



[TRANSLATION]

Citation: *SA v Canada Employment Insurance Commission*, 2022 SST 1213

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

## Decision

**Appellant:** S. A.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (458113) dated March 2, 2022  
(issued by Service Canada)

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**Tribunal member:** Josée Langlois

**Type of hearing:** Teleconference

**Hearing date:** September 7, 2022

**Hearing participant:** Appellant

**Decision date:** September 8, 2022

**File number:** GE-22-1425

## Decision

[1] The appeal is dismissed.

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

## Overview

[3] On November 19, 2021, the Appellant stopped working for X because she refused to comply with a mandatory COVID-19 vaccination directive.

[4] The Appellant disagrees. She says that she didn't commit misconduct and that it isn't fair that she lost her job for refusing to get vaccinated. She says that she liked her job and was good at it.

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

## Issue

[6] Did the Appellant lose her job because of misconduct?

## Analysis

[7] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

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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.

### **Why did the Appellant lose her job?**

[8] I find that the Appellant lost her job because she refused to comply with the employer's directive. She had to provide the employer with proof of vaccination against COVID-19 by November 19, 2021, and she refused to do so.

[9] The Appellant and the Commission agree on why the Appellant lost her job.

[10] The employer told the Commission that, on October 4, 2021, the Government of New Brunswick started requiring all health care workers to be vaccinated against COVID-19.

[11] The employer implemented the government-imposed vaccination policy. On October 6, 2021, it told the Appellant that, under the *COVID-19 Vaccination Directive – Nursing Homes and Adult Residential Facilities*, a vaccination attestation was required to work in health care.<sup>2</sup> Employees had until November 19, 2021, to provide proof of vaccination showing that they had received a first dose of vaccine.<sup>3</sup>

[12] In accordance with this directive, the employer asked the Appellant for proof of vaccination. She refused to provide this proof, since she didn't want to get vaccinated.

[13] On November 19, 2021, the employer suspended the Appellant.

[14] The Appellant admits that she refused to comply with the employer's directive that calls for providing proof of vaccination. I find that she committed the acts that the employer says she did and that initially got her suspended before she was let go.

### **Is the reason for the Appellant's dismissal misconduct under the Act?**

[15] The reason for the Appellant's dismissal is misconduct under the Act. A worker who is let go because of misconduct can't get EI benefits.

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<sup>2</sup> GD3-27.

<sup>3</sup> GD3-30.

[16] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Appellant 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 Act.<sup>6</sup>

[17] There is misconduct if the Appellant 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>7</sup>

[18] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.<sup>8</sup>

[19] The employer, X, sent the Commission the mandatory vaccination directive and the vaccination directive for long-term care facilities issued by the Government of New Brunswick.<sup>9</sup>

[20] On October 6, 2021, the employer told all employees, including the Appellant, that they had to receive two doses of the COVID-19 vaccine to be able to continue working.

[21] There was a deadline for providing the vaccination attestation for both doses of vaccine. Employees had to provide proof of first-dose vaccination on November 19, 2021, and proof of second-dose vaccination on December 21, 2021.

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

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> GD3-21 to GD3-31.

[22] The Appellant refused to provide the attestation for first-dose vaccination on November 19, 2021. She didn't ask for an exemption for medical or religious reasons. She knew that refusing to comply with the employer's directive could get her dismissed.

[23] On January 11, 2022, she told the Commission that she knew about the government-imposed requirements but that she disagreed and that she refused to comply with the vaccination policy because it went against her values.

[24] The Appellant argues that she was let go because she refused to get vaccinated, not because she wasn't good at her job. She says that she didn't commit misconduct. She disagrees with the Commission's decision because she doesn't think the employer could force her to get vaccinated and because this practice is discriminatory.

[25] The Appellant also says that she didn't contract COVID-19 despite being unvaccinated and that she is healthy. She doesn't understand why it was misconduct for her to refuse to get vaccinated because her employer implemented a government policy. She says that the policy came directly from the government, not the employer. On this point, she argues that her employer called her back to work when this restriction was lifted and that it understands her reasons for refusing to get vaccinated. She went back to work for X about two months ago, since the vaccination attestation isn't required anymore.

[26] The Commission argues that the Appellant knew that violating the vaccination policy could get her dismissed.

[27] I agree with the Commission when it says that the Tribunal doesn't have jurisdiction to decide on the efficacy of vaccines or to determine whether the employer's policy was reasonable.<sup>10</sup>

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<sup>10</sup> *Paradis v Attorney General of Canada*, 2016 FC 1282.

[28] Although I understand the Appellant's position, when an employee deliberately violates a directive from the employer, this attitude and this behaviour get in the way of carrying out their duties toward their employer.

[29] Even though the employer implemented this directive in response to the one imposed by the government, the Appellant failed in her duties toward the employer by not complying with its directive.

[30] On this point, I do understand the Appellant's reasons for refusing to get vaccinated. I understand that, for personal reasons, she made [*sic*] chose not to get vaccinated against COVID-19.

[31] But, to decide whether the Appellant's non-compliance amounts to misconduct under the Act, I don't have to determine whether the suspension/dismissal was an appropriate measure; I have to determine whether the Appellant's actions amount to misconduct.

[32] The Appellant knew that, beginning on November 19, 2021, the Government of New Brunswick would impose COVID-19 vaccination on health care workers. She knew that this requirement applied to her because she worked for X. She knew that her employer had to implement the government-imposed directive. She made a conscious decision not to comply with it.

[33] Wrongful intent doesn't have to be proven to find misconduct. In other words, I don't have to determine whether the Appellant did something wrong. I understand her explanations, and I am satisfied that she didn't mean to do something wrong. I also understand that this situation has caused her financial worry and that she is also afraid of losing her job again if such a vaccination policy were implemented again.

[34] The Appellant's employer let her go for not following its rules; she refused to comply with the vaccination policy, which was mandatory for all employees (unless they provided a medical exemption or an exemption for religious reasons). Even though this directive came during the Appellant's employment rather than when she was hired, her

refusal to comply with it meant that she wasn't following the employer's rules. She herself admits it when she says that her employer was required to impose the policy.

[35] Even though I understand the Appellant's confusion because the employer enforced the mandatory vaccination directive on November 19, 2021, and the same employer has rehired her now that the directive isn't in force anymore, she wasn't complying with the directive in place on November 19, 2021. I agree with her that she didn't lose her job because she wasn't good at it. She lost her job because she refused to comply with the employer's vaccination directive.

[36] The Appellant admits that she received clear guidance from the employer on the vaccination directive on October 6, 2021. On November 19, 2021, she refused to provide proof of vaccination as required by the directive. She knew the rules and decided not to follow them. This deliberate act amounts to misconduct.

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

[37] The Appellant can't get regular benefits if she was let go because of misconduct. When an employee doesn't follow their employer's rules, they can assume they will be let go.

[38] As mentioned, I don't have to determine whether the dismissal was an appropriate penalty. But I note that the possibility of getting benefits is assessed in the same way for a period of suspension or after a dismissal. In this case, I have to decide whether the Appellant acted as the employer says she did and whether her actions amount to misconduct under the Act.

[39] Based on my findings above, I find that the Appellant lost her job because of misconduct. The Appellant acted as the employer says she did, and refusing to comply with the employer's mandatory vaccination directive amounts to misconduct under the Act.

## **Conclusion**

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

[41] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section