



Citation: *JM v Canada Employment Insurance Commission*, 2022 SST 1627

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

## Decision

**Appellant:** J. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (477628) dated June 7, 2022 (issued by Service Canada)

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**Tribunal member:** Kristen Thompson

**Type of hearing:** Teleconference

**Hearing date:** December 6, 2022

**Hearing participant:** Appellant

**Decision date:** December 9, 2022

**File number:** GE-22-2381

## 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 lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she didn't say whether she had been vaccinated, or 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 Claimant says that she didn't know the policy applied to her, and she didn't know the consequences of non-compliance with the policy, until the day before she was put on unpaid leave. She says she shouldn't have to disclose her medical information to her employer. She says she had concerns about the safety of rapid tests.

[7] The Claimant says that the policy is against a number of laws and legal principles including: the *Canadian Bill of Rights*, the *Criminal Code*, the *Canadian Charter of Rights and Freedoms*, human rights law, privacy law, and health law. She says she was using other safety precautions, including masking and sanitizing.

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

## Issue

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

## Analysis

[9] 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>

[10] 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?

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

[12] The Claimant doesn't dispute that this happened.

[13] The Commission says that it acknowledges that the Claimant had reservations about long-term effects of rapid antigen tests, and that she had the right to refuse both vaccination and testing. However, it says that the Claimant's refusal to comply with the employer's mandatory policy is misconduct.

[14] I find that it is undisputed that 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?

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

[16] 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

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

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.

[17] 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 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>

[18] 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>

[19] 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>

[20] 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.

[21] 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

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<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.

<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.

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>

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

- The employer had a vaccination policy;
- The employer notified the Claimant of its expectations about getting vaccinated or getting tested regularly;
- The employer communicated its expectations about the policy to the Claimant; and,
- The Claimant was aware of the policy and understood that failure to comply could lead to her suspension.

[23] The Claimant says that there was no misconduct because:

- She didn't know the policy applied to her, and she didn't know the consequences of non-compliance with the policy, until October 14, 2021, the day before she was put on unpaid leave;
- She shouldn't have to disclose her medical information to her employer;
- She had concerns about the safety of rapid tests, including that there is no long-term data about using these tests;
- She was using other safety precautions, including masking and sanitizing; and,
- The policy is against a number of laws and legal principles including: the *Canadian Bill of Rights*, the *Criminal Code*, the *Canadian Charter of Rights and Freedoms*, human rights law, privacy law, and health law.

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

[24] The employer's vaccination policy was made pursuant to a public health order. The policy says that:

- Designated frontline employees are required to be regularly tested for COVID-19 and provide proof of a negative test result before they can resume working, unless they provide proof of vaccination;
- Designated employees are those who have direct and ongoing or prolonged contact with vulnerable populations. If there is doubt whether the testing requirement applies, considerations include:
  - Will the person have close contact with departmental clients?
  - Is the person in attendance one-time only or rarely, or will they be in attendance on an ongoing basis?
  - Is the person in a role where there is no direct contact or only brief contact with the client (e.g., administrative or support services)?
- Testing of those who haven't provided proof of full vaccination is required to begin no later than October 18, 2021; and,
- Testing will be required up to three times per week for full-time employees.<sup>11</sup>

[25] The Claimant received the following correspondence from her employer:

- An email dated August 24, 2021, stating that all employees who work with vulnerable populations will need to be fully immunized by October 31, 2021, or undergo regular testing;<sup>12</sup>
- An email dated September 1, 2021, asking employees if they will get frequent testing, if they aren't vaccinated;<sup>13</sup>

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<sup>11</sup> See GD3-28 to 37.

<sup>12</sup> See GD3-51 to 53.

<sup>13</sup> See GD3-60 to 61.

- An email dated October 8, 2021, stating that all provincial employees who have direct and ongoing or prolonged contact with vulnerable populations are to be vaccinated, or comply with strict testing procedures. It states that an employee's department will advise them if their position is designated. It also states: "Refusal to participate in testing will mean the designated employee will not be able to attend the workplace and work";<sup>14</sup>
- An email forwarded on October 19, 2021, stating that Health Canada has extended the shelf life of the rapid test kits;<sup>15</sup>
- A memo dated October 20, 2021, stating that the employer must follow the requirement that all non-vaccinated staff must begin testing effective October 18, 2021. It states that the Claimant is expected to follow this requirement, and provide the employer with a negative test result three times per week;<sup>16</sup>
- An email dated October 20, 2021, providing information about the safety of the swabs used in rapid test kits;<sup>17</sup>
- An email dated October 22, 2021, asking if the Claimant is prepared to take tests and follow the policy;<sup>18</sup>
- An email dated October 25, 2021, stating that as soon as the Claimant takes the rapid tests and provides a negative result, she can return to work;<sup>19</sup>
- A letter dated October 27, 2021, stating that the Claimant was sent home on October 19, 2021, as she refused to be tested. It states that she has used her vacation time, and her request for sick leave is denied. It states that she will be placed on an unpaid leave of absence for failure to comply with the public

