



Citation: *VC v Canada Employment Insurance Commission*, 2023 SST 416

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

## **Decision**

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| <b>Appellant:</b>             | V. C.  |
| <b>Respondent:</b>            | Canada Employment Insurance Commission   |
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| <b>Decision under appeal:</b> | Canada Employment Insurance Commission reconsideration decision (486650) dated July 5, 2022 (issued by Service Canada) |
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| <b>Tribunal member:</b>       | Elizabeth Usprich  |
| <b>Type of hearing:</b>       | Teleconference   |
| <b>Hearing date:</b>          | January 10, 2023   |
| <b>Hearing participant:</b>   | Appellant  |
| <b>Decision date:</b>         | January 13, 2023   |
| <b>File number:</b>           | GE-22-2479   |

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from 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 was working as an investigator for her employer when she was suspended from her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she did not have an exemption and she did not get vaccinated.

[4] Even though the Claimant does not dispute that this happened, she says that going against her employer's vaccination policy is not misconduct. The Claimant feels that the employer made an unfair policy and that it went against the collective agreement that was in place. The Claimant says that the employer has no right to unilaterally change terms of the contract to require vaccination.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

## Issue

[6] Was the Claimant suspended from her job because of misconduct?

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<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.

## **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 was suspended 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 get suspended from her job?**

[9] I find that the Claimant was suspended from her job because she did not follow her employer's mandatory vaccination policy. The Claimant says that she was put on a leave of absence because of this. The Claimant said that because of her religion she did not want to get vaccinated. The Claimant says that she followed her employer's policy and tried to get a religious exemption but the employer denied her the exemption. The Claimant feels that her employer discriminated against her by refusing to give her a religious exemption. The Claimant does not feel it is misconduct for not following the policy. The Claimant feels that the employer's policy was an unfair because she was working from home and she posed no risk to anyone. The Claimant feels she should be entitled to benefits.

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

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

[11] The Claimant says that she was not suspended but rather put on an unpaid leave of absence for not being vaccinated. The Claimant's Record of Employment (ROE)<sup>3</sup> also indicates that the reason for issuing the ROE is due to "leave of absence". I am not bound by how the employer and employee characterize their separation.<sup>4</sup> Section 31

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

<sup>3</sup> See GD3-18.

<sup>4</sup> See, for example, *Canada (Attorney General) v. Morris*, 1999 CanLII 7853 (FCA).

refers to a “suspension” from employment due to misconduct.<sup>5</sup> In other words, when it was the employer's decision to place an employee on an unpaid leave of absence, due to misconduct, it is typically the same, as a suspension for the purposes of the *Employment Insurance Act* (Act). I will be referring to the Claimant's unpaid leave of absence as a suspension because that is the word used by the Act.

[12] The Act does not 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.

[13] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>7</sup> The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>8</sup>

[14] 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>9</sup>

[15] The law does not say I have to consider how the employer behaved.<sup>10</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>11</sup>

[16] The Commission has to prove that the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of probabilities.

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<sup>5</sup> See section 31 of the Act.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>8</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>10</sup> See section 30 of the Act.

<sup>11</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

This means that it has to show that it is more likely than not that the Claimant was suspended from her job because of misconduct.<sup>12</sup>

[17] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it is not for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.<sup>13</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[18] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.<sup>14</sup> He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[19] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.<sup>15</sup>

[20] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.<sup>16</sup>

[21] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.<sup>17</sup> He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

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<sup>12</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>13</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>14</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>15</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>16</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>17</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.<sup>18</sup>

[22] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.<sup>19</sup> He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.<sup>20</sup>

[23] These cases are not about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy;<sup>21</sup>
- the employer clearly communicated with the Claimant about its expectations about vaccination;<sup>22</sup>
- the Claimant knew or ought to have known the consequences of not complying with the policy, including the requirement to get vaccinated if she was not given an exemption;<sup>23</sup> and
- the Claimant was aware of the policy and there was misconduct because the Claimant knew the vaccination policy was mandatory and she made the choice not to get vaccinated.

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

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<sup>18</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>19</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>20</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>21</sup> See GD12 employer's vaccination policy.

<sup>22</sup> See GD3-26 and GD3-37.

<sup>23</sup> See GD12-9 section 7.1.2.2.

