



Citation: *KM v Canada Employment Insurance Commission*, 2022 SST 862

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

## **Decision**

**Appellant:** K. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (453244) dated February 22, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** July 28, 2022

**Hearing participant:** Appellant

**Decision date:** August 5, 2022

**File number:** GE-22-1063

## 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.<sup>1</sup>

## Overview

[3] The Claimant worked as a Registered Nurse at a hospital. The employer put the Claimant on a “non-disciplinary unpaid leave of absence” and then dismissed her because she did not comply with their covid19 vaccination policy at work. 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 and lost her employment due to her own misconduct.<sup>3</sup>

[5] The Claimant disagrees because the employer breached her rights when they imposed a mandatory covid19 vaccination policy.<sup>4</sup> As well, she was harassed and coerced by the employer to get vaccinated for covid19.

## Documents submitted after the hearing

[6] At the hearing, the Claimant said she had documents that were not part of the file. She explained that she had a copy of an email sent by the employer about the policy; her exemption request and response from the employer; a vaccine notice of liability; a termination letter and unpaid leave letter.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

<sup>2</sup> See unpaid leave letter at GD7-4 to GD7-9; record of employment at GD3-16.

<sup>3</sup> See initial decision at GD3-23 to GD3-24 and reconsideration decision at GD3-40 to GD3-41.

<sup>4</sup> See appeal forms at GD2-1 to GD2-24.

[7] The Claimant submitted all of these documents after the hearing, which I accepted because they were relevant.<sup>5</sup> A copy was shared with the Commission. No reply submissions from the Commission were received as of today's date.

## Issue

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

## Analysis

[9] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>6</sup>

[10] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>7</sup>

[11] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>8</sup>

[12] 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.

## Why did the Claimant stop working?

[13] I find that the Claimant was put on a mandatory and unpaid leave of absence from November 12, 2021 to November 26, 2021 because she did not comply with the employer's covid19 vaccination policy.

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<sup>5</sup> See GD6-1 to GD6-19 and GD7-1 to GD7-9.

<sup>6</sup> Section 30 of the *Employment Insurance Act* (EI Act).

<sup>7</sup> See section 31 of the 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.

<sup>8</sup> 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

[14] Specifically, the Claimant did not obtain her first covid19 vaccine dose by November 12, 2021. The deadline to obtain her first covid19 dose was then extended to November 26, 2021, and she still did not comply.<sup>9</sup> I note that while the Claimant was put on an unpaid non-disciplinary leave of absence, this is similar to a suspension because she was not permitted to return to work and deemed unfit to attend work.

[15] I also find that the Claimant was dismissed from her job on November 30, 2021 because she did not comply with the employer's covid19 vaccination policy.<sup>10</sup>

[16] This is consistent with the Claimant's testimony, record of employment, unpaid leave letter and termination letter, discussions between the Commission and Claimant, as well as the employer.<sup>11</sup>

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

[17] The employer implemented a covid19 vaccination policy (policy) effective November 1, 2021. A copy of the policy was outlined in the Chief Executive Officer's (CEO) email to employees on November 1, 2021.<sup>12</sup>

[18] The email says that the hospital implemented a mandatory covid19 vaccination policy for all employees after the Board of Directors unanimously approved it on October 27, 2021. The purpose was to protect patients, colleagues, families and other who may be at high risk for serious health effects related to covid19 illness.<sup>13</sup>

[19] The policy requires that employees obtain and provide evidence of their first covid19 vaccination dose by November 12, 2021.<sup>14</sup>

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<sup>9</sup> See GD7-4 to GD7-9.

<sup>10</sup> See GD3-21; GD7-4 to GD7-9 and GD6-16 to GD6-17.

<sup>11</sup> See GD3-16; GD3-18; GD3-19; GD6-16 to GD6-17 and GD7-4 to GD7-9.

<sup>12</sup> See policy at GD6-1 to GD6-4.

<sup>13</sup> See GD6-1; GD6-2.

<sup>14</sup> See GD6-3.

[20] The policy allows for medical exemptions which must be accepted by the hospital's *Occupational Health and Safety Department*. It states that exemptions based on creed or religion will be assessed on case-by-case basis.<sup>15</sup>

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

[21] The employer told the Commission that the policy was communicated to employees by email, telephone calls with managers and meetings.<sup>16</sup>

[22] The Claimant testified that she first found out about the policy on November 1, 2021 after receiving an email from the CEO sent to all staff.<sup>17</sup> She agreed that the policy was communicated to her on more than one occasion because she was starting to feel like the employer was harassing her.

