



Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 30

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

# Decision

**Appellant:** C. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (455637) dated October 5, 2022 (issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Videoconference

**Hearing date:** January 12, 2023

**Hearing participant:** Appellant

**Decision date:** January 13, 2023

**File number:** GE-22-3307

## Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she didn't provide proof of vaccination.

[4] Even though the Claimant doesn't dispute that this happened, she says that she wasn't warned that she would be dismissed for it. The employer had consistently stated that employees would be put on leave if they didn't follow the vaccination policy. The Claimant was still considering whether to get vaccinated when the deadline to provide proof of vaccination passed and the employer dismissed her.

[5] The Commission 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.

## Matters I have to consider first

### The employer is a not a party to the 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

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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.

employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

### **The Claimant's appeal was returned to the General Division**

[7] The Claimant first appealed her denial of EI benefits to the Tribunal's General Division in March 2022. The General Division member summarily dismissed the Claimant's appeal because she found the Claimant had no reasonable chance of success. This meant the Claimant didn't get a chance to speak at a hearing about her appeal, and that the Tribunal didn't fully consider her arguments about her case in its decision.

[8] The Claimant appealed the summary dismissal decision to the Appeal Division. The Appeal Division member found that the Claimant's appeal should not have been summarily dismissed. She ordered the appeal to be returned to the General Division for a hearing. This decision is a result of that hearing

### **Issue**

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

### **Analysis**

[10] 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?**

[11] Both parties agree that the Claimant was dismissed because she didn't provide proof of vaccination as expected by her employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

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

[12] The reason for the Claimant's dismissal isn't misconduct under the law.

[13] 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>

[14] 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>

[15] 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>

[16] I only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>7</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

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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.

<sup>7</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[17] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about providing proof of vaccination
- the Claimant knew or should have known what would happen if she didn't follow the policy

[18] The Claimant says that there was no misconduct because she couldn't have known that she would be dismissed if she missed the deadline to provide her proof of vaccination.

[19] The employer's vaccination policy says that employees had to provide proof that they had received at least one dose of a COVID-19 vaccine by September 13, 2021. Employees who did not provide proof of their vaccination by that date would be placed on unpaid leave.

[20] The Claimant testified that she had several discussions with her direct supervisor and the employer's Human Resources (HR) representative about the policy. She had concerns about the safety of the vaccine and told them that she was not vaccinated but was considering getting the vaccine.

[21] The Claimant had planned to go on holiday from September 10 to September 20, 2021. So, she would be on vacation when the deadline to provide her proof of vaccination passed.

[22] She met with her supervisor and the HR representative on September 8, 2021. She told them that she planned to get vaccinated but asked if she could do it after her holiday finished because she was worried about having a negative reaction to the vaccine. The supervisor and HR representative told her to just enjoy her vacation.

[23] On September 11, 2021, the employer sent her an email saying that she was no longer allowed to enter the workplace because she hadn't provided her proof of vaccination.

[24] The Claimant testified that she was confused. She thought the employer had given her an extension of time to get vaccinated. But, after she received that email she wondered if she was being placed on unpaid leave until she got vaccinated after her holiday. She contacted them on September 12, 2021, for clarification.

[25] In her email on September 12, 2021, the Claimant stated the employer told her that September 13<sup>th</sup> is the deadline and "any unvaccinated employees will be automatically terminated" after that date.

[26] The employer dismissed the Claimant on September 13, 2021, but didn't notify her until the Claimant contacted them to ask why a client was telling her that the employer said she no longer worked there. After her vacation, the Claimant met with the employer and the employer gave her a termination letter.

[27] The Claimant argues that she could not have known that she would be dismissed as a result of not providing her proof of vaccination by September 13, 2021, because the employer had previously stated that employees who didn't follow the policy would be put on unpaid leave. And further, she had asked for more time to provide her proof of vaccination and believed the employer was willing to give her additional time when they told her to enjoy her vacation.

[28] There is some conflicting evidence about whether the employer told the Claimant that she could be terminated. Specifically, the Claimant wrote in her email dated September 12, 2021, that the employer had said unvaccinated employees would be terminated. When there is conflicting information, I have to decide which version is most likely. I have to consider all of the evidence and make a decision on the balance of probabilities.<sup>8</sup>

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<sup>8</sup> See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

[29] I asked the Claimant about this email at the hearing. The Claimant explained that she mentioned termination in this email because she wanted to see what the employer said in response. The email was meant to challenge and question the employer's position in response to the email telling her that she was not allowed to enter the workplace. But, the employer had never told her that she, or any other employee, would be terminated if they didn't follow the vaccination policy. Instead, the employer had consistently stated in conversations and in writing that employees who didn't follow the policy would be placed on unpaid leave.

[30] I believe the Claimant. She gave open and straightforward testimony about the communications between her and the employer. Her explanation about the wording she used in the email on September 12, 2021, was reasonable. I think her testimony on this matter is credible, so I accept that the employer did not tell the Claimant that she would be terminated if she didn't follow the vaccination policy.

[31] I find that the Commission hasn't proven that there was misconduct because the evidence supports that the Claimant didn't know, nor should she reasonably have known, that she would be dismissed for not providing her proof of vaccination by September 13, 2021.

[32] There is no dispute that the Claimant was aware of the employer's policy. She knew that the policy required she provide proof of her vaccination. However, the evidence tells me the Claimant had a reasonable belief that she would not be dismissed if she didn't provide that proof by September 13, 2021.

[33] The Claimant testified that she had an ongoing discussion with the employer about her intentions to follow the policy. She expressed that she would prefer to wait until after her vacation to meet the employer's expectations regarding vaccination, and the employer told her to enjoy her vacation.

[34] The Claimant thought this meant the employer was going to grant her an extension of time to provide her proof of vaccination. And, if the employer wasn't going

to give her an extension, she thought she would be placed on unpaid leave and would be able to return to work when she got her vaccination.

[35] There is no evidence in the file that supports the employer communicated that the Claimant would be terminated for not following the vaccination policy. Rather, the employer's policy and its emails consistently stated that employees who did not provide their proof of vaccination by September 13, 2021, would be placed on unpaid leave.

[36] Based on this evidence, I find the Claimant did not know, nor should she reasonably have known, that she would be terminated for not providing her proof of vaccination by September 13, 2021.

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

[37] Based on my findings above, I find that the Claimant didn't lose her job because of misconduct.

### **Conclusion**

[38] The Commission hasn't proven that the Claimant lost her job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[39] This means that the appeal is allowed.

Catherine Shaw  
Member, General Division – Employment Insurance Section