



Citation: *MT v Canada Employment Insurance Commission*, 2022 SST 1794

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

Decision

Appellant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458562) dated March 11, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: September 14, 2022

Hearing participant: Appellant

Decision date: October 4, 2022

File number: GE-22-1337

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 lost her job 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.¹

Overview

[3] M.T. is the Claimant in this case. The Claimant has worked as a Registered Practical Nurse (RPN) for around 14 years at a nursing home. The employer suspended and then dismissed the Claimant because she did not comply with the “covid19 mandatory vaccination policy” (policy) at work.² The Claimant then applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended and lost her employment due to her own misconduct.⁴

[5] The Claimant disagrees with the Commission because the employer denied her religious and medical exemption request.⁵

A teleconference was scheduled

[6] The Claimant initially asked for an in-person hearing.⁶ At the time, in-person hearings were not available due to the covid19 pandemic. The Tribunal offered the Claimant other options: teleconference or videoconference. The Claimant wrote to the

¹ See section 30 and 31 of the *Employment Insurance Act* (EI Act).

² See record of employment (ROE) at GD3-20.

³ See application for EI benefits at GD3-3 to GD3-19.

⁴ See initial decision at GD3-46 to GD3-47 and reconsideration decision at GD3-110 to GD3-111.

⁵ See notice of appeal at GD2-1 to GD2-18.

⁶ See GD2-4.

Tribunal to advise that her preference was a teleconference.⁷ As a result, a teleconference was scheduled.⁸

Issue

[7] Was the Claimant suspended and did she lose her job because of misconduct?

Analysis

[8] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.⁹

[9] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹⁰

[10] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹¹

[11] To answer the question of whether the Claimant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

The Claimant was suspended and dismissed

[12] I find that the Claimant was suspended on November 2, 2021 because she did not comply with the employer's policy that required her to be vaccinated for covid19. The Claimant was not permitted to continue working or able to return to the workplace.

⁷ See Claimant's email response dated May 6, 2022.

⁸ See notice of hearing at GD1-1 to GD1-3.

⁹ See section 30 of the EI Act.

¹⁰ See section 31 of the EI Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

¹¹ See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

[13] I also find that the Claimant was dismissed from her job on January 3, 2022 for the same reason.

[14] This was consistent with the Claimant's testimony¹², record of employment, suspension letter, dismissal and discussions between the Commission and Claimant.¹³

The employer's covid19 mandatory vaccination policy

[15] As noted above, the employer implemented a covid19 mandatory vaccination policy effective September 7, 2021.¹⁴ A copy of the policy is included in the file.¹⁵

[16] The policy states that the employer is committed to taking every precaution reasonable in the circumstances for the protection of the health and safety of workers from the hazard of covid19.¹⁶

[17] The policy states the following:

- a) Employees must disclose their vaccination status to the employer by September 13, 2021;
- b) Employees are required to be fully vaccinated with a covid19 vaccine series by October 30, 2021.¹⁷ However, this deadline was extended to December 13, 2021 and then again to January 2, 2021 for the Claimant.¹⁸
- c) For a two dose series, employees must have their first dose by September 30, 2021 and second dose by October 30, 2021. For a single dose series, it must be obtained by September 30, 2021.

¹² The Claimant testified that she was suspended on November 1, 2021, but the suspension letter shows that her suspension was effective November 2, 2021.

¹³ See ROE GD3-20 to GD3-21; suspension letter dated November 1, 2021 at GD3-30 to GD3-31; termination letter dated January 4, 2022 at GD3-40 to GD3-41 and supplementary record of claim (SROC) at GD3-72.

¹⁴ See GD3-67.

¹⁵ See policy at GD3-63 to GD3-68 and GD3-93 to GD3-96.

¹⁶ See GD3-63.

¹⁷ See GD3-65.

¹⁸ See GD3-30 to GD3-31 and GD3-32.

[18] The policy also provides for accommodation for employees who are not able to obtain a covid19 vaccine related to a protection ground based on the Human Rights Code.¹⁹ The policy sets out the steps for making a request, including the requirement to submit written proof of the need for accommodation.

The policy was communicated to the Claimant

[19] The Claimant testified that the policy was communicated to her sometime in late August 2021, or September 2021. She said the employer sent out emails at work and a letter was mailed to her. As well, she obtained a copy of the policy from the website and printed it so that she could review its contents.

[20] I accept that the policy was communicated to the Claimant in late August or early September 2021. The evidence shows that the Claimant signed and submitted a request for accommodation form based on creed on September 3, 2021.²⁰

There were consequences for not complying with the policy

[21] The policy says that “employees who do not comply with the policy may be subject to discipline, up-to and including dismissal.”²¹

[22] The Claimant testified that she knew if she did not comply with the policy, she would be suspended. However, she explained that she did not know that she would be dismissed.

[23] I was not persuaded by the Claimant’s testimony that she did not know it would lead to her dismissal because the policy says that non-compliance that “may be subject to discipline, up-to and including dismissal”.²² The Claimant agreed that she had a copy of the policy and reviewed its contents, so she would have reviewed the section of the policy identified as non-compliance.