[23] I find that the policy was first communicated to the Claimant on November 1, 2021.

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

[24] The policy says that a failure to comply with the policy by November 12, 2021 will result in leave without pay/suspension.<sup>18</sup> It then states that termination will follow on November 30, 2021.

[25] The unpaid leave letter sent to the Claimant says that a failure to comply with the extended deadline to obtain her first covid19 vaccination by November 26, 2021 will result in termination.<sup>19</sup>

[26] The Claimant testified that she was suspended on November 1, 2021 until November 26, 2021. Since she did not comply with the policy, she was terminated on

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<sup>15</sup> See GD6-3.

<sup>16</sup> See GD3-19.

<sup>17</sup> See GD6-1 to GD6-4.

<sup>18</sup> See GD6-3.

<sup>19</sup> See GD7-4 to GD7-9.

November 30, 2021. This is consistent with the unpaid leave letter and termination letter issued by the employer.<sup>20</sup>

### **Is there a reason the Claimant could not comply with the policy?**

[27] As noted above, the policy provided for a medical exemption, creed and/or religious exemptions.

[28] The Claimant testified that she has a heart condition. She spoke to her doctor about her concerns. However, she was unable to obtain a medical note exempting her from the covid19 vaccine because her doctor said that she would have to take the vaccine first and see if there was a reaction.<sup>21</sup> She explained that she was not willing to take the risk.

[29] The Claimant also said that she did submit a human rights exemption to the employer on November 12, 2021.<sup>22</sup> She provided a copy of her exemption request, however it was denied by the employer.<sup>23</sup>

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

[30] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>24</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>25</sup>

[31] 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.<sup>26</sup>

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<sup>20</sup> See GD7-4 to GD7-9 and GD6-17 to GD6-18.

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

<sup>22</sup> See exemption request at GD6-8 to GD6-10.

<sup>23</sup> See employer's response at GD6-18 to GD6-19.

<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>25</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>26</sup> See *Attorney General of Canada v Secours*, A-352-94.

[32] 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 let go because of that.<sup>27</sup>

[33] 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.<sup>28</sup>

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

[35] First, I find that the policy was communicated to the Claimant and was aware of the deadline dates to comply. The Claimant also had enough time to comply with the policy.

[36] Specifically, the policy was communicated to her on November 1, 2021 when the CEO sent an email to all staff. She had to obtain her first covid19 vaccine dose by November 12, 2021. This was later extended to November 26, 2021.

[37] Second, I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons. I accept that the Claimant did not have wrongful intent by choosing to not be vaccinated for covid19, which was her choice to make. However, it is still misconduct because the employer introduced a policy making vaccination for covid19 a condition of her continued employment.

[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.<sup>29</sup>

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<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>29</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[39] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to a suspension and dismissal. While the employer noted that it was unpaid non-disciplinary leave of absence, this was a suspension because the Claimant was not allowed to work and deemed unfit to return to work.

[40] The consequences were communicated to her on November 1, 2021 when the CEO sent an email to all the staff and in the unpaid leave letter issued on November 12, 2021.

[41] Fourth, I find that the Claimant has not proven she was exempt from the policy. The Claimant did not submit a medical exemption to the employer because she could not obtain a medical note from her doctor. While she did submit a human rights exemption to the employer, it was denied.

[42] 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 Rights Code*<sup>30</sup> 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.<sup>31</sup>

[43] 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. So, being vaccinated 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 duty to the employer.

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<sup>30</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>31</sup> 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](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates).



[44] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.<sup>32</sup> In this case, it was not involuntary because it was the Claimant's actions that led to her suspension and dismissal.

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

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

- a) The employer's policy was discriminatory resulting in differential treatment
- b) She felt that the employer was harassing her
- c) The employer did not accommodate
- d) The employer breached the collective agreement
- e) The employer failed to discuss the policy in advance with employees and the union
- f) Other provinces have hired back their unvaccinated nurses

[46] 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.<sup>33</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[47] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments.

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<sup>32</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>33</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[48] At the hearing, the Claimant confirmed that the union has already filed several grievances on behalf of employees. She is expecting an update at the end of 2022, or early 2023.

## **Conclusion**

[49] 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.

[50] 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.

[51] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section