



Citation: *DL v Canada Employment Insurance Commission*, 2022 SST 281

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

## **Decision**

**Appellant:** D. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (448088) dated February 4, 2022  
(issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Decision date:** March 14, 2022

**File number:** GE-22-510

## Decision

[1] The appeal is allowed.

## Overview

[2] The Claimant's employer put a policy in place regarding COVID-19 vaccination.

[3] The employer's policy said that every employee must be fully vaccinated against COVID-19 by October 29, 2021, or, if they could not be vaccinated for religious reasons, then they would need to provide a letter from their religious leader.

[4] The Claimant says she cannot be vaccinated for religious reasons and provided a letter to her employer from her religious leader on November 1, 2021.

[5] Her employer said they reviewed the letter she provided, but determined the letter did not set out a valid basis for accommodation as the letter suggests it is merely the Claimant's personal belief she cannot be vaccinated, and not actually a part of her religion that is precluding her from being vaccinated.

[6] The Claimant's employer terminated her employment on November 2, 2021, saying that her refusal to be vaccinated and abide by the vaccination policy is insubordination.

[7] The Claimant then applied for employment insurance (EI) benefits.

[8] The Canada Employment Insurance Commission (Commission) reviewed the Claimant's reasons for losing her job and determined that she had lost her employment due to her own misconduct so they could not pay her benefits.

[9] The Claimant requested the Commission reconsider their decision that she had lost her job due to misconduct.

[10] The Commission reviewed their decision but declined to change it, upholding their initial decision to disqualify the Claimant from benefits because she lost her job due to misconduct.

[11] On February 14, 2022, the Claimant filed an appeal of the Commission's reconsideration decision. The issue before me is whether the Claimant lost her job due to misconduct.

## **Analysis**

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>1</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>2</sup> 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.<sup>3</sup>

[13] 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.<sup>4</sup>

[14] The Commission has to prove that the Claimant 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 lost her job because of misconduct.<sup>5</sup>

[15] The Claimant says that she followed all of her employer's COVID-19 policies.

[16] The Claimant says her employer's COVID-19 policy states that employees who are not vaccinated for religious reasons will not be disciplined and that her employer

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<sup>1</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>2</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>3</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

would required a letter from her religious leader. The Claimant says she provided the leader from her religious leader to her employer, but they disregarded it and fired her.<sup>6</sup>

[17] The Claimant notes her letter was provided slightly after the deadline but says that was not her fault as she was sick from October 18, 2021, to October 29, 2021.<sup>7</sup>

[18] On February 28, 2022, the Commission filed submissions in which they conceded the appeal.

[19] The Commission submits they previously determine the Claimant had committed misconduct, despite knowing about her religious exemption letter, due to the Claimant submitting the letter beyond the employer's deadline for exemption requests. However, the employer accepted the letter, despite it being submitted late, and dismissed the Claimant, in part, due their inability to accommodate the Claimant's religious beliefs. Therefore, there is no link between the timing of the delivery of the letter with the Claimant's dismissal.<sup>8</sup>

[20] The Commission submits the Claimant was prevented from following her employer's COVID-19 vaccine policy due to her religious beliefs.

[21] The Commission submits the letter from the Claimant's religious leader shows that it is a fundamental belief of the religion that precludes the Claimant from getting a vaccine and there is no freedom of choice amongst the congregation as the letter clearly outlines the church's position against vaccinations.

[22] I have reviewed the evidence and submissions in the file and I agree with the Commission that the appeal should be allowed.

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<sup>6</sup> GD02-1

<sup>7</sup> GD02-1

<sup>8</sup> GD04-1

***Why was the Claimant fired?***

[23] The first part of determining if the Claimant lost her job due to misconduct is to determine why she was fired.

[24] In the termination letter the employer sent to the Claimant, they say she was fired for insubordination, for failing to follow their COVID-19 vaccination policy as she refused to comply with it by providing a valid exemption.<sup>9</sup>

[25] The COVID-19 policy supplied by the employer to the Commission says the following:

- Employees who are not vaccinated for either medical or religious reasons will not be disciplined for this decision.
- The reason for not being vaccinated will need to be disclosed to Human Resources, either a doctor's note for medical reasons or a letter from a religious leader for religious reasons.
- All unvaccinated employees will need to provide proof of a negative COVID-19 test twice per week and take a COVID-19 vaccination educational session.

[26] In regard to compliance with the employer's COVID-19 policy there is no evidence the Claimant failed to comply with the twice weekly testing and requirement to take an education session. So, I find the Claimant did not fail to comply with that part of the policy.

