



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1659

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

## Decision

**Appellant:** S. S.  
**Representative:** P. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (461592) dated April 8, 2022  
(issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Videoconference  
**Hearing date:** September 8, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** September 16, 2022  
**File number:** GE-22-1569

## Decision

[1] The appeal is allowed in part.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was dismissed because of misconduct (in other words, because he did something that caused him to be dismissed). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits from January 2, 2022.<sup>1</sup>

[3] The Commission hasn't proven the Claimant was suspended because of misconduct. This means the Claimant isn't disentitled from receiving EI benefits from November 14, 2021, to January 1, 2022.<sup>2</sup>

## Overview

[4] The Claimant lost his job for not complying with his employer's vaccination policy. The policy required him to be vaccinated against COVID-19 or have an approved exemption. The Claimant asked for an exemption to the policy on religious grounds, but the employer denied his request. The same day it denied the Claimant's exemption request, it placed the Claimant on an unpaid leave of absence (suspension) for not complying with the policy requirements by the deadline. Later, the employer dismissed him for still not complying with the policy.

[5] The Commission decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[6] The Claimant disagrees that it was misconduct. He is unable to get vaccinated for religious reasons. He feels the employer unlawfully denied his religious exemption request, which shows that they were not going to accept any exemption on religious grounds. He says this shows the employer discriminated against him.

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

<sup>2</sup> Section 31 of the Act says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

## **Matter I have to consider first**

### **The employer is not a party to this appeal**

[7] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

### **Issue**

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

### **Analysis**

[9] The law says that claimants who lose their job because of misconduct are disqualified from receiving benefits.<sup>3</sup>

[10] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.<sup>4</sup>

[11] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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<sup>3</sup> See section 30 of the Act.

<sup>4</sup> See section 31 of the Act.

## **Why did the Claimant lose his job?**

[12] Both parties agree that the Claimant was suspended and later dismissed because he did not comply with the employer's mandatory COVID-19 vaccination policy. I see no evidence to contradict this, so I accept it as fact.

## **Is the reason he lost his job misconduct under the law?**

[13] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>6</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>7</sup>

[15] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.<sup>8</sup>

[16] The Commission has to prove that the Claimant lost his 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 was dismissed because of misconduct.<sup>9</sup>

[17] The Commission says that there was misconduct because the Claimant was aware that he was required to comply with the employer's policy to continue working in his job. The Claimant didn't provide proof of vaccination or an approved exemption by

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

the deadline. In doing so, he willfully made the choice not to comply with the employer's policy.

[18] The Claimant says that there was no misconduct because he tried to comply with the employer's vaccination policy. He is unable to be vaccinated because of his religious beliefs. He requested an exemption from the policy on religious grounds and felt the employer unreasonably and unlawfully denied his exemption request.

[19] The Claimant was employed at a municipal transit company. On September 7, 2021, the employer put in place a policy that required employees to be vaccinated against COVID-19 or have an approved exemption. Employees were required to show proof of their full vaccination by October 30, 2021.<sup>10</sup>

[20] The policy states that staff who were not compliant with the policy would be subject to discipline up to and including dismissal.<sup>11</sup>

[21] The Claimant said that he was notified about the policy in September 2021. Shortly after the policy was announced, he told his manager that he was unvaccinated. He asked for an exemption from the mandatory vaccination for religious reasons.

[22] On October 25, 2021, the Claimant sent the employer an affidavit stating he had sincerely held religious beliefs that prevented him from getting the COVID-19 vaccination. In part, he stated that he can't take a vaccine "that has been validated, tested or manufactured using cell-lines derived from aborted human fetal tissue."<sup>12</sup>

[23] On November 9, 2021, the Claimant's supervisor sent him an email stating that she had consulted with a family member about the use of aborted human fetal tissue in the development of vaccines. The supervisor stated that two of the vaccines do not use an abortion-derived cell line in the development or production of the vaccine. That fetal cells were used to test the vaccines, she said "this nexus to abortion is too remote."<sup>13</sup>

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<sup>10</sup> See GD7-2 to GD7-6.

<sup>11</sup> See GD7-5.

<sup>12</sup> See GD3-30.

<sup>13</sup> See GD3-31.

[24] On November 15, 2021, the Claimant met with the employer. The employer informed him that his exemption request was denied<sup>14</sup> and that he was being suspended from work due to non-compliance with the vaccination policy. The suspension letter states that he had until December 12, 2021, to comply with the employer's policy or he would be terminated.<sup>15</sup>

[25] On December 10, 2021, the employer sent a letter extending the deadline for compliance. The letter stated that he would have until January 2, 2022, to comply with the requirements of the vaccination policy.

[26] On January 3, 2022, the Claimant was dismissed from his employment for still not being in compliance with the policy.

### **The Claimant isn't disentitled for being suspended due to misconduct**

[27] I find the circumstances of the Claimant's suspension from work doesn't meet all of the elements of the legal test for misconduct. So, the Claimant isn't disentitled from receiving benefits for being suspended due to misconduct from November 14, 2021, to January 1, 2022.

