



Citation: *EP v Canada Employment Insurance Commission*, 2022 SST 1519

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

## **Decision**

**Appellant:** E. P.  
**Representative:** P. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (503645) dated August 12, 2022  
(issued by Service Canada)

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**Tribunal member:** Elizabeth Usprich

**Type of hearing:** Videoconference

**Hearing date:** October 19, 2022

**Hearing participants:** E. P.  
Appellant  
P. P.  
Appellant's representative

**Decision date:** October 25, 2022

**File number:** GE-22-2964

## 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, E.P., worked as a registered nurse at a hospital. The Claimant's employer says that she was let go because she went against its vaccination policy: she did not get vaccinated and was not granted an exemption.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[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.

## Interpreter

[6] An interpreter, G.M., attended the hearing to translate.

## Issue

[7] Did the Claimant lose her job because of 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.

## Analysis

[8] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>2</sup>

[9] 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?

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

### 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] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[13] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Claimant doesn't have to have

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<sup>2</sup> See sections 30 and 31 of the Act.

<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>5</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>6</sup>

[15] The law doesn't say I have to consider how the employer behaved.<sup>7</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>8</sup>

[16] I have to focus on the Act only. 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>9</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] 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>10</sup>

[18] The Commission says that the employer had a vaccination policy. It also says the employer clearly communicated with the Claimant about its expectations about vaccination. The employer sent emails to the Claimant to communicate what it expected. So, the Claimant knew or ought to have known the consequences of not complying with the policy. The Commission says that the Claimant was aware of the

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<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See section 30 of the Act.

<sup>8</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

policy and that there was misconduct because the Claimant knew there was a mandatory vaccination policy and made the choice not to get vaccinated.

[19] The Claimant says that there was no misconduct because the employer's vaccination policy was unfair, unsafe and went against her religious beliefs. The Claimant also says that there was no misconduct because she could have performed her duties if the employer allowed her to be at work. The Claimant also feels that her employer went against her human rights by refusing a religious exemption.

[20] The Claimant submitted videos and other evidence about the efficacy of the COVID-19 vaccine. The Claimant's Representative also argued that it should not be considered a vaccine as it does not stop transmission of the virus. I have reviewed all of the material submitted. Again, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>11</sup>

[21] The Claimant does not dispute that her employer had a vaccination policy and that she was aware of it.

[22] The policy indicates that that all existing healthcare workers had to show that they had been vaccinated (or started getting vaccinated) or have a medical reason why vaccination was not possible. There were also a religious/creed exemption.<sup>12</sup> If workers were not vaccinated, then there was a required education session.<sup>13</sup> The policy also required antigen testing a minimum of 2 times per week.<sup>14</sup> The Claimant says she took the education session and complied with the antigen testing. I accept that she did.

[24] The policy says that a failure to get vaccinated may result in disciplinary action, up to and including termination.<sup>15</sup> The Claimant says she was aware that she could lose her job if she did not follow the policy.

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<sup>11</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> See GD3-55.

<sup>13</sup> See GD3-53 and GD3-54.

<sup>14</sup> See GD3-55.

<sup>15</sup> See GD3-55 Non-compliance.

[25] The Claimant says that she chose not to get vaccinated because she felt that it was against her religious beliefs. The Claimant says that she has the right to informed consent and to her bodily autonomy. The Claimant believes that her employer was attempting to coerce her into getting the vaccine. The Claimant feels that her employer was asking her to choose between getting an unproven vaccine or be unemployed. The Claimant said that according to Canadian rights, and her collective agreement, she has the right to decide what medical treatment she receives.

### **Medical or other exemption**

[26] The Claimant was aware that her employer required that if she did not get vaccinated she had to get an exemption to remain employed.<sup>16</sup> The Claimant submitted a request for a religious based exemption to her employer.<sup>17</sup> The Claimant says that the employer refused her request by email. The Claimant says that the employer did not seek any additional information about her religious beliefs.

[27] The Claimant provided testimony along with additional documents about her genuinely held belief about vaccinations. I accept that the Claimant is refusing to have the COVID-19 vaccine due to her religious beliefs and concerns about its safety.

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<sup>16</sup> See GD3-37, GD3-40, and GD3-42.

<sup>17</sup> See GD3-46 to GD3-48.

## Elements of misconduct?

[28] I find that the Commission has proven that there was misconduct for the reasons that follow.

[29] There is no dispute that the employer had a vaccination policy. The Claimant knew about the vaccination policy, including that the consequences included dismissal. I find that the Claimant made her own choice not to get vaccinated. This means that the Claimant's choice to not get vaccinated was conscious, deliberate and intentional.

[30] The Claimant's employer did not grant her an exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee could face discipline, including termination of employment.<sup>18</sup> The Claimant said that she was aware of this risk to her employment.

[31] The Claimant was unvaccinated and did not have an exemption. The policy required all employees to either have an exemption or get vaccinated. The Claimant was aware of these requirements. This means that she was not in compliance with her employer's policy. That means that she could not work and carry out her duties owed to her employer. This is misconduct.

[32] The Claimant said that she was aware that by not getting vaccinated (or have an exemption) that she could be terminated. I therefore find that the Claimant knew there was real possibility that she could be let go for not following the policy.

[33] By not getting vaccinated or by not getting an exemption, the misconduct led to the Claimant losing her employment.

[34] 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 for doing so and knew that, as a result, dismissal was a real possibility.

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<sup>18</sup> See GD3-55 Non-compliance.

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

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

**Conclusion**

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

[37] This means that the appeal is dismissed.

Elizabeth Usprich  
Member, General Division – Employment Insurance Section