¹⁹ See GD3-66 to GD3-67; Human *Rights Code*, R.S.O. 1990, c. H.19.

²⁰ See GD3-77 to GD3-78.

²¹ See GD3-67.

²² See GD3-67.

[24] There were also other documents issued by the employer that communicated the consequences.

[25] For example, there was an internal email sent to employees on October 6, 2021 that said if they don't comply by the deadline dates set out, they would be suspended and that would lead to termination on December 13, 2021.²³

[26] In addition, the suspension letter dated November 1, 2021 said that continued non-compliance would lead to termination with cause effective December 13, 2021.²⁴

[27] A subsequent letter issued provided the Claimant with an extension to comply by January 2, 2022. If not, she would be terminated for cause on January 3, 2022.²⁵

The Claimant did not have an approved exemption from the policy

[28] As noted above, the policy provided for exemption and accommodation for employees who are not able to obtain a covid19 vaccine related to a protection ground based on the *Human Rights Code*.²⁶

[29] The Claimant testified that she requested an exemption based on creed and for medical reasons. She explained that she has allergies. She submitted her first request on September 3, 2021 asking only for accommodation based on creed.²⁷ The employer acknowledged her request on September 28, 2021.²⁸ The Claimant submitted a second exemption request on October 7, 2021 and asked for accommodation based on creed and for medical reasons.²⁹ She submitted copies of documents to support her request.³⁰

²³ See GD3-69 to GD3-71.

²⁴ See GD3-30.

²⁵ See GD3-32.

²⁶ See GD3-66 to GD3-67; *Human Rights Code*, R.S.O. 1990, c. H.19

²⁷ See GD3-77 to GD3-78.

²⁸ See GD3-79.

²⁹ See GD3-80 to GD3-81.

³⁰ See GD3-33 to GD3-36; GD3-86.

[30] The employer denied her request for exemption on October 26, 2021.³¹ In their denial letter, they said she was expected immediately to comply with the policy and was given a 5 working day grace period to obtain her first dose.

Is it misconduct based on the law – the *Employment Insurance Act*?

[31] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³² Misconduct also includes conduct that is so reckless that it is almost wilful.³³

[32] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.³⁴

[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 because of that.³⁵

[34] The Commission has to prove that the Claimant was suspended and lost her job 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 and lost her job because of misconduct.³⁶

[35] I find that the Commission has proven that there was misconduct for the following reasons.

³¹ See GD3-82 to

³² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³⁴ See *Attorney General of Canada v Secours*, A-352-94.

³⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[36] First, I find that the policy was communicated to the Claimant in early September 2021 and she was aware of the deadline dates to comply. She enough time to comply with the requirements of the policy. In fact, there were two extensions to the final deadline, which was January 2, 2022.

[37] Second, I find that the Claimant willfully and consciously chose to not to comply with the policy for her own personal reasons. She did not agree with the employer's implementation of the policy and decided not to comply. .

[38] This was a deliberate choice she made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.³⁷ I accept that the Claimant did not have wrongful intent, but it was still misconduct.

[39] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to suspension and dismissal. The evidence in this case supports that the Claimant knew she would be suspended and dismissed if she did not comply. The consequences were communicated to her verbally and in writing.

[40] Fourth, I find that the Claimant has not proven she was exempt from the policy. While she did apply for an exemption based on creed and for medical reasons, it that was denied by the employer. This means that once the denial was communicated to her on October 26, 2021, she knew that she had to comply with the policy and was given a further extension to do so.³⁸

[41] The *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human*

³⁷ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

³⁸ See GD3-82.

*Rights Code*³⁹ as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.⁴⁰

[42] Lastly, I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. The Claimant worked as an RPN in a long-term care home. This means that vaccination for covid19 became a condition of her employment when they introduced the policy. The Claimant breached the policy when she chose not to comply with it and that interfered with her ability to carry out her duties.

What about the Claimant's other arguments?

[43] The Claimant raised other arguments to support her position. Some of them included the following:

- a) The employer failed to accommodate her
- b) The employer unfairly denied her religious/creed exemption request
- c) She was not required to take the flu vaccine
- d) She was not provided with informed consent
- e) The employer breached her Charter⁴¹ rights
- f) Many of the residents in the long-term care home were unvaccinated

³⁹ Human *Rights Code*, R.S.O. 1990, c. H.19.

⁴⁰ See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

⁴¹ 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.

[44] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.⁴² I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[45] I acknowledge the Claimant's additional arguments, but her recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments in order to obtain the remedy she is seeking.⁴³

[46] I note that she has already filed a union grievance, but is currently waiting for an arbitration date.⁴⁴ Also, the Claimant said that her employer suggested she file a claim with the *Human Rights Tribunal* of Ontario. The Claimant says that she inquired already about filing a human rights claim and has one year to do so.

Conclusion

[47] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a suspension and dismissal.

[48] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[49] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

⁴² See *Canada (Attorney General) v Marion*, 2002 FCA 185.

⁴³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

⁴⁴ See union grievance at GD3-39; GD3-87 to GD3-92.