[27] Second, I find the Claimant did choose one of the two accepted reasons for not getting vaccinated, as she says she cannot be vaccinated for a religious reason, so she complied with that part of the policy.

[28] Third, I find the Claimant did provide a letter from a religious leader to her employer, although it was on November 1, 2021, which her employer said was late.

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<sup>9</sup> GD03-70

However, her employer did accept the letter, and says they considered it<sup>10</sup> which supports it was not the letter being provided late that resulted in her termination.

[29] I find the Claimant followed the employer's COVID-19 policy, and thus failing to follow that policy is not why she was fired.

[30] So, why was the Claimant fired if it was not for failing to follow the employer's COVID-19 policy?

[31] I find she was fired because she was not vaccinated and asked for a religious exemption.

[32] The employer declined to accommodate the Claimant's religious exemption. I find it is clear the employer was planning to deny the Claimant's religious exemption request, and then dismiss her, before the Claimant even submitted her religious leader's letter.

[33] In an internal email dated September 23, 2021, the employer was speaking with a lawyer about how they could reject a religious exemption. I find the employer looking to find a way to reject religious exemptions in a general sense, without having even read the Claimant's at that point, shows a general plan to reject all religious accommodations.<sup>11</sup> I note the email to the lawyer is not asking in a general sense how to reject medical exemptions.

[34] Further, in even more compelling evidence, the employer told the Commission that they were not going to accept any religious letters. I find this shows the employer had already decided before the Claimant even submitted her letter from her religious leader that they were going to reject it.<sup>12</sup>

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<sup>10</sup> GD03-66

<sup>11</sup> GD03-60

<sup>12</sup> GD03-51

[35] In the employer's internal communication document it says that in the first week of November 2021, they reached out to all employees without any vaccinations and no approved medical reason to notify them of termination.

[36] I find this is more proof that the employer was not going to accept any religious exemption requests as it says that all employees without an approved medical reason will be terminated, not any employees without an approved religious or medical reason, or all employees without an approved reason, it specifically lists any employees without a medical reason as going to be terminated.

[37] This supports that it is only medical reasons for not being vaccinated that they were going to, or did accept.

[38] The employer having already decided to reject religious letters before the Claimant even submitted her letter shows that what the employer was going to do with someone who asked for a religious exemption was pre-planned and was not related to the content of the Claimant's religious letter, the date she submitted it, or any sort of refusal of the Claimant to comply with the employer's COVID-19 policy.

***Was the Claimant's conduct misconduct?***

[39] So, now that I have determined why the Claimant was fired, I now have to determine if the Claimant committed the conduct she was fired for.

[40] The answer to that question is yes. The Claimant intentionally did not get vaccinated and asked for a religious exemption.

[41] The final part of the test to determine if the Claimant lost her job due to misconduct is whether the Claimant knew, or ought to have known, that she would be fired for not being vaccinated and asking for a religious exemption.

[42] I find the Claimant could not possibly have known this, nor should she ought to have known this.

[43] I find the Claimant could not possibly have known her employer had predetermined that they were going to reject all religious exemption letters.

[44] The employer's COVID-19 policy says that a religious reason is a valid reason to not be vaccinated and that employees will not be disciplined for this decision.<sup>13</sup>

[45] I find this policy would lead the Claimant to expect there would be no discipline at all, never mind termination, for her decision to not be vaccinated and ask for a religious exemption.

[46] Further, in the September 28, 2021,<sup>14</sup> and October 14, 2021,<sup>15</sup> letters the Claimant received from her employer, they state any employee who cannot provide proof of vaccination, and is declining vaccination for a reason other than a medical reason, is required to do twice weekly testing and attend an education session.

[47] I find this wording would further lead the Claimant to believe that she can remain unvaccinated, and request a religious exemption and would not be fired for it, as these letters continue to support the written COVID-19 policy of the employer that not being vaccinated for religious reasons is a valid option as they offer the option of not being vaccinated for a reason other than a medical reason.

[48] So, as the Claimant did not know, nor should she ought to have known, that she would be fired for not being vaccinated and asking for a religious exemption, as she could not have known her employer had predetermined to reject all religious exemptions, her conduct does not rise to the level of misconduct and therefore she should not be disqualified from benefits.

[49] The appeal is allowed.

Gary Conrad  
Member, General Division – Employment Insurance

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<sup>13</sup> GD03-57

<sup>14</sup> GD03-61

<sup>15</sup> GD03-62