



Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 926

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

## Decision

**Appellant:** J. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (535286) dated August 29, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** Teleconference

**Hearing date:** March 2, 2023

**Hearing participant:** Appellant

**Decision date:** March 14, 2023

**File number:** GE-22-3210

## Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job).

[3] This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[4] The Appellant was initially suspended and later lost her job. The Appellant's employer said that she was let go because she didn't follow their mandatory COVID-19 vaccination policy.

[5] Even though the Appellant doesn't dispute that this happened, she says that she shouldn't have had to follow her employer's policy and didn't think she would be let go for not following it.

[6] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

## Issue

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

## Analysis

[8] 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 the Appellant

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

[9] I find the Appellant lost her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[10] The Appellant and the Commission agree on why the Appellant lost her job. The Appellant says her employer dismissed her because she didn't follow her their mandatory COVID-19 vaccination policy.<sup>2</sup> Her employer also says (in the Appellant's termination letter, dated March 3, 2022) they dismissed her for this reason.<sup>3</sup>

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

[11] The reason for the Appellant's dismissal is misconduct under the law.

[12] 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 Appellant'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>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Appellant 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>

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<sup>2</sup> GD3-30.

<sup>3</sup> GD3-90.

<sup>4</sup> See *Mishibinijima 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.

[14] There is misconduct if the Appellant 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>

[15] The Commission has to prove that the Appellant was dismissed from 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 Appellant was dismissed from her job because of misconduct.<sup>8</sup>

[16] The law doesn't say I have to consider how the employer behaved.<sup>9</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.<sup>10</sup>

[17] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>11</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[18] The Commission says there was misconduct because the Appellant knew about her employer's mandatory COVID-19 vaccination policy and what could happen if she didn't follow it, but she chose not to follow it anyway.<sup>12</sup>

[19] The Appellant says there was no misconduct because she shouldn't have been forced to follow her employer's policy and she didn't think she would be let go for not following it.

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

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See section 31 of the Act.

<sup>10</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> GD4-3.

[20] The Appellant's employer told the Commission that they dismissed the Appellant for not following their mandatory COVID-19 vaccination policy.<sup>13</sup>

[21] The Appellant's employer's mandatory COVID-19 vaccination policy says the following:

- The policy takes effect on September 7, 2021.<sup>14</sup>
- All employees are required to declare (attest to) their COVID-19 vaccination status by October 20, 2021.<sup>15</sup>
- All employees are required to be fully vaccinated as of October 20, 2021, unless they have an approved medical, religious, or human rights exemption.<sup>16</sup>
- Employees who don't follow the policy will face progressive action up to and including termination.<sup>17</sup>

[22] The Appellant testified that:

- She heard about her employer's policy from management and random letters, but never actually got a copy until the Commission sent it to her.
- Her employer didn't share information with employees about the benefits and risks of the COVID-19 vaccine as their policy required. She requested more information herself, but they didn't respond until the day they suspended her.
- Her employer had no intention of approving any exemption requests and her manager tried to manipulate her into getting the vaccine.
- Her doctor says she wasn't eligible for a medical exemption, but she knows she's allergic to the vaccine.
- She submitted a religious exemption request, but her employer denied it.
- She didn't get vaccinated after her employer denied her exemption request.

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<sup>13</sup> GD3-28.

<sup>14</sup> GD3-83.

<sup>15</sup> GD3-84.

<sup>16</sup> GD3-85.

<sup>17</sup> GD3-86.

- She knew she could be let go for not following her employer's policy after they denied her exemption request, but she didn't think this would actually happen because they kept changing their deadlines.
- Another Tribunal decision (*A.L. v. Canada Employment Insurance Commission*) supports her appeal because it found that refusing to get vaccinated isn't misconduct.

[23] I find the Commission has proven there was misconduct for the following reasons.

[24] I find the Appellant committed the actions that led to her dismissal, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[25] I further find the Appellant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[26] There is evidence the Appellant knew about her employer's policy. She said she knew about it, as noted above. She also submitted a religious exemption request, as noted above, which I find shows she was aware of the policy and its requirements.

[27] There is also evidence the Appellant chose not to follow her employer's policy. She said she didn't get vaccinated after her employer denied her religious exemption request, as noted above.

