



Citation: *MV v Canada Employment Insurance Commission*, 2022 SST 1795

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

## Decision

**Appellant:** M. V.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (459405) dated February 26, 2022  
(issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** June 22, 2022

**Hearing participant:** Appellant

**Decision date:** July 5, 2022

**File number:** GE-22-879

## 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 put on a leave of absence because of misconduct (in other words, because she did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.

## Overview

[3] M.V. is the Claimant in this case. The Claimant was working as a staffing officer and has worked for the same employer for around 37 years. The employer **put the Claimant on an unpaid leave of absence on November 26, 2021** because she did not comply with their covid19 vaccination practice at work.<sup>1</sup> The Claimant then applied for EI regular benefits.<sup>2</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended from her employment due to her own misconduct.<sup>3</sup>

[5] The Claimant disagrees because the employer illegally put her on an unpaid leave of absence of absence. She does not want to attest to her vaccination status via the employer's attestation telephone line because her privacy was previously breached by the employer. The employer also acted in bad faith and failed to accommodate her.<sup>4</sup>

## Matters I have to consider first

### The Claimant submitted documents after the hearing

[6] At the hearing, the Claimant mentioned that she had an audio recording with her employer about the status of her employment. She played the audio recording at the

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<sup>1</sup> See record of employment at GD3-15 to GD3-16.

<sup>2</sup> See application for benefits at GD3-3 to GD3-14.

<sup>3</sup> See initial decision at GD3-90 and reconsideration decision at GD3-109 to GD3-110.

<sup>4</sup> See notice of appeal at GD2-1 to GD2-12.

hearing, and sent a copy of it after the hearing to be added to the file. It was shared with the Commission.<sup>5</sup>

[7] The Claimant also said that she was relying on a Supreme Court of Canada case to support her position.<sup>6</sup> I asked her to submit a copy of the case. She submitted it after the hearing and it was shared with the Commission.<sup>7</sup> The Commission has provided no reply submissions as of the date of this decision.

### **Other arguments raised by the Claimant**

[8] The Claimant raised some arguments based on the *Canadian Charter of Rights and Freedoms* (Charter).<sup>8</sup> I explained that the Tribunal had a different process for Charter files and that I could provide her with more information.<sup>9</sup>

[9] The Claimant decided that she did not want to proceed by Charter appeal. This which means she is not relying on her Charter arguments at this hearing.

### **Issue**

[10] Why is the Claimant no longer working? Is it because of misconduct based on the *Employment Insurance Act*?<sup>10</sup>

### **Analysis**

[11] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>11</sup>

[12] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits. Unless their period of suspension

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<sup>5</sup> See GD11A and GD11B.

<sup>6</sup> See *Cabiakman v Industrial Alliance Life Insurance Co.*, 2004 SCC 55.

<sup>7</sup> See GD12-1 to GD12-32.

<sup>8</sup> See *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and GD6-1 to GD6-30.

<sup>9</sup> See section 20(1) of the *Social Security Tribunal Regulations*.

<sup>10</sup> See *Employment Insurance Act*, S.C. 1996, c.23.

<sup>11</sup> Section 30 of the *Employment Insurance Act* (Act).

expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.<sup>12</sup>

[13] As well, a Claimant who *voluntarily* takes a period of time from their employment without just cause is not entitled to receive EI benefits until they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer.<sup>13</sup>

### **Why is the Claimant no longer working for his employer?**

[14] I find that the Claimant was put on a mandatory and unpaid leave of absence on November 27, 2021 because she did not comply with the employer's vaccination practice. I am going to refer to the practice as the employer's "policy" in this decision.

[15] The Claimant was not permitted to continue working remotely and prohibited from attending work. She is on an administrative leave without pay until she is compliant with the policy. This is also consistent with her record of employment and the employer's letter dated November 27, 2021.<sup>14</sup>

[16] The Claimant said there were two records of employment issued by the employer and that one of them said she was dismissed. However, there is no record that she was dismissed by the employer or that a second record of employment existed. Therefore, I am relying on the record of employment in the file that says she was on a leave of absence for non-compliance with the vaccination practice, as well as other related documents in the file.<sup>15</sup>

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<sup>12</sup> See section 31 of the Act.

<sup>13</sup> See section 32(1) and 32(2) of the *EI Act*.

<sup>14</sup> See record of employment at GD3-15 and employer's letter at GD3-57.