[28] There is no dispute that the Claimant was aware of the employer's policy. He knew that the policy required he be vaccinated against COVID-19 or have an approved exemption by October 30, 2021.

[29] The Claimant asked for an exemption to the policy on religious grounds on October 25, 2021. This supports that the Claimant intended to comply with the policy by getting an approved exemption.

[30] The Claimant received an email from his supervisor on November 9, 2021. This email appeared to be in response to the Claimant's exemption request because the supervisor stated that there wasn't a sufficient connection between the use of fetal cells

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<sup>14</sup> See GD3-32.

<sup>15</sup> See GD3-33.

to test the COVID-19 vaccines and abortion. But, the supervisor didn't tell the Claimant that his exemption request was denied.

[31] On November 15, 2021, the employer informed the Claimant that his exemption request was denied and that he was being suspended from work due to non-compliance with the vaccination policy. The Claimant was given a letter informing him of the denial of his exemption request and a letter informing him of his suspension at the same time.

[32] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.<sup>16</sup>

[33] In this case, there is no indication that the Claimant deliberately violated the employer's policy before he was suspended on November 15, 2021. In fact, it appears the Claimant made efforts to be compliant with the employer's policy. Namely, he applied for an exemption on religious grounds. This step is set out in the policy for employees who are unable to get a COVID-19 vaccination for a reason related to a protected ground. This tells me that the Claimant attempted to comply with the policy.

[34] The Claimant only knew that he was not in compliance with the policy when the employer denied his exemption request on November 15, 2021. At this point, the Claimant became aware that he didn't have an approved exemption to the policy. But, the employer didn't give him an opportunity to meet the other policy requirements – being fully vaccinated – before he was suspended from his job.

[35] For the Claimant's conduct to be misconduct within the meaning of the *Employment Insurance Act*, he must have wilfully committed the conduct. The conduct in question is that the Claimant did not comply with the employer's COVID-19 vaccination policy.

[36] In my view, the Claimant did not wilfully act in non-compliance with the policy before he was suspended from his job on November 15, 2021.

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<sup>16</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[37] Even though he was not vaccinated, the policy considers that a non-vaccinated person can be in compliance if they have an approved exemption. The Claimant had asked for an exemption. His exemption request was denied at the same time that he was suspended from work.

[38] Before his exemption request was denied, the Claimant could not have known, nor should he reasonably have known, that he could be suspended for his conduct to that point. So, I find the Claimant was not wilfully non-compliant with the employer's policy at the time he was suspended from work.

### **The Claimant is disqualified for being dismissed due to misconduct**

[39] I find the circumstances of the Claimant's dismissal from work meets all of the elements of the legal test for misconduct. So, the Claimant is disqualified from receiving benefits for being dismissed due to misconduct as of January 2, 2022.

[40] I understand that the Claimant didn't intend to be non-compliant with the policy. He wasn't vaccinated against COVID-19 because he had religious objections to the way he believed the vaccines were developed and tested. However, the employer's policy required employees to be fully vaccinated or have an approved exemption by October 30, 2021. Once the Claimant was informed that he didn't have an approved exemption to the vaccine, he became non-compliant by not meeting either of the policy's requirements.

[41] The Claimant's representative submitted that the employer unreasonably and unlawfully denied the Claimant's exemption request.

[42] He said the supervisor's email on November 9, 2021, indicates that the supervisor consulted a family member about the Claimant's religious beliefs and whether they were a valid reason to be exempted from vaccination. He said this supports that the employer didn't follow proper procedure to consider the Claimant's exemption request. Further, he says it supports that the employer didn't intend to approve any religious exemption request.



[43] The Claimant's representative submitted a previous decision from the Tribunal, *DL v Canada Employment Insurance*.<sup>17</sup> This decision concerned a claimant who was dismissed from her job because she didn't comply with her company's COVID-19 vaccination policy. The claimant had asked for an exemption to the policy for religious reasons and the employer had denied her request because it said the Claimant's request was based on her personal beliefs.

[44] In *DL v Canada Employment Insurance Commission*, the claimant provided an email from the employer which show that it asked its legal department about rejecting religious exemption requests. The Tribunal Member considered that the employer didn't inquire about rejecting medical exemption requests, which indicated that it was treating religious exemption requests differently. Further, the employer told the Commission that they were not going to accept any religious letters. The Tribunal Member concluded that this evidence showed the employer had already decided to reject the claimant's exemption request before she had even submitted it.

[45] The Claimant's representative says that the circumstances of the claimant in *DL v Canada Employment Insurance Commission* are identical to the Claimant's circumstances. He also requested an exemption from his employer's policy for religious reasons. The employer also denied his request because it said the Claimant's request indicated that his objection to the vaccine was based on his "personal preference or singular belief" rather than a religious edict. And he argues that the supervisor's email shows that the employer intended to deny all religious exemption requests.