[28] I acknowledge the Appellant says she didn't get a copy of her employer's policy and only found out about it from management and random letters. But I find this wasn't actually the case. This is because the Commission's records indicate the Appellant told the Commission she had a copy of her employer's policy and submitted it (and various other letters her employer sent her about the policy) upon request.<sup>18</sup>

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<sup>18</sup> GD3-30. From the Commission's record of its conversation with the Appellant on July 5, 2022: "Agent asked the claimant if she can submit a copy of the policy and any other supporting documents including

[29] So, since the Appellant submitted a copy of her employer's policy (and other related documents) to the Commission<sup>19</sup>, I find this means she knew about it and what she had to do to follow it.

[30] I also acknowledge the Appellant feels her employer didn't share information with employees about the risks and benefits of the COVID-19 vaccine as their policy required before they let her go.

[31] I note the employer's policy does say they will provide information about the risks and benefits of the COVID-19 vaccine across multiple channels.<sup>20</sup> But I find the Appellant's own evidence (what she sent the Commission) shows her employer did in fact do this. For example, one document (FAQs for staff about the COVID-19 vaccination policy<sup>21</sup>) has detailed information about the vaccine and says if employees had scientific questions about it, they could book an in-person vaccination information session with a Clinical Vaccine Educator.<sup>22</sup>

[32] I also find the Appellant's own evidence shows her employer did respond to her directly about her concerns over the safety of the COVID-19 vaccine well before they let her go. I note their email to the Appellant, dated January 17, 2022, recommends she read more about the topic from the Ontario COVID-19 Science Advisory Table.<sup>23</sup>

[33] In other words, I find the evidence indicates the Appellant chose not to follow her employer's policy despite being made aware before she was let go of resources where she could find out more information about the COVID-19 vaccine. So, I don't give her argument much weight here.

[34] Additionally, I acknowledge the Appellant feels her employer had no intention of approving any exemptions (religious or otherwise) and that her manager tried to

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her exemption requests and the employer's response. The claimant agreed." "Claimant said she will be sending the documents to the agent tomorrow via email (July 6, 2022).

<sup>19</sup> For what the Appellant sent the Commission, see GD3-32 to GD3-90.

<sup>20</sup> GD3-83.

<sup>21</sup> GD3-39 to GD-46.

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

<sup>23</sup> GD3-97.

manipulate her into getting the vaccine. But I find there is no evidence to indicate either of these things happened.

[35] I note the Appellant didn't tell the Commission that her employer had no intention of approving any exemptions or that her manager tried to manipulate her into getting the vaccine. I asked the Appellant why she didn't tell the Commission about these things, and she said she didn't think they were relevant.

[36] I don't accept the Appellant's explanation. When the Appellant testified about these things, it was clear to me that she felt they were relevant to her appeal as she spent a few minutes talking about them. I find it is reasonable to believe if she felt they were relevant to her appeal during the hearing, she would have felt the same way when she spoke to the Commission.

[37] I also note the Appellant didn't submit any evidence that her employer had no intention of approving any exemptions or that her manager tried to manipulate her into getting the vaccine. When I asked if she had any evidence besides her testimony, she said she didn't.

[38] Taken together, I'm not persuaded by these arguments. The Appellant couldn't provide a good reason for why she didn't tell the Commission about them beforehand, and she didn't submit any evidence besides her testimony. So, I don't give them much weight here.

[39] I also acknowledge the Appellant feels she is allergic to the COVID-19 vaccine even though her doctor says she isn't, so she couldn't ask for a medical exemption.

[40] But I find this isn't relevant here, unfortunately. I can't consider why the Appellant wasn't able to get a medical exemption from her doctor. The Act and Court say that I must focus on the Appellant's actions leading up to her dismissal, as noted above. When I do that, I find the evidence shows the Appellant ultimately applied for a religious exemption and chose not to get vaccinated (as her employer's policy required) even after it was denied.



[41] I will now turn to the Appellant's reliance on another Tribunal decision (*A.L. v. Canada Employment Insurance Commission*). I will refer to it as A.L.

[42] I note that I'm not bound by prior decisions of the Tribunal. This means that I can decide for myself if I agree with these decisions and choose how much weight to give them if an appellant brings them up in their own appeal.

