



Citation: *LH v Canada Employment Insurance Commission*, 2023 SST 336

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

## Decision

**Appellant:** L. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (478352) dated June 9, 2022 (issued by Service Canada)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** Teleconference

**Hearing date:** November 29, 2022

**Hearing participant:** Appellant

**Decision date:** January 10, 2023

**File number:** GE-22-2167

## Decision

[1] I am dismissing L. H.'s appeal.

[2] She didn't comply with her employer's mandatory COVID-19 vaccination policy. And her employer dismissed her because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven that she lost her job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, she did something that caused her to lose her job.

[4] This means she doesn't qualify for Employment Insurance (EI) benefits.

[5] This is what Commission decided. So the Commission made the correct decision in her EI claim.

## Overview

[6] The Claimant, who is a Registered Nurse, lost her job working as a Care Coordinator for the X (employer).<sup>1</sup>

[7] The Claimant's employer said that it let her go because she didn't comply with its mandatory COVID vaccination policy (vaccination policy).

[8] The Claimant doesn't dispute this.

[9] 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 disqualified her from receiving EI benefits.

[10] The Claimant says her conduct wasn't misconduct. She shouldn't be denied EI for misconduct because her employer medically discriminated against her. She has serious and long-lasting side effects from past vaccination. She was diligent and

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<sup>1</sup> In this decision, I refer to L. H. as the "Claimant". I do this because the *Employment Insurance Act* (EI Act) uses the word "claimant", meaning the person who has made a claim for EI benefits. And she is appealing the Commission's decision to deny her EI claim.

complied with her employer's process for requesting a medical exemption. Yet her employer fired her while she was still waiting to see a specialist about an underlying autoimmune condition. She says her employer took Directive 6 to "extreme measures".<sup>2</sup>

[11] I have to decide whether the reason the Claimant lost her job is misconduct under the EI Act.

## **Issue**

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

## **Analysis**

[13] The law says that you can't get EI benefits if you lose your job because of misconduct.

[14] I have to decide two things.

- the reason the Claimant lost her job
- whether the EI Act considers that reason to be misconduct

## **The reason the Claimant lost her job**

[15] I find the Claimant's employer dismissed her because she didn't comply with its vaccination policy.

[16] The Claimant and the Commission agree about this.

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<sup>2</sup> Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act*, Service Providers in accordance with the *Home Care and Community Services Act, 1994*, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006*, and Ambulance Services within the meaning of the *Ambulance Act, R.S.O. 1990, c. A.19*. Issued under Section 77.7 of the *Health Protection and Promotion Act (HPPA)*, R.S.O. 1990, c. H.7. (Issued August 17, 2021).

[17] It's what the Claimant wrote on her EI application.<sup>3</sup> It's what she told the Commission and testified to at the hearing.<sup>4</sup>

[18] It's what her employer told the Commission and wrote in its termination letter to the Claimant.<sup>5</sup> And her employer used code M (dismissal or suspension) on her record of employment.<sup>6</sup>

[19] I have no reason to doubt what the Claimant says or what her employer says (when it talked to the Commission, and what it wrote in the record of employment and the termination letter.) And there is no evidence that goes against what the Claimant and her employer say.

### **The reason is misconduct under the law**

[20] The Claimant's refusal to comply with her employer's vaccination policy is misconduct under the EI Act.

#### ***What misconduct means under the EI Act***

[21] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and legal issues I must consider when making my decision.

[22] The Commission has to prove that it is more likely than not she lost her job because of misconduct.<sup>7</sup>

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<sup>3</sup> See her EI application at GD3-9, where she writes: "I was terminated for not complying with their COVID-19 Vaccination policy ..."

<sup>4</sup> See the Commission's notes of its phone calls with the Claimant at GD3-20 and GD3-34.

<sup>5</sup> See the Commission's notes of its phone calls with the employer at GD3-19.

<sup>6</sup> See the record of employment at GD3-17. And see the termination letter at GD3-45 to GD3-47.

