



Citation: *DC v Canada Employment Insurance Commission*, 2022 SST 1599

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

## Decision

**Appellant:** D. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (477545) dated May 27, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** In person

**Hearing date:** October 19, 2022

**Hearing participant:** Appellant

**Decision date:** October 21, 2022

**File number:** GE-22-2179

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] D.C. is the Claimant in this case. She worked for a municipality. The employer suspended and dismissed the Claimant because she not comply with the covid19 mandatory vaccination policy at work.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI regular benefits because she was suspended and lost her employment due to her own misconduct.<sup>4</sup>

[5] The Claimant disagrees with the employer's policy and their decision to put her on an unpaid leave of absence and terminate her employment.<sup>5</sup> She argues that the employer failed to accommodate and did not approve her religious exemption. As well, she argues that it was not misconduct and she should be entitled to EI benefits.

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<sup>1</sup> See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

<sup>2</sup> See record of employment (ROE) at GD3-29 to GD3-30.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-28.

<sup>4</sup> See initial decision at GD3-44 and reconsideration decision at GD3-49.

<sup>5</sup> See notice of appeal forms at GD2-1 to GD2-9; GD6-1 to GD6-30 and GD8-1 to GD8-15.

## **Matter I have to consider first**

### **The Claimant submitted a document at the hearing**

[6] The Claimant testified that the employer denied her religious exemption request. She was not sure of the exact date the religious exemption request was denied by the employer. I asked the Claimant to submit a copy of the denial letter.

[7] The Claimant sent the Tribunal a copy of the denial letter from her employer. A copy was shared with the Commission.<sup>6</sup>

## **Issue**

[8] Was the Claimant suspended and did she lose her job because of misconduct?

## **Analysis**

[9] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>7</sup>

[10] To answer the question of whether the Claimant was suspended and lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant stop working?**

[11] I find that the Claimant was put on a mandatory and unpaid leave of absence on November 9, 2021 and then dismissed on January 3, 2022. The reason this happened was because she did not comply with the employer's "*covid19 mandatory vaccination policy*" (policy).

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<sup>6</sup> See exemption denial letter at GD9-1 to GD9-3.

<sup>7</sup> See sections 30 and 31 of the EI Act.

[12] I acknowledge that the Claimant was not given a choice on whether she wanted to be put on unpaid leave of absence or dismissed because it was imposed on her by the employer.

[13] These facts are not disputed between the parties. However, the parties do dispute whether the Claimant's conduct amounts to misconduct under the EI Act.

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

[14] The *Employment Insurance Act* (EI Act) does not 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 EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>8</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>9</sup>

[16] The Claimant does not 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>10</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>11</sup>

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<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>10</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>11</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[18] The law does not say I have to consider how the employer behaved.<sup>12</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>13</sup>

[19] I have to focus on the EI Act only. I cannot 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 are not for me to decide.<sup>14</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] The Commission has to prove that the Claimant was suspended and 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>15</sup>

[21] I find that the Commission has proven that there was misconduct for the following reasons.

### **The policy was communicated to the Claimant**

[22] I find that the policy was communicated to the Claimant in August 2021 and September 2021 in town hall meetings and by email.<sup>16</sup> The Claimant confirmed receiving and reviewing a copy of the policy.<sup>17</sup>

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<sup>12</sup> See section 30 of the EI Act.

<sup>13</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>14</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>15</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>16</sup> September 7, 2021 was the effective date of the policy at GD3-34 and August 19, 2021 email at GD3-39 and October 6, 2021 email at GD3-40 to GD3-42.

<sup>17</sup> See policy at GD3-31 to GD3-34.

[23] The Claimant testified that she was aware of the October 30, 2021 deadline date to comply. She understood and knew that she had to be fully vaccinated for covid19 to be in compliance with the policy (or have an approved exemption).<sup>18</sup>

[24] The Claimant was also given enough time to comply with the policy as the employer had provided an extension to be fully vaccinated for covid19 by December 12, 2021 and January 2, 2022.<sup>19</sup>

### **The Claimant was not exempt from the policy**

[25] The Claimant was not exempt from the policy because it applied to all employees, even though she was working from home during the covid19 pandemic.

[26] The Claimant was aware that the policy provided for religious exemptions. She explained that the policy did not provide for a specific deadline to submit an exemption request. Even so, she submitted her religious exemption request to the employer on October 5, 2021, but it was denied by the employer on October 29, 2021.<sup>20</sup>

[27] The Claimant testified that she made extensive efforts to speak with upper management and human resources about her request, but they maintained their denial and there was no internal appeal process.

### **The Claimant's human rights arguments**

[28] I acknowledge the Claimant's testimony that she has sincerely held religious beliefs as an Evangelical Christian. One of her primary arguments is that the employer failed to grant her religious exemption, they did not accommodate her by allowing her to continue working from home and there was no internal appeal process. The employer did tell her to file a claim with the *Human Rights Tribunal Ontario* (HRTO).

