



Citation: *GM v Canada Employment Insurance Commission*, 2022 SST 1771

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

## Decision

**Appellant:** G. M.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (461657) dated May 2, 2022 (issued by Service Canada)

---

**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** August 16, 2022

**Hearing participant:** Appellant

**Decision date:** August 29, 2022

**File number:** GE-22-1680

## 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 his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Claimant isn't entitled to Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was placed on a leave of absence from his job. His employer said he was suspended because he didn't comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant says his employer didn't have the authority to enforce a leave of absence since he didn't request one. He also says his employer unjustly refused to accommodate his request for an exemption to the COVID-19 vaccination policy based on religious grounds.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant isn't entitled to EI benefits.

## Issues

[6] Did the Claimant voluntarily take leave or was he suspended from his job?

[7] Was the Claimant suspended from his job because of misconduct?

---

<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that a claimant who is suspended from their job because of misconduct is disentitled from receiving benefits.

## Analysis

### **Did the Claimant voluntarily take leave or was he suspended from his job?**

[8] The Claimant was suspended from his job.

[9] The law deals with dismissal for misconduct and voluntarily leaving without just cause together.<sup>2</sup> This is because both refer to actions a claimant has taken that result in the loss of employment.<sup>3</sup> The legal issue at stake for both is disqualification from receiving EI benefits.

[10] Sometimes it isn't clear if a claimant is unemployed because they were dismissed or because they voluntarily left their job. In cases like those, since the legal issue at stake for both is the same in the law, based on the evidence, the Tribunal can decide the grounds for disqualification.<sup>4</sup>

[11] In this case, the Claimant's employer issued a record of employment (ROE) that listed the reason for issuing it as leave of absence. But the employer later told the Commission that the Claimant is suspended without pay for non-compliance with their COVID-19 vaccination policy.

[12] In its initial decision, the Commission notified the Claimant that it could not pay him EI benefits because he was suspended from his job because of his misconduct. The Commission reconsidered this decision at the Claimant's request and maintained it.

[13] The Claimant testified his employer can't put him on a leave of absence. He referred to his collective agreement that says an employee has to ask for a leave of absence, which he didn't do. The Claimant pointed to other times he had taken leave and the ROE issued by his employer clearly stated the reason for separation. He said this is not the case now.

---

<sup>2</sup> See section 30 of the Act.

<sup>3</sup> This reasoning appears in two Federal Court of Appeal decisions. See *Canada (Attorney General) v Easson*, A-1598-92; *Canada (Attorney General) v Desson*, 2004 FCA 303.

<sup>4</sup> See *Canada (Attorney General) v Borden*, 2004 FCA 176,

[14] I find that the question of whether a claimant has voluntarily taken leave from a job or if their employer has suspended them from their job is like the question of voluntarily leaving without just cause versus dismissal. The difference in the two questions is that the issue at stake in the first is disentitlement. As noted above, the issue at stake in the second question is disqualification.

[15] In this case, I find that the Claimant's employer placed the Claimant on an unpaid leave of absence. I don't find they did so because he asked for leave; rather, I find they did so because of an action he took (declining to take the COVID-19 vaccine). So, I give a lot of weight to the employer's statement to the Commission and find they suspended him from his job.

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

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

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

[17] I find that the Claimant was suspended from his job because he didn't comply with his employer's COVID-19 vaccination policy.

[18] The Commission says that the reason the employer gave is the reason for the suspension. The employer told the Commission that the Claimant is suspended without pay because he didn't comply with their COVID-19 vaccination policy.

[19] The Claimant says that his employer implemented a COVID-19 vaccination policy. But he says they refused his request to be accommodated on religious grounds to be exempted from the policy. He says that his employer then "rendered [him] ineligible to work". The Claimant states the employer claims that he is in breach of its policy.

[20] I find from his evidence that the Claimant's employer implemented a new policy requiring that employees take the COVID-19 vaccine. The Claimant asked to be exempted from the policy, but his employer declined his request. The Claimant testified that based on his religious beliefs, he can't in clear conscience take the COVID-19 vaccine.

[21] I understand from the Claimant's evidence that he believes his employer's actions are discriminatory and violated his human rights. But he has not given another reason why his employer suspended him. So, I find that the Claimant was suspended because he didn't take the COVID-19 vaccine.

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

[22] 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.<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>

[24] 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 suspended because of that.<sup>8</sup>

[25] It is not my role to determine if dismissal (or in this case suspension) by the employer was justified or was the appropriate sanction. It's my role to determine if the Claimant's action is misconduct under the law.<sup>9</sup>

---

<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.

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

<sup>9</sup> See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[26] The Commission has to prove that the Claimant was suspended from his job because of misconduct. It 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 from his job because of misconduct.<sup>10</sup>

[27] The Commission says that there was misconduct because the Claimant didn't comply with his employer's mandatory COVID-19 vaccination policy.

[28] The Claimant says that his employer acted unjustly by not accommodating him based on religious grounds. He also says the Commission acted unfairly and in bad faith by accepting his employer's explanation without question.