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] I have to focus on what the Claimant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.<sup>8</sup> I can't consider whether the employer's policy is reasonable, or whether suspension and dismissal were reasonable penalties.<sup>9</sup>

[24] The Claimant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct.<sup>10</sup> To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or intentional.<sup>11</sup> And misconduct also includes conduct that is so reckless that it is almost wilful.<sup>12</sup>

[25] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer, and knew or should have known there was a real possibility of being let go because of that.<sup>13</sup>

[26] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.<sup>14</sup> So, for example, I can't decide whether the Claimant was wrongfully dismissed under employment law or decide if her employer breached a collective agreement.<sup>15</sup> I can't decide whether her employer discriminated against her or should have accommodated her under human rights law.<sup>16</sup> And I can't decide whether her employer infringed her privacy or other rights in the employment context, or otherwise.

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<sup>8</sup> This is what sections 30 and 31 of the EI Act say.

<sup>9</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>11</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>12</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>14</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

<sup>15</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>16</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

### ***What the Commission and the Claimant say***

[27] The Commission and the Claimant agree on the key facts in this case. The key facts are the facts the Commission has to prove to show that the Claimant's conduct is misconduct under the EI Act.

[28] The Commission says that there was misconduct under the EI Act because the evidence shows:<sup>17</sup>

- the employer adopted a COVID vaccination policy, and communicated it to all staff<sup>18</sup>
- the vaccination policy sets two deadlines:
  - for her to disclose her vaccination status (September 9, 2021)
  - to be fully vaccinated against COVID and give her employer proof, or get an exemption (October 30, 2021)<sup>19</sup>
- she knew what she had to do<sup>20</sup>
- she also knew her employer could put her on unpaid leave or dismiss her if she didn't get vaccinated and give proof, or wasn't given an exemption, by the deadline<sup>21</sup>
- she applied for an exemption. But her employer denied her application. The employer's occupational health and safety doctor reviewed her circumstances

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<sup>17</sup> See the Commission's Representations at GD4.

<sup>18</sup> See the employer's memo to all staff (*Mandatory COVID-19 Vaccination Policy and Disclosure of Vaccination Status by September 9, 2021*, dated September 2, 2021) at GD3-38, and *Home and Community Care support Services COVID-19 Vaccination Policy* (Dated September 1, 2021; Effective September 7, 2021) at GD3-41 to GD3-44. See also the Commission's notes of its call with the employer at GD3-19.

<sup>19</sup> See the vaccination policy at GD3-42, and see the memo at GD3-40.

<sup>20</sup> See the Commission's notes of its phone calls with the Claimant at GD3-20. She also testified to this at the hearing.

<sup>21</sup> See the policy at GD3-43: "Employees who fail to comply with this policy and/or the requirement of Directive 6 will be subject to progressive discipline up to unpaid leave and/or termination." The memo says the same thing at GD3-38.

and communicated with her family doctor, who didn't say she met the exemption criteria.<sup>22</sup>

- she didn't get fully vaccinated and give proof to her employer by the deadline, which was a wilful and deliberate refusal to comply with the vaccination policy<sup>23</sup>
- her employer dismissed her because she didn't comply with its vaccination policy<sup>24</sup>

[29] The Claimant says her conduct isn't misconduct.<sup>25</sup> She says her employer took Directive 6 to "extreme measures"—she disagrees with the medical exemption criteria and disagrees with having to give her employer her personal health information.

[30] At the hearing she testified she didn't agree with the Commission's position that her conduct was intentional or reckless to the point of being wilful. She says she did everything she could to keep her job. She complied with every step in the medical exemption process. But her employer forced her to choose between her job and not getting vaccinated. And she chose not to get vaccinated by the deadline because she was waiting to see a specialist doctor about her autoimmune condition.

***The Commission has proven misconduct under the EI Act***

[31] I believe and accept the Claimant's evidence and the Commission's evidence for the following reasons.

