



Citation: *VT v Canada Employment Insurance Commission*, 2023 SST 492

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

## Decision

**Appellant:** V. T.  
**Representative / Witness:** M. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (468062) dated May 4, 2022  
(issued by Service Canada)

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**Tribunal member:** Linda Bell

**Type of hearing:** Videoconference  
**Hearing date:** January 26, 2023  
**Hearing participants:** Appellant  
Appellant's representative / witness  
Interpreter

**Decision date:** January 30, 2023  
**File number:** GE-22-2372

## Decision

[1] I am allowing the appeal in part.

[2] V.T. is the Appellant. In this decision I will be referring to her as the Claimant.

[3] The Canada Employment Insurance Commission (Commission) has proven the Claimant was dismissed from her job because of misconduct (in other words, because she did something that caused her to be dismissed). This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits for this reason.<sup>1</sup>

[4] The Claimant meets the availability requirements for EI benefits from November 15, 2021, to June 27, 2022. This means she isn't disentitled from receiving EI benefits until June 28, 2022.

## Overview

[5] The Claimant was put on unpaid leave (suspended) and then dismissed from her job. The Claimant's employer says she was suspended and dismissed because she didn't comply with their mandatory COVID-19 vaccination policy. She refused to get vaccinated.

[6] The Claimant applied for regular EI benefits on November 20, 2021. Her claim was made effective on November 14, 2021.

[7] The Commission accepted the employer's reason for the suspension and dismissal. It decided the Claimant was suspended and dismissed because of misconduct. Because of this, the Commission decided the Claimant was disqualified from receiving EI benefits as of November 14, 2021.<sup>2</sup>

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) states that, if a claimant is dismissed due to misconduct, they are not entitled to receive EI benefits until they have returned to work and acquired enough hours of insurable employment to requalify for benefits.

<sup>2</sup> November 14, 2021, is the Sunday of the week in which her claim (benefit period) starts.

[8] The Commission also decided the Claimant didn't meet the availability requirements for EI benefits. So, it decided she was disentitled from receiving EI benefits indefinitely for this reason, starting on November 15, 2021.<sup>3</sup>

[9] Even though the Claimant doesn't dispute that this happened, she says her actions were not misconduct. She also says she has been available for and actively seeking employment since she lost her job. She says English is her second language so there were misunderstandings during her conversations with the Commission.

## **Matters I have to consider first**

### **Potential added party**

[10] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

### **Adjournment**

[11] The hearing was initially scheduled to proceed on December 6, 2022. But there were logistical issues. So, the Tribunal adjourned the hearing to January 26, 2023.

### **Interpreter Services**

[12] In her appeal documents, the Claimant indicated that she was not comfortable speaking either English or French at the hearing. She requested a Romanian interpreter. The Tribunal arranged for an interpreter to attend the hearing and provide interpretation services for the Claimant.

[13] During the hearing, the Claimant presented her evidence through the assistance of the interpreter. She testified that English has been her second language since she

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<sup>3</sup> The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable. In this case, the Claimant's benefit period starts November 14, 2021, so the Commission determined the disentitlement started on Monday, November 15, 2021.

came to Canada in 2001. She said her understanding of English was a “level 4.” She explained this meant she understood most of what is said in English, she can also comprehend or understand most of what she reads in English, but not everything.

[14] I find the Claimant displayed a good understanding of what was said in English, during the hearing. The Claimant was responsive to what I said in English at the hearing. Several times she answered my questions in English before the interpreter translated them into Romanian. So, I am satisfied she has the ability to ask for clarification if she didn't understand something that was said to her in English.

[15] The Claimant's representative / witness says she speaks Romanian and English. She indicated that she understood English fully. She wished to speak in English during the hearing. She said she would explain everything to the Claimant after the hearing. The Claimant said she was okay with her representative / witness proceeding in English.

[16] So, when the Claimant spoke in Romanian, the interpreter translated what the Claimant said into English. He then translated everything I said directly to the Claimant, from English into Romanian. The representative / witness didn't object to any of the translations made by the interpreter. She presented evidence and arguments in English. So, I find the Claimant had a full and fair opportunity to be heard.

## **Issues**

[17] Has the Commission shown the Claimant was dismissed because of misconduct?

[18] Has the Claimant shown she meets the availability requirements for regular EI benefits?

## Analysis

### Misconduct

[19] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.<sup>4</sup>

[20] To answer the question of whether the Claimant was dismissed because of misconduct, I have to decide two things. First, I have to determine why the Claimant was dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

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

[21] Both parties agree the Claimant was put on leave without pay (suspended) and then dismissed because she refused to be vaccinated by the deadline set out by the employer, in accordance with the Provincial Health Order (PHO).

