



Citation: *CM v Canada Employment Insurance Commission*, 2022 SST 1652

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

Decision

Appellant: C. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (509156) dated July 8, 2022
(issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference

Hearing date: December 7, 2022

Hearing participant: Appellant

Decision date: December 9, 2022

File number: GE-22-2630

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 from her employment due to her own misconduct. This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was placed on unpaid leave (suspended) from her job. Her employer said that she was suspended because she refused to get vaccinated in accordance with its Covid-19 (Covid) vaccination policy.

[4] The Claimant doesn't dispute that this happened. However, she says that her employer's policy was flawed, unreasonable, and violated her rights. She feels her employer should have accommodated her, based on her personal creed. She says her employer discriminated against her because of her medical status and her human rights beliefs. She worked remotely and shouldn't have been required to be vaccinated. She says there was no misconduct on her part.

[5] The Commission found that the Claimant wasn't entitled to benefits because she had stopped working by voluntarily taking leave from her job on November 30, 2021 without just cause.² On reconsideration, the Commission found that the Claimant wasn't entitled to benefits, because she stopped working on November 30, 2021 due to misconduct under the *Employment Insurance Act* (Act).³

¹ Section 30 of the Act says that Claimants who lose their job because of misconduct are disqualified from receiving benefits. Subsection 30(1) of the Act states that a Claimant who voluntarily leaves employment without just cause is not entitled to benefits under s. 31 of the Act. Section 31 also addresses what happens when a Claimant is suspended for misconduct.

² GD3-24.

³ GD3-60.

Issue

[6] Was the Claimant suspended from her job because of misconduct?

[7] To answer this, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Analysis

Why was the Claimant suspended from her job?

[8] I find that the Claimant was suspended from her job because she didn't comply with the employer's mandatory Covid vaccination policy. The Claimant agrees that she was suspended from her job because she refused to be vaccinated against Covid.

[9] The Claimant testified that the employer announced in September, 2021, that all employees were going to have to be vaccinated against Covid. The employer put a policy in place effective October 19, 2021, based on the province's Covid vaccination mandate, which required all provincial healthcare employees to be fully vaccinated.⁴

[10] The Claimant testified that the policy said that if employees weren't vaccinated by the deadline, and didn't have an exemption from being vaccinated, they would be suspended.

[11] The employer sent an email to employees, titled "Covid-19 Vaccination for Team Members – Frequently Asked Questions (FAQ)."⁵ It said that under the province's Covid vaccine mandate announced on September 29, 2021, all employees had to be vaccinated. Employees had to have the first dose of the vaccine by November 30, 2021. They had up to 70 days after the first dose to get the second dose.

[12] The FAQ said that employees had to provide the employer with proof of vaccination using an online form. It said that employees who were not vaccinated would

⁴ GD3-54.

⁵ GD3-34-GD3-43.

be suspended for 14 days. After those 14 days, employees who had not started the vaccination process, and didn't have an approved exception from being vaccinated, would remain on suspension, and may face termination of employment. The Claimant testified that she received the employer's vaccination policy, but didn't see the FAQ document.

[13] The employer sent the Claimant an email on November 8, 2021, saying she hadn't submitted any documentation as required by its vaccination policy. The employer said that employees had to submit their vaccination status, whether they were vaccinated or not, or were requesting an exemption.⁶

[14] The employer emailed the Claimant again on November 30, 2021, and attached a link to the online webform, asking her to report her vaccination status.⁷

[15] The Claimant responded to the employer's email on November 30, 2021. She said that she didn't consent to filling out the webform, because it asked for private medical information. She said that she didn't consent to being suspended, because she was ready and willing to work.⁸ She sent in a statement, declining to receive the Covid vaccine.⁹ She emailed the employer again in December, 2021, saying that she continued to decline the Covid vaccine.¹⁰

[16] The Claimant requested an exemption from being vaccinated. The employer denied her request, and advised her that she must comply with the policy and fill out the webform indicating her vaccination status and intentions.¹¹

[17] The Claimant was suspended effective December 1, 2021.

[18] The Claimant told the Commission Officer that she was placed on unpaid leave on December 1, 2021, because she wouldn't provide her employer with her vaccination

⁶ GD3-51.

⁷ GD3-49-GD3-50.

⁸ GD3-51.

⁹ GD3-53.

¹⁰ GD3-49.

