



Citation: *TM v Canada Employment Insurance Commission*, 2022 SST 1662

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

Decision

Appellant: T. M.
Representative: M. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (451278) dated February 15, 2022
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference
Hearing date: June 29, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: July 20, 2022
File number: GE-22-986

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 job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer placed her on an unpaid leave of absence from her job. It said that she was placed on the unpaid leave of absence because she refused to comply with the employer's mandatory COVID-19 vaccination policy. The Commission initially decided the Claimant was not entitled to EI benefits because she had taken a period of leave from her job without just cause.

[4] The Claimant requested reconsideration of the Commission's decision. The Commission changed its decision from "Leave of Absence – No Just Cause" to "Misconduct proven" due to the Claimant's failure to comply with her employer's mandatory vaccination policy.

[5] The Claimant does not agree she committed misconduct. She applied for an exemption to the vaccination requirement for creed and medical reasons. Her employer rejected her exemption request. The Claimant was unable to provide the necessary medical documents to support her request for a medical exemption because she could not see a specialist doctor prior to the policy deadline. The Claimant says it is not the case that she is refusing to get vaccinated, she is willing to be vaccinated if the specialist says she can be vaccinated.

¹ 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.

Matters I have to consider first

The employer is not an added party

[6] Sometimes the Tribunal sends a 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. The employer did not reply to the letter.

[7] 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, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a voluntary leave of absence

[8] The Claimant's Representative submitted the Claimant did not voluntarily leave her job. She said that the Claimant had no choice and did not choose to go on an unpaid leave of absence. The Claimant's Representative submitted that non-compliance with the employer's policy was out of the Claimant's control. She said there was just cause when looking at all the circumstances. The Claimant's employer introduced a policy that allowed two weeks for compliance. The Claimant told her employer she was trying to get the medical assessments completed so she could take the vaccine.

[9] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.²

[10] There is no evidence in the appeal file to show the Claimant agreed to take a period of leave from her employment beginning on September 27, 2021.³

² See section 32 of the EI Act

³ The Record of Employment records the Claimant's last day for which she was paid as September 27, 2021.

[11] The section of the law on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to **their** misconduct is not entitled to benefits (emphasis added).⁴ The evidence shows it was the Claimant's conduct that led to her not working. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension.

My jurisdiction is limited

[12] The Claimant was initially suspended from her job for failing to comply with the employer's testing requirements. She was later dismissed. The appeal file shows that the Claimant applied for EI benefits after she was suspended.

[13] My jurisdiction, in other words my ability to make a ruling on an appeal, comes only after the Commission makes a decision on reconsideration that the Claimant then chooses to appeal. In this case, the Commission has only made an initial decision and reconsidered its decision to not pay the Claimant EI benefits because she was suspended from her job due to misconduct. So, I will issue a decision on that issue only.

Issue

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

Analysis

[15] To answer the question of whether the Claimant was suspended from her job because of misconduct, 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 the reasons for the suspension to be misconduct within the meaning of the EI Act.

⁴ See section 31 of the EI Act

Why was the Claimant suspended from her job?

[16] I find that the Claimant was suspended from her job because she did not comply with the employer's mandatory vaccination policy.

[17] The Claimant testified that on September 7, 2021, she received a copy of the employer's policy requiring vaccination against COVID-19. All employees were required to comply by September 20, 2021 by providing proof of vaccination, or a documented medical reason for not being fully vaccinated, or written proof of a bona fide human rights code exemption. Unvaccinated employees who did not have a medical or human rights code exemption were expected to attend an education session and provide proof of receiving a first dose of the vaccine by October 8, 2021 and a second dose by October 31, 2021.

[18] The Claimant said she told her employer on September 21, 2021 that she was trying to get her request for an exemption based on creed notarized. Part of that exemption request included her concerns about her ability (medically) to receive the vaccine. The Claimant testified she had a reaction to a vaccine she received in childhood. She developed a severe case of the disease that she was being vaccinated against. She was concerned this might happen if she were to get vaccinated against COVID-19. The Claimant said her employer replied that she had until October 7, 2021 to get vaccinated, if she did not get approval from her doctor to not get vaccinated.

[19] The Claimant was off work for illness on September 22, 23 and 24, 2021. Her supervisor called her saying that due to her non-vaccinated status she needed a note from her doctor to be off work. The Claimant saw her doctor on September 28, 2021, she was placed off work due to stress from September 24, 2021 onward. The doctor certified this in a note that the Claimant submitted to her employer.

