



Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 691

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

## Decision

**Appellant:** J. F.  
**Representative:** L. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (449550) dated January 19, 2022  
(issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Videoconference  
**Hearing date:** April 11, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** May 12, 2022  
**File number:** GE-22-611

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she violated its policies by refusing to disclose her vaccination status.

[4] Even though the Claimant doesn't dispute that this happened, she says that it isn't the real reason why the employer let her go. The Claimant says that the employer actually let her go because she modified the vaccination attestation form and submitted the modified form instead.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

## Matter I have to consider first

### The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

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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.

## Issue

[7] Did the Claimant lose her job because of misconduct?

## Analysis

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

### Why did the Claimant lose her job?

[9] I find that the Claimant lost her job because she chose not to comply with the employer's policy that required her to attest to her COVID-19 vaccination status. This is consistent with the evidence on file.

[10] The Claimant and the Commission don't agree on why the Claimant lost her job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant was dismissed for not complying with company policy by completing an attestation of her vaccination status.

[11] The Claimant disagrees. The Claimant says that the real reason she lost her job is because the employer retaliated against her for submitted an edited version of the vaccination attestation form.

[12] The Claimant worked as an intervener assisting deaf-blind individuals with their activities of daily living. In September 2021, her employer implemented a policy that required employees to sign an attestation form which included a disclosure of the employee's vaccination status.

[13] The Claimant didn't want to disclose her vaccination status. She testified that she didn't think it was right for the employer to ask her to disclose private medical information. And she didn't believe the employer had a good reason to ask her to disclose her vaccination status.

[14] The Claimant testified that the employer's policy required her to submit the completed attestation form by September 24, 2021. But, she was given an extension of time to hand in the form. She was required to submit the completed form by October 13, 2021.<sup>2</sup>

[15] The Claimant told the employer that she wanted to keep her medical information private.<sup>3</sup> She felt that the employer wasn't willing to work with her. She offered to participate in an educational session. She also offered to submit to regular rapid antigen testing at the employer's expense. But, the employer refused. The employer insisted that the Claimant had to submit a completed attestation form in order to comply with its policy.<sup>4</sup>

[16] On October 13, 2021, the employer suspended the Claimant for five days.<sup>5</sup> This suspension was extended for an additional five days on October 21, 2021.<sup>6</sup> The Claimant acknowledged that both of these disciplinary actions were for failing to sign the attestation form.<sup>7</sup>

[17] On October 21, 2021, she edited the attestation form and submitted it to the employer. She made several changes on the form to indicate that she was not willing to disclose her vaccination status.<sup>8</sup> The Claimant testified that the employer told her that they needed to receive an unedited attestation form.

[18] The Claimant filed multiple "concern forms" with her union regarding the employer's policy and the disciplinary action she was facing. On October 26, 2021, she submitted a concern form stating that she has agreed to do more than what is required

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<sup>2</sup> See the employer's email dated October 7, 2021, found at GD6-58.

<sup>3</sup> See the Claimant's email dated October 9, 2021, found at GD6-57.

<sup>4</sup> See the employer's response to a concern form submitted by the Claimant, this is found at GD6-55.

<sup>5</sup> See the employer's letter dated October 13, 2021, found at GD6-56.

<sup>6</sup> See GD6-57.

<sup>7</sup> See GD6-4.

<sup>8</sup> The Claimant provided a copy of the edited attestation form on GD6-10 to GD6-11. The changes she made to the form include crossing out the option that stated she was declining to be vaccinated because she was not getting the vaccine and replaced it with a statement that said she was declining because she was "not sharing vaccine status," and crossing out the statement that "declining vaccination for any reason" to state that "declining sharing vaccination status" will result in an employee undergoing mandatory rapid antigen testing.

by the *Occupational Health and Safety Act*, but she is still facing disciplinary actions and possible termination of her employment if she does not disclose her COVID-19 vaccination status.<sup>9</sup>

[19] On October 21, 2021, the employer sent the Claimant a reminder that she was required to submit her attestation form by October 28, 2021, or should would face “further discipline up to and including termination.”<sup>10</sup>

[20] On October 28, 2021, the employer sent the Claimant an email stating that they if they didn’t receive a “valid, unedited Attestation Form” by 4:00 PM, the Claimant would receive further discipline up to and including termination.<sup>11</sup>

[21] The Claimant acknowledged that she did not submit a completed and unedited attestation form to the employer and she was terminated effective October 28, 2021.

[22] The employer issued a letter dated October 28, 2021, that states the claimant has failed to comply with the employer’s COVID-19 vaccination policy because they did not receive her valid vaccination attestation form.<sup>12</sup> For this reason, she is terminated from her job.

[23] I am not satisfied that the Claimant was dismissed because she submitted an edited attestation form. The evidence before me supports that the Claimant’s choice not to disclose her vaccination status is the conduct that led to her dismissal. I find it is more likely that this was the real reason for her dismissal, and not an excuse.

