



Citation: *PM v Canada Employment Insurance Commission*, 2022 SST 1609

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

## Decision

**Appellant:** P. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (486359) dated June 3, 2022 (issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** In person

**Hearing date:** November 9, 2022

**Hearing participant:** Appellant

**Decision date:** November 21, 2022

**File number:** GE-22-2325

## 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 his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disentitled and disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer says that he was suspended and then let go because he went against its vaccination policy: he take the get vaccinated.

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

[5] The Commission accepted the employer's reason for the suspension and dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled, then disqualified from receiving EI benefits.

## Issue

[6] Did the Claimant lose his job because of misconduct?

## Analysis

[7] 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>

[8] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant

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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.

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

lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant lose his job?**

[9] I find that the Claimant lost his job because he went against his employer's vaccination policy.

[10] The Claimant says taking the COVID-19 vaccine would go against his firmly held beliefs. He says his employer didn't offer a reasonable, alternative measure to the requirement to take the vaccine.

[11] The Commission says the Claimant's employer implemented a vaccination policy as a condition of the Claimant's employment. It says the Claimant chose not to comply with the policy.

[12] The Claimant doesn't dispute the reason his employer suspended and then dismissed him. Even though he thinks his employer firing him was harsh and discriminatory, I find that the Claimant lost his job because he went against his employer's COVID-19 vaccination policy.

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

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

[14] 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.

[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>3</sup> Misconduct also includes

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

conduct that is so reckless that it is almost wilful.<sup>4</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>5</sup>

[16] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.<sup>6</sup>

[17] 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>

[18] 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.

[19] The Commission has to prove that the Claimant lost his 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 his job because of misconduct.<sup>10</sup>

[20] The Claimant says there was no misconduct because he did everything he could to avoid termination without compromising his sincerely held beliefs concerning

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

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

<sup>6</sup> See *Mishibinjima 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.

vaccines. He says he was willing to work with his employer, which shows his commitment to his job.

[21] The Commission says there was misconduct because the Claimant chose not to comply with his employer's COVID-19 vaccination policy. It says the vaccination policy was a condition of the Claimant's employment. The Commission says the Claimant knew or should have known that he could be suspended or dismissed if he did not comply with the policy.

[22] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could be suspended from and lose his job if he went against his employer's COVID-19 vaccine policy. But he chose not to take the vaccine even after his employer denied his request for accommodation.

[23] The Claimant told the Commission that his employer put in place a mandatory vaccination policy. He testified that the employer brought employees into a meeting room, showed them a video about the vaccine, and then asked them to disclose their vaccination status. The Claimant told his employer he wasn't vaccinated. His employer told him he had to be vaccinated by November 20, 2021, but later extended the deadline to January 1, 2022.

[24] The Claimant testified about beliefs he holds that has led him and his family not to take vaccines from before the COVID-19 pandemic. In support of this, he submitted affidavits concerning his beliefs that allowed his three children to attend school without being vaccinated.

[25] The Claimant testified that his employer asked him to present any documents he had in support of a request for accommodation to exempt him from having to take the COVID-19 vaccine. He said he sent information to his employer, but his request for accommodation was denied. The employer asked for additional information, but the employer again denied the Claimant's request for accommodation. He testified that his employer said his choice not to take the COVID-19 vaccine is a personal one.

[26] The Claimant's employer sent the Commission a copy of an email sent to employees about its COVID-19 vaccination policy. It says that all employees have to be vaccinated against COVID-19 by October 30, 2021 or risk being unavailable for work. Effective November 21, 2021, employees who are unvaccinated would be placed on an unpaid absence. Effective December 31, 2021, employees who are still unvaccinated will have their employment terminated.

[27] I asked the Claimant about the email noted above. The Claimant confirmed that he got the email. But he said that with all of the documents he gave to his employer, he never thought he would be fired. He thought his employer would accommodate him.

[28] The Claimant's employer sent the Commission follow-up emails to the email referred to above. The Claimant says he didn't get them. But he says he got registered letters after he was placed on unpaid leave. He said that one letter said his status hadn't changed, and he needed to be vaccinated.

[29] The Claimant testified that from the beginning, he explained his beliefs and situation concerning the COVID-19 vaccine. He said the employer told him it would do whatever was in its power to accommodate him. The Claimant again said he never thought the employer would fire him, but he thought they would accommodate him.

[30] The Claimant testified to an unrelated medical experience he had and how he was able to avoid using traditional medicine for healing. So I don't doubt that he has deeply held beliefs that caused him not to take the COVID-19 vaccine. But I find that his employer evaluated the information the Claimant gave it, but denied his request for accommodation.

[31] I find from the Claimant's testimony that he knew about his employer's COVID-19 vaccination policy. He knew about the deadlines and the consequences of not complying with the policy. He also testified about a registered letter he got saying that he needed to be vaccinated. The Claimant testified his employer denied his request for accommodation. So, I find that the Claimant knew that his conduct, namely not taking the COVID-19 vaccine could result in the loss of his job.

[32] I find that the Claimant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. I also find he should have known his employer might fire him. For these reasons, I find that the Commission has proven that there was misconduct.

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

[33] Based on my findings above, I find that the Claimant was suspended from and then lost his job because of misconduct.

[34] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

### **Conclusion**

[35] The Commission has proven that the Claimant was suspended from and then lost his job because of misconduct. Because of this, the Claimant is disentitled and then disqualified from receiving EI benefits.

[36] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section