



Citation: *MM v Canada Employment Insurance Commission*, 2022 SST 1749

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

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (475179) dated May 25, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Decision date: November 3, 2022

File number: GE-22-2233

Introduction

[1] The Claimant lost her job for not getting the COVID-19 vaccination. Her employer implemented a policy that required employees to get vaccinated or have an approved exemption. The Claimant wasn't vaccinated and didn't have an exemption by the deadline, so the employer placed her on an unpaid leave of absence (suspension).

[2] The Commission decided the Claimant couldn't be paid EI benefits because she was suspended due to her misconduct. The Claimant asked the Commission to reconsider this decision because she feels the employer's indefinite suspension should be considered a dismissal, instead. She doesn't dispute that she lost her job for refusing to get the COVID-19 vaccination, but says it was her right to decide whether to be vaccinated.

[3] The Commission maintained its decision because the Claimant was aware of the employer's requirement that she be vaccinated, she knew that failing to comply with the policy would cause her to lose her job, and she made the choice not to comply. The Claimant has appealed this decision to the Tribunal.

Issue

[4] I must decide whether the appeal should be summarily dismissed.

Analysis

[5] I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.¹

[6] The law says that claimants who are dismissed from their job because of misconduct are disqualified from receiving benefits.²

¹ Section 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states this requirement.

² See section 30 of the *Employment Insurance Act*.

[7] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.³

[8] The Claimant worked as a Registered Nurse in a hospital. On September 7 2021, the employer put in place a policy that required all employees to be vaccinated against COVID-19 or have an approved exemption by October 30, 2021.⁴ Employees who were not vaccinated against COVID-19 or had an approved exemption by this deadline may be placed on an indefinite leave of absence or be disciplined up to and including termination.⁵

[9] The Commission provided several communications from the employer to the Claimant.

[10] On September 1, 2021, the employer sent the Claimant an email asking her to read the policy and provide them with a declaration about her decision to be vaccinated by September 15, 2021.⁶

[11] On September 7, 2021, the employer sent an email to all staff announcing the COVID-19 vaccination policy. It stated that all employees must be fully vaccinated by October 30, 2021. This required employees to get their first dose of the vaccination by September 15, 2021.⁷

[12] On September 16, 2021, the employer emailed the Claimant directly. It reminded her that the policy required her to report her vaccination status and receive her first

³ See section 31 of the *Employment Insurance Act*.

⁴ See GD3-41 to GD3-43

⁵ See GD3-42.

⁶ See GD3-21.

⁷ See GD3-22.

dose of the vaccine by September 15, 2021. It states that if she fails to comply with the requirements of the policy by October 30, 2021, she will be placed on an indefinite unpaid leave of absence until she is fully vaccinated or the vaccination is no longer required.⁸

[13] The Claimant said she was aware of the policy and the consequences of not being vaccinated. She knew that failing to comply meant that she could not continue working.⁹

[14] On September 16, 2021, the Claimant asked the employer for an exemption from the vaccination requirement on religious grounds.¹⁰ The employer denied her request on October 22, 2021.¹¹

[15] The Claimant was placed on an unpaid leave of absence (suspended) from her job as of October 31, 2021.¹² The employer's suspension letter states the Claimant is being placed on administrative leave without pay because she is not compliant with the COVID-19 policy.¹³

[16] For there to be misconduct under the *Employment Insurance Act*, the Commission has to show that the Claimant engaged in wilful conduct that she knew or reasonably should have known could get in the way of carrying out her duties to her employer and that there was a real possibility of being let go because of that.¹⁴

[17] Wilful conduct means that the conduct was conscious, deliberate, or intentional.¹⁵ 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.¹⁶

⁸ See GD3-23.

⁹ See GD2-8.

¹⁰ See GD3-26 to GD3-35.

¹¹ See GD3-36.

¹² See GD3-15.

¹³ See GD3-37 to GD3-40.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

¹⁶ See *Attorney General of Canada v Secours*, A-352-94.

[18] Before summarily dismissing an appeal, the Tribunal must send written notice to the Claimant and allow her time to make submissions.¹⁷

[19] Given that the evidence on record shows that the Claimant chose not to comply with the employer's mandatory vaccination policy and she was aware she could lose her job for that choice, the Tribunal sent notice of its intention to summarily dismiss this appeal on October 14, 2022.¹⁸ The Claimant provided further submissions, which have been taken into consideration in the writing of this decision.¹⁹

[20] From the evidence on file, I see that the employer put in place a policy that required the Claimant to be vaccinated against COVID-19, or to have an approved exemption. The Claimant was notified of this policy. She was told that she would be suspended if she did not comply with the policy.

[21] The Claimant submitted that her suspension should be considered a dismissal, since she has been placed on leave for an indefinite period.

[22] It's true that the Commission decided that the Claimant was disentitled from being paid EI benefits because she was suspended from her job due to misconduct. But, even if the Claimant was dismissed from her job, rather than suspended, she would still not be payable EI benefits if she lost her job due to misconduct. So, the critical element is not whether the Claimant was suspended or dismissed from her job, it is whether she lost her job due to misconduct within the meaning of the *Employment Insurance Act*.

[23] However, the evidence on file overwhelmingly indicates that the employer placed the Claimant on an unpaid leave of absence, which is akin to a suspension. Both the Claimant and the employer acknowledged that the Claimant could return to her job if she was vaccinated against COVID-19, or the vaccination requirement was lifted. This

¹⁷ Section 22 of the *Social Security Tribunal Regulations*

¹⁸ See GD6.

¹⁹ See GD7.

supports that the Claimant wasn't dismissed from her job, but is rather on an indefinite suspension while she doesn't meet the conditions of her employment.

[24] The Claimant also submitted that the employer's policy was not reasonable, the employer could have provided accommodations to the vaccine requirement, such as testing, and the employer unreasonably denied her religious exemption request.

[25] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[26] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified.²⁰

[27] I understand that the Claimant wanted to be accommodated or exempted from the employer's policy, but it is not my role to decide whether the employer should have offered her an accommodation or approved her exemption request. It is my role to decide on the Claimant's entitlement to EI benefits in accordance with the *Employment Insurance Act*.

[28] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.²¹

[29] The Claimant was not vaccinated and did not have an approved exemption. She was not in compliance with the employer's policy. And, at the time she was suspended, she had no intention to become compliant.

[30] If I accept the facts as true, there is no argument that the Claimant could make that would lead me to a different conclusion. There is no evidence that she could

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FCA 1281

²¹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

provide that would change these facts. As a result, I find her appeal is bound to fail, no matter what arguments or evidence she could bring to a hearing.²² This means I must summarily dismiss her appeal.²³

Conclusion

[31] I find that the appeal has no reasonable chance of success; so, the appeal is summarily dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

²² See *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

²³ See section 22, *Social Security Tribunal Regulations*