- the employer's vaccination policy was unfair and went against her religious beliefs;
- she worked from home and was therefore not putting anyone at risk; and
- her employer was contradictory because they believed the Claimant's religious beliefs were sincere but decided it did not supersede their duty to protect their employees and the public.<sup>24</sup>

[26] The Claimant does not dispute that her employer had a vaccination policy and that she was aware of it.

[27] The Claimant does not believe that it is fair that her employer's policy applied to her because she works from home. The Claimant testified that prior to the pandemic there was not exclusively working from home. However, since then it has become that way and she believes that it will continue.

[28] The Claimant feels that her employer's policy is unfair and should not have applied to her. However, the policy clearly states that it applies to all employees even those that are in a virtual work arrangement. The Claimant feels that it is illegal for the employer to mandate that people working from home have a requirement to be vaccinated. She has filed a grievance with the help of her union on this issue.<sup>25</sup>

[29] The employer's vaccination policy says that "employees must comply with this policy regardless of whether they work onsite, remotely, or telework."<sup>26</sup> I find that the policy is clear that it applies to all employees including those working from home (remotely). Therefore, the policy applies to the Claimant.

### **Medical or other exemption**

[30] The Claimant was aware that her employer required that if she did not get vaccinated, she had to get an exemption to remain employed.<sup>27</sup> The Claimant submitted

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<sup>24</sup> See GD2-15 denial of accommodation and GD2-17 interview Claimant had with HR.

<sup>25</sup> See GD2-19.

<sup>26</sup> See GD12-8 section 6.1.1.

<sup>27</sup> See GD12-8 Consequences of Non-Compliance.

a request for a religious-based exemption to her employer.<sup>28</sup> The Claimant says that she submitted the request around the end of October 2021. In December 2021, she was called for an interview with Human Resources (HR) about the accommodation request.<sup>29</sup> The Claimant says that the employer refused her request around February 14, 2022.<sup>30</sup> After the exemption request denial the Claimant says her employer told her she had until March 11, 2022 to get vaccinated. The Claimant says that by denying her exemption she was put in the position of either following her religious beliefs or staying employed.

[31] The Claimant provided testimony about her genuinely held religious belief about vaccinations. The Claimant supported her religious beliefs with an affidavit as well as a letter from her religious leader.<sup>31</sup> I accept that the Claimant is refusing to have the COVID-19 vaccine due to her religious beliefs.

[32] The Claimant agreed that she did not have an exemption under her employer's mandatory policy. There is no evidence to the contrary so I accept that the Claimant's testimony on these points.

### **Public Health Sudbury & Districts and Ontario Nurses' Association<sup>32</sup> and CUB decision 58443<sup>33</sup>**

[33] The Claimant submitted a recent<sup>34</sup> arbitration decision that she says supports that she should not have been denied an accommodation. The Claimant says that even though it was a labour arbitration decision I should follow it. In this case an employee had their religious exemption denied and the labour arbitrator found that the exemption should have been granted. It was found that because the grievor had a sincerely held

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<sup>28</sup> See GD3-22.

<sup>29</sup> See GD2-17.

<sup>30</sup> See GD2-15.

<sup>31</sup> See GD3-22 (affidavit) and GD3-25 (letter from religious leader).

<sup>32</sup> See GD8-3.

<sup>33</sup> See GD9-2.

<sup>34</sup> It was released June 7, 2022.



belief about not getting vaccinated that she should have been permitted an exemption by her employer because of that.

[34] The Claimant says that she was discriminated against by her employer and that therefore her EI Appeal should be allowed.

[35] I am not bound by this decision. It is a labour arbitration decision based on a collective agreement. I am not a labour board arbitrator, and the Claimant would have to make her arguments about the collective agreement and its potential violation to another body.

[36] The Claimant also referred to another case but did not submit it. She says that it was a CUB (Canadian Umpire Benefit) decision. I am not permitted to do research but the Claimant says that in that case the employee, as part of the job, was required to exercise before working. The Claimant says that he was not aware of this requirement when he started the position and did not agree with the requirement and therefore left that employment. The Claimant says that in that case the person received EI benefits. The Claimant compares this to her situation and says that she was not aware of any vaccination requirement prior to accepting her position. She says that she would not have taken the position had she known, as all vaccinations are against her religious beliefs. The Claimant argued that her employer was making a unilateral change to her employment contract.

