



Citation: *SM v Canada Employment Insurance Commission*, 2022 SST 1677

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

## Decision

**Appellant:** S. M.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (473128) dated May 27, 2022 (issued by Service Canada)

---

**Tribunal member:** Kristen Thompson

**Type of hearing:** Teleconference

**Hearing date:** November 17, 2022

**Hearing participant:** Appellant

**Decision date:** November 21, 2022

**File number:** GE-22-2294

## 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.

[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 she should have been exempted from the policy due to medical concerns or her religion. She says that she was taking other precautions, including wearing a mask, screening, and testing. She says that she had little to no contact with vulnerable people. She says the policy wasn't part of her employment contract.

## 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 the employer has the right to manage daily operations, including implementing policies. It says when the employer implemented the vaccination policy, it became a condition of the Claimant's employment. It says that the Claimant's action of not complying with the policy was conscious, deliberate, and intentional. It says that she knew or should have known that she could be suspended or dismissed from her job if she didn't comply with the policy.

[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

---

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

misconduct – the questions and criteria to consider when examining the issue of misconduct.

[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 was 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

---

<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>

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

- The employer had a vaccination policy;
- The employer clearly notified the Claimant about its expectations about getting vaccinated;
- The employer sent correspondence to the Claimant and spoke to the Claimant several times to communicate what it expected; and,
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[22] The Claimant says that there was no misconduct because she should have been exempted from the policy due to medical concerns or religion. She says that she was taking other precautions. She says that she had little to no contact with vulnerable people. She says the policy wasn't part of her employment contract.

[23] The employer's vaccination policy says:

- Employees must have both doses of the COVID-19 vaccine as of October 15, 2021;
- Employees who don't comply will be placed on unpaid leave for 2 weeks;
- Employees who still aren't vaccinated after the unpaid leave will be terminated; and,
- There is an exemption to the policy based on a medical cause.<sup>11</sup>

---

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

<sup>11</sup> See GD2-20.

[24] The Claimant says that conversations with her employer about vaccination started in March 2021. She says she spoke with management many times. She says that she received the policy on August 30, 2021.

[25] The Claimant says that she didn't comply with the policy – she didn't get vaccinated. She says that she had deep concerns about the vaccine. She says she knew people who had adverse reactions from getting the vaccine. She says that she tried to get vaccinated but suffered from a panic attack.

[26] The Claimant says that she spoke with her doctor about getting the vaccine. She says her doctor told her that she should be able to get the vaccine. She says that she didn't apply for a medical exemption from her employer.

[27] The Claimant says her employer didn't accept religious exemptions. Her religious leader provided her with a letter.<sup>12</sup> But she says she didn't provide the letter to her employer.

[28] The Claimant says that, when the pandemic first hit, she worked from home because she wasn't an essential worker. She says when she returned to the workplace, she took safety precautions. She says that when the policy came out, the option to mask, screen, and test went away, and she wasn't allowed to work from home.

[29] The Claimant received a letter from her employer dated October 6, 2021. It says that she told the employer that she will not get vaccinated. It says that she will be placed on unpaid leave as of October 15, 2021 and terminated as of October 29, 2021.

[30] The Claimant says that her employer provided her with paid leave as of October 15, 2021. She says her employer told her, upon her suspension, that she can have her job back if she gets vaccinated over the weekend. She says that she was terminated as of October 29, 2021. She says her employer gave her a severance package.

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

---

<sup>12</sup> See GD3-28 to 31.

- The employer had a vaccination policy that said employees must be vaccinated or will face termination;
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated;
- The employer spoke to the Claimant to communicate what it expected, provided her with the written policy, and wrote to her about the policy and its consequences; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

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

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

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

### **Conclusion**

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

[35] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section