[29] I find that the Commission has proven that there was misconduct, because the Claimant didn't comply with his employer's COVID-19 vaccination policy.

[30] The Claimant didn't take the COVID-19 vaccine. He testified that he didn't do so because of his religious beliefs.

[31] The Claimant's employer told the Commission that they sent an email to employees with their COVID-19 vaccination policy. They told the Commission that employees who didn't comply with the policy would be placed on leave without pay. They added that those who didn't comply by March 31, 2022 would be dismissed.

[32] The Claimant attached a copy of his employer's COVID-19 vaccination policy to his notice of appeal. The policy details what non-compliance means and what would happen to those who don't comply. It also allows for medical and non-medical human rights accommodation. The Claimant confirmed at the hearing that this is the policy that the employer sent by email.

[33] I asked the Claimant if he knew that if he didn't take the COVID-19 vaccine that he would be placed on leave without pay and eventually fired. The Claimant didn't answer the question directly. He explained that the policy states that it will adhere to the provincial human rights code. He said that he followed the process to ask for a non-

---

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

medical accommodation. Since the Claimant sent the policy to the Tribunal, I find he was aware of its contents.

[34] The Claimant sent the Commission copies of emails and letters between himself and his employer about his request for an exemption to the COVID-19 vaccination policy. In a letter dated January 31, 2022, the employer confirmed its decision communicated in a letter from six days earlier denying his request for accommodation based on religious grounds.

[35] The Claimant confirmed at the hearing that his employer never granted his request for accommodation on religious grounds. He said that the questions his employer asked him in relation to his request infringed on his privacy.

[36] In his notice of appeal, the Claimant says he has filed a human rights complaint with the provincial human rights authority. In support of his appeal, he included a copy of a document entitled "A human rights approach to proof of vaccination during the COVID-19 pandemic".

[37] Concerning the document noted above, the Claimant testified that the human rights commission says that before a COVID-19 vaccination policy can be implemented, an employer has to take into consideration all employee needs and offer options. He added that vaccination can't be a blanket requirement.

[38] The Claimant also filed a complaint with the Labour Relations Board. He says that as a result he is "entitled to EI benefits until this issue is resolved".

[39] I accept as fact that the Claimant has filed complaints related to his employer's COVID-19 vaccination policy. While it is his right to pursue this type of recourse, I don't find that it means that he is entitled to EI benefits until the complaints are resolved. I must decide whether the Claimant knew or should have known that choosing not to take the COVID-19 vaccine could lead his employer to suspend him.

[40] The Claimant quoted from a Supreme Court of Canada (SCC) decision in his notice of appeal.<sup>11</sup> He made submissions about it at the hearing. He said that this decision supports his position. The Claimant stated that his employer is looking for an objective reason for his refusal to take the vaccine. But he said the SCC decision clearly states that there is no need for an objective reason because religion cannot be objective.

[41] I acknowledge the decision the SCC made in the case the Claimant referred to. The Court held on the facts of the case that the respondent had interfered in a non-trivial way with and infringed on the appellants' protected religious rights. The Claimant says that his employer's policy requiring him to take the COVID-19 vaccine contrary to his religious beliefs can't supersede the *Canadian Charter of Rights and Freedoms*.

[42] In spite of the above, it is not my role to decide whether the Claimant's employer infringed on the Claimant's religious rights. This is the role of other judicial authorities. Again, the Claimant has exercised his right by complaining to provincial authorities.

[43] I also don't find the Claimant's statement that the Commission is colluding with the employer to deny him benefits is supported. The Commission's role is to decide if the Claimant's conduct is misconduct under the Act. To do so, it looked at the conduct, in this case the Claimant not taking the COVID-19 vaccine. It evaluated the behaviour to come to its own decision on misconduct. To do so, it spoke with both the Claimant and his employer.

[44] The employer's letters to the Claimant show that even after denying his request for accommodation on November 17, 2021, they gave him a chance to give more information about his religious beliefs. The employer asked the Claimant specific questions. They also said that he could provide a statement from a religious leader of his faith on the faith's position on vaccinations.

[45] I am satisfied from the correspondence between the Claimant and his employer that the employer gave the Claimant a chance to explain his request for

---

<sup>11</sup> See *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551



accommodation. The employer's letters show they reviewed the information and responses the Claimant gave to their questions. I accept and find as fact that after doing so, the employer denied the Claimant's request for accommodation.

[46] I understand that the Claimant doesn't agree with his employer's decision to deny his request for accommodation and require him to take the COVID-19 vaccination to continue to work. The Claimant says his religious beliefs caused him to decide not to take the vaccine. But in the absence of the employer approving an exemption to their policy, I find that the Claimant chose not to comply with the policy.

[47] I find that the Claimant's action referred to above was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so even though his employer required him to take the vaccine and denied his request for accommodation. He did so knowing that he would be placed on an unpaid leave absence. I have found that this means that he was suspended. For this reason, I find that the Commission has proven that there was misconduct.

### **So, was the Claimant suspended from his job because of misconduct?**

[48] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

### **Conclusion**

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

[50] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section