[43] I acknowledge the Appellant feels A.L. shows she didn't commit misconduct because the Member found the appellant's refusal to get vaccinated isn't misconduct.

[44] I note that in A.L., the Member applied their misconduct analysis when looking at the appellant's collective agreement and what it did and didn't say about vaccinations.<sup>24</sup>

[45] But I disagree with this approach. I find the Act and the Court haven't given me the authority to apply a collective agreement (or an employment contract, in this case) and decide whether the employer rightfully dismissed or suspended an appellant, as noted above. This means the Tribunal isn't the right forum to decide whether an appellant was wrongfully dismissed or suspended. If I start doing this, I exceed my authority as a decision-maker.

[46] Also, I note the Court has recently said that A.L. doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.<sup>25</sup>

[47] So, for these reasons, I won't follow A.L. and don't give it much weight here.

[48] While I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence clearly shows she made a conscious decision not to follow it. She didn't get vaccinated after her employer denied her religious exemption request, which shows that her actions were intentional.

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<sup>24</sup> *A.L. v. Canada Employment Insurance Commission*, SST, paragraphs 29 to 67.

<sup>25</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

[49] I also find the Appellant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead her to being let go.

[50] There is evidence the Appellant knew she could be let go for not following her employer's policy. She said she knew this, as noted above.

[51] There is also other evidence that confirms the Appellant knew she could be let go for not following her employer's policy. This evidence is:

- A letter from her employer, dated October 7, 2021. It says she hasn't gotten vaccinated and doesn't have an approved exemption. If that doesn't change as of October 21, 2021, she'll be in violation of their policy and will face discipline up to and including termination for cause.<sup>26</sup>
- A letter from her employer, dated December 6, 2021. It says her exemption request is denied and to follow their policy, she now needs to get her first COVID-19 vaccine dose within 14 days and her second dose within 28 days of the first dose.<sup>27</sup>
- A letter from her employer, dated December 20, 2021. It says they told her on December 6, 2021 that she had 14 days to get her first dose. That deadline has now passed, so she's in violation of their policy and this letter serves as a written warning. If she doesn't get her first dose within the next 14 days (by January 3, 2022, she'll be placed on unpaid suspension beginning on January 4, 2022, up to and including January 17, 2022. If she continues to not follow their policy, she'll be terminated.<sup>28</sup>
- A letter from her employer, dated February 17, 2022. It says she hasn't followed their policy (by getting vaccinated), so she's being placed on unpaid suspension from February 17, 2022 to March 2, 2022. This is her last chance to comply with

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<sup>26</sup> GD3-32.

<sup>27</sup> GD3-47.

<sup>28</sup> GD3-33.

their policy, and if she doesn't get and provide proof of her first dose by March 2, 2022, she'll be terminated with cause.<sup>29</sup>

- A letter from her employer, dated March 3, 2022. It says they told her numerous times, including in her letter of suspension, that she would be terminated for cause if she didn't provide proof of vaccination. She hasn't done that, so she's terminated for cause effective immediately.<sup>30</sup>

[52] I acknowledge the Appellant didn't think she would be let go because her employer changed their policy deadlines multiple times. But I find this doesn't mean she also still couldn't have known she could be let go. In my view, even though the Appellant's employer did change their policy deadlines, the evidence shows they continued to tell the Appellant she could be let go if she didn't follow their policy, as noted above.

[53] In other words, I find it was entirely possible for the Appellant to believe both things (that she would be able to keep her job but could also be let go) at the same time, especially as she confirmed she knew about her employer's policy and what would happen if she didn't follow it, as noted above.

[54] So, while I acknowledge the Appellant didn't think she would be let go for not following her employer's policy, I find the evidence shows she still should have known she could be let go.

[55] I therefore find the Appellant's conduct is misconduct under the law since she committed the conduct that led to her dismissal (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known her actions would lead to her being let go.

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<sup>29</sup> GD3-89.

<sup>30</sup> GD3-90.

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

[56] Based on my findings above, I find the Appellant lost her job because of misconduct.

[57] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew or ought to have known that refusing to get vaccinated after her employer denied her religious exemption request was likely to cause her to be let go from her job.

**Conclusion**

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

[59] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section