



Citation: *HW v Canada Employment Insurance Commission*, 2022 SST 1507

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

**Decision**

**Appellant:** H. W.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (500022) dated July 20, 2022 (issued by Service Canada)

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**Tribunal member:** Susan Stapleton  
**Type of hearing:** Videoconference  
**Hearing date:** October 26, 2022  
**Hearing participant:** Appellant  
**Decision date:** November 2, 2022  
**File number:** GE-22-2781

## 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 she is 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 Covid-19 (Covid) vaccination policy by refusing to disclose her vaccination status.

[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.

## 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] I find that the Claimant lost her job because she didn't follow her employer's vaccination policy. The parties agree that she was dismissed because she refused to report her vaccination status.

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

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

[10] 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.

[11] Case law says that, to be misconduct, 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>

[12] 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 dismissed from her job because of that.<sup>5</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.

[13] The law doesn't say I have to consider how the employer behaved.<sup>6</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>7</sup>

[14] 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>8</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[15] The Commission has to prove that the Claimant lost her job because of misconduct. It 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 was dismissed because of misconduct.<sup>9</sup>

[16] The Commission says there was misconduct because:

- The employer had a vaccination policy;
- The employer clearly notified the Claimant of its expectations about getting vaccinated, and disclosing whether she had been vaccinated; and
- the Claimant knew or should have known that she would lose her job if she didn't follow the policy.

[17] The Claimant says there was no misconduct because:

- the employer's vaccination policy is unreasonable, intrusive, illegal, violates her rights and would not reduce Covid transmission;
- the Covid vaccine is dangerous to her health;
- vaccination was not a condition of employment under her collective agreement;

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<sup>6</sup> See section 30 of the Act.

<sup>7</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>8</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88

- she was a very good employee and not getting vaccinated didn't interfere with performing her job duties, which she performed very well, unvaccinated, before she lost her job;
- the employer didn't have to dismiss her for not being vaccinated; and
- she didn't think her employer would follow through with dismissing her.

[18] The Claimant worked for the employer as a Librarian for two and a half years.

[19] The employer put a mandatory vaccination policy in place on September 2, 2021. An email was sent to employees, directing them to the policy and to a Questions and Answers sheet about the policy. This policy applied to all employees. The Claimant testified that the Policy applied to her.

[20] The Policy says:

- All employees are required to be fully vaccinated with a COVID vaccine series by October 30, 2021.
- Proof of vaccination is required from all employees.
- Employees who do not provide proof that they are fully vaccinated by September 20, 2021, must attend mandatory education, and will also have to be vaccinated.
- Employees who do not comply with the policy may be subject to discipline, up to and including dismissal.

[21] The Policy says that written requests for accommodation can be submitted. The Claimant didn't apply for an exemption.

[22] The Questions and Answers sheet specifies that not reporting vaccination status will result in the same consequences as not being vaccinated. Namely, the employee may be subject to discipline, up to and including dismissal.

[23] The Questions and Answers sheet addresses consequences for not attending the mandatory education. It says "Employees who don't comply with this policy may be subject to discipline, up to and including dismissal." The Claimant didn't take the mandatory education.

[24] The Questions and Answers sheet addresses whether an employee would lose their job if they decided not to get vaccinated. It says “Right now, the focus is on education and getting the workforce vaccinated... Employees who don't comply with this policy...may be subject to discipline, up to and including dismissal.”

[25] The Questions and Answers sheet says that regular testing and working from home are not allowable alternatives to being vaccinated.

[26] The Claimant was put on unpaid leave (suspended) from her job on November 1, 2021, because she didn't report her Covid vaccination status. The employer told her that if she didn't comply with its policy by December 13, 2021, she would be dismissed from her job<sup>10</sup>.

[27] The deadline to comply with the employer's vaccination policy was extended to January 2, 2022. The employer told the Claimant that if she didn't provide proof that she was fully vaccinated by then, she would be dismissed<sup>11</sup>.

[28] The Claimant didn't provide proof that she was vaccinated by January 2, 2022, so she was dismissed<sup>12</sup>.

[29] It is clear that the Claimant made a conscious and deliberate choice not to comply with her employer's requirements under the mandatory vaccination policy. She confirmed in her Notice of Appeal and in her testimony at the hearing that she refused to disclose her vaccination status to her employer.

[30] I must also consider whether the Claimant knew, or ought to have known, that not following her employer's vaccination policy would interfere with carrying out her job duties.

[31] She argues that she was able to carry out her job duties without being vaccinated, and that she did so until she was suspended on November 1, 2021.