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<sup>18</sup> This is consistent with the policy at GD3-32 and the employer's statement to the Commission at GD3-37 and previous statements

<sup>19</sup> See employer's email to the Commission at GD3-38.

<sup>20</sup> See GD9-2.

[29] However, this Tribunal is not the appropriate place to raise her arguments to get the remedy she is seeking from her employer. I am bound by Federal Court decisions. The Federal Court has already decided that it was a matter for another forum when another claimant argued that the employer's policy violated their human rights.<sup>21</sup>

[30] I acknowledge that the Claimant has submitted various newspaper articles involving vaccination cases that went to labour arbitration, but *Ontario Labour Arbitration* cases are not binding on me.<sup>22</sup>

### **The Claimant's conduct was wilful misconduct**

[31] I find that the Claimant willfully and consciously chose to not to comply with the policy for her own personal reasons. Once the religious exemption was denied on October 29, 2021, the Claimant was required to comply with the policy and she had enough time to do so, given the extensions to the deadline to comply.<sup>23</sup>

[32] I was not persuaded by the Claimant's argument that vaccination was not part of her initial employment contract.<sup>24</sup> Even so, the court has said that misconduct can include a breach of an express or implied duty in an employment contract.<sup>25</sup> The employer imposed the policy at work because of the covid19 pandemic, so it became a condition of her continued employment.<sup>26</sup>

[33] The Claimant submitted a news article about a *Social Security Tribunal* (General Division) case.<sup>27</sup> However, that case was factually different from this case because it involved a claimant who had not been given enough notice to comply with the employer's covid19 vaccination policy and did not know he would be dismissed, so his conduct was not deemed wilful misconduct. In this case, there was a clear policy in place, it was communicated to the Claimant, she knew the consequences and had

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<sup>21</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>22</sup> See GD6-16 to GD6-20; GD8-7 to GD8-9 and GD8-13 to GD8-15.

<sup>23</sup> See GD9-2; and GD3-38.

<sup>24</sup> See job contract at GD6-13 to GD6-15.

<sup>25</sup> See *Canada (Attorney General) v Brissette* 1993 FCA 3020 and *Canada (Attorney General) v Lemire*, 2010 FCA 314.

<sup>26</sup> See policy statement at GD3-31.

<sup>27</sup> See GD8-10 to GD8-12.

months to comply before she was put on an unpaid leave of absence and then dismissed.

### **The Claimant knew the consequences of not complying with the policy**

[34] I find that the Claimant knew or ought to have known that not complying with the policy would lead to an unpaid leave of absence and dismissal.

[35] The Claimant agreed that she knew the risk and that it could lead to unpaid leave of absence and dismissal if she did not comply with the policy. She chose to accept that risk. While she had hoped it would not happen, there was no reason to believe that the employer would not follow through with the consequences outlined in the policy<sup>28</sup> and by email.<sup>29</sup>

[36] The Claimant made deliberate choice to not comply. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>30</sup> Even though the Claimant in this case did not have wrongful intent, it was still misconduct.

### **The Digest of Entitlement Principles (Digest) is not law**

[37] The Claimant made arguments to support her position using the Commission's "*Digest of Entitlement Principles*" (Digest).

[38] I acknowledge that the Digest provides information and guidelines on how the Commission interprets the law and its policies. However, the Digest guidelines are not law, so I am not required to follow them.<sup>31</sup> The test for misconduct has been outlined by the Federal Court and that is what I am required to apply.<sup>32</sup>

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<sup>28</sup> See GD3-34.

<sup>29</sup> See GD3-40 to GD3-41.

<sup>30</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>31</sup> See *Canada (Attorney General) v Hudon*, 2004 FCA 22; *Canada (Attorney General) v Gagnon*, 2004 FCA 351

<sup>32</sup> See paragraphs 15 and 17 of this decision.



## **So, was the Claimant suspended and did she lose her job because of misconduct?**

[39] Based on my findings above, I find that the Claimant was put on an unpaid leave of absence and dismissed because of misconduct.

[40] This is because the Claimant's actions led to her unpaid leave of absence and dismissal. She acted deliberately. She knew that refusing to get vaccinated (after her religious exemption was denied) was likely to cause the unpaid leave of absence and dismissal.

[41] At the hearing, the Claimant explained that she is still considering filing a claim with the HRTO and noted that the time limit to file might be in early November 2022 or January 2023. Given that, I told the Claimant that I would expedite the issuance of my decision and have done so.<sup>33</sup>

## **Conclusion**

[42] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[43] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>33</sup> The General Division of the Tribunal strives to issue decisions within 15 days after hearing a case.