[22] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended and then dismissed from her job because she refused to be vaccinated against COVID-19.

#### – Has the Commission shown the reason for the Claimant's dismissal misconduct under the law?

[23] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[24] To be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>6</sup>

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<sup>4</sup> See sections 30 and 31 of the Act.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[25] 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>7</sup>

[26] 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 there was a real possibility of being let go because of that.<sup>8</sup>

[27] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.<sup>9</sup>

[28] The Commission says there was misconduct because the Claimant's employer informed her that she must be vaccinated by a set time frame based on the PHO. It says the Claimant was told of the consequences. Specifically, the Claimant was told she would be placed on unpaid leave (suspended) as of October 12, 2021, and then terminated as of October 26, 2021, if she failed to receive Dose 1 of the vaccine. She was made aware so her actions were wilful and deliberate when refusing to be vaccinated, and this proves misconduct.

[29] I recognize the Commission provided documents in which it recorded the telephone conversions with the Claimant.<sup>10</sup> In those documents the Commission wrote that the Claimant said she had a lot of notice that there was a new policy being implemented requiring employees to be vaccinated. She asked for a religious exemption, but it was refused. She was aware she needed to be vaccinated by October 12, to be able to work with seniors. There is no indication the Claimant informed the Commission she was having difficulty understanding the officer's questions or what was being said during those conversations.

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<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>10</sup> See pages GD3-21 and GD3-38 to GD3-39.

[30] The Claimant disputes that she was informed of the consequences or that she would be dismissed. She admits the employer gave her some letters that said it was mandatory to get vaccinated. But she says she was also told she could request a religious exemption, which is what she did. She argued she didn't know she would be dismissed or the full effects of her actions because the employer never gave her a copy of a policy.

[31] The Claimant says she submitted a letter from her pastor on September 10, 2021, as her request for a religious exemption. Employer put her on an unpaid leave of absence (suspended) effective October 12, 2021. Then during a telephone conversation on October 26, 2021, the employer told her she was being dismissed effective immediately.

[32] The representative / witness argued the employer failed to make the Claimant fully aware she would be dismissed if she wasn't vaccinated. This is because she says the Claimant wasn't given a copy of the policy.

[33] Further, the representative / witness said that although the Claimant can read some English, she doesn't have a clear understanding of English, especially anything that is written in legal language. This is supported by the fact that she had someone assist her when completing her application for EI benefits.

[34] I find the Claimant was notified of the consequences if she failed to be vaccinated. Both parties submitted a copy of that October 7, 2021, letter issued by the employer. This letter states, in part:

- If you have not received Dose 1 by October 11, you will not be permitted to work October 12, 2021, onward. You will be placed on an unpaid leave of absence for two weeks starting October 12, 2021, and if you do not receive Dose 1 during that time your employment will be terminated effective October 26, 2021.

[35] There is no dispute that the Claimant was aware of the PHO requiring all employees working in residential care to be vaccinated against COVID-19. This is

because she submitted her pastor's letter as a request for religious exemption from that PHO.

[36] The parties agree the employer wrote to the Claimant on October 7, 2021, setting out the requirements and deadlines for vaccination against COVID-19. She was put on a leave of absence without pay (suspended) effective October 12, 2021, as set out in the letter. So, she ought to have known she would have been dismissed if she didn't comply by October 26, 2021.

[37] It is important to note that it isn't within my jurisdiction to decide whether the employer ought to have exempted the Claimant from getting a COVID-19 vaccine based on her religious faith or creed. Such a decision was the employer's to make. I can't interfere with that decision.

[38] The law doesn't say I have to consider how the employer behaved.<sup>11</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>12</sup>

[39] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.<sup>13</sup>

[40] It is also important to know that the Federal Court recently issued a decision in a matter relating to a healthcare worker who refused to be vaccinated as required by their Provincial Health Directive.<sup>14</sup> The Court confirmed I can't make any decisions about whether the Claimant had other options under other laws. Issues about whether the Claimant was wrongfully suspended and dismissed, or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me

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<sup>11</sup> See section 30 of the EI Act.

<sup>12</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>14</sup> See *Cecchetto v Attorney General of Canada*, 2023 FC 102.



to decide.<sup>15</sup> I can consider only one thing: whether the Claimant's action or inaction is misconduct under the EI Act.

[41] I acknowledge the Claimant has a right to decide whether to be vaccinated or disclose her vaccination status. But the employer's October 7, 2021, letter clearly sets out the consequences if she refused to follow the PHO, which in this case was suspension and dismissal from her employment.

