



Citation: *SR v Canada Employment Insurance Commission*, 2023 SST 468

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

## Decision

**Appellant:** S. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (481529) dated June 7, 2022 (issued by Service Canada)

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**Tribunal member:** Jillian Evans

**Type of hearing:** Teleconference

**Hearing date:** November 15, 2022

**Hearing participant:** Appellant

**Decision date:** January 3, 2023

**File number:** GE-22-2326

## Decision

1. S. R.'s appeal is dismissed.
2. The Canada Employment Insurance Commission (Commission) has proven that the Appellant, S. R., lost her job because of misconduct (in other words, because she wilfully did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

3. The Appellant S. R. was employed by a company that provided mobile dental care to residents of long term care homes. Her employer says that her employment came to an end because she didn't comply with the homes' COVID-19 immunization policies for external service providers.
4. The Appellant doesn't dispute that this happened. She agrees that she chose not to receive COVID-19 vaccines by the required deadline set out in the LTC homes' policies and she agrees that she knew that she would lose her job as a result.
5. The Commission decided that the Appellant lost her job due to misconduct. The Commission decided that the Appellant was disqualified from receiving EI benefits.
6. The Appellant says that her decision not to be vaccinated should not disqualify her from receiving benefits. She had always been a dedicated and well-regarded employee and never had any performance complaints or disciplinary actions against her.
7. She disputes the Commission's determination of misconduct and argues that her failure to comply with external policies that were not part of her initial employment contract should not exclude her from EI benefits.

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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.

8. My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

## **Issue: Did the Appellant lose her job because of misconduct?**

### **Analysis**

9. To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why S. R. lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

10. The Commission and the Appellant agree about why S. R. lost her job.
11. The Appellant was employed as a dental assistant with a company that provided mobile dental services to residents of various long term care facilities. Those facilities implemented policies in the summer and fall of 2021 based on provincial mandates and public health orders.<sup>2</sup>
12. The policies implemented by the care homes required that, by a certain date, all individuals providing services to residents of long term care homes had to be vaccinated against COVID-19. Both internal and outside service providers were bound by these policies.<sup>3</sup>
13. In August of 2021, the Appellant's employer advised her that because of the LTC homes' new vaccination requirements, employees of the mobile dental business (outside service providers) would be unable to work unless they were vaccinated. The employer gave the Appellant a deadline of October 12, 2021 to meet this vaccination requirement.<sup>4</sup>

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<sup>2</sup> GD3-29; GD3-30 to GD3-48

<sup>3</sup> GD3-44 and GD3-45

<sup>4</sup> GD3-20

14. The Appellant confirms that she was aware of this requirement, understood that she would no longer be able to perform her job with the company without receiving the required vaccines and chose not to get vaccinated.
15. She recognized that this choice would mean that she could no longer work for her employer: soon after the employer notified staff of the homes' policies the Appellant emailed her boss that these policies would mean the end of her employment with the company.<sup>5</sup>
16. The Appellant advised at the hearing that she and her employer agreed that the Appellant would continue to work until the vaccination deadline.
17. S. R. trained her replacement and her last day of work was Friday, October 8, 2021.<sup>6</sup>
18. When the employer issued the Appellant's Record of Employment, she entered "Quit" as the reason for separation from work.<sup>7</sup> The Appellant disputes this – she states that she did not quit, that she wanted to continue on at the job and that in fact she was "fired because she did not get the COVID-19 vaccine."<sup>8</sup>
19. Despite the notation on the Record of Employment, the employer confirmed when contacted by the Commission that the Appellant had been let go from the company: although the employer "did not want to lose this employee as she was an excellent worker...since the employee refused to be vaccinated, she no longer met the job requirements."<sup>9</sup>
20. The Appellant and the Commission agree that she was dismissed from her job because she declined to receive COVID-19 vaccinations.