[20] The Claimant testified that on September 27, 2021 she had an on-line meeting with her supervisor. Her union representative was present. She had completed a rapid antigen test which showed a negative result for COVID-19. Her supervisor did not want to see the results. She provided her religious creed exemption request to the employer

on September 27, 2021. Her request to work from home while the employer considered her exemption request was refused.⁵ The Claimant was placed on a leave of absence effective September 27, 2021.

[21] The evidence tells me the Claimant was suspended from her job when she failed to show proof of vaccination against COVID-19, or have an approved exemption, by September 20, 2021, as required by her employer.

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

[22] Yes, the reason for the Claimant's suspension is misconduct under the law.

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[24] 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 because of that.⁹

[25] The Commission has to prove that the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not the Claimant was suspended from her job because of misconduct.¹⁰

[26] The Commission submitted the Claimant was aware of the policy and the requirements to comply with the policy, or face disciplinary action, up to and including

⁵ The Claimant had been working from home since March 2020

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

being placed on an unpaid leave of absence or termination. It says the Claimant did not comply by providing the required exemption forms, or by meeting the requirement of being vaccinated. The Commission goes on to say the Claimant's failure to comply with the policy resulted in her being dismissed. It says these actions were conscious, as the Claimant had been made aware, on many instances, of the policy and consequences of failing to comply.

[27] The Claimant testified that she submitted her request for a religious exemption on September 27, 2021. A representative of the employer told a Service Canada officer that the religious / creed exemption form required that it be filled out by a faith leader.¹¹ The employer representative said that the Claimant filled out the form herself stating she was Catholic. The employer responded with a letter from a Catholic Bishop stating that Catholics can receive the vaccine.

[28] The Claimant testified when she saw her doctor on September 28, 2021 it was to get the medical form required for her sick leave on September 22, 23 and 24, 2021 completed and to discuss her concerns about being vaccinated. The Claimant said her doctor understood her concerns given the history of her reaction to a prior vaccine.

[29] The Claimant saw an allergist (Dr. P.) who wrote a note dated September 29, 2021. The note said:

[Claimant] was seen on September 29, 2021. She has been given a temporary exemption from COVID19 vaccination until her clinical investigations have been completed. Please let me know if you need more information.

[30] The Claimant said that she made a couple of telephone calls to her employer. She "got back" that her religious exemption request was denied. The Claimant said that the medical exemption form required that she be allergic to one or two ingredients in the

¹¹ The employer spoke to Service Canada on January 31, 2022. See page GD3-34

vaccine. She said the doctor could not complete the form until the actual testing for those ingredients was done.

[31] The Claimant gave the note from Dr. P. to her employer. The employer representative told a Service Canada officer that the Claimant claimed a health exemption but the proper form was not filled out by a medical doctor. The employer confirmed to the officer that the form was very specific to two exemptions: anaphylaxis or history of myocarditis / pericarditis. The employer said the Claimant's medical did not indicate either.¹²

[32] Dr. P. referred the Claimant to another specialist (Dr. J.). She was scheduled to have a telephone appointment with Dr. J. on December 10, 2021 that was rescheduled to January 10, 2022. The Claimant said Dr. J. was concerned with her health concerns and referred her to a clinic specializing in adverse drug reactions. The referral is dated February 11, 2022. The Claimant sent her employer a copy of the referral to the clinic to her employer. As of the date of the hearing, the Claimant has yet to be seen at the clinic.

[33] The appeal file has a letter dated September 27, 2021, from the employer to the Claimant. The letter concerns an unpaid leave of absence. It describes the meeting held with the Claimant on September 27, 2021. The letter says the Claimant "has confirmed that you will not comply with the policy, furthermore you are unwilling to reconsider this decision and you understand that failure to comply may result in disciplinary action up to and including your termination of employment for just cause."

[34] The appeal file has a letter dated October 21, 2021 from the employer to the president of the Claimant's union local. The letter concerns a meeting held to discuss the Claimant's grievance on being placed on an unpaid leave of absence. The letter notes that the Claimant enquired about various medical questions and was directed to her doctor or public health for their expertise. The employer asked the Claimant if in the event the allergist confirmed it was safe for her to receive the vaccine would she be

¹² The employer spoke to Service Canada on January 31, 2022. See page GD3-34

agreeable to receive the COVID-19 vaccine. The Claimant is recorded as responding that she would not be able to make that decision without all of her questions answered.