[42] As set out above, I find the Claimant knew or ought to have known that dismissal was a real possibility if she failed to become vaccinated against COVID-19. I am not convinced that having English as a second language prevented the Claimant from knowing the consequences of her choice not to be vaccinated against COVID-19. Nor am I convinced that not being given a copy of the employer's policy prevented her from understanding the consequences of not complying with the PHO. She clearly knew about the PHO because she submitted her pastor's letter in September 2021, as her request for a religious exemption. Plus, the employer set out the requirements and deadlines in its October 7, 2021, letter.

[43] As set out above, the Claimant testified her English ability is at "level 4." English became her second language almost twenty-two years ago when she came to Canada in 2001. Although she may not fully understand everything she reads in a legal document, she certainly displayed the capacity to ask for assistance if she didn't fully understand something she read.

[44] Further, I am not convinced that the Claimant failed to understand what was said during the conversations she had with the Commission's officer. The Commission provided copies of the Supplementary Records of Claim in which the officer documented the questions asked to the Claimant. Those questions are clear and concise. The Claimant's answers, as documented, were clear and on topic. There is no indication on file that the Commission's officers had any trouble communicating with the

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<sup>15</sup> See *Cecchetto v Attorney General of Canada*, 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Claimant. Nor is there any indication that the Claimant indicated she was having difficulty understanding those conversations.

[45] After careful consideration of my findings above, I find the Commission has proven misconduct. This is because the Claimant's refusal to be vaccinated was deliberate or intentional. There was a cause-and-effect relationship between her refusal to be vaccinated and the suspension and dismissal. So, I find the Claimant was suspended and then dismissed from her job because of misconduct.

[46] The claim (benefit period) was effective November 14, 2021. This means the Claimant is disqualified from receiving EI benefits as of November 14, 2021, because she was dismissed due to misconduct.

### **Availability**

[47] I find the Claimant meets the availability requirements for EI benefits as of March 25, 2022.

[48] Different sections of the law require claimants to show they are available for work.<sup>16</sup> The Commission says the Claimant was disentitled under both sections because she hasn't shown she was capable of, and available for work, and unable to find suitable employment.

[49] I have determined the Claimant isn't disentitled under section 50(8) of the Act. This is because the Claimant says the Commission never asked her to prove her availability by submitting a detailed job search record. Nor did they explain to her what information was required for a job search record. There is nothing in the appeal record to show otherwise. So I find the Claimant isn't disentitled under section 50(8) of the Act.

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<sup>16</sup> Paragraph 18(1)(a) of the Act provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment. Subsection 50(8) of the Act provides that, for the purpose of proving that a Claimant is available for work and unable to obtain suitable employment, the Commission may require the Claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.

[50] When determining availability under paragraph 18(1)(a) of the Act, I must consider whether the Claimant has shown she was capable of and available for work and unable to find suitable employment.<sup>17</sup> The Claimant has to prove three things to show she was available under this section:

- a) A desire to return to the labour market as soon as a suitable job is available
- b) That desire is expressed through efforts to find a suitable job
- c) No personal conditions were set that might unduly limit their chances of returning to the labour market<sup>18</sup>

[51] The Commission says the Claimant said she hasn't applied for any jobs. She hasn't been looking for work because she needs to be vaccinated in order to return to her job or work in hospitals. The Commission submits the Claimant's own statements show that she has not proven her availability for work.

[52] The Claimant disputes the Commission's submissions. She says the Commission failed to understand what she was saying so it didn't document their conversations properly. She argued the Commission failed to consider that English is her second language, so it didn't give her a proper opportunity to understand their questions or to explain her circumstances.

– **Desire to return to work**

[53] I find the Claimant did show a desire to return to work. She testified she wanted to work because she needed money to support herself. The Commission documented that she told them she was available to work any time. So I find she meets this criteria.

– **Efforts to find a suitable job**

[54] I find the Claimant has shown she made sufficient efforts to find a suitable job, starting May 4, 2022. This is the date the Commission informed her it was maintaining

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<sup>17</sup> See paragraph 18(1)(a) of the Act.

<sup>18</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

its decision that it couldn't pay her EI benefits because she was restricting her availability. Here is what I considered.

[55] The Regulations list nine job-search activities I have to consider. Some examples of those activities are

- Networking
- looking for jobs listed on-line
- updating your resume
- applying for a job.<sup>19</sup>

[56] I recognize there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. This means I must consider specific circumstances on a case-by-case basis.<sup>20</sup>

[57] In this case, the economic effects caused by the global COVID-19 pandemic and public health orders in the Claimant's region are circumstances that need to be considered when determining the reasonable period to explore suitable job opportunities.

[58] I have also considered the effects of having English as second language. In this case, I find that having English as a second language, didn't limit the Claimant's ability to search and secure suitable employment. She admits that she began speaking with friends and members of her church who assisted her in finding work. This is supported by the fact she was able to secure a full-time job at X on May 12, 2022.

