



Citation: *GL v Canada Employment Insurance Commission*, 2023 SST 1643

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

# **Decision**

**Appellant:** G. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (535343) dated October 4, 2022 (issued by Service Canada)

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**Tribunal member:** Susan Stapleton

**Type of hearing:** Videoconference

**Hearing date:** January 10, 2023

**Hearing participant:** Appellant

**Decision date:** January 11, 2023

**File number:** GE-22-3331

## 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 from her employment due to her own misconduct. This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was placed on unpaid leave (suspended) from her job. Her employer said that she was suspended because she refused to get vaccinated in accordance with its Covid-19 (Covid) mandatory vaccination policy.

[4] The Claimant doesn't dispute that this happened. However, she didn't agree with the employer's policy. It went against her religious beliefs. She says her employer violated her rights, and should have accommodated her, based on her religious beliefs. She filed a human rights complaint. She says there was no misconduct on her part.

[5] The Commission found that the Claimant was disqualified from receiving benefits because she lost her job due to her own misconduct. The Commission later decided that the Claimant was disentitled from receiving benefits from March 28, 2022 to June 17, 2022, because she was suspended from her job during that period, due to misconduct.

## Issue

[6] Was the Claimant suspended from her job because of misconduct?

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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. Subsection 30(1) of the Act states that a Claimant who voluntarily leaves employment without just cause is not entitled to benefits under s. 31 of the Act. Section 31 also addresses what happens when a Claimant is suspended for misconduct.

[7] To answer this, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

## **Analysis**

### **Why was the Claimant suspended from her job?**

[8] I find that the Claimant was suspended from her job because she didn't comply with the employer's mandatory Covid vaccination policy. The Claimant agrees that she was suspended from her job because she didn't follow the employer's policy and get vaccinated.

[9] The Claimant testified that the employer sent an email to employees in August, 2021, which said that all employees would have to be vaccinated against Covid, and attest to being vaccinated, by October 29, 2021.

[10] The employer put a policy in place effective October 6, 2021.<sup>2</sup>

[11] The employer's policy said that:

- All employees had to attest to being fully vaccinated by October 29, 2021, or by two weeks after returning from a leave with pay, or by two weeks after being informed that a request for accommodation had been denied;
- employees who did not attest to being fully vaccinated by the deadline would not be allowed to continue to work or enter the employer's premises; and
- employees who did not attest to being fully vaccinated by the deadline would be suspended without pay.

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<sup>2</sup> GD3-21-GD3-34.

[12] The Claimant requested a religious exemption from being vaccinated. The employer denied her request. She feels that her religious exemption request should have been approved by the employer.

[13] The Claimant testified that she didn't get vaccinated, and was suspended on March 23, 2022. She was recalled to work in June, 2022, when the employer's mandatory vaccination policy was suspended. However, she took a sick leave until October, 2022, and then returned to her job.

[14] The employer told the Commission Officer that the Claimant was suspended due to non-compliance with its Covid vaccination policy. It confirmed that while the deadline to be vaccinated was October 29, 2021, the Claimant was allowed to continue working until March 23, 2022, while her request for a religious exemption was being considered.<sup>3</sup>

[15] The Claimant testified that she told the employer that she wasn't vaccinated and wasn't going to get vaccinated. She confirmed that she couldn't work for the employer unless she was vaccinated or had an approved exemption from being vaccinated.

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

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

[17] The 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.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have

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<sup>3</sup> GD3-48.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>6</sup>

[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 suspended from her job because of that.<sup>7</sup>

[20] 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.<sup>8</sup>

[21] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.<sup>9</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[22] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.<sup>10</sup> He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[23] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.<sup>11</sup>

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<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

[24] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.<sup>12</sup>

[25] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.<sup>13</sup> He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The FCA relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.<sup>14</sup>

[26] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.<sup>15</sup> He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.<sup>16</sup>

[27] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or policies and determine whether it was right to suspend the Claimant. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[28] The Commission says that there was misconduct because the Claimant chose not to comply with the employer's vaccination policy and knew that her choice could result in being suspended from her job.

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<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>13</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>14</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>15</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[29] The Claimant says that there was no misconduct, because her employer's policy was illegal and violated her rights. Her employer should have exempted her from being vaccinated on religious grounds. There is no requirement in her collective agreement for her to be vaccinated against Covid. She has a right to informed consent and to refuse medical treatment.

[30] I find that the Claimant made a conscious and deliberate choice not to be vaccinated, contrary to the employer's policy. She testified that she didn't get vaccinated and wasn't approved for an exemption from being vaccinated. She told her employer that she wasn't vaccinated and wasn't going to get vaccinated.

[31] The Claimant knew that not being vaccinated meant that she couldn't do her job. She testified that she knew that she couldn't work without being vaccinated, unless she had an exemption. Her exemption request was denied by the employer, so she knew that not being vaccinated by the deadline meant that she couldn't continue to work.

[32] The Claimant knew that not complying with the employer's vaccination policy meant that she could be suspended from her job. She confirmed in her testimony that she received and read the employer's vaccination policy. She said that the policy applied to her. She testified that she knew what the policy required of her. She said the employer told her that the consequences of not following the policy included being suspended from her job. She wasn't surprised when she was suspended.

[33] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a vaccination policy that said all employees had to be fully vaccinated, or have an approved exemption from being vaccinated;
- the employer clearly communicated its policy to the Claimant, and specified what it expected in terms of getting vaccinated ;
- the Claimant knew the consequence of not following the employer's vaccination policy;

- the Claimant didn't have an exemption from being vaccinated; and
- the Claimant didn't get vaccinated and was suspended as a result.

### **So, was the Claimant suspended from her job because of misconduct?**

[34] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[35] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated would cause her to be suspended from her job.

### **Conclusion**

[36] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[37] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section