



Citation: *YS v Canada Employment Insurance Commission*, 2023 SST 280

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

Decision

Claimant:	Y. S.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (489560) dated July 6, 2022 (issued by Service Canada)
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Tribunal member:	Bret Edwards
Type of hearing:	Teleconference
Hearing date:	January 10, 2023
Hearing participant:	Claimant
Decision date:	January 13, 2023
File number:	GE-22-2669

Decision

[1] The appeal is dismissed. I disagree 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.¹

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says her employer's policy was unfair and she didn't think that she would be let go for not following their policy.

[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.

Issue

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

Analysis

[7] 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.

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Why did the Claimant lose her job?

[8] I find that the Claimant lost her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission agree on why the Claimant was let go from her job. The Claimant says that she was let go because she didn't follow her employer's COVID-19 vaccination policy as this is what her termination letter says.² Her employer also says that she was let go for this reason.³

Is the reason for the Claimant's dismissal misconduct under the law?

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

[11] 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 suspension 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.

[12] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[13] 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.⁷

² GD3-41 to GD3-42.

³ GD3-34, GD3-41 to GD3-42.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[14] The Commission has to prove that the Claimant was let go from 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 was let go from her job because of misconduct.⁸

[15] The law doesn't say I have to consider how the employer behaved.⁹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹⁰

[16] 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.¹¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] The Commission says that there was misconduct because the Claimant knew about her employer's mandatory COVID-19 vaccination policy and knew that she could be let go if she didn't follow their policy, but chose not to follow it anyway.¹²

[18] The Claimant says that there was no misconduct because her employer's policy was unfair and she didn't think that she would be let go for not following it.¹³

[19] The Claimant told the Commission and testified that:

- She knew about her employer's policy and received multiple reminders about deadlines for it in fall 2021.¹⁴

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁹ See section 31 of the Act.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² GD4-5.

¹³ GD2-394.

¹⁴ GD3-45.

- She didn't get vaccinated by the deadline her employer gave her because she had some concerns about the safety and effectiveness of the COVID-19 vaccine that hadn't yet been addressed.¹⁵
- She didn't submit a request to be exempted from her employer's policy for religious or medical reasons. She spoke with her doctor about getting a medical exemption, but they told her she didn't meet the criteria for one.¹⁶
- She did reach out to her employer to say that she was concerned the COVID-19 vaccine wasn't safe or effective enough.¹⁷
- Her employer's policy was unfair because it wasn't part of her original employment contract.¹⁸

[20] The Claimant also told the Commission and testified that:

- Her employer's policy and the reminders they sent her said that she could be let go if she didn't follow their policy.¹⁹
- But she didn't think she would actually be let go if she didn't follow their policy²⁰ for several reasons.
- First, her employer kept changing their policy deadlines, so she didn't think they were serious about letting people go.
- Second, she hadn't consented to getting vaccinated, so she couldn't believe her employer went ahead and fired her.
- Third, she was injured and off work at the time and therefore didn't see herself as a danger to other people.
- Fourth, her employer didn't offer any alternative work options in order for her to continue earning income before they let her go.

¹⁵ GD3-45.

¹⁶ GD3-45.

¹⁷ GD3-45.

¹⁸ GD2-9 to GD2-388 (copy of her collective agreement).

¹⁹ GD3-45.

²⁰ GD2-394.

[21] The Claimant's employer told the Commission that:

- They introduced a mandatory COVID-19 vaccination policy on September 7, 2021, which required all employees to be fully vaccinated by September 30, 2021 in order to continue working.²¹
- They extended the vaccination deadline twice, ultimately to November 20, 2021, and told employees that if they weren't fully vaccinated by then, they would be put on unpaid leave.²²
- They later told employees that they would be terminated with cause if they weren't fully vaccinated by the end of 2021.²³
- The Claimant was injured and not able to work until January 18, 2022. At that time, they gave her 9 weeks to comply with the policy or she would be terminated.²⁴

[22] I find that the Commission has proven there was misconduct for the following reasons:

[23] I find the Claimant committed the actions that led to her dismissal, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[24] I further find the Claimant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[25] There is clear evidence that the Claimant knew about her employer's policy. She told the Commission and testified that she was aware of it, as mentioned above.

[26] There is also clear evidence that the Claimant chose not to follow her employer's policy. She told the Commission and testified that she didn't get vaccinated by the

²¹ GD3-27.

²² GD3-27.

²³ GD3-27.

²⁴ GD3-34.

deadline her employer gave her or request a religious or medical exemption from the policy, as mentioned above.

[27] I acknowledge that the Claimant feels that her employer's policy was unfair because it wasn't part of her original work contract.

[28] Unfortunately, I find that this argument isn't relevant here. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I need to focus on the Claimant's actions leading to her dismissal and whether she knew her actions could lead to her being let go. If the Claimant wants to pursue this argument, she needs to do that through another forum.

[29] I also acknowledge that the Claimant has concerns about the safety and effectiveness of the COVID-19 vaccine and thought her employer should know what those were in order to understand why she didn't want to get vaccinated.

