



[TRANSLATION]

Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 1224

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

**Decision**

**Appellant:** J. F.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (468055) dated April 28, 2022  
(issued by Service Canada)

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**Tribunal member:** Nathalie Léger  
**Type of hearing:** Teleconference  
**Hearing date:** September 21, 2022  
**Hearing participant:** Appellant  
**Decision date:** September 23, 2022  
**Amendment date:** October 27, 2022  
**File number:** GE-22-1836

## Decision

[1] The appeal is ~~allowed~~ dismissed. The Tribunal disagrees with the Claimant's arguments.

[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 she is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant, who is a personal care worker in a seniors' residence, lost her job. Her employer says that she was let go because she refused to be vaccinated, which goes against the policy her employer put in place. Her employer put the policy in place when a government decision obligated it to.

[4] Even though the Claimant doesn't dispute what happened, she says that her refusal to get vaccinated can't be misconduct. She says that she didn't have enough time to make a decision and that nobody can impose a medical procedure.

[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 Appellant is disqualified from receiving EI benefits.

## Issue

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

## Analysis

[7] 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

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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.

her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

[8] Both parties recognize that the Appellant lost her job because she refused to be vaccinated by her employer's deadline.

[9] I can't see anything in the file that could make me find otherwise.

[10] As a result, I find that the Appellant lost her job because she refused to be vaccinated by her employer's deadline.

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

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

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</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>4</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>5</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

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</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>6</sup>

[15] The Commission says there was misconduct for the following reasons:

- On October 21, 2021, the government mandated healthcare facilities to make sure that all their workers be vaccinated against COVID-19.
- The same day, the employer sent the Claimant a letter telling her that she had until November 15, 2021, to comply with the vaccine mandate. This letter also told her that if she didn't comply with the mandate, she could be let go.
- The Appellant testified that she had no religious reason to refuse vaccination and that her health also didn't stop her from being vaccinated.

[16] The Claimant says that there was no misconduct because the three weeks she was given to think about, look into, and decide on vaccination wasn't long enough. Also, she says that the vaccine wasn't necessary in her case. Since she had already had COVID-19, she believes she has natural immunity, which makes mandatory vaccination useless.

[17] It is important to note that it isn't for the Tribunal to decide whether the employer's deadline for the Appellant to make her decision was long enough. It is also not within the Tribunal's jurisdiction to decide whether the fact that she had already had COVID-19 could replace the need to be vaccinated. This decision, which isn't unreasonable on its face, is the employer's to make—the Tribunal can't interfere with this decision.

[18] The Claimant recognizes that she knew she would be fired if she didn't comply with the vaccine mandate. She recognizes that many of her colleagues chose to be

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<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

vaccinated after receiving the employer's letter. She recognizes that she decided not to be vaccinated knowing that she could be let go.

[19] The day of the hearing, the Claimant also sent the Tribunal an article from the internet<sup>7</sup> about a Tribunal decision<sup>8</sup> that she says applies to her case. In this decision, the Tribunal found that the Appellant's refusal to be vaccinated doesn't amount to misconduct.

[20] This decision is based on facts that are very different from those in the Appellant's file. In that file, the following facts have been supported:

- The appellant had only three days to decide to be vaccinated.
- He didn't get any letter or confirmation about the employer's policy.
- He wasn't clearly informed that he could be let go if he didn't comply with the employer's directive.
- He worked in a field where a ministerial order didn't apply.

[21] As shown above, the Appellant's situation is very different. As a result, this decision isn't helpful to her case.

[22] I find that the Commission has proven misconduct because the Appellant's refusal to be vaccinated was deliberate or intentional. Also, there was a cause and effect relationship between the refusal and the dismissal.

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

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

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<sup>7</sup> <https://www.jccf.ca/federal-tribunal-rules-in-favour-of-fired-employee-denied-ei-for-not-taking-covid-shots/>

<sup>8</sup> *TC v Employment Insurance Commission*, SST, August 31, 2022.

## **Conclusion**

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

[25] This means that the appeal is dismissed.

Nathalie Léger

Member, General Division – Employment Insurance Section