<sup>15</sup> See record of employment at GD3-15.

### **What was the employer's policy?**

[17] The employer implemented a "mandatory vaccination practice" (policy) effective October 29, 2021.<sup>16</sup> The policy says that the employer is committed to a healthy and safe environment for all employees. As a requirement, employees must be fully vaccinated for covid19.

[18] The policy requires that employees first attest to their vaccination status for covid19 by November 12, 2021. It provides employees with a phone number to an automated system to attest. Employees must be fully vaccinated by for covid19 by November 26, 2021.

### **Was the policy communicated to the Claimant?**

[19] I find that the policy was communicated to the Claimant on several occasions by the employer and with sufficient notice in order for her to comply.

[20] The Claimant testified that she was aware of the employer's policy because there were meetings about it, she received notices and her supervisor told her. She was also aware of the deadlines, specifically that she had to attest to her vaccination status by November 12, 2021 and be fully vaccinated by November 26, 2021.

### **What were the consequences of not complying with the policy?**

[21] The policy says that "submitting a false or misleading attestation about vaccination status, or any other breach of this practice is considered major misconduct and will result in discipline up to and including termination".<sup>17</sup>

[22] The employer sent the Claimant a letter on November 25, 2021 that said if she did not immediately attest to her vaccination status, she would be placed on an administrative leave without pay effective November 27, 2021.<sup>18</sup>

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<sup>16</sup> See policy at GD3-64 to GD3-71.

<sup>17</sup> See GD3-65.

<sup>18</sup> See GD3-75.

[23] The Claimant testified that she did not expect to be put on a mandatory leave of absence for not attesting to her vaccination status on the employer's telephone line. She said that the employer wrote it was an "administrative leave" only.

[24] The Claimant relied on a screenshot of a page that said "If employees do not comply with the vaccination practice, they will be placed on LWOP until they receive their first dose. The current practice is an administrative measure, not a disciplinary one".<sup>19</sup>

[25] The Claimant then explained that several months prior to administrative leave, around March 2021 she was on an unpaid leave without pay for elder care leave.<sup>20</sup>

### **Is there a reason the Claimant cannot comply with the employer's policy?**

[26] The policy provides accommodation for employees based on medical, religious or other prohibited grounds of discrimination under the *Canadian Human Rights Act*.<sup>21</sup>

[27] The policy requires that employees must first attest to their vaccination status on their automated telephone as either: "fully vaccinated, or partially vaccinated and intends to be fully vaccinated; or unable to be fully vaccinated". Employees must then provide some documentation to support their request as outlined in the policy.

[28] The Claimant testified that she asked the employer for a religious exemption on November 15, 2021 and made her request by email instead of the automated telephone line.<sup>22</sup>

[29] The Claimant's main concern is that she did not want to attest to her vaccination status over an automated telephone line for privacy reasons. She wanted to submit the information to the employer by paper hardcopy. She explained the employer had

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<sup>19</sup> See GD6-13.

<sup>20</sup> See GD6-28 to GD6-29.

<sup>21</sup> See GD3-64; see *Canadian Human Rights Act*, R.S.C., 1985 c. H-6.

<sup>22</sup> See GD3-60 to GD3-64.

breached her privacy when they accidentally mailed a letter addressed to her – to someone else in the organization.<sup>23</sup>

[30] The Claimant also provided the Commission with some additional information about her religious exemption request.<sup>24</sup>

### **Is the Claimant's conduct considered misconduct under the law?**

[31] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>25</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>26</sup>

[32] The Claimant does not have to have wrongful intent (in other words, she does not does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>27</sup>

[33] 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 let go (or suspended) because of that.<sup>28</sup>

[34] 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.<sup>29</sup>

[35] I find that the Commission has proven that the Claimant was suspended because of misconduct for the following reasons.

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<sup>23</sup> See GD3-20 to GD3-21.

<sup>24</sup> See GD3-87 to GD3-88.

<sup>25</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>26</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>27</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>28</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>29</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[36] First, the Claimant was put on an unpaid leave of absence on November 27, 2021 because she refused to attest to her vaccination status by the deadline set out in the policy on November 12, 2021. She had been informed of the employer's policy in response to the covid19 pandemic and had been given time to comply.

[37] The Claimant does not dispute that she did not attest to her vaccination status on the automated telephone line by November 12, 2021 as required by the policy.<sup>30</sup> While the Claimant's preference was to make her attestation by paper hardcopy instead, the policy did not provide for this option.