[30] Unfortunately, I find that this argument isn't relevant here either. Once again, as mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. If the Claimant feels that her employer should be responsible for showing her that the COVID-19 vaccine is safe and effective, she needs to pursue this argument through another forum too.

[31] So, while I acknowledge the Claimant's concerns about her employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that she made a conscious decision not to follow the policy. She didn't get vaccinated as the policy required her to do, which shows that her actions were intentional.

[32] I also find the Claimant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being let go.

[33] I note that the Claimant told the Commission and testified that she knew she could be let go if she didn't follow her employer's policy, as mentioned above.

[34] I also note that there is evidence from the Claimant's employer that clearly states she could be let go if she didn't follow their policy. This evidence is:

- A copy of their mandatory COVID-19 vaccination policy, which says that all employees must be fully vaccinated unless they have an approved exemption, and if they don't get vaccinated, they may be terminated.²⁵
- An update to the policy, which extends the deadline to get fully vaccinated to November 20, 2021 and says that anyone who remains unvaccinated by December 31, 2021 will be terminated with cause.²⁶
- An email to the Claimant, dated January 18, 2022. It says that her latest report from the WSIB Back and Neck Speciality clinic shows that she can handle sedentary duties, so they are offering her a temporary work assignment that is suitable for her based on her restrictions. It also says that she has until March 22, 2022 (9 weeks from today) to comply with their vaccination policy so she can return to work.²⁷
- The Claimant's termination letter, dated March 23, 2022. It says that they told her on January 18, 2022 that she had until March 22, 2022 to get vaccinated in order to keep her job, and since she hasn't yet gotten vaccinated, she hasn't followed their policy and is therefore terminated with cause.²⁸

[35] I acknowledge that the Claimant feels her employer wasn't going to actually let her go because they changed their mandatory COVID-19 vaccination policy deadlines more than once. While this did happen, I find that there is no evidence that it meant they didn't intend to actually go forward with their policy.

[36] Instead, I find that there is clear evidence that the Claimant's employer continued to send the Claimant reminders about their policy and what would happen if she didn't follow it even as they adjusted the deadlines, which means that she should have known that they still had every intention of enforcing it. So, I don't give this argument much weight.

²⁵ GD3-36 to GD3-38.

²⁶ GD3-40.

²⁷ GD3-43 to GD3-44.

²⁸ GD3-41 to GD3-42.

[37] I also acknowledge that the Claimant feels her employer wasn't going to actually let her go because she hadn't consented to getting vaccinated as they had asked.

[38] But I find the Claimant's decision not to get vaccinated is precisely why her employer did let her go. Their mandatory COVID-19 vaccination policy and the reminders they sent to the Claimant about it clearly say that if she didn't get vaccinated, she would be let go, as mentioned above. So, I don't give this argument much weight either.

[39] Additionally, I acknowledge that the Claimant feels her employer wasn't going to actually let her go because she was injured and not working and they hadn't offered her alternative work options to earn income.

[40] However, I disagree that this is what happened. There is evidence that the Claimant was able to work again by January 18, 2022, as mentioned above, and she herself also told the Commission this.²⁹

[41] Also, there is evidence that on January 18, 2022, the Claimant's employer did offer her a temporary work assignment that was suitable for her based on her restrictions, if she followed their policy and got vaccinated, as mentioned above. She chose not to get vaccinated and therefore wasn't able to take up that assignment, but the fact remains that her employer did offer it to her in the first place.

[42] Even if the Claimant hadn't been able to work at that time, I also find that the evidence shows that she could still have been let go.

[43] I note that the Claimant's employer's mandatory COVID-19 vaccination policy doesn't say that people on injured leave are exempt from it. Instead, it says that all employees are required to be fully vaccinated in order to continue working unless they have an approved medical or religious exemption.³⁰

²⁹ GD3-45.

³⁰ See GD3-36 to GD3-40. The policy and follow-up letters about it repeatedly say that all employees must follow the policy.

[44] I find that it's reasonable to believe that if the Claimant's employer wanted to exempt employees on injured leave from their policy, they would have clearly said this. Since they didn't, I conclude that the policy applied to the Claimant whether or not she was on injured leave.

[45] I believe the Claimant when she says she thought she would be able to keep her job. Unfortunately though, I find this doesn't mean she also couldn't have still known that she could be let go.

[46] In other words, I find it was entirely possible for her to believe both of these things (that she would be able to keep her job but could also be let go) at the same time, especially as she confirmed that she knew about her employer's mandatory COVID-19 vaccination policy and the consequences of not following it, as mentioned above.

[47] So, while I understand that the Claimant didn't think she would be let go, I find that the evidence clearly shows that she should have known that she could be let go.

[48] I therefore find that the Claimant's conduct is misconduct under the law since she committed the conduct that led to her dismissal (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being let go.

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

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

[50] The Claimant testified that being let go has hurt her financially and she is entitled to EI because she has been contributing to it for many years.

[51] I understand the Claimant's argument and sympathize with her financial situation. Unfortunately, however, Employment Insurance isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits.

The Commission has proven that the Claimant was let go from her job because of misconduct. This means that she isn't able to receive EI benefits.

Conclusion

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

[53] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section