



Citation: *MV v Canada Employment Insurance Commission*, 2022 SST 1255

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

## Decision

<b>Appellant:</b>	M. V.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	Canada Employment Insurance Commission reconsideration decision (468921) dated May 4, 2022 (issued by Service Canada)
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<b>Tribunal member:</b>	Elizabeth Usprich
<b>Type of hearing:</b>	Teleconference
<b>Hearing date:</b>	August 30, 2022
<b>Hearing participant:</b>	Mya Volk Appellant
<b>Decision date:</b>	September 9, 2022
<b>File number:</b>	GE-22-1823

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[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, M. V., worked as a respiratory therapist. She worked for the same employer for over 31 years. The Claimant did not follow her employer's COVID-19 vaccination policy. The employer put the Claimant on a leave of absence on October 26, 2021. The employer then dismissed the Claimant on November 15, 2021 because she did not get vaccinated or provide an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to receive EI benefits because she was suspended and then lost her employment due to her own misconduct.

[5] The Claimant disagrees that she engaged in any kind of misconduct. She had her own medical issues and wanted to wait to get vaccinated.

[6] 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.

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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.

## **Matters I have to consider first**

### **Documents Submitted**

[7] The Commission relied on the employer's mandatory vaccination policy but had not provided the Tribunal with a copy. The Tribunal asked them to do so. The document was received and coded as GD7. A copy was sent to the Claimant.

[8] At the hearing, the Claimant read an email from her employer dated October 15, 2021 and was asked to submit it after the hearing. The document was received and coded as GD11.

[9] The Claimant also had the Request for Reconsideration (Exemption) process that was in place and submitted that. The document was received and coded as GD9-4 to GD9-5.

[10] During the hearing, the Claimant said that she had an example email from the Provincial Health Officer (PHO) that said medical exemptions were not being processed due to high request volume. This was not received. Instead, the Claimant submitted a generic automatic reply from the PHO. The Claimant stated it was not in response to an exemption request but to a different question. This was received and coded as GD10-2 to GD10-3.

[11] The Claimant said during the hearing that while suspended from work her employer offered a chance to remain employed by taking the Janssen (Johnson & Johnson) vaccine. This email was received and coded as GD11-4 to GD11-6.

### **Issue**

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

### **Analysis**

[13] 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?**

[14] I find that the Claimant lost her job because she did not follow her employer's mandatory vaccination policy. The Claimant agrees that she was let go because she did not follow her employer's vaccination mandate. The Claimant does not feel it is misconduct for not following the mandate. The Claimant feels she should be entitled to benefits.

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

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

[16] 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 does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>4</sup>

[17] 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>

[18] 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>6</sup>

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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.

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

[19] The Commission says that there was misconduct because the Claimant knew there was a mandatory vaccination policy and made the choice not to get vaccinated.

[20] The Claimant says that there was no misconduct because she could have performed all her duties if the employer allowed her to be at work.

[21] The Claimant says she lost her job because she did not get vaccinated in the employer's timeline.<sup>7</sup> The Claimant wondered if the employer's email was actually a policy. The Claimant said that she was not able to get a medical exemption to the vaccination policy. The Claimant believes that her work should have accommodated her. The Claimant had a medical condition that remained unchanged when she was suspended and then let go.<sup>8</sup>

### **Provincial Health Order/Employer Policy**

[22] On October 14, 2021 the Provincial Health Officer (PHO) issued an Order in British Columbia about COVID-19 vaccination status.<sup>9</sup> This Order applied to health care workers. The Claimant does not dispute that this Order applied to her.

[23] The Order required that an unvaccinated staff member "must not work after October 25, 2021, unless the staff member is in compliance with the conditions of the exemption".<sup>10</sup>

[24] The Order also says "an unvaccinated staff member who has provided proof of an exemption request may work until their request is responded to by me or the medical health officer...".<sup>11</sup>

[25] On October 15, 2021 the Claimant's employer sent an email to all Health Employees and Medical Staff.<sup>12</sup> This email said that those that "have not received your

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<sup>7</sup> See GD3-10 the Claimant's request for reconsideration reason for suspension/dismissal.

<sup>8</sup> See GD3-28 the Claimant's explanation about why there was no misconduct.

<sup>9</sup> See GD7-7 to GD7-29 the Order of the Provincial Health Officer dated October 14, 2021.

<sup>10</sup> See GD7-14 paragraph 3.

<sup>11</sup> See GD7-15 paragraph 3.

<sup>12</sup> See GD11-2.

first dose of COVID-19 vaccine before October 26: you will not be permitted to work, on-site or remotely”.<sup>13</sup>

[26] The same email says that “employees who have not received a first dose of COVID-19 vaccine by Nov. 15, should anticipate their employment and/or other contractual arrangements with IH may be terminated.”<sup>14</sup>

[27] The same email discusses requests for vaccine exemptions. It says “the only exception to the mandatory vaccination order is for those who are seeking approval from the PHO for a medical deferral or exemption. To be considered for an exemption, an individual will likely have had one dose of vaccine and experienced a serious adverse event or have a pre-existing medical condition the [sic] warrants being exempted for a period of time. If you are seeking a medical exemption, do so as soon as possible. For more information, see the Guidelines for request for reconsideration (exemption) process.”<sup>15</sup>

[28] The Claimant was aware of her employer’s requirement to be vaccinated against COVID-19.

[29] The Claimant was aware that termination “may” have occurred but she felt that these were only guidelines and that her employer could have done more to accommodate her. She says that her employer said that they were following the PHO order. The Claimant argued that the PHO order said nothing about termination.