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<sup>22</sup> See her exemption request, completed by her family doctor, at GD3-32 and GD3-33. Also see her appeal notice at GD2-18. See the Commission's notes of its phone call with the Claimant at GD3-20, and with the employer at GD3-19. Her employer explains its reasons for denying her exemption request in its termination letter, at GD2-13 and GD2-14.

<sup>23</sup> See the termination letter at GD3-45 to GD3-47. The Claimant also said this in her EI application, said this to the Commission, and testified to this at the hearing.

<sup>24</sup> See the termination letter at GD2-13 to GD2-15.

<sup>25</sup> See her appeal notice at GD2-5.

[32] I have no reason to doubt the Claimant's evidence (from her EI application, her reconsideration request, her appeal notice, and what she said at the hearing). Her story stayed essentially the same from her EI application through the hearing.

[33] And what she said is consistent with what the vaccination policy says, and what her employer wrote in the termination letter and on her record of employment.

[34] I accept the Commission's evidence because it's consistent with the Claimant's evidence. And there is no evidence that contradicts the Commission's evidence.

[35] Based on the evidence I have accepted, I find that the Commission has proven the Claimant's conduct was misconduct because it has shown the Claimant:

- knew about the vaccination policy
- knew about her duty to get fully vaccinated and give proof (or get an exemption) by the deadline
- knew that her employer could dismiss her if she didn't get vaccinated
- applied for an exemption, but her employer denied her an exemption
- consciously, deliberately, and intentionally made the decision not to get vaccinated by the deadline
- was dismissed from her job because she didn't comply with the vaccination policy

***The Claimant's other argument: her employer medically discriminated against her***

[36] The Claimant said that her employer discriminated against her when it put her on unpaid leave then dismissed her.<sup>26</sup> She calls this "medical discrimination" because she

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<sup>26</sup> See her appeal notice at GD3-5. She also said this at the hearing.



has an autoimmune condition and has long-term side effects from getting the H1N1 vaccination.

[37] The Claimant argues she had a right to choose not to get vaccinated at least until she could consult a specialist doctor about the safety of COVID vaccination for her. Her employer should have accommodated her unique medical circumstances—it had done so in the past in terms of scheduling. She was willing to wear PPE and not come to work if she was feeling sick. Instead, her employer stuck to the narrow medical exemptions in Directive 6, and the deadline it had set for full vaccination. It discriminated against by placing her on unpaid leave and dismissing her before she saw a specialist.

[38] I accept what the claimant wrote in her documents, said to the Commission and testified to at the hearing about her medical circumstances. There is no evidence that goes against what she said and wrote. So I have no reason to doubt her evidence on this point.

[39] I think the Claimant's medical discrimination argument might succeed under human rights law. Unfortunately for the Claimant, I can't consider this argument in her EI appeal.<sup>27</sup> I have to consider whether her conduct is misconduct *under the EI Act*. I can't consider whether the vaccination policy her employer adopted, its application of the policy to her circumstances, or the penalty it imposed on her infringed her rights under human rights law.

[40] The courts have rightly pointed out that there are other legal avenues for a claimant to raise human rights arguments.<sup>28</sup> She raises the medical discrimination argument in a grievance she has filed against her employer.<sup>29</sup>

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<sup>27</sup> See the legal principles, and cases I cite for support, in paragraphs 23 and 26, above.

<sup>28</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>29</sup> See her grievance at GD3-30, where she makes these arguments.

***Summary of my finding about misconduct***

[41] After considering and weighing all the documents and testimony, I find the Commission has shown the Claimant lost her job because of misconduct under the EI Act.

**Conclusion**

[42] The Commission has proven that the Claimant lost her job because of misconduct under the EI Act

[43] Because of this, the Claimant is disqualified from receiving EI benefits.

[44] This means the Commission made the correct decision in her EI claim.

[45] So I am dismissing her appeal.

Glenn Betteridge  
Member, General Division – Employment Insurance Section