



Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 1008

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

# **Decision**

**Appellant:** M. L.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (513871) dated September 20, 2022 (issued by Service Canada)

---

**Tribunal member:** Bret Edwards

**Type of hearing:** Videoconference

**Hearing date:** March 21, 2023

**Hearing participant:** Appellant

**Decision date:** March 27, 2023

**File number:** GE-22-3487

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost her job. The Appellant's employer said she was let go because she went against their mandatory COVID-19 vaccination policy (by not getting vaccinated).

[4] Even though the Appellant doesn't dispute this happened, she says her employer unfairly asked her to get vaccinated. She also says she didn't think she would be let go for going against her employer's policy.

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

## Matter I have to consider first

### The Charter of Rights and Freedoms

[6] In her Notice of Appeal, the Appellant referred to the Charter of Rights and Freedoms.<sup>2</sup>

[7] I note the Tribunal can't consider any arguments related to the Charter of Rights and Freedoms unless they specifically focus on how EI law (the *Employment Insurance Act* and *Employment Insurance Regulations*) violates the Charter. At the hearing, I told

---

<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.

<sup>2</sup> GD2-5.

the Appellant this and asked if she wanted to make a Charter argument that the Tribunal could consider. She said she didn't.

[8] I note the Appellant went on to refer to the Charter (by saying her employer's mandatory COVID-19 vaccination policy violates her Charter rights) anyway, but she did this knowing that I can't consider this argument here for the reason I've just mentioned.

## **Issue**

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

## **Analysis**

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

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

[11] I find the Appellant lost her job because she went against her employer's mandatory COVID-19 vaccination policy (by not getting vaccinated).

[12] The Appellant and the Commission agree on why the Appellant lost her job. The Appellant says she was let go for going against her employer's policy.<sup>3</sup> Her employer told the Commission the same thing.<sup>4</sup>

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

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

[14] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to decide whether the Appellant's dismissal is misconduct under the Act. It sets out the legal test for

---

<sup>3</sup> GD3-29.

<sup>4</sup> GD3-28.

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

[15] Case law says that to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless it is almost wilful.<sup>6</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>7</sup>

[16] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out his duties toward her employer and that there was a real possibility of being let go because of that.<sup>8</sup>

[17] The Commission has to prove the Appellant was dismissed from her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Appellant was dismissed from her job because of misconduct.<sup>9</sup>

[18] The law doesn't say I have to consider how the employer behaved.<sup>10</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>11</sup>

[19] 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>12</sup> I can

---

<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.

<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 section 31 of the Act.

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

<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] 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 to go against it anyway.<sup>13</sup>

[21] The Appellant says there was no misconduct because her employer unfairly asked her to get vaccinated and she didn't think she would be let go for going against her employer's policy (by not getting vaccinated).<sup>14</sup>

[22] The Appellant's employer told the Commission:<sup>15</sup>

- They dismissed the Appellant on February 17, 2022 for going against their COVID-19 vaccination policy because she didn't get vaccinated.
- They required all employees to get vaccinated because they are a hospital/care facility.
- They told all employees at the end of August 2021 that they had to be vaccinated by October 20, 2021.
- They warned (via letter) all employees who didn't meet this requirement that they might be suspended or terminated.

[23] The Appellant's employer's mandatory COVID-19 vaccination policy says:

- It comes into effect immediately (September 7, 2021).<sup>16</sup>
- All employees are required to follow the policy by getting fully vaccinated.<sup>17</sup>
- All employees are required to attest to their vaccination status and be fully vaccinated by October 20, 2021, unless they have an approved exemption.<sup>18</sup>

---

<sup>13</sup> GD4-3.

<sup>14</sup> GD2-8.

<sup>15</sup> GD3-28.

<sup>16</sup> GD3-38.

<sup>17</sup> GD3-38.

<sup>18</sup> GD3-40 to GD3-42.

