) Effective November 8, 2021, employees may **request an exemption** from the vaccine requirement based on a medical condition or other protected ground as defined under BC's Human Rights Code
- d) Employees who do not **provide proof of vaccination or refuse to disclose their vaccination status by November 22, 2021** will be considered unvaccinated
- e) Personal information on vaccine status will be collected, retained, used and disclosed in a manner that respects the provisions of the *Freedom of Information and Protection of Privacy Act* and will be treated with the utmost confidentiality
- f) Unvaccinated employees except those who have requested and/or been granted a medical exemption or other accommodation **will be placed on leave without pay for 3 months**. Unvaccinated employees will not be able to use vacation or other banked leave time in lieu of leave without pay. After 3 months of being placed on leave without pay, employees who have not become at least partially vaccinated **may be terminated**
- g) Unvaccinated employees who have been placed on leave without pay, and who become **partially vaccinated** within 3 months of being placed on leave without pay, **may be offered alternative return to work arrangements**. Employees must receive their second vaccine dose within 35 days of receiving their first dose. Employees who do not receive their second vaccine within 35 days will be placed back on leave without pay and may be terminated

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

[28] First, I find that the policy was first communicated to the Claimant on October 5, 2021. The Claimant agreed that she first heard about the policy on October 5, 2021 when she received an email from her employer. The policy became effective November

1, 2021 and she received notice of that by email as well.²¹ She also received a copy of the policy via web link.

[29] I was not persuaded by the Claimant's position that she did not have enough notice to comply with the policy. She explained that the policy was only effective November 1, 2022, so she only had until November 22, 2021 to comply.

[30] I disagree with the Claimant because she knew as of October 5, 2021 that a vaccine policy was coming and the deadline to provide proof of vaccination for covid19 was November 22, 2021.²² The Claimant could have complied anytime before the deadline. The policy made considerations for partially vaccinated employees, so if she had taken steps to be partially vaccinated, the policy says that she may have offered her alternative return to work arrangements. As well, there were other opportunities for the Claimant to comply, including after she was put on a leave of absence on November 24, 2022 and up-to her termination on May 6, 2022. In my view, the Claimant had ample notice and time to comply with the policy.

[31] Second, I find that the Claimant wilfully and consciously chose not to comply with the policy for her own reasons. The Claimant knew that she had to comply by November 22, 2021 but did not do so mainly because she did not agree with the employer's policy. She told the employer that she did not feel the need to disclose her private medical information to them, so she was not in compliance with the policy.

[32] I note that the Claimant was not exempt from the policy because she did not ask for a medical and/or religious exemption. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.²³

[33] I acknowledge that the Claimant's argument that being vaccinated for covid19 was not a term of her employment. However, the employer wrote that she was "*not*

²¹ See November 1, 2021 email at GD6-4 to GD6-6.

²² See November 1, 2021 email at GD6-4 to GD6-6.

²³ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

meeting the terms and conditions of your employment” as a reason for being placed on a leave of absence without pay effective November 24, 2021.²⁴ This suggests that being vaccinated for covid19 became a term and condition of her employment, according to her employer.

[34] The Federal court has said that misconduct can include a breach of an express or implied duty in an employment contract.²⁵ In this case, the employer imposed the policy based on a *Provincial Health Order* because of the covid19 pandemic, so vaccination for covid19 (unless exempted) became a condition of her continued employment.

[35] Third, I find that the Claimant knew or ought to have known that by not complying with the policy, she would be placed on unpaid leave of absence and terminated. The employer sent several letters to communicate their expectations.

[36] I was not persuaded by the Claimant’s argument that it was confusing and she was “left in the dark” between November 2021 and May 2022. Based on the evidence in the file, the policy clearly stated employees who are non-compliant would be placed on a leave without pay for 3 months and after 3 months, employees who have not become at least partially vaccinated *may* be terminated.²⁶ The unpaid leave letter says she would be placed on leave for 3 months, and if she continues to be in non-compliance, her employment *may* be terminated.²⁷ The final warning letter say she *will* be terminated for just cause if she remains non-compliant.²⁸ The next letter sent was a “recommendation for dismissal” letter, followed by a termination letter.²⁹ This information is also consistent with the employer’s discussion with the Commission, based on the notes in the file.³⁰

²⁴ See unpaid leave letter dated November 23, 2021 at GD7-21 to GD7-22.