[46] I agree with the principle that if the employer did not intend to approve any religious exemption request, this would support that the employer was discriminating against employees for their religious beliefs. However, I am not convinced that the evidence supports that the Claimant's employer intended to deny all exemption requests made on religious grounds.

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<sup>17</sup> *DL v Canada Employment Insurance Commission*, 2022 SST 281.

[47] The supervisor's email states that she consulted a family member about the use of aborted fetal tissue in the development of COVID-19 vaccines. She states that this family member gave her information that two of the vaccines do not use abortion-derived cell lines in their development or production. It acknowledges that fetal cells were used to test these vaccines, but then says that the "nexus to abortion is too remote."

[48] While I understand that the supervisor referencing that this information came from her family member may raise the suspicion that the supervisor was biased or used an improper process to consider the Claimant's exemption request, I find the email does not indicate that the supervisor had prejudged and intended to deny all exemption requests made on religious grounds.

[49] The employer denied the Claimant's exemption request on November 15, 2021. The letter informing the Claimant that his exemption was denied states that the Claimant didn't "establish a requirement to accommodate under the... Accommodation Policy or the *Ontario Human Rights Code*." It says that the information the Claimant provided didn't "establish a creed" as set out in the Guidelines for Accommodating Creed under the *Ontario Human Rights Code*. It also references a recent Ontario Human Rights Commission decision which stated that a person who chooses not to be vaccinated based on personal preference or a singular belief does not have a right to accommodation" under the *Ontario Human Rights Code*.

[50] I note that the letter does not reference aborted human fetal cell lines, nor the information given by the supervisor in her email. This letter instead indicates that the Claimant's affidavit of religious belief wasn't enough to meet the employer's requirements to be accommodated from its vaccination policy.

[51] In my view, the Claimant's evidence isn't enough to show that the employer intended to deny all religious exemption requests. So, there isn't evidence to conclude that the employer discriminated against the Claimant based on his religious beliefs.

[52] The representative also submitted a decision from the Supreme Court of Canada, *Syndicat Northcrest v Amselem*,<sup>18</sup>

[53] This decision addressed the freedom of religion in relation to a group of Orthodox Jews to set up personal structures on their condominium balconies to celebrate a religious event. The Justices found that having a sincerely held belief that has a nexus to religion is enough to trigger the protection of the Charter to the person's freedom of religion. In this case, setting up the personal structure was not necessary to the practice of Orthodox Judaism, but it was a form of religious practice for the appellants, and so the Justices found that it should be protected under the Quebec *Charter of Human Rights and Freedoms* (and the *Canadian Charter of Rights and Freedoms*).

[54] The Claimant's representative argues that the employer's letter indicates that it judged the Claimant's religious beliefs beyond the standard set out by the Supreme Court of Canada in *Syndicat Northcrest v Anselem*. He says that the Claimant establishing that he had a sincerely held belief with a nexus to religion should have been enough for the employer to approve his exemption request.

[55] It is not within my authority to determine if the employer was justified in dismissing the Claimant.<sup>19</sup> It is equally not within my authority to determine whether the employer should have accommodated the Claimant in some other way.

[56] The Federal Court has said that "the conduct of the employer is not a relevant consideration" to whether a claimant was dismissed due to their misconduct. Rather, the focus is on whether the claimant's act or omission amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>20</sup>

[57] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is just one of

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<sup>18</sup> *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551.

<sup>19</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185, at para 3.

<sup>20</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282, at para 31

these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[58] These laws are enforced by different courts and tribunals.

[59] This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[60] But the SST is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond our jurisdiction. Nor is the SST allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[61] The Claimant may have recourse to his claims that the employer's policy violated his rights. But, he must raise that issue with the correct court or tribunal.

[62] The Claimant was notified about the employer's policy in September 2021. He asked for a religious exemption to the policy, but the employer denied his request. He was aware that he was not exempted from the policy by November 15, 2021. Regardless, he chose not to comply with the policy before he was dismissed on January 3, 2022. It is clear from the evidence that he reasonably should have known the consequences of not complying would result in the loss of his employment.

[63] Based on this evidence, I am satisfied that the Claimant acted willfully when he chose not to comply with the employer's vaccination policy between November 15, 2021, and January 3, 2022.

### **So, was the Claimant dismissed because of misconduct?**

[64] Based on my findings above, I find that the Claimant was dismissed because of misconduct.

## Conclusion

[65] The Commission has proven that the Claimant was dismissed from his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits from January 2, 2022.

[66] The Commission hasn't proven the Claimant was suspended because of misconduct. So, he isn't disentitled from receiving EI benefits from November 14, 2021, to January 1, 2022.<sup>21</sup>

[67] This means that the appeal is allowed in part.

Catherine Shaw  
Member, General Division – Employment Insurance Section

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<sup>21</sup> Section 31 of the Act says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.