[37] The Claimant says that her employer violated the collective agreement by implementing a policy unilaterally. This is a similar argument to also saying that an employer cannot put in place any new conditions (absent legislation requiring it) unless an employee explicitly or implicitly agrees to it. Yet, as indicated above, other Courts and Tribunals have considered this very issue and have found differently.

[38] One of the reasons for not following the CUB decision is that it is contrary to other court decisions. As noted above, in *McNamara*, *Paradis* and *Mishibinijima*<sup>35</sup> these

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<sup>35</sup> See paragraphs 26 to 30 of this decision above.

Court cases make it clear that the focus must be on what a claimant has or has not done.

[39] Again, I have to focus on the Act only. I cannot make any decisions about whether the Claimant has other options under other laws.<sup>36</sup> I can only consider whether what the Claimant did, or failed to do, is misconduct under the Act.

[40] The Claimant also submitted a post from the Justice Centre for Constitutional Freedoms<sup>37</sup> that questions the way in which “misconduct” is being applied. I am not bound by a group’s belief on such matters and instead must look at the court and tribunal cases on the matter.

[41] Ultimately, the Claimant was aware of the vaccination policy when it was implemented. I agree that the policy was new as it was established in response to a new pandemic. This is different than the CUB decision.

## **Canadian Charter of Rights and Freedoms**

[42] The Claimant says that EI is not following the *Canadian Charter of Rights and Freedoms* (Charter) to be free from religious discrimination. The Claimant is not alleging that a particular section of the Act is infringing the Charter. Instead, the Claimant seems to be arguing that her reason for not following her employer’s policy, her religion, should be accepted by EI and she should be granted benefits. The Claimant seems to be arguing that by not permitting her EI benefits that she is being discriminated against.

[43] As mentioned above, it is the employer who determined whether or not the Claimant would be granted an exemption under their policy. I have to focus on the Act only and must look at only what the Claimant did or did not do.

[44] This Tribunal can consider whether a section of the Employment Insurance Act (or its regulations) infringes the rights that are guaranteed by the Charter. The Claimant

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<sup>36</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>37</sup> See GD2-21 dated June 14, 2022.

is not challenging any part of the EI Act, rather she feels that her employer's policy infringed the Charter.

[45] It is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter. There are other courts or tribunals to address those types of issues.

### **Elements of misconduct?**

[46] I find that the Commission has proven that there was misconduct for the reasons that follow.

[47] There is no dispute that the employer had a vaccination policy. The Claimant knew about the vaccination policy. The Claimant feels that the policy is unfair and should not apply to her because she worked from home. However, the employer's policy applies to all employees including those that worked virtually.<sup>38</sup>

[48] The Claimant requested a religious exemption from her employer so that she would not have to get vaccinated.<sup>39</sup> The letter from her religious leader says "that believers should follow their conscience"<sup>40</sup> and that each member of the congregation should make their own choice. The Claimant testified that her employer denied her exemption request. I see no evidence to contradict this.

[49] I find that the Claimant made her own choice not to get vaccinated. This means that the Claimant's choice to not get vaccinated was conscious, deliberate and intentional.

[50] The Claimant did not have an accommodation exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee would be placed on an unpaid leave of absence.<sup>41</sup>

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<sup>38</sup> See GD12-8 section 6.1.1.

<sup>39</sup> See GD3-22.

<sup>40</sup> See GD3-25.

<sup>41</sup> See GD12-9 section 7.1.2.2.

[51] The employer's policy requires all employees to have an exemption or get vaccinated. The Claimant did not receive an exemption and did not get vaccinated. This means that she was not in compliance with her employer's policy. That means that she could not carry out her duties owed to her employer. This is misconduct.

[52] The Claimant agreed that she was aware that by not having an exemption or by not getting vaccinated that she would be placed on an unpaid leave of absence. This means that the Claimant knew there was real possibility that she could be placed on an unpaid leave of absence (a suspension).

[53] By not having an exemption, or for not getting vaccinated, the misconduct, led to the Claimant being suspended from her employment.

[54] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Claimant knew that by not following the policy that she would not be permitted to work. This means that she could not carry out her duties to her employer. The Claimant was also aware that there was a real possibility that she could be suspended for this reason.

### **So, was the Claimant suspended from her job because of misconduct?**

[55] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[56] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated without an exemption was likely to cause her to get suspended from her job.

### **Conclusion**

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

[58] This means that the appeal is dismissed.

Elizabeth Usprich  
Member, General Division – Employment Insurance Section