



Citation: *KW v Canada Employment Insurance Commission*, 2022 SST 1586

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

Decision

Appellant:	K. W.
Respondent:	Canada Employment Insurance Commission
<hr/>	
Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (468514) dated May 6, 2022 (issued by Service Canada)
<hr/>	
Tribunal member:	Kristen Thompson
Type of hearing:	Teleconference
Hearing date:	October 21, 2022
Hearing participant:	Appellant Appellant's representative
Decision date:	October 27, 2022
File number:	GE-22-1896

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.¹

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 get vaccinated and didn't follow the testing rules.

[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.

[6] The policy requires employees to either provide proof of vaccination, or a medical exemption, or participation in a vaccination education program. Employees who don't provide proof of vaccination are subject to regular testing.

[7] The Claimant says that she refused vaccination due to her concerns about safety. She says she refused testing due to her concerns about safety, and the stress of false positive test results.

[8] The Claimant says that the employer changed the terms of her employment contract. She says the policy is against her human rights. She says the employer should

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

have allowed her to work from home. She says that she was taking other safety precautions.

Issue

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

Analysis

[10] 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.²

[11] 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?

[12] I find that the Claimant lost her job because she went against her employer's vaccination policy.

[13] The Claimant doesn't dispute this happened.

[14] The Commission says that the Claimant was made aware of the policy and what was required of her. It says that she was aware that failure to comply with the policy would lead to her loss of employment.

[15] I find that the Claimant lost her job because she went against her employer's vaccination policy.

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

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

² See sections 30 and 31 of the Act.

[17] 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.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[19] 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.⁶

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

[21] 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.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See section 30 of the Act.

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

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[22] 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.¹⁰

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

- The employer had a vaccination policy;
- The employer clearly notified the Claimant about its expectations about getting vaccinated or getting tested regularly;
- The employer spoke to the Claimant about the policy, sent memos on the human resources online portal, and emailed the Claimant several times to communicate what it expected; and,
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[24] The Claimant says that there was no misconduct because she could have performed her work from home. She says that her workplace was a safe and there were no outbreaks. She says she was taking other safety precautions, including masking and keeping physical distance from others. She says that the employer changed the terms of her employment contract. She says the policy is against her human rights.

[25] The employer's vaccination policy says that employees must do one of the following:

- Provide proof of vaccination; or,
- Provide a medical reason for not being vaccinated from a physician or nurse practitioner, and the time period for the medical reason; or,

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

- Participate in a COVID-19 educational program about vaccine safety and the benefits of vaccination.¹¹

[26] The employer's vaccination policy allows for testing. If an employee doesn't provide proof of vaccination, they are required to test regularly. The policy says that employees must complete regular antigen point-of-care testing results for COVID-19 to the employer at weekly intervals.¹²

[27] The Claimant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. On the following dates, the employer told her about the requirements and the consequences of not following them:

- Memos were posted on the human resources portal on August 20, September 2, and September 17, 2021;
- Emails were sent to the Claimant on September 16 and 17, and October 1 and 6, 2021; and,
- In-person meetings were held with the Claimant and the employer in September and October 2021.¹³

[28] The employer told the Commission that the Claimant was dismissed for not complying with the policy. The employer says that the Claimant was put on an unpaid leave before she was dismissed. The employer says the options were to show proof of vaccination or testing.¹⁴

[29] The Claimant testified that she was told by the employer, in August 2021, that a vaccination policy was going to be applied. She says that she doesn't often look at the human resources portal, as it isn't used in her position. She says she received a copy of the policy.

¹¹ See GD3-26 to 30.

¹² See GD3-26 to 30.

¹³ See GD3-25.

¹⁴ See GD3-18 and 24.

[30] The Claimant testified about a meeting with her employer in September 2021. At the meeting, the employer told her that if she doesn't follow the policy, she would be put on an unpaid leave of absence. She says she received a follow up letter from the employer about their conversation.

[31] The Claimant says she was put on an unpaid leave of absence on October 8, 2021. She says that the employer told her to contact him if she changed her mind about vaccination or testing. She says she didn't change her mind. She says she was dismissed on January 4, 2022.

[32] The Claimant testified that she was told by the employer that testing would happen more than just weekly. She says that her employer told her that testing would happen two or more times per week. She says that the employer provided the employees with the tests.

[33] The Claimant says that she is scared to get vaccinated or tested. She says she read many bad things about the test swabs, including that the swab contains a poisonous substance. She says her medical information is personal and shouldn't be shared with her employer. She says that it would be too stressful for her to receive a false positive test result.

[34] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said employee must provide proof of vaccination or test regularly. The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated or tested regularly. The Claimant was provided with a copy of the policy;
- The employer sent memos and emails, and spoke directly with the Claimant several times to communicate what it expected of her. The employer told the Claimant to contact him if she changed her mind about vaccination or testing, when she was put on unpaid leave; and,

- The Claimant knew or should have known the consequence of not following the employer's vaccination policy. She made a conscious, deliberate, and intentional decision that she wouldn't be vaccinated or tested.

[35] I note that I can only look at whether the Claimant's actions were misconduct under the EI Act. I am not making decisions about whether the Claimant has any course of action under other laws, including changes to her employment contract, human rights, vaccine and testing safety, and if her job duties could be performed from home.¹⁵

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

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

[37] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated or follow the testing rules was likely to cause her to lose her job.

Conclusion

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

[39] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.