



Citation: *VS v Canada Employment Insurance Commission*, 2023 SST 418

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

## Decision

**Appellant:** V. S.  
**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (496293) dated July 28, 2022 (issued by Service Canada)

---

**Tribunal member:** Kristen Thompson  
**Type of hearing:** Teleconference  
**Hearing date:** January 19, 2023  
**Hearing participant:** Appellant  
**Decision date:** January 23, 2023  
**File number:** GE-22-2800

## 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 get 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.

[6] The Claimant says that she is a unionized employee, and the policy wasn't part of the collective agreement. She says that the vaccine may not be safe and doesn't prevent transmission. She says that the policy is unfair. She says that the employer should have allowed for alternative measures, including testing. She says that the definition of misconduct shouldn't include whether she chooses to have a medical procedure.

## Issue

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

---

<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act says that claimants who are suspended because of misconduct are not entitled to receive benefits.

## Analysis

[8] 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> The Commission based its decision on the Claimant's suspension from her job.<sup>3</sup> At the hearing, the Claimant says that she was first suspended, but later dismissed from her job.

[9] 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.

### Why did the Claimant lose her job?

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

[11] The Claimant doesn't dispute this happened.

[12] The Commission says that the Claimant lost her job because she went against her employer's vaccination policy.

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

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

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

[15] 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

---

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

<sup>3</sup> See GD4.

misconduct—the questions and criteria to consider when examining the issue of misconduct.

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

[17] 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>7</sup>

[18] The law doesn't say I have to consider how the employer behaved.<sup>8</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>9</sup>

[19] 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>10</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] 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

---

<sup>4</sup> See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See section 30 of the Act.

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

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.<sup>11</sup>

[21] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the Claimant knew about the employer's expectations about getting vaccinated and telling it whether she had been vaccinated
- the Claimant knew or should have known what would happen if she didn't follow the policy

[22] The Claimant says that there was no misconduct because:

- she is a unionized employee, and the policy wasn't part of the collective agreement
- the definition of misconduct shouldn't include whether she chooses to have a medical procedure
- the vaccine may not be safe, and doesn't prevent transmission
- the policy is unfair
- the employer should have allowed for alternative measures, including testing

[23] The Claimant says that she chose not to get vaccinated.

[24] The Claimant says that she was made aware of the employer's mandatory COVID-19 vaccination policy in October 2021.

[25] The Claimant says that she didn't ask for an exemption to the policy.

---

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[26] The Claimant says that she was aware that failure to comply with the policy would cause her to be let go from her job. She says that she thought that the policy would change.

[27] The Claimant says that the employer's deadline to comply with the policy was around November 22, 2021. She says that she didn't comply with the policy and was suspended around this time.

[28] The Claimant says that she received written correspondence from her employer about the policy and its consequences. She says she received warning letters dated November 21, 2021, and January 1, 2022. She says that the letters indicated that she could continue working only if she received the vaccine.

[29] The Claimant says that she was dismissed effective May 27, 2022. She says she received a termination letter dated May 20, 2022.

[30] The Claimant says that she filed a grievance against her employer.

[31] I find that the Commission has proven that there was misconduct because:

- the employer had a policy that required vaccination
- the Claimant confirmed that she was aware of the employer's expectations in terms of getting vaccinated and telling it whether she had been vaccinated
- the Claimant confirmed that the employer sent letters to her several times to communicate what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

[32] I note that the Claimant may have other legal options that she can pursue against the employer. As stated by the Claimant, she filed a grievance.

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

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

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

**Conclusion**

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

[36] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section