²⁵ See *Canada (Attorney General) v Brissette* 1993 FCA 3020 and *Canada (Attorney General) v Lemire*, 2010 FCA 314.

²⁶ See GD3-22.

²⁷ See unpaid leave letter dated November 23, 2021 at GD7-21 to GD7-22.

²⁸ See letter dated January 18, 2022 at GD7-6 to GD7-7.

²⁹ See recommendation for dismissal letter dated April 26, 2022 at GD7-3 to GD7-4 and dismissal letter dated May 6, 2022 at GD7-8.

³⁰ See SROC at GD3-35 to GD3-36.

[37] I acknowledge that the employer did not terminate her employment after the 3 month unpaid leave period, but it shows that the employer was trying to give her opportunities and further time to comply.

[38] The Claimant referenced the Commission's *Digest of Benefit Entitlement Principles* (Digest). The Digest provides information on how the Commission interprets its policies and law. The Digest is not law. In any event, the section she referenced was not applicable because this case did not involve a voluntary leave of absence. As noted above, the leave of absence was imposed by the employer.

[39] The Claimant relied on a document she referred to as "Step 3" which she says was posted at the workplace on November 1, 2021.³¹ The Claimant says that this document acknowledges that person's health status is private information and that mask use is always a personal choice.³²

[40] Even so, I find that this particular document is separate from the employer's covid19 vaccination policy (also effective on November 1, 2022). There was no evidence that this document overrode the policy and requirement to provide proof of vaccination by November 22, 2022.

[41] I note that the policy does say that personal information will be collected, retained, used and disclosed under the provisions of the *Freedom of Information and Protection of Privacy Act* and will be treated with the utmost confidentiality. While there may have been other communications, protocols and procedures at work, the Claimant was clearly expected to comply with the employer's covid19 vaccination policy effective November 1, 2021.³³

[42] The Claimant said that she has paid into EI benefits, but this does not mean she has an automatic right to EI benefits.

³¹ See GD6-8 to GD6-15.

³² See GD3-40.

³³ See GD6-9 to

So, was the Claimant suspended and did she lose her job because of misconduct?

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

[44] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that failing to comply with the policy was likely to cause her to be suspended and lose her job.

What about the Claimant's other arguments?

[45] The Claimant raised a number of other arguments to support her position, including some of the following:

- a) She was constructively dismissed
- b) The employer did not accommodate her
- c) Other vaccinated people were permitted to work from home
- d) Her medical information is private and confidential, based on the *Privacy Act*
- e) She does not qualify for a medical or religious exemption
- f) She was discriminated against by the employer
- g) Her union is not supportive
- h) There are long-term side effects of the vaccine, its in the clinical stages and it is an experimental gene therapy
- i) She has bodily autonomy
- j) She experienced financial hardship for around 5-8 months
- k) She was coerced

- l) She was discriminated against and bullied
- m) It is an offence based on the section 221, 265 and 266 of the *Criminal Code*³⁴
- n) The employer infringed on her rights provided for in the *Canadian Bill of Rights*, *Canadian Charter of Rights and Freedoms* (Charter) and *Universal Declaration of Human Rights*³⁵

[46] I acknowledge the Claimant's additional arguments, but her recourse is to pursue an action in court, or any other Tribunal that may deal with her specific arguments. I can only decide whether what the Claimant did or failed to do is misconduct under the Act. I have already decided that it was misconduct in this case.

[47] The Claimant said that she has already filed a grievance with her union and is currently waiting for an arbitration date to address some of these issues. She included some additional information about this.

Conclusion

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

[49] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

³⁴ See GD2-9.

³⁵ See GD2-9.