¹¹ GD3-44.

status. She said that when she was hired, nothing was said about giving out her personal medical information. She felt it was a violation of her rights.¹²

[19] The employer told the Commission Officer that the Claimant had not been allowed to return to work, because she didn't get the Covid vaccine. It said that the vaccine mandate was provincially regulated, and that as a government health organization, it had to follow the province's rules regarding vaccination.¹³

[20] The employer told the Commission Officer that the Claimant didn't provide proof of her vaccination status. It said all employees had to provide proof of vaccination. Employees who were not vaccinated by December 1, 2021 were suspended. The employer confirmed that the Claimant wasn't approved for an exemption from being vaccinated.¹⁴

[21] The Claimant said that she didn't get vaccinated against Covid, because she lives by her own creed, holistically, and believes in natural immunity.¹⁵ She testified that she told her employer that she wasn't vaccinated and wouldn't be getting vaccinated. She testified that she couldn't work for the employer unless she had the vaccine.

[22] The employer's policy, according to the FAQ document,¹⁶ says:

- The policy applies to all employees, with the exception of those who receive a medical or human rights exemption from being vaccinated.
- All employees must have at least one dose of a Covid vaccine by November 30, 2021, and be fully vaccinated within 70 days after the first dose.
- Employees must provide proof of vaccination.
- Employees who are not fully vaccinated, and do not have an exemption from being vaccinated on medical or religious grounds, will not be allowed to continue

¹² GD3-17.

¹³ GD3-18.

¹⁴ GD3-19.

¹⁵ GD3-29.

¹⁶ GD3-34-GD3-43.

to work, and their employment will be suspended without pay, and possibly terminated.

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

[23] The reason for the Claimant's suspension is misconduct under the law.

[24] The Act doesn't 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.

[25] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁸ 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.¹⁹

[26] 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 from her job because of that.²⁰

[27] The law doesn't say I have to consider how the employer behaved.²¹ Instead, I have to focus on what the Claimant did or failed to do, and whether that amounts to misconduct under the Act.²²

[28] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁹ See *Attorney General of Canada v Secours*, A-352-94.

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ See section 30 of the Act.

²² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

arrangements (accommodations) for the Claimant aren't for me to decide.²³ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[29] The Commission has to prove that the Claimant was suspended because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct.²⁴

[30] The Commission says that there was misconduct because the Claimant failed to comply with the employer's mandatory Covid vaccine policy and was aware of the consequences of refusing to be vaccinated.

[31] The Claimant says that there was no misconduct, because her employer's vaccine policy is flawed, and violates her rights. She says her employer's policy is illegal, because it forces medical intervention on her, and the vaccine isn't safe or effective in preventing the introduction or transmission of Covid. She feels her employer should have accommodated her, based on her personal creed.

[32] I find that the Claimant made a conscious and deliberate choice not to be vaccinated. She testified that she didn't get vaccinated and wasn't approved for an exemption from being vaccinated. She told her employer that she wasn't vaccinated and wasn't going to get vaccinated.

[33] The Claimant knew that not being vaccinated meant that she couldn't do her job. She testified that employees couldn't work without being vaccinated, unless they had an exemption. Her exemption request was denied by the employer, so she knew that not being vaccinated by the deadline meant that she couldn't work.

[34] The Claimant testified that she "never dreamed" that refusing to get vaccinated would result in her being suspended from her job. She said she hoped the employer "wouldn't go through with it," and that she was very surprised when they did. She said

²³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

that even after receiving the employer's emails, advising her that she could be suspended if she didn't comply with the vaccination policy, she "never dreamed they would do something like this to people."

[35] However, I find that the Claimant knew, or should have known, that not complying with the employer's vaccination policy meant that she could be suspended from her job. Although she said that she didn't see the FAQ document, she confirmed in her testimony that she received and read the policy. She said the policy applied to her, although she didn't believe that it should. She testified that she knew what the policy required of her, and that the consequences of not following the policy included being put on an unpaid leave of absence.

[36] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a vaccination policy that said all employees had to be fully vaccinated, or have an approved exemption from being vaccinated on medical or human rights grounds;
- the employer clearly communicated its policy to the Claimant, and specified what it expected in terms of getting vaccinated ;
- the employer wrote to the Claimant, to communicate what it expected;
- the Claimant knew the consequence of not following the employer's vaccination policy;
- the Claimant didn't have an exemption from being vaccinated; and
- the Claimant didn't get vaccinated and was suspended as a result.

So, was the Claimant suspended from her job because of misconduct?

[37] I understand the Claimant's position and that she has concerns regarding the Covid vaccine. I sympathize with her situation. However, I cannot change the law. Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[38] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to be suspended from her job.

[39] The Claimant says her employer violated her rights and that she has a right to receive EI benefits.²⁵ I understand that she feels she should get EI because she's paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. She has not met the requirements to be eligible for benefits.

Conclusion

[40] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[41] This means that the appeal is dismissed.

Susan Stapleton
Member, General Division – Employment Insurance Section

²⁵ GD3-21-GD3-22.