



Citation: *DC v Canada Employment Insurance Commission*, 2022 SST 1770

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

## Decision

**Appellant:** D. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (511514) dated July 4, 2022 (issued by Service Canada)

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**Tribunal member:** Marc-André St-Jules

**Type of hearing:** Teleconference

**Hearing date:** December 19, 2022

**Hearing participant:** Appellant

**Decision date:** December 22, 2022

**File number:** GE-22-2889

## 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 told the Commission that she was let go because she went against its vaccination policy: she refused to be vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that she had health issues which could be aggravated by taking the vaccine. In addition to that, the Claimant says she researched the efficacy of the vaccine. She says her research revealed the vaccine does not prevent the transmission of COVID so there is no reason to take a vaccine.

[5] The Commission accepted the employer's reason for the dismissal. The Claimant knew, or ought to have known, that the consequences of refusing included unpaid leave and up to and including dismissal. It was 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 issue before me is the disqualification effective February 13, 2022, following the Claimant's termination. The Claimant was placed on unpaid leave effective January 4, 2022, then terminated effective February 1, 2022, for non-compliance with the

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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.

vaccine policy. The Commission, however, disqualified the Claimant effective February 13, 2022, as this is the start date of the benefit period.

## **Issue**

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

## **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>

[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 did not comply with her employer's vaccination policy.

[11] The Claimant doesn't dispute that she was let go because she wasn't vaccinated.

[12] The Commission says the Claimant was dismissed for not following the employer's vaccination policy.

[13] I find that the Claimant was first suspended then her employment terminated for not following the vaccine policy implemented by the employer. No evidence before me suggests any other reason why the Claimant is no longer working for the employer.

### **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.

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

[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 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>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 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>

[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>6</sup>

[18] 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>

[19] I have to focus on the EI 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.

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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.

<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.

[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 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>

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

- The employer had a vaccination policy which started with unpaid leave followed by termination for individuals who do not comply.
- The employer communicated the policy to all staff.
- The communication clearly notified the Claimant about its expectations about getting 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:

- A person should not be punished for making a personal medical choice.
- Employers should not have the right to demand a medical procedure where the adverse effects are not known.
- The Justice Centre for Constitutional Freedoms says the government is acting illegally in denying EI benefits.
- The policy does not consider natural immunity.
- The government is twisting the meaning of misconduct to deny employment insurance benefits.
- The vaccine does not prevent the spread of COVID.

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<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- She has an excellent work history and no previous disciplinary record.
- The Claimant offered to undergo daily rapid tests as well as wear a mask but the employer denied her requests.

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

- The employer had a vaccination policy that said employees must be in compliance or may be suspended followed by termination of employment.
- The employer clearly advised the Claimant about what it expected of its employees in terms of getting vaccinated.
- The employer communicated the policy to all staff to explain what it expected.
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

[24] I find the Claimant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. The Claimant testified that in September 2021, the policy was introduced but did not initially have dates or consequences. The Claimant testified that she was asked to sign to confirm receipt. This version of the policy did not mention the consequences. The Claimant was therefore not comfortable in signing and declined to do so.

[25] The Claimant testified she did receive an email dated November 19, 2021.<sup>11</sup> Similar to the policy announced in September, it also did not provide dates required to comply. It does, however, mention both unpaid leave and termination for employees who remain unvaccinated without mentioning dates.

[26] The Claimant acknowledged she did also receive the email dated December 13, 2021.<sup>12</sup> The email mentions unpaid leave effective January 4, 2022, followed by

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<sup>11</sup> See GD2 page 19.

<sup>12</sup> See GD2 page 14.

termination effective February 1, 2022, for individuals who have not complied with the policy.

[27] On December 24, 2021, the Claimant wrote an email to her employer.<sup>13</sup> In this email she explains why she will not be complying and asking for the employer to issue a record of employment “without cause” if they will be terminating her employment. The Claimant sent another email December 31, 2021.<sup>14</sup> In this email, she provides statistics on new COVID cases for both vaccinated and unvaccinated people and questioning the need for suspension and termination in light of the statistics.

[28] The Claimant testified that she did discuss exemptions with her doctor but the doctor was unwilling to support an exemption request. The Claimant testified that she has medical issues such as:

- Heart murmur.
- Arthritis
- Migraines
- High cholesterol

[29] The Claimant argues that the risk involved with the various vaccines is greater than the benefit. She testified she did research on the various vaccines via various websites and United States health authorities.<sup>15</sup> She was not able to find anything supporting how the various vaccines would affect her health concerns outlined above. For this reason, she decided not to take the vaccine.

[30] I agree the Claimant can decline vaccination. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace.

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<sup>13</sup> See GD2 page 15.

<sup>14</sup> See GD2 page 16.

<sup>15</sup> Centre for Disease Control and the Federal Drug Administration.

This includes developing and applying policies related to health and safety in the workplace.

[31] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.<sup>16</sup>

[32] The Claimant quotes parts of a letter from the Justice Centre for Constitutional Freedoms addressed to Minister Qualtrough. The quotes say the government is illegally denying EI benefits based on vaccine status.<sup>17</sup> The quotes do not provide the legal analysis to support the opinion. Many of the points raised in the letter are dealt with in this decision, as they were adopted by the Claimant as her arguments.

[33] I find the Claimant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issue. I have no doubt the Claimant was a valuable employee. She stated she had an excellent work history with no disciplinary record. Nothing in the file contradicts this.

[34] I understand that the Claimant feels that because she paid into the employment insurance fund, she should receive financial support. This belief goes against the fundamental principle of employment insurance, that is, an employee must not voluntarily place herself in a position of unemployment.

[35] The Claimant says that the threshold for misconduct has not been met. I accept the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent for there to be misconduct.<sup>18</sup> I agree the Claimant

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<sup>16</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>17</sup> See GD2 page 6.

<sup>18</sup> See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.



had no wrongful intent. It is sufficient that the conduct be conscious, deliberate, or intentional.

[36] The evidence before me shows the Claimant made a personal or conscious choice not to follow the employer's vaccination policy. This resulted in the suspension from her job.

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

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

[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 the appeal is dismissed.

Marc-André St-Jules  
Member, General Division – Employment Insurance Section