



Citation: *HF v Canada Employment Insurance Commission*, 2023 SST 115

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

## **Decision**

**Appellant:** H. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (526818) dated September 1, 2022 (issued by Service Canada)

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**Tribunal member:** Kristen Thompson

**Type of hearing:** Teleconference

**Hearing date:** March 22, 2023

**Hearing participant:** Appellant

**Decision date:** March 24, 2023

**File number:** GE-22-3088

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't say whether she had been vaccinated.

[4] Even though the Appellant 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 Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] The Appellant says that her religious exemption should have been granted. She says that the policy is against several laws and legal principles. She says that the vaccine is unsafe and doesn't stop transmission. She says that other safety precautions were available.

## Issue

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

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) says that Appellants 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 Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

### Why did the Appellant lose her job?

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

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

[12] The Commission says that the Appellant lost her job because she went against her employer's vaccination policy.

[13] I find that it's undisputed that the Appellant lost her job because she went against her employer's vaccination policy.

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

[14] The reason for the Appellant'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 Appellant'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.

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<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 Appellant 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 Appellant 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 Appellant 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 Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>9</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.<sup>10</sup>

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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.

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

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

- the employer had a vaccination policy
- the Appellant was made aware of the policy
- the Appellant didn't receive a religious exemption from the employer
- the Appellant was made aware what would happen if she didn't follow the policy

[22] The Appellant says that there was no misconduct because:

- her religious exemption should have been granted
- the policy is against several laws and legal principles including medical privacy, discrimination, informed consent, bodily autonomy, wrongful termination, and coercion
- the vaccine has adverse effects, and doesn't stop transmission
- she was using other safety precautions, including wearing personal protective equipment

[23] The employer's vaccination policy says employees must be fully vaccinated against COVID-19 by October 22, 2021. Employees who aren't vaccinated will face discipline up to and including termination.<sup>11</sup>

[24] The employer's vaccination policy was revised on September 3, 2021. It says:

- employees must be fully vaccinated against COVID-19 by October 22, 2021
- employees who don't say whether they have been vaccinated will be considered not vaccinated

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<sup>11</sup> See GD3-33 to 34.

- employees may be exempted from the policy due to a confirmed medical contraindication or a reason that is verified as applicable under the *Ontario Human Rights Code*
- employees who don't follow the policy will face discipline up to and including termination<sup>12</sup>

[25] The Appellant testified that she didn't tell her employer whether she had been vaccinated. She says that she first heard about the mandatory vaccination policy through the news in mid-August 2021.

[26] The Appellant testified she was on sick leave when the employer implemented the vaccine policy in August 2021.

[27] The Appellant testified that she handed in a request for a human rights exemption at the beginning of September 2021. Her request says that she is choosing to decline a mandatory vaccine and testing, based on her religion or a relevant human rights ground.<sup>13</sup>

[28] The employer denied her request for a human rights exemption by letter dated September 14, 2021.<sup>14</sup>

[29] The Appellant testified that she was scheduled to return to work from her sick leave on November 8, 2021. She says that she met with her employer on November 8, 2021, to determine her vaccination status. She says that she didn't tell her employer whether she had been vaccinated.

[30] The Appellant testified that she met with her employer on November 9, 2021, for a termination meeting. The employer sent her a termination letter dated November 9, 2021.<sup>15</sup>

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<sup>12</sup> See GD3-35 to 38.

<sup>13</sup> See GD3-39 and 40.

<sup>14</sup> See GD3-41.

<sup>15</sup> See GD3-42 to 44.

[31] The Appellant testified that she was unaware that the revised policy stated: employees who don't say whether they have been vaccinated will be considered not vaccinated. She says that she didn't receive the revised policy until after she was terminated.

[32] The Appellant testified that, even if she had known about this revised policy provision, she still wouldn't have told her employer whether she had been vaccinated.

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

- the employer had a vaccination policy that said employee must be vaccinated against COVID-19, unless provided with an exemption
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated and telling it whether she had been vaccinated
- the Appellant was aware that the employer denied her request for an exemption
- the employer spoke to the Appellant several times to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

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

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

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

**Conclusion**

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

[37] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section