



Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 1700

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

Decision

Appellant: L. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (476385) dated May 12, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: September 21 & September 29, 2022

Hearing participants: Appellant

Decision date: October 7, 2022

File number: GE-22-1954

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 then lost her job because of misconduct. In other words, she did something that caused her to be suspended and lose her job.

[3] This means that the Claimant is disentitled (because she was suspended) and then disqualified (because she lost her job) from receiving Employment Insurance (EI) benefits.¹

Overview

[4] The Claimant lost her job working in healthcare. Her employer had a mandatory COVID vaccination policy. Her employer says that she was put on an unpaid leave of absence and then dismissed because she wasn't vaccinated against COVID.² In other words, because she didn't follow its COVID vaccination policy.

[5] The Claimant doesn't dispute this.

[6] But she says that refusing to get vaccinated and to give her employer proof of COVID vaccination is not misconduct under the Employment Insurance Act (EI Act). Her contract and section 7 of the EI Act don't say she has to be vaccinated against COVID.³ Her employer didn't have a right to suspend her and breached its duty to accommodate her. And her employer's COVID vaccination policy was unlawful because no one can force her to get vaccinated against COVID.

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.

² In this decision, a suspension means the same thing as a leave of absence without pay and an unpaid leave.

³ Section 7 of the EI Act says EI benefits are payable to people who qualify for them. And sets out the basic qualification requirement.

[7] The Commission accepted the employer's reason for the suspension and the dismissal. So, it decided that the Claimant lost her job because of misconduct and disentitled her from receiving EI benefits from the date her employer suspended her.

Matter I considered first

Hearing was adjourned

[8] The Appeal hearing started on September 21, 2022.

[9] The Claimant said she didn't receive all the documents in her Appeal. I had no reason to doubt what she said. She was ready to go ahead with the hearing. She was surprised when I asked her if she had the GD3 and GD4 documents.⁴ And she carefully searched her emails as I reviewed the Tribunal's records.

[10] So, I decided to adjourn the hearing.

[11] It would have been unfair to her to proceed with the hearing. She would not have been able to present her best case because she hadn't reviewed the GD3 and GD4 documents.

[12] After I adjourned the hearing, the Tribunal sent her the GD3 and GD4 documents. And she confirmed she received them.

[13] The hearing was rescheduled and went ahead on September 29, 2022.

Issue

[14] Did the Claimant get suspended from her job and then lose her job because of misconduct?

[15] To answer this question, I have to decide two things.

⁴ GD3 is the Commission's Reconsideration File. GD4 is the Commission's Representations.

- First, I have to decide why the Claimant was suspended from her job and why she lost her job.
- Second, I have to decide whether the law considers those reasons to be misconduct.

Analysis

The reason the Claimant was suspended and lost her job

[16] I find that the Claimant was suspended because she didn't follow her employer's COVID vaccination policy. She and her employer agree about this. And there's no evidence that says otherwise.⁵

[17] I find that the Claimant lost her job because she didn't follow her employer's COVID vaccination policy. She and her employer agree about this. And there's no evidence that says otherwise.⁶

The reason for the suspension and dismissal is misconduct under the EI Act

[18] I find that the reason for the Claimant's suspension and her dismissal is misconduct under the law.

Misconduct, Disentitlement, and Disqualifications under the EI Act

[19] There is misconduct under the law if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties to her employer. And she knew or should have known there was a real possibility she could be suspended or let go because of that.⁷

⁵ See these pages about the reason she was suspended: GD2-10, GD3-24, GD3-25, GD3-27, GD3-41, and GD3-73.

⁶ See these pages about the reason she lost her job: GD3-24, GD3-25, GD3-26, GD3-27, GD3-41, and GD3-74.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[20] There is misconduct where the Claimant's conduct is wilful. This means her conduct was conscious, deliberate, or intentional, or so reckless that it is almost wilful.⁸ She didn't have to have wrongful intent. In other words, she doesn't have to mean to be doing something wrong.⁹

[21] There must be a causal link between the Claimant's misconduct and her employment. In other words, the misconduct must constitute a breach of an express or implied duty resulting from her contract of employment, and she was suspended and lost her job because of misconduct, and not for another reason.¹⁰

[22] The Commission has to prove misconduct on a balance of probabilities. So, it has to show that it is more likely than not that the Claimant was suspended and lost her job because of misconduct.¹¹

The evidence and arguments

[23] The Commission says that there was misconduct because she didn't comply with the employer's provincially mandated COVID vaccination policy. She knew about that vaccination policy. And she knew her employer could suspend or dismiss her if she didn't get vaccinated and give proof. She made a deliberate choice not to get vaccinated.