[35] The appeal file has a letter dated October 29, 2021 from the employer to the Claimant. It concerns the Claimant's status with respect to the COVID 19 Vaccination Policy. The letter notes that the Claimant had not yet provided proof of vaccination or secured an approved exemption. The letter goes on to say that the employer required the Claimant to comply with the policy (provide proof of first vaccination or receive an approved exemption) or to return all employer property by November 10, 2021. The letter concludes with a reminder that continued failure to comply with the policy may lead to disciplinary action up to and including dismissal.

[36] The Claimant testified that her union contacted the employer's human resources department and asked them to look at the medical notes. Her medical exemption was denied and she received the final notice to comply with the policy. The Claimant's union has filed a grievance on her behalf.

[37] The appeal file has a letter dated January 12, 2021 from the employer to the Claimant. It is a final notice to comply with the COVID-19 Vaccination Policy. The employer required the Claimant to "either provide proof of first vaccination or secure an approved exemption under the Policy by no later than the start of business day on Monday, February 14, 2022." The letter goes on to say "Failure to comply with the above will lead to termination of your employment for just cause effective Monday, February 14, 2022."

[38] The Claimant's Representative submitted that this is not a case of misconduct. She said that the Claimant didn't choose to not submit a request for a medical exemption but that the Claimant has not been able to get the medical exemption forms completed. The Claimant was suspended and terminated before she was given a chance to get the medical information required by the employer. The Claimant's Representative argued that an accommodation under the provincial human rights code would require that the employer have the medical information before making a decision.

[39] The Claimant's Representative submitted that the employer could say that the Claimant's request for a creed exemption does not meet the exemption criteria. But in this case, the Claimant was suspended before the employer assessed that exemption request.

[40] The Claimant's Representative stated the Claimant didn't refuse to get vaccinated but that the Claimant just needed a doctor to confirm she could get vaccinated. She noted the Commission has not considered the circumstances of why the Claimant could not get the medical exemption form completed. The Claimant's doctors were professionally unable to make the assessment. The Claimant kept her employer informed throughout. She was trying to get the medical assessments done to take the vaccine. She was not able to provide the form because her doctor did not have the medical knowledge to do the testing required. Her doctors were willing to give more medical information to the employer but the employer never took steps to get that information

[41] The Claimant's Representative noted there was an accommodation process in the policy and that should have taken place prior to the Claimant being terminated. The employer did not address whether the Claimant, who had been teleworking for 18 months from her home, could be offered another type of work. The Claimant agreed to do testing and work from home.

[42] I think the Commission has met its burden to prove the Claimant lost her employment due to her misconduct within the meaning of the EI Act. The reasons for my decision follow.

[43] It is not my role to determine if the employer's policy or actions were reasonable or violated the Claimant's collective agreement or any other law.¹³ There are other venues, such as the grievance procedure, arbitration, courts and human rights tribunals

¹³ The courts have said that in cases for 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. See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282.

where these claims and allegations can be made. It is equally not my role to determine the safety or efficacy of the COVID-19 vaccines.

[44] The employer's policy required that all employees to comply with the policy by September 20, 2021 by providing proof of vaccination, or a documented medical reason for not being fully vaccinated or written proof of a bona fide human rights code exemption. Unvaccinated employees who did not have a medical or human rights code exemption were expected to attend an education session and provide proof of receiving a first dose of the vaccine by October 8, 2021 and a second dose by October 31, 2021. The policy also provided two bases for exemption from vaccination: for religious / creed reasons and for specific medical reasons. The Claimant initially requested a religious exemption using the employer's form. She did not provide a certification from a creed leader as required by the policy. As part of that exemption request she wrote that as a child she was vaccinated against a childhood disease and suffered one of the worst cases of that disease in her province. She went on to say "I believe the power of prayer got me through this and so many other illnesses and situations."

[45] The Claimant also sent a letter to her employer via email. In the letter she stated "I conscientiously object to participating in a compelled vaccination mandate and am requesting an exemption from the [employer's] mandatory vaccination and proof of COVID-19 vaccination status on religious grounds." The Claimant then laid out the basis for her beliefs.

[46] At the end of her letter the Claimant wrote that her employer was not required to agree with her beliefs but its task was to accommodate her to the point of undue hardship. The Claimant noted she had worked from home for 18 months and saw no reason why she could not continue to work from home until such time as the pandemic had subsided. She was prepared to wear a mask and distance in order to attend the workplace and submit to rapid antigen testing once every seven days with the cost of the tests to be borne by her employer.

[47] With her initial request for a religious exemption the Claimant communicated to her employer that she would not be getting vaccinated. The employer decided that the

Claimant's request for religious exemption did not meet the criteria for exemption and her request for exemption was denied.