[30] The Claimant believes that she was able to perform all of her duties and therefore what she did should not be called misconduct.

### **Is It A Policy?**

[31] The Claimant does not dispute that she knew of the email letters about mandatory vaccination from her employer.

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<sup>13</sup> See GD11-2 of employer’s email to health employees and medical staff dated October 15, 2021.

<sup>14</sup> See GD11-3 of employer’s email to health employees and medical staff dated October 15, 2021.

<sup>15</sup> See GD11-3 of employer’s email to health employees and medical staff dated October 15, 2021.

[32] The Claimant questioned whether her employer's email letter dated October 15, 2021<sup>16</sup> is a policy because it was not in a policy format. The Claimant's Collective Agreement may include directives about the format a policy must take. If that is the case and the Claimant believes it does not comply then the appropriate action would be to file a grievance through her union. However, for EI purposes the email letter qualifies as a communication of the employer's policy.

[33] The Claimant does not deny that she was aware of her employer's policy. She was also aware it was based on the Provincial Health Officer's (PHO) order.<sup>17</sup>

[34] I find that the Claimant's employer had a policy about mandatory vaccination. I find the Claimant was aware of that policy. Whether the policy met terms in her collective agreement is not something I can consider.

## **Medical Exemption**

[35] The Claimant said that due to a cardiac and neuro muscular problem<sup>18</sup>, that predated the vaccination policy, she did not want to get the COVID-19 vaccine at that time. The Claimant says that she wanted to wait to get vaccinated because of her personal medical issues.

[36] The Claimant said her medical issues were not related to COVID-19 and/or the COVID-19 vaccine. These issues caused the Claimant to take medical leaves. The Claimant says she took a week off in June 2021, August 2021 and September 2021<sup>19</sup> for these issues. The Claimant believes the final week may show as a vacation rather than a medical leave.

[37] After the employer's emails, the Claimant said she went to her family doctor to try to get a medical exemption. Her family doctor refused to support a medical exemption.

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<sup>16</sup> See GD11 which was an email to all Interior Health Employees and Medical Staff.

<sup>17</sup> See GD7-7 to GD7-29.

<sup>18</sup> See GD3-26 of Claimant's request for reconsideration.

<sup>19</sup> See GD9-1 of Claimant's documents.

The Claimant says her doctor told her that the directions were to not give medical exemptions. The doctor did not clarify who gave the directions.

[38] Requests for medical exemptions had to be through the PHO. The Claimant was aware of this. The Claimant gave the Tribunal a copy of the exemption process.<sup>20</sup> The document says: "to be considered for an exemption you will likely have had a dose of vaccine and experienced a serious adverse event". It also says "or have a pre-existing medical condition the [sic] warrants being exempted for a period of time".

[39] The Claimant admitted that she did not pursue requesting a medical exemption with the PHO. The Claimant said that her family doctor would not support a medical leave or exemption. The Claimant said as part of an exemption request with the PHO her family doctor would have to fill in a form. The Claimant stated that her family doctor would not have done so.

[40] The Claimant believed that for a time that the PHO was sending out responses to exemption requests that "no exemptions are being considered due to high request volume and lack of staff for processing".<sup>21</sup> At the hearing, the Claimant said that she could provide the Tribunal with documentation to support that. There was nothing submitted from the Claimant that showed that.

[41] The Claimant's issue was that her family doctor was not supporting her request for an exemption. Even if the PHO's office was receiving exemptions the Claimant would not have been able to apply because it required documentation from her family doctor. I asked the Claimant if she approached the emergency room doctor that had given her a note for her medical leave. The Claimant said that she did not.

[42] I find that the Claimant did not apply for a medical exemption. I find that the Claimant could not get support for a vaccine medical exemption from her primary care physician (her family doctor).

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<sup>20</sup> See GD9-4 to GD9-5 dated October 8, 2021.

<sup>21</sup> See GD9-3 email from Claimant to Tribunal dated August 30, 2022.



## Four Elements of Misconduct

[43] There are four elements to misconduct. The Claimant's actions must be wilful (conscious, deliberate, intentional); the Claimant must have known, or ought to have known, that it would cause problems carrying out duties towards the employer; the Claimant must have known, or ought to have known, that there was a real possibility in being let go; and the alleged misconduct caused the termination.

[44] I find that the Claimant made her own choice not to get vaccinated. The Claimant's family doctor did not support an application for medical exemption.

[45] Without a medical exemption the PHO Order<sup>22</sup> and the Claimant's employer<sup>23</sup> made it clear that an unvaccinated employee could not go to work. The Claimant was unvaccinated and did not have a medical exemption. This means that she could not go to work to carry out her duties towards her employer. This is misconduct.

[46] The Claimant agreed that she was aware that by not getting vaccinated (or an exemption) that she could be terminated. The Claimant said that she hoped that she would be given a longer time to comply or that there would be a different consequence. I am empathetic to the Claimant's long career with the employer. Unfortunately, the employer's email, and the Claimant's understanding of the email, means that termination was a real possibility.

[47] By not getting vaccinated or by not getting an exemption, the misconduct, led to the Claimant being let go.

[48] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant did not follow a mandatory vaccination policy or get an exemption.

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<sup>22</sup> See GD7-7 to GD7-29 the Order of the Provincial Health Officer dated October 14, 2021.

<sup>23</sup> See GD11-2 employer's email to health employees and medical staff dated October 15, 2021.

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

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

**Conclusion**

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

[51] This means that the appeal is dismissed.

Elizabeth Usprich  
Member, General Division – Employment Insurance Section