[59] I recognize the Commission documented that on March 1, 2022, the Claimant said she has not tried to apply for any jobs yet because she doesn't know where to

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<sup>19</sup> See section 9.001 of the Regulations.

<sup>20</sup> See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

apply. She said she would love to go back to work in her position as a dietary aide, but she was told she has to get vaccinated to come back to work.

[60] During their May 4, 2022, conversation, the Commission documented the Claimant said she continues to look for work as a dietary aide or in housekeeping, but she needs to be vaccinated for those jobs. She confirmed she had not been looking for work lately because she isn't vaccinated, and no one will hire her.

[61] I find that it is more likely than not that the Claimant didn't start looking for work until May 4, 2022, which is when the Commission told her it was maintaining their decision that she hadn't proven her availability. I acknowledge that the Claimant said at the hearing that she made efforts to find a suitable job after she learned she was dismissed. Specifically, she started speaking with friends and people from her church to find another job. However, the evidence supports that she didn't start looking for another job as soon as she was dismissed. Instead, based on her statements to the Commission on March 1, 2022, and May 4, 2022, I find on a balance of probabilities she began looking for another job on May 4, 2022, after her final conversation with the Commission.

[62] The Claimant testified she has no medical condition or family obligation that prevented her from working. She has prior work experience in Canada in housekeeping and as a dietary aide. She successfully completed a food safe course. She says she was applying for any suitable job based on her experience and certification in Canada.

[63] She explained in detail how she was alone and had to provide for herself financially, so she needed to work. Her friends helped her update her resume, they sent her job postings she applied to, and networked with their employers. She was applying for suitable employment based on her experience and education.

[64] The Claimant says her efforts were successful. She started working for X on May 12, 2022. She worked there full-time, 40 hours per week, until June 3, 2022. She says she quit this job because the commute was too hard. She doesn't drive so she had to take public transportation to a neighbouring city to work at this job. She had to travel

three hours one way. So, she was getting up at 4:00 a.m. to travel to work and would not get back home until after 8:00 p.m. every day. She quit and continued to look for another job closer to her home.

[65] The Claimant testified that she started working at a meat factory on June 28, 2022. She has been working there part-time and full-time hours. She said her hours fluctuate between part-time, full-time, and overtime.

[66] The Claimant says that she stopped looking for another job once she started working at the meat factory. She says she is okay to stay working there and is available whenever her employer calls her to work.

[67] After consideration of the evidence set out above, I find the Claimant's efforts were enough to meet the availability requirements of this second factor from May 4, 2022, to June 27, 2022.

– **Conditions that might unduly limit her chances of going back to work**

[68] I find the Claimant didn't set conditions that would unduly limit her chances of going back to work between May 4, 2022, to June 27, 2022.

[69] The Commission says being unvaccinated is a condition that unduly limits the Claimant's chances of going back to work with her former employer.

[70] The Claimant said she knows now that she would need to be vaccinated to work for her former employer as a dietary aide. She admits that she told the Commission she wanted to return to work for her former employer. But she says she never said she was restricting her availability to work for them or not looking for another job.

[71] Instead, she says she was looking for work. She provided credible evidence of how she was networking with friends and people at her church. She submitted several job applications since losing her job. She was successful in her efforts to find a job as she started working for X on May 12, 2022. When that job turned out to be too far away, she secured another job at the meat factory on June 28, 2022. But, as set out above,

the evidence supports a finding that she didn't begin looking for another job until May 4, 2022.

[72] The Claimant readily admits that she stopped being available for another job as of June 28, 2022, when she started working at the meat factory. This is because she says her job at the meat factory is enough.

[73] Based on the foregoing, I find the Claimant meets this third criterion from May 4, 2022, to June 27, 2022. This means she isn't disentitled from receiving EI benefits during this period.

[74] Overall, I find the Claimant didn't prove her availability for EI benefits from November 14, 2021, to May 3, 2022, and from June 28, 2022, onward. The Claimant readily admits she is restricting her availability to her current employer at the meat factory. She started that job on June 28, 2022. This means she is disentitled from receiving EI benefits from November 15, 2021, to May 3, 2022, starting from June 28, 2022.

## **Conclusion**

[75] The Commission has shown the Claimant was dismissed from her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits as of November 14, 2021.

[76] The Claimant meets the availability requirements from May 4, 2022, to June 27, 2022. This means she is disentitled from receiving EI benefits for this reason, from November 15, 2021, to May 3, 2022, starting from June 28, 2022.<sup>21</sup>

Linda Bell

Member, General Division – Employment Insurance Section

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<sup>21</sup> The disentitlement is imposed on workdays (Monday through Friday) for which benefit may have been paid.