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<sup>5</sup> GD3-20

<sup>6</sup> GD3-20

<sup>7</sup> GD3-16

<sup>8</sup> GD2

<sup>9</sup> GD3-29

21. The Appellant understood that her employment ended because she was no longer able to provide the client services that she was hired to do. I see no evidence to contradict this and so I find that the Appellant lost her job for this reason.

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

22. The Appellant's decision not to receive the COVID-19 vaccines amounts to misconduct.

23. Although the *Employment Insurance Act* doesn't provide an exact definition of the word misconduct, case law (decisions from courts and tribunals) shows us how to determine whether an Appellant's actions and behaviours amount to misconduct under the Act.

24. In reviewing the decisions by the courts, we find a difference between the common use of the word "misconduct" and the legal meaning of that word in the Employment Insurance context.

25. The Commission bears the burden of proving that S. R.'s decision not to be vaccinated fits this legal meaning of the word.

26. Case law says that, to be misconduct, the conduct has to be wilful. This means that the Commission needs to prove that the conduct was conscious, deliberate, or intentional.<sup>10</sup> They do not need to prove that there was deceit or a desire to cause the employer harm.

27. The case law also says that misconduct, in the context of the Act, means behaviour that could get in the way of an employee carrying out their duties toward their employer. Where an employee through their own actions can no longer perform the services required of them under the employment contract, that employee cannot force others to bear the burden of their unemployment.<sup>11</sup>

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<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>11</sup> See *Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684

28. This means that the Commission also bears the burden of proving that the Appellant's choices and actions breached an important and necessary part of their job responsibilities. The case law does not require that the Commission demonstrate that the behaviour be dangerous, criminal, deceptive or unethical in order to amount to misconduct.

29. For example, where a truck driver loses their driver's licence due to their personal behaviour during off-work hours, they are rendered unable to perform essential elements of their job. To the extent that these deliberate personal choices prevent the employee from performing central elements of their job, the behaviour can be deemed misconduct.<sup>12</sup>

30. Finally, the case law also establishes that for behaviour to be misconduct in the context of the Employment Insurance Act, it needs to be objectively and reasonably foreseeable by the employee that their actions might cause them to be fired.<sup>13</sup>

31. I find that the Commission has proven, on a balance of probabilities, that S. R. lost her job because of misconduct:

- She was aware that if she had not received two doses of a COVID-19 vaccine by October 12, 2021, she would not be able to provide dental care to her employer's clients. She made the conscious decision not to get the vaccines nonetheless.
- The ability to attend to and treat residents of long term care homes was a fundamental part of the Appellant's job responsibilities.
- The Appellant was unable to attend to and treat residents of long term care homes without being vaccinated. Compliance with the facilities' vaccination policies became a necessary part of the Appellant's job.

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<sup>12</sup> See *Canada (A.G.) v. Brissette*, [1994] 1 F.C. 684

<sup>13</sup> See *Canada (AG) v. Lemire*, 2010 FCA 314 at para 15

- The Appellant was very aware that she would lose her employment if she did not receive the COVID-19 vaccines and she decided not to adhere to the policies anyway.

32. The Appellant raised other issues in her submissions.

33. The Appellant argued that she had been paying into EI for her entire working life and that it was unfair for her to now be denied benefits right when she needs them the most.

34. The Employment Insurance Act is an insurance plan. Like other insurance policies, claimants looking to collect benefits under the plan need to meet the specified conditions of the plan.<sup>14</sup> The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. I have determined that she did not.

35. The Tribunal is not authorized to make decisions based on compassion or fairness. It must follow the law and apply the Act.<sup>15</sup>

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

36. Based on my findings above, I find that the Appellant lost her job because of misconduct. The Appellant's actions caused her dismissal. She acted deliberately. She knew that refusing to get vaccinated would render her unable to perform her job and that she would lose her employment as a result.

### **Conclusion**

37. The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

38. This means that the appeal is dismissed.

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<sup>14</sup> See *Pannu v. Canada (Attorney General)* 2004 FCA 90

<sup>15</sup> See *Canada (Attorney General) v Knee* 2011 FCA 301

Jillian Evans

Member, General Division – Employment Insurance Section