[48] The Claimant submitted two doctor's notes to her employer after she was suspended. One was for a period of illness prior to her suspension. The second note, dated September 29, 2021 was from a specialist, Dr. P. He wrote that the Claimant had been given a temporary exemption from COVID19 vaccination until her clinical investigations have been completed. She was referred to a second specialist, Dr. J, whom she had a telephone appointment with on January 10, 2022. On February 11, 2022, Dr. J. referred her to a specialist clinic. As of the date of the hearing, she has not yet been assessed by that clinic.

[49] The Claimant's Representative submitted that it is not within the Claimant's control that she has been unable to have a doctor complete the required medical form indicating the reasons for a medical exemption. She is asking that the Claimant be accommodated until such time as the medical testing can be completed. This is something that I cannot order an employer to do as it is not within my jurisdiction.

[50] The employer's policy permits a medical exemption for two very specific reasons: anaphylaxis or history of myocarditis / pericarditis. The Claimant expressed her concerns to her employer about experiencing an adverse reaction to the vaccine against COVID-19 based on her experience with a vaccine she received in childhood. Her doctors have acknowledged her concerns. The physicians she has seen are recommending further investigations. There is no evidence, as of the hearing, that a physician has certified the Claimant can be medically exempted from receiving the vaccine against COVID-19 due to the two exemptions provided in the policy.

[51] The Claimant's Representative has suggested that the Claimant is willing to be vaccinated if the specialists confirm that she is medically able to be vaccinated. But that is different from the policy which provides for a medical exemption for two very specific reasons. The Claimant has yet to provide proof that she meets either of those exemptions.

[52] The policy, issued on September 7, 2021, required that proof of vaccination, a religious / creed exemption or a medical exemption be provided by September 20, 2021. The Claimant failed to provide proof of her vaccination or secure an exemption in accordance with the policy. Although she submitted a religious exemption form after September 20, 2021, it was not certified by a faith leader as required by the policy. The Claimant told her employer she was trying to get a medical exemption, but she had not, by the date she was suspended, provided proof of medical exemption.

[53] On September 27, 2021, a week after the policy deadline for providing proof of vaccination or submitting proof of a religious or a medical exemption, the Claimant confirmed to her employer she was not willing to get vaccinated and she was aware her failure to comply with the policy may result in disciplinary action up to and including termination of employment. This evidence tells me that at the time the Claimant was suspended from her job she was aware of the employer's policy and knew that she could be suspended for not complying with the policy, and as a result not able to perform her employment duties. This means that the Commission has met its burden of proving that the Claimant was suspended from her job due to her misconduct within the meaning of the EI Act and the case law described above.

Other Matters

[54] The law says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

- (a) the period of suspension expires;
- (b) the claimant loses or voluntarily leaves their employment; or,
- (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.¹⁴

¹⁴ See section 31 EI Act

[55] The Commission spoke to the Claimant on February 14, 2022, to tell her that on reconsideration it had changed its reason to deny her claim because of “voluntary leave - no just cause” to a finding of misconduct. The Claimant asked if it would make any difference in the decision since she was going to be terminated on February 14, 2022. The Service Canada officer replied no. The Commission wrote a letter the Claimant on February 15, 2022, informing her of the change to its reason for denying her EI benefits.

[56] The employer wrote to the Claimant on October 29, 2021. It noted that she had yet to secure an approved exemption and reminded her that failure to comply with the policy may lead to disciplinary action up to and including termination from employment. A final notice to comply was sent to the Claimant on January 12, 2022 stating that she would be terminated on February 14, 2022 if she failed to provide proof of vaccination or secure an approved exemption.

[57] On February 14, 2022, the Claimant’s employer terminated her for her continued non-compliance with the policy. This means the disentitlement from EI benefits due to a suspension for misconduct ended on February 14, 2022. As noted above, my jurisdiction is limited to the reconsideration decision issued by the Commission with respect to the Claimant being suspended from her employment due to misconduct. I make no finding with respect to whether the Claimant is indefinitely disqualified from receiving EI benefits once she was terminated from her job.

Conclusion

[58] I am sympathetic to the Claimant's circumstances but, as tempting as it may be in such cases (and this may well be one), I am not permitted to re-write the law or to interpret it in a manner that is contrary to its plain meaning.¹⁵ I must follow the law and render decisions based on the relevant legislation and precedents set by the courts

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

[60] This means the appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

¹⁵ *Canada (Attorney General) v. Knee*, 2011 FCA 301.