[24] The Claimant submitted the edited form on October 21, 2021. However, the Claimant had received multiple warnings before that date. These warnings notified her that she would be subject to disciplinary action up to and including termination if she failed to comply with the employer’s COVID-19 vaccination policy. She had been

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<sup>9</sup> See GD6-46.

<sup>10</sup> See GD6-57.

<sup>11</sup> See GD6-44.

<sup>12</sup> See GD6-42 to GD6-43.

suspended from work on October 14, 2021, and again on October 21, 2021, for failing to submit a completed attestation form.

[25] There is no evidence to support that the employer dismissed the Claimant because she submitted an edited form on October 21, 2021. The employer responded to the Claimant's edited attestation by refusing to accept the form. The employer did not immediately dismiss the Claimant for editing the attestation form. Rather, the employer gave the Claimant further opportunities to submit a completed attestation form before making the decision to terminate her employment.

[26] I find the essential conduct that led to the Claimant's loss of employment was that she chose not to comply with the employer's policy that required her to attest to her COVID-19 vaccination status.

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

[27] The reason for the Claimant's dismissal is misconduct under the law.

[28] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>13</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>14</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>15</sup>

[29] 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>16</sup>

[30] 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

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<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>14</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>15</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.<sup>17</sup>

[31] The Commission says that there was misconduct because the Claimant was fully aware of the employer's policy and that her failure to comply would result in a loss of employment. Still, the Claimant willfully made the choice not to comply knowing that her decision would have a negative impact on the employment relationship.

[32] The Claimant says that there was no misconduct because she did not intend to damage the employment relationship. She tried to reach an agreement with the employer that would allow her to continue working without disclosing her vaccination status.

[33] I find that the Commission has proven that there was misconduct.

[34] The Claimant wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in the loss of her employment.

[35] The Claimant was notified about the employer's policy on September 9, 2021.<sup>18</sup> She chose not to complete the COVID-19 vaccination attestation form as required by the policy<sup>19</sup>. She knew the policy could result in her termination<sup>20</sup>. She did not comply with the policy by the extended deadline of October 13, 2021, so she was suspended from her job. She was given a further chance to comply with the employer's policy by October 28, 2021. When she failed to disclose her vaccination status by submitting a completed COVID-19 vaccination attestation form, she was dismissed from her job.<sup>21</sup>

[36] I acknowledge that the Claimant asked the employer to accommodate her concerns. She asked to be exempted from disclosing her vaccination status, and asked

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<sup>17</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>18</sup> See the concern form dated October 26, 2021, at GD6-48.

<sup>19</sup> The Claimant testified to this effect and communicated this to the employer on a concern form dated October 19, 2021, found at GD6-50.

<sup>20</sup> The Claimant acknowledged this in a concern form dated October 26, 2021, found at GD6-46.

<sup>21</sup> See the formal notice of termination dated October 28, 2021, at GD6-42 to GD6-43.

the employer to cover the expenses related to the testing required for non-vaccinated employees. However, the employer refused these accommodations.

[37] The Claimant was aware that the employer was not willing to exempt her from the policy based on her desire to keep her vaccination status private. Yet, she chose not to comply with the employer's policy, regardless. If she intended to comply with the policy after the employer refused her requested accommodations, the Claimant could have communicated that to her employer and asked for another extension of time.

[38] The Claimant submitted a policy statement from the Ontario Human Rights Commission stating that all levels of government should approach COVID-19 pandemic management from a human rights-based approach. I note that 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>22</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>23</sup>

[39] The Claimant submits that the employer's policy went further than it had to by requiring employees to disclose their medical status. She pointed to several documents issued by the Ontario Ministry of Health which indicate that employers can offer employees options if they choose not to be vaccinated.<sup>24</sup>

[40] The employer stated that it was mandated to have a vaccination policy and that its policy aligns with the Ministry of Health's requirements, and with other agencies in their sector.<sup>25</sup> The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer

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<sup>22</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>23</sup> See the 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).

<sup>24</sup> See the document titled "Instructions Issued by the Office of the Chief Medical Officer of Health" found at GD6-17 to GD6-20, and the document titled "COVID-19 Guidance: Congregate Living for Vulnerable Populations" found at GD6-21 to GD6-39.

<sup>25</sup> See the employer's response to a concern form submitted by the Claimant at GD6-47.



implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[41] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.

[42] I understand the Claimant's concerns that the employer's policy was not fair and that it did not give her any other option than to disclose her vaccination status. I acknowledge that she disagrees with the employer's policy and that the loss of her employment was unjustified. But, I do not have the authority to decide whether the employer breached any of her rights by suspending the Claimant and then dismissing her from her job when they could have accommodated her in some other way.

[43] The Claimant may have other recourse to pursue her claims that the employer's policy breached her human rights and that the employer harassed and unjustly dismissed her. But these matters must be addressed by the correct court or Tribunal.

### **So, did the Claimant lose her job because of misconduct?**

[44] Based on my findings above, I find that the Claimant lost her job because of misconduct.

### **Conclusion**

[45] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[46] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section