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<sup>10</sup> GD3-72

<sup>11</sup> GD3-71

<sup>12</sup> GD3-70

However, she confirmed to the Commission Officer on May 3, 2022,<sup>13</sup> that she was aware that if she failed to comply with the policy, she wouldn't be allowed to continue working.

[32] The Claimant also testified that she knew she couldn't return to work without providing proof that she was vaccinated. She knew that unvaccinated employees who didn't have an exemption were not allowed to work after October 30, 2021. So, she knew that if she wasn't vaccinated against Covid, she couldn't carry out her duties towards her employer.

[33] Another thing I have to consider when deciding whether there has been misconduct is that the Claimant must have known, or ought to have known, that there was a real possibility of being dismissed from her job if she didn't follow her employer's vaccination policy.

[34] The Employer told the Commission Officer<sup>14</sup> that the Claimant received notice of its vaccination policy, but refused to be vaccinated. It said that the Claimant was told that she was going to be dismissed from her job.

[35] The Claimant testified that she didn't think that the employer would go through with dismissing her for not being vaccinated. She hoped it wouldn't take a step that extreme. She said the employer's communications left the door open for other solutions, such as testing, work-from-home arrangements, or temporary leaves of absence. And other employers hadn't fired their employees for not being vaccinated.

[36] She says the employer's communications didn't clearly state that termination would be the result of remaining unvaccinated. She says that she believed that an unpaid leave was the harshest punishment she would endure. However, I find that the employer's policy, as well as its communications directly to the Claimant, made it clear

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<sup>13</sup> GD3-29-GD3-30

<sup>14</sup> GD3-26

that if she didn't comply with its vaccination policy, her employment would be terminated.

[37] The Claimant argues that her employer downplayed the chance of dismissal, citing the Question and Answer sheet where it says that "right now, the focus is on education and getting the workforce vaccinated." However, the Question and Answer sheet also went on to advise that "employees who don't comply with this policy...may be subject to discipline, up to and including dismissal."

[38] In its September 2, 2021 email about the mandatory vaccination policy, the employer said that all employees had to be vaccinated by October 31, 2021. While the possibility of being dismissed was not stated in this email, employees were directed to the Question and Answer sheet, which does clearly state this possible consequence.

[39] In a September 21, 2021 email to employees, the employer said that "non-compliance will be addressed on a case by case basis." It directed employees to the Question and Answer sheet about the policy. The Question and Answer sheet clearly states that dismissal is a potential consequence of not complying with the policy.

[40] In an October 29, 2021 letter, the employer told the Claimant that she was suspended without pay effective November 1, 2021 and would remain suspended without pay until she complied with its vaccination policy. The employer said that if she didn't comply by December 12, 2021, she would be dismissed from her job.

[41] In an October 30, 2021 letter, the employer told the Claimant that the deadline to comply with the vaccination policy was extended to January 2, 2022. The employer said that if she didn't comply by the deadline, she would be dismissed from her job effective January 2, 2022.

[42] The Claimant testified at the hearing that she didn't think the employer would dismiss her, because it kept extending the deadline to comply with the policy. She hoped they would just keep extending her unpaid leave. Although I acknowledge that the employer did give the Claimant extensions to comply with the policy, it made it clear that if she didn't comply, she would be dismissed from her job.



[43] I find that the Claimant knew, or at least ought to have known, that there was a real possibility she would lose her job if she didn't follow the employer's vaccination policy. This is because the employer's policy and accompanying Questions and Answers sheet, and the employer's communications to the Claimant, clearly stated that she would be dismissed if she didn't comply with its vaccination policy.

[44] Finally, the alleged misconduct must have caused the Claimant to lose her job. The parties agree that not following the employer's vaccination policy is why she lost her job.

[45] I find that the Commission has proven that there was misconduct, because it has proven that:

- the employer had a vaccination policy that said all employees had to show proof of being vaccinated;
- the employer clearly told the Claimant about what it expected of her in terms of providing proof of vaccination;
- the Claimant knew or should have known that she could be dismissed from her job if she didn't provide proof of vaccination;
- the Claimant didn't report her vaccination status, which she knew meant that she couldn't do her job;
- her conduct was wilful;
- her failure to be vaccinated caused her to lose her job.

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

[46] While I am sympathetic to the Claimant's circumstances and her genuine concerns about the vaccine's possible effects, I cannot change the law. Based on my findings above, I find that the Claimant lost her job because of misconduct.

[47] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew or should have known that refusing to provide proof of vaccination was likely to cause her to lose her job.

## **Conclusion**

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

[49] This means the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section