[24] The Claimant says that there was no misconduct: There is no clause in her contract or section in the EI Act that says she has to get vaccinated against COVID. Her employer breached its duty to accommodate her, and had no legal right to suspend her. And her employer's COVID vaccination policy was unlawful because no one can force her to get vaccinated against COVID.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Canada (Attorney General) v Lemire*, 2010 FCA 314 at paragraph 14; *Canada (Attorney General) v Brissette*, [1994] 1 FC 684 (CA) paragraph 14; *Canada (Attorney General) v Cartier*, 2001 FCA 274 at paragraph 12; and *Canada (Attorney General) v. Nguyen*, 2001 FCA 348 at paragraph 5.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

The Commission has shown there was misconduct

[25] I find that the Commission has shown the Claimant was suspended and then lost her job because of misconduct.

[26] The Commission and the Claimant agree on the essential facts. What the Claimant told the Commission and said at the hearing supports the Commission's reconsideration decision and its position in this Appeal.

[27] The employer had a mandatory COVID vaccination policy, which it provided to the Commission.¹² The employer was required to have the policy by order of British Columbia's Provincial Health Officer, dated October 14, 2021.¹³

[28] The employer first notified its employees about the policy during a meeting in September 2021 and followed up with an email to all staff in October 2021.¹⁴

[29] Under the vaccination policy the Claimant had a duty to get a first dose of a COVID vaccine before October 26, 2021. And to notify her employer. Employees who chose to remain unvaccinated could be placed on unpaid leave and face termination of employment.

[30] The Claimant told the Commission she knew about the employer's mandatory COVID vaccination policy. And knew the consequences of not following the policy.¹⁵

[31] On October 25, 2021, the employer placed the Claimant on unpaid leave of absence for three weeks. The employer's letter says if she doesn't get a first dose of COVID vaccine during the three weeks, her employment may be terminated effective November 15, 2021. The letter makes an exception for employees waiting for a decision on a medical deferral or an exemption request.¹⁶

¹² See GD3-44 to GD3-47.

¹³ See GD3-48 to GD3-72.

¹⁴ See the employer's all-staff bulletin (dated October 7, 2021), at GD3-45 to GD3-47.

¹⁵ See the Commission's notes of its conversations with the Claimant at GD3-26 and GD3-77.

¹⁶ See the suspension letter at GD3-73.

[32] The Claimant didn't get a first dose of COVID vaccine. And she didn't apply for a medical deferral or an exemption.

[33] Her employer terminated her effective November 15, 2021, because she hadn't received a first dose of the vaccination, or applied for a medical deferral or exemption.¹⁷

[34] Based on this evidence, I find that the employer suspended and then dismissed the Claimant because she willfully breached her duty to get vaccinated under her employer's mandatory COVID vaccination policy. This is misconduct under the law.

The Claimant's arguments

[35] The Claimant says the "qualifying for benefits" section of the EI Act doesn't say claimants have to get vaccinated.¹⁸

[36] This is true. However, you can't read this section of the EI Act alone. You have to read it with the other sections. Other sections disentitle or disqualify claimants from getting EI regular benefits. Her appeal is about disentitlement and disqualification for misconduct. So, I can't accept her argument about the EI Act.

[37] The Claimant also says it wasn't misconduct because being vaccinated against COVID wasn't a duty expressed or implied in her employment contract.

[38] I disagree. I find that her employer's mandatory COVID vaccination policy (based on the provincial public health order) made COVID vaccination a term of her employment. In other words, it became an implied term of her contract.

[39] The Claimant also says that her refusal to get vaccinated isn't misconduct because:¹⁹

- her employer had a duty to accommodate her and didn't do that

¹⁷ See the termination letter at GD3-74.

¹⁸ See section 7 of the EI Act.

¹⁹ See her Notice of Appeal at GD2-6 to GD2-12.

- an employer can't place an employee on leave of absence, the employee has to request it, based on a Supreme Court of Canada decision
- Canada doesn't force people to get immunized because of the Constitution.
- forcing someone to get a COVID vaccination is assault and torture under the Criminal Code
- an employer can't make an employee participate in a medical surveillance program

[40] I can't consider these arguments because they deal with the reasonableness or legality of her employer's policy and decisions. The courts have clearly said that when the Tribunal looks at misconduct under the EI Act it shouldn't look into whether employer's decision to suspend or dismiss the employee was justified, or ask whether the penalty was reasonable or appropriate.²⁰

[41] As a unionized employee, the Claimant and her union might make these arguments in a grievance against her employer.

The Claimant was suspended and lost her job because of misconduct

[42] Based on my reasons above, I find that the Claimant was suspended from her job due to misconduct from October 25, 2021 until November 14, 2021. I also find that she lost her job due to misconduct effective November 15, 2021.

²⁰ See, for examples, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; and *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5.

Conclusion

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

[44] The appeal is dismissed.

Glenn Betteridge
Member, General Division – Employment Insurance Section