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<sup>14</sup> See GD3-62 to 69.

<sup>15</sup> See GD3-128 to 129.

<sup>16</sup> See GD3-126.

<sup>17</sup> See GD3-132 to 133

<sup>18</sup> See GD3-154.

<sup>19</sup> See GD3-243.

health order. It states that she will be able to return to work if she decides to comply with the order;<sup>20</sup>

- An email dated January 4, 2022, stating the employer is checking in with the Claimant, to see if anything has changed. It states that the Claimant can't report to work unless she shows proof of vaccination, takes rapid tests three times per week, or the provincial health order changes;<sup>21</sup>
- An email dated January 13, 2022, advising the Claimant that her position has been filled on a short-term basis. It states that the employer hopes that the Claimant will be able to return once the provincial health order allows;<sup>22</sup>
- A letter dated February 24, 2022, stating that there are recent changes to the public health order, effective March 1, 2022. It asks if the Claimant will be returning to work on March 1, 2022.<sup>23</sup>

[26] The Claimant testified that she wouldn't disclose her vaccination status to her employer.

[27] The Claimant testified that she refused to take the tests for COVID-19. She says she was concerned about the safety of the tests. She says that she didn't have enough information to decide, based on informed consent. She says there isn't information on the long and short-term risks of taking the tests. She says that she raised her concerns with the employer starting in September 2021.

[28] The Claimant testified that she was informed of the policy in August 2021. However, she says that she didn't know the policy applied to her, or the consequences of non-compliance, until she was told by her employer on October 14, 2021. She didn't think she was a designated employee, who has direct and ongoing or prolonged contact with vulnerable populations, for the following reasons:

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<sup>20</sup> See GD3-26.

<sup>21</sup> See GD3-261.

<sup>22</sup> See GD3-283.

<sup>23</sup> See GD3-279



- She is a receptionist;
- She went to the office, but sat separately from her coworkers;
- She was barely in contact with clients;
- Clients weren't coming into the office, at that time; and,
- She doesn't work directly with a vulnerable population.

[29] The Claimant says the employer spoke with her on October 14, 2021, and was told she will have to take rapid tests. She says that she attended at the workplace the following week, on October 19, 2021. She says she refused to take the test and was sent home.

[30] The Claimant says she was given expired tests, but she found out that the shelf life was extended until January 2022. She says that she contacted the manufacturer, on October 22, 2021, and it confirmed that test kits were approved by Health Canada under an emergency order. The manufacturer gave her information on the sterilization and the safety of the sterilization process.<sup>24</sup> She says she spoke with her doctor, a pharmacist, and the manufacturer, but no one had information on the long-term effects of using the tests. She says she didn't contact public health, as suggested by her employer.

[31] The Claimant says that the employer's policy was lifted in March 2022. She says that she returned to work as of March 1, 2022.

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

- The employer had a vaccination policy that said designated employees are required to be regularly tested for COVID-19, unless they provide proof of vaccination;

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<sup>24</sup> See GD3-241 to 242.

- The employer clearly told the Claimant about what it expected of its designated employees in terms of getting vaccinated or getting tested regularly;
- Even if the Claimant didn't understand that the policy applied to her until October 14, 2021, she was given many opportunities to comply with the policy and return to work. She could have complied with the policy when she next attended work, on October 19, 2021. Between October 20, 2021, and January 4, 2022, the employer sent written communication to the Claimant asking if she will comply with the policy, in order to return to work. The Claimant made a conscious, deliberate, or intentional decision to not comply with the policy; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy. The consequence that she wouldn't be able to attend at the workplace and work were communicated to the Claimant in the email of October 8, 2021, verbally on October 14 and 19, 2021, and in a memo on October 27, 2021.

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

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

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

### **Conclusion**

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

[36] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section