



Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 265

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

## **Decision**

<b>Appellant:</b>	M. H.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	Canada Employment Insurance Commission reconsideration decision (489056) dated July 6, 2022 (issued by Service Canada)
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<b>Tribunal member:</b>	Suzanne Graves
<b>Type of hearing:</b>	Videoconference
<b>Hearing date:</b>	December 16, 2022
<b>Hearing participant:</b>	Appellant
<b>Decision date:</b>	January 3, 2023
<b>File number:</b>	GE-22-2845

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proved that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

[3] I don't have the authority to make a decision about whether the Claimant's employer violated his rights based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any other laws that protect rights and freedoms. These laws are enforced by different courts and tribunals.

## Overview

[4] The Claimant was suspended from his job. The Claimant's employer told the Commission that he was placed on an unpaid leave of absence because he went against its vaccination policy: he didn't get vaccinated.

[5] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He argues that the employer should have exempted him from its vaccine requirement because it went against his religion.

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

[7] The Claimant is appealing the Commission's decision to the Social Security Tribunal (Tribunal).

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (EI Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits for the period of the suspension, unless they accumulate new hours with a different employer.

## **Matter I have to consider first**

### **The employer is not a party to the appeal**

[8] Sometimes, the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter.<sup>2</sup> The employer did not reply to that letter. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

### **Issue**

[9] Did the Claimant lose his job because of misconduct?

### **Analysis**

[10] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). These laws include the *Canadian Bill of Rights*, and a number of other laws that protect rights and freedoms.

[11] The Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's rights or to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[12] This issue is beyond my jurisdiction. You must go to a different tribunal or a court to address that. The Tribunal's role is to decide whether a claimant is disqualified from receiving EI benefits because they lost their employment due to their own misconduct.

[13] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>3</sup>

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<sup>2</sup> The Tribunal's notice to the employer as a potential added party is at GD5.

<sup>3</sup> See sections 30 and 31 of the EI Act.

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

### **Why was the Claimant suspended from his job?**

[15] I find that the Claimant was placed on an unpaid leave of absence from his job because he didn't comply with his employer's COVID-19 Immunization Policy.

[16] The Claimant does not dispute that he lost his job because his employer required employees to be vaccinated by November 1, 2021, and he did not confirm that he was vaccinated by that date.

[17] The Claimant says he couldn't take the vaccine because it went against his religion. He applied for an exemption, as specifically allowed under the employer's COVID-19 vaccination policy, but his employer refused to exempt him.<sup>4</sup>

[18] I find that the reason the Claimant lost his job was because he did not comply with his employer's COVID-19 vaccination policy.

### **Is the reason the Claimant was suspended from his job misconduct under the law?**

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>6</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>7</sup>

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<sup>4</sup> The Claimant's exemption request dated October 26, 2021, is set out at GD3-29 to 33. The employer's letter refusing the Claimant's exemption request dated October 29, 2021, is at GD3-34 to 36.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

[20] 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 being let go because of that.<sup>8</sup>

[21] The Commission has to prove that the Claimant was dismissed from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.<sup>9</sup>

### **The Claimant's argument**

[22] The Claimant argues he lost his job through no fault of his own and says he was not suspended because of misconduct. He says the employer's vaccination policy specifically allowed for an exemption, and his employer is required to follow its accommodation policies. He argues that his actions were not deliberate. He couldn't take the vaccine because it went against his faith, so he applied for an exemption. The Claimant testified that he fully expected his employer to grant his exemption from the vaccine requirement.

[23] The Claimant says his accommodation request was wrongfully denied.<sup>10</sup> He argues that he has been a valued and dedicated employee for almost 12 years and has never been accused of misconduct. His employer knew that he lived in accordance with his faith, and that he couldn't take the vaccine for religious reasons. He says he submitted all required documentation from his church to support his exemption request.

### **The Commission's argument**

[24] The Commission says that the Claimant's employer placed him on a mandatory leave of absence because he refused to comply with its vaccination policy, which was a requirement of his job. It argues that the employer communicated the mandatory

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<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>10</sup> The Claimant makes these arguments at GD2-9.

vaccination policy to all employees and the Claimant knew that failure to comply with it could cause the loss of his employment.

[25] The employer's policy required employees of the organization to be fully vaccinated against COVID by November 1, 2021. The Claimant applied for a creed-based exemption, under the terms of the employer's policy. But the employer refused his request. So, it says he was required to provide proof of his vaccination status.

[26] The Commission argues there was misconduct because the Claimant willfully disregarded the employer's COVID-19 health policy, knowing that this could jeopardize his employment.

[27] The Commission also says that the Tribunal does not have the authority to weigh in on whether the employer acted fairly or reasonably by imposing vaccination or attestation policies.

## **Was the Claimant suspended from his job because of misconduct?**

[28] I find that the Claimant was suspended from his job because of misconduct.

[29] The Claimant doesn't dispute that he was informed about the possibility of being suspended or terminated if he didn't confirm his vaccination status by the required date.

[30] I find that the Claimant had enough information to know that his decision not to provide confirmation of vaccination could lead to him being placed on a leave of absence or dismissed.

[31] The employer's policy allowed employees to request a religious exemption, but his request was refused. When he did not declare that he was vaccinated in accordance with the policy, the Claimant was placed on an unpaid leave of absence.

[32] As noted above, I can't make a decision about whether the employer should have given the Claimant an exemption under the policy, or whether he has options

under other laws. Issues about whether the Claimant was wrongfully let go or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>11</sup>

[33] Courts have said that I don't have the authority to decide whether the employer should have granted him an exemption under the terms of its policy. The arguments for why such an exemption should have been granted are more appropriately raised in another forum.<sup>12</sup>

[34] It is not my role to decide whether the employer's penalty was too severe, or whether the employer was guilty of misconduct. I can only consider one thing: whether what the Claimant did or failed to do is misconduct under the EI Act, and whether this led to the loss of his job.<sup>13</sup>

[35] Based on my findings above, I find that the Commission has shown, on the balance of probabilities, that the Claimant was suspended from his job because of misconduct.<sup>14</sup>

## Conclusion

[36] The Commission has proved that the Claimant was suspended because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[37] The appeal is dismissed.

Suzanne Graves

Member, General Division – Employment Insurance Section

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<sup>11</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> *Paradis v Canada (AG)*, 2016 FC 1282; *MD v Canada Employment Insurance Commission*, 2022 SST 889; *SS v Canada Employment Insurance Commission*, 2022 SST 780.

<sup>13</sup> *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *SS v Canada Employment Insurance Commission*, 2022 SST 780.

<sup>14</sup> The Claimant says that he was dismissed from his job, and not suspended (See GD6). However, the employer's letter to the Claimant dated October 29, 2021, states that the Claimant will be placed on an unpaid leave of absence as of November 1, 2021.