[38] Second, I was not persuaded by the Claimant's argument that the employer had received and accepted her attestation after she emailed them asking for a religious exemption from the policy.<sup>31</sup> While I acknowledge that she sent the email to the employer on November 15, 2021, she did not follow the steps required by the policy, which was to attest using the automated telephone line.<sup>32</sup>

[39] The employer advised her on the same date that all employees are required to attest via the attestation line, but she chose not to do so.<sup>33</sup> There is an email from the employer dated February 24, 2022 that says her religious exemption will not be evaluated because their records indicate that she has not completed her telephone attestation for which the steps have been outlined to her.<sup>34</sup> This further supports that the employer did not receive or accept her request via email.

[40] In my view, the Claimant knew exactly what was expected of her because it was outlined in the policy and by the letter from the employer. If she wanted an exemption from the policy, she needed to first attest to her vaccination status on the automated telephone line. This was the first step before making her request for religious exemption from the policy.

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<sup>30</sup> See GD3-76 to GD3-77.

<sup>31</sup> See GD12-4.

<sup>32</sup> See GD3-59 to GD3-61.

<sup>33</sup> See GD3-45.

<sup>34</sup> See GD6-11.



[41] Third, I was not persuaded by the Claimant's argument that she did not know her conduct would lead to a mandatory unpaid leave of absence but that she thought it would lead an administrative leave.

[42] The policy clearly states that "submitting a false or misleading attestation about vaccination status, **or any other breach of this practice**<sup>35</sup> is considered major misconduct and will result in discipline up to and including termination". The employer also sent a letter requiring immediate action stating that if she does not comply by November 26, 2021, she would put on an administrative leave without pay.<sup>36</sup>

[43] The Commission refers to it as a "suspension" and I agree with them.<sup>37</sup> In this case, the Claimant was not permitted to return to work at the office, or remotely. The Claimant relied on the *Digest of Benefit Entitlement Principles* to support that she was on an authorized period of leave (as a result laid off), but there was no evidence to support that she was on authorized period of leave as she claimed.<sup>38</sup> It is clear that she did not have a choice to continue working, so the leave was not taken voluntarily by the Claimant. There was no date she would resume her employment because her leave of absence was indefinite until she complied.

[44] Fourth, I accept that the employer has a right to develop and impose policies at the workplace in response to the covid19 pandemic. I also accept that the Claimant has a right to choose whether she want to attest to her vaccination and/or be vaccinated for covid19.

[45] I find that the Claimant consciously and deliberately chose not to comply with the policy even though she knew or ought to have known it would lead to an unpaid administrative leave of absence. This was her choice and it led to undesirable consequences, such as an unpaid administrative leave of absence.

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<sup>35</sup> Emphasis added.

<sup>36</sup> See GD3-30.

<sup>37</sup> See section 31 of the EI Act.

<sup>38</sup> See GD7-1 to GD7-5.

[46] Lastly, the purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment or suspension which is insured against must be involuntary.<sup>39</sup> The Claimant's conduct was not involuntary because it was her conduct that led her to stop working.

### **Is the Claimant's conduct misconduct?**

[47] Yes, based on my findings above, I find that the Claimant was put on an unpaid leave of absence or suspended because of misconduct.

### **What about the Claimant's other arguments?**

[48] The Claimant has raised several arguments to support her appeal, including some of the following:

- a) The employer breached the collective agreement in bad faith
- b) It was a breach of the *Canada Labour Code*
- c) Her privacy rights have been breached by the employer
- d) The employer has failed to accommodate her
- e) Arguments about the vaccine efficacy
- f) She is experiencing financial hardship since she has been unable to work

[49] The Claimant said that she has filed a union grievance and complaint with the *Canadian Human Rights Commission*.<sup>40</sup>

[1] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide whether the employer breached her employment rights by putting her on an unpaid leave of absence.

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<sup>39</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>40</sup> See GD8-1 to GD8-3; GD3-22 to GD3-23.

[50] The court has said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>41</sup> I have decided that her conduct amounted to misconduct.

[51] The Claimant's recourse is to pursue this action in court, or any other Tribunal that may deal with these particular matters.

## **Conclusion**

[52] The Commission has proven on a balance of probabilities (more likely than not) that the employer put her on a leave of absence or suspended her because of misconduct under the EI Act.

[53] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>41</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.