



Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 1640

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

## **Decision**

**Appellant:** N. S.  
**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (488564) dated July 25, 2022 (issued by Service Canada)

---

**Tribunal member:** Kristen Thompson  
**Type of hearing:** Videoconference  
**Hearing date:** November 10, 2022  
**Hearing participant:** Appellant  
**Decision date:** November 30, 2022  
**File number:** GE-22-2648

## 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 get vaccinated or didn't say she has been vaccinated.

[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 the employer should have allowed her an exemption to the policy based on her religion.

## Issue

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

---

<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.

## Analysis

[8] 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>

[9] 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?

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

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

[12] The Commission says that the Claimant was informed about the policy and was given enough time to comply with the policy. It says that the Claimant knew that her request for an exemption of the policy was refused by the employer.

[13] I find that it is undisputed 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?

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

[15] 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.

---

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

[16] 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>

[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>6</sup>

[18] 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>

[19] 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.

[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>10</sup>

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

---

<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.

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

- The employer had a vaccination policy;
- The employer informed the Claimant about its expectations about getting vaccinated and telling the employer she has been vaccinated; and,
- The Claimant was warned that she would face dismissal if she didn't follow the policy.

[22] The Claimant says that there was no misconduct because the employer should have allowed her an exemption to the policy based on her religion.

[23] The employer's vaccination policy says that:

- Employees are to be fully vaccinated unless accommodated based on a certified medical condition, religion, or another reason under the *Canadian Human Rights Act*;
- Employees must attest they are vaccinated by October 29, 2021, or two weeks after the date the employee has been informed that an accommodation to the policy is denied;
- Employees must comply with the policy regardless of whether they work onsite, remotely, or telework; and,
- Employees who don't comply with the policy won't have access to the workplace and will be put on leave without pay.<sup>11</sup>

[24] The Claimant says that the policy was published on October 6, 2021. She says that she received a copy of the policy by email the following day. She says she was aware that the deadline to the policy was October 29, 2021.

[25] The Claimant says she submitted her religious accommodation request on October 21, 2021. She says her request was denied by her employer.

---

<sup>11</sup> See GD3-24 to GD3-37.

[26] The employer denied the Claimant's religious accommodation request in writing, in letter dated December 9, 2021. The letter said that she was unable to show that her religion prevented her from complying with the policy. It said she is required to get the vaccine and tell the employer she is vaccinated. It says that she will be put on leave without pay if she doesn't comply by January 6, 2022.<sup>12</sup>

[27] The Claimant says that her employer's requirements to get religious accommodation wasn't clear. She says the employer didn't have a theologian look at her request for accommodation.

[28] The Claimant says she was put on leave without pay as of January 7, 2022. The Claimant says that she was expecting her employment contract to be renewed. She says that her employer gave her a verbal offer of continued employment in September 2021. She says she accepted the offer.

[29] The Claimant says that her manager later said her contract may not be renewed if she doesn't comply with the policy. She says that she would have been made a full-time employee had she complied with the vaccination policy.

[30] The Claimant says that she received a letter, dated January 13, 2022, advising that her contract will not be renewed as of February 11, 2022.

[31] The Claimant says that she held onto her religious beliefs and didn't get vaccinated.

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

- The employer had a vaccination policy that said employees are to be fully vaccinated, unless accommodation is approved by the employer;
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated and telling the employer;

---

<sup>12</sup> See GD2-14.

- The employer sent correspondence to the Claimant several times to communicate what it expected, including providing her with a copy of the policy and letter dated December 9, 2021, stating that she doesn't have an exemption to the policy and is required to get the vaccine; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

[33] I find that the Claimant lost her employment when she was put on leave without pay on January 7, 2022. I rely on the Claimant's testimony to find that her employment contract was likely to have been renewed had she complied with the policy. This means that section 33 of the Act doesn't apply to the Claimant's situation. The Claimant didn't lose her employment within 3 weeks of the expiration of a term of employment. As well, but for the Claimant's act of misconduct, her term of employment wasn't going to expire.

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

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

[35] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated and say she has been vaccinated was likely to cause her to lose her job.

### **Conclusion**

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

[37] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section