



Citation: *DK v Canada Employment Insurance Commission*, 2022 SST 1734

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

## Decision

**Appellant:** D. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (491228) dated July 12, 2022 (issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Videoconference

**Hearing date:** December 13, 2022

**Hearing participant:** Appellant

**Decision date:** December 23, 2022

**File number:** GE-22-2670

## 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 say whether she had been 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.

## Issue

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

## Analysis

[7] 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>

[8] 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

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

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

lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

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

[10] The Claimant says her employer told her it dismissed her on December 2, 2021 because she didn't disclose her COVID-19 vaccine status.

[11] The Commission says the Claimant went against her employer's COVID-19 vaccine policy when she didn't state her vaccine status. It concluded that this caused her to lose her job.

[12] The Claimant doesn't dispute the reason her employer let her go. She doesn't think her employer was right to let her go. But, I find that the Claimant lost her job because she went against her employer's COVID-19 vaccination policy.

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

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

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

[15] 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

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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.

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>

[16] 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>

[17] 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>

[18] 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 is misconduct under the Act.

[19] 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 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>

[20] The Claimant says there was no misconduct because she did nothing wrong. She says her medical information is private and she shouldn't have to give it to her employer.

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<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 there was misconduct because the Claimant wilfully refused to give her employer her vaccination status. It says she didn't report her status even though the employer had a clear policy saying she had to do so.

[22] I find that the Commission has proven that there was misconduct, because the Claimant knew that her employer would likely let her go if she didn't say if she was vaccinated against COVID-19. But she chose not to do so even after her employer denied her request for accommodation.

[23] The Claimant's employer sent a message to its employees on September 8, 2021 about its mandatory COVID-19 vaccination requirement. The employer required all employees to be fully vaccinated effective October 30, 2021. The message says that employees who don't record their vaccination status will be placed on an unpaid leave of absence for up to one month as of October 31, 2021. Those who are not fully vaccinated by November 30, 2021 may be terminated as early as December 1, 2021.

[24] The Claimant testified that she read the employer's message noted above on September 12 or 13. She confirmed that she got a reminder email dated September 20, 2021 that the employer sent directly to her.

[25] The Claimant's employer sent her an email dated November 24, 2021. It confirmed that the employer had placed the Claimant on unpaid leave because she didn't comply with a condition of employment. It said that if the Claimant remains non-compliant, her employment will be terminated on December 1, 2021. The Claimant confirmed that she probably got this email.

[26] The Claimant asked her employer for an accommodation to exempt her from having to take the COVID-19 vaccine. She attached a "Statement of Religious Belief and Conscience Affidavit" to this request. But on November 27, 2021, the employer denied this request. It did so because the information the Claimant gave didn't establish a sincere connection between her religious beliefs and her ability to get the vaccine. The employer concluded that the Claimant had asked for accommodation for secular, not religious reasons.

[27] I find from the Claimant's testimony that she knew about her employer's COVID-19 vaccination policy. She knew about the deadlines and the consequences of not complying with the policy.

[28] The Claimant testified that she didn't really think her employer would fire her. But the letter refusing her request for accommodation states that if she doesn't contact the employer to say she will comply with its policy, the employer will consider her to be non-compliant and her employment will be terminated as early as December 1, 2021. I find that she should have known that she faced the real possibility of dismissal.

[29] The Claimant believes that she was discriminated against because she was unvaccinated. She submitted that the Justice Centre for Constitutional Freedoms says that the government has twisted the meaning of misconduct so she can't get EI benefits. The Claimant referred to section 2(b) of the *Canadian Bill of Rights*.

[30] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The *Canadian Bill of Rights* is one of these laws. There is also the, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[31] I understand that the Claimant believes that her employer's vaccine policy is discriminatory. But I am not allowed to make rulings on the laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant must go to a different tribunal or a court to address that.

[32] I find that the Claimant's action, namely going against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to say if she had taken the vaccine. She should have known that going against her employer's policy would lead to her dismissal. For these reasons, I find that the Commission has proven that there was misconduct.

[33] The Claimant says her employer has offered to re-hire her. She says that this means her dismissal shouldn't be coded as misconduct. It is good that the Claimant

can return to her job. But, it doesn't change my finding that the reason the Claimant lost her job is misconduct under the Act.

[34] The Claimant says she paid into the EI benefits program all her life and wasn't able to get them.

[35] I sympathize with the Claimant in the circumstances. But, the purpose of the Act is to compensate claimants who lose their jobs involuntarily and are out of work.<sup>11</sup> The Act is an insurance plan. Like an insurance plan, a claimant has to meet the conditions of the plan to get EI benefits.<sup>12</sup>

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

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

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

### **Conclusion**

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

[39] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section

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<sup>11</sup> See *Caron v Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.

<sup>12</sup> See *Pannu v. Canada (AG)*, 2004 FCA 90.