- If employees don't follow the policy, they will face progressive action up to and including termination of employment.<sup>19</sup>

[24] The Appellant says:

- She knew about her employer's policy. She couldn't remember how much of it she read but understood there were things being done that were part of the policy.<sup>20</sup>
- She didn't get vaccinated because she had medical reasons and some concerns about the vaccine's safety and long-term consequences.<sup>21</sup>
- She requested a medical exemption from her employer, but they denied it. Her doctor also told her she didn't meet the criteria for a medical exemption.<sup>22</sup>
- Her employer unfairly refused her medical leave in November and December 2021.<sup>23</sup>
- Her employer unfairly asked her to get vaccinated to keep working. Vaccine mandates were never required before and her employer's policy was new.<sup>24</sup> Her job was also low risk to the general population.<sup>25</sup>
- Her employer also unfairly didn't respond directly when she asked them to accept any liability if she got the vaccine and had side effects. They also told her they weren't holding vaccine information sessions anymore when she asked.<sup>26</sup>
- She knew she could be let go if she didn't follow her employer's policy. They had warned her about this.<sup>27</sup>

---

<sup>19</sup> GD3-43.

<sup>20</sup> GD3-46.

<sup>21</sup> GD3-29, GD3-46.

<sup>22</sup> GD3-29, GD3-46.

<sup>23</sup> GD2-43 to GD2-54.

<sup>24</sup> GD2-8.

<sup>25</sup> GD2-2 to GD2-4.

<sup>26</sup> GD2-58 to GD2-62.

<sup>27</sup> GD3-46.

- But she didn't think she would be let go because she hoped her employer would update their policy as the COVID-19 pandemic evolved and new information about the vaccine came out.

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

[26] 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.

[27] I further find the Appellant's actions were intentional as she made a conscious decision to go against her employer's policy.

[28] There is evidence the Appellant knew about her employer's policy. She said she knew about it, as noted above. She also said she requested a medical exemption, which shows she was aware of the policy and its requirements.

[29] 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 medical exemption request, as noted above.

[30] I acknowledge the Appellant feels her employer unfairly asked her to get vaccinated to keep working as her job was low risk to the general population.

[31] I also acknowledge the Appellant feels her employer unfairly didn't respond directly after she asked them to accept any liability for side effects from getting the vaccine and when they told her they weren't holding vaccine information sessions anymore.

[32] But I find these arguments aren't relevant here. As noted above, the Act and the Court say I must focus on the Appellant's actions, not the employer's conduct, when analyzing misconduct.

[33] In other words, I can't look at whether the Appellant's employer acted unfairly for the reasons she says. If the Appellant wants to pursue these arguments, she needs to do that through another forum.

[34] So, while I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence shows she made a conscious decision to go against it. She didn't get vaccinated after her employer denied her medical exemption request, which shows her actions were intentional.

[35] I also find the Appellant knew or should have known that going against her employer's policy could lead to her being let go.

[36] There is evidence the Appellant knew she could be let go if she didn't follow her employer's policy. She said she knew because her employer had warned her about this, as noted above.

[37] There is other evidence the Appellant's employer told her she could be let go if she didn't follow their policy. The evidence is:

- A letter to the Appellant, dated December 17, 2021. It says they expected her to be fully vaccinated by October 20, 2021, and then told her to get her first dose by November 30, 2021. Since she hasn't done that, she's being put on unpaid leave from December 17, 2021 to December 30, 2021 for going against their policy. If she doesn't provide proof of her first dose by December 30, 2021, she will be terminated with cause on that date.<sup>28</sup>

[38] I acknowledge the Appellant didn't think she would be let go for going against her employer's policy because she hoped her employer would update their policy as the COVID-19 pandemic evolved and new information about the vaccine came out.

---

<sup>28</sup> GD2-55.



[39] But I find this doesn't mean the Appellant also still couldn't have known she could be let go. The evidence shows her employer told her this could happen, as noted above.

[40] 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 the consequences of going against it, as noted above.

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

[42] 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.

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

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

[44] 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 medical exemption request was likely to cause her to be let go from her job.

## **Conclusion**

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

[46] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section