



Citation: *LY v Canada Employment Insurance Commission*, 2023 SST 1084

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

## Decision

**Appellant:** L. Y.  
**Representative:** M. Y.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision dated November 15, 2022 (issued  
by Service Canada)

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**Tribunal member:** Suzanne Graves

**Type of hearing:** In person  
**Hearing date:** April 14, 2023  
**Hearing participant:** Appellant's representative  
**Decision date:** May 15, 2023  
**File number:** GE-22-3777

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proved that the Appellant was suspended and later dismissed from her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant can't receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant was suspended, then dismissed from her job as an ultrasound technician at a health care centre. The Appellant's employer told the Commission she was let go because she went against its vaccination policy: she didn't get vaccinated.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. It says she acted deliberately when she decided not to take the vaccine and knew she was likely to lose her job because of that decision. As a result, the Commission decided that she couldn't receive benefits from November 25, 2021.

[5] The Appellant doesn't dispute that this happened, but she argues that going against her employer's vaccination policy isn't misconduct. She says that she had serious concerns about vaccine safety, and whether it might destabilize her existing health condition. She also argues that the employer failed to accommodate her, and that her employment contract specifically recognizes her right to refuse vaccines.

[6] On September 1, 2022, the General Division of the Tribunal decided to summarily dismiss the Appellant's appeal. The Appellant appealed that decision to the Tribunal's Appeal Division (AD), and on November 15, 2022, the AD returned the matter to the General Division. I held a hearing on the appeal on April 14, 2023.

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

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

### **The employer is not a party to the appeal**

[7] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal wrote to the Appellant's employer asking if they wished to be added as a party, but it did not reply to that letter.<sup>2</sup> 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 as there is no evidence to show that it has a direct interest in the outcome of this appeal.

### **I will accept documents sent in after the hearing**

[8] After the hearing the Appellant sent in a copy of her collective agreement and written arguments. I accepted the documents as they are relevant to the issues in this appeal. The Tribunal sent the documents to the Commission and allowed it time to respond. The Commission made no new arguments in reply.

## **Issue**

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

## **Analysis**

[10] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). These laws include the *Canadian Bill of Rights*, and a number of other laws that protect rights and freedoms.

[11] The Tribunal isn't allowed to consider whether an action taken by an employer violates a claimant's rights or to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any of the other laws that protect rights and freedoms. You must go to a different tribunal or a court to address this issue.

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<sup>2</sup> The Tribunal's notice to the employer is at GD5.

[12] 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>3</sup> My role is to decide whether a claimant is disqualified from receiving EI benefits because they lost their employment due to misconduct.

[13] To answer the question of whether the Appellant was dismissed 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?**

[14] The Appellant lost her job because she went against her employer's COVID-19 vaccination policy.

[15] The Commission says that the Appellant was dismissed because she failed to get vaccinated as required by the employer's immunization policy.

[16] The Appellant doesn't dispute that the employer dismissed her for refusing to get vaccinated. She argues that she never consented to the vaccination requirement and had serious health concerns about taking it. She also says the policy was in direct conflict with her employment contract.

[17] I find that the Appellant was dismissed because she did not comply with the employer's vaccination policy.

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

[18] The *Employment Insurance Act* (EI 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 EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

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<sup>3</sup> See sections 30 and 31 of the EI Act.

[19] 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>

[20] 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>

[21] The law doesn't say I have to consider how the employer behaved.<sup>8</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>9</sup>

[22] I have to focus on the EI Act only. I can't make any decisions about whether the Appellant has options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for her aren't for me to decide.<sup>10</sup>

[23] The Commission has to prove that the Appellant lost her job because of misconduct. It 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 lost her job because of misconduct.<sup>11</sup>

## **The Commission's argument**

[24] The Commission says there was misconduct because:

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

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

<sup>8</sup> See section 30 of the EI Act.

<sup>9</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the employer had a vaccination policy
- the employer clearly notified the Appellant of its expectations about getting vaccinated
- the employer sent emails to the Appellant to communicate what it expected
- the Appellant knew or should have known what would happen if she didn't follow the policy

## **The Appellant's argument**

[25] The Appellant says there was no misconduct. She argues that she didn't take the vaccine because she had a medical condition and was concerned about adverse health consequences. She was willing to follow any other protocols, but the vaccine could have caused a serious reaction, even a life-threatening situation.<sup>12</sup>

[26] She says her employer discriminated against her and should have accommodated her disability. Two doctors said they couldn't guarantee that the vaccine was safe for her, but they could not issue an exemption since the criteria weren't broad enough to include her medical condition.

[27] The Appellant also says that dismissal is contrary to the terms of her employment agreement, which allows her to refuse vaccines. She argues that an employment contract is different from a policy, and the employer can't unilaterally impose a new employment condition. She referred to another decision of the General Division of this Tribunal<sup>13</sup> in which the Tribunal decided that the Commission didn't prove that the Appellant had breached an expressed or implied duty arising out of their employment contract.

## **My findings**

[28] I find that the reason the Appellant lost her job is misconduct under the law.

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<sup>12</sup> The Appellant makes these arguments at GD2-9.

<sup>13</sup> *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

[29] The employer's vaccination policy states that all employees must be fully vaccinated against COVID-19 unless they have written proof of a medical exemption.<sup>14</sup>

[30] The employer sent the Appellant a copy of the vaccination policy issued on September 7, 2021, and updated on November 24, 2021. The policy states that employees must provide evidence that they have received a first dose of the vaccine by November 25, 2021. It also says that if proof is not provided by that date, employees will be placed on an unpaid leave of absence. If proof of a first dose is not provided by December 3, 2021, employees will be terminated.<sup>15</sup>

[31] The Appellant doesn't dispute that the employer informed her about the vaccination policy requirements and the consequences of not following them.

[32] The Appellant's employer decided, in the context of a global pandemic, to follow public health recommendations to change the terms of employees' contracts to impose a vaccination policy. This policy required its employees to be vaccinated against COVID-19. It is well-established law that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act.<sup>16</sup>

[33] An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. So, when the employer implemented this policy as a requirement for all employees, the policy became a condition of the Appellant's employment.

[34] I acknowledge the recent decision of the General Division of this Tribunal in 2022-SST-1428. But the courts and the Tribunal's Appeal Division have held, in similar circumstances, that the Tribunal is not the appropriate forum through which a claimant can obtain the remedy they are seeking.<sup>17</sup>

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<sup>14</sup> This part of the employer's policy is at GD3-28.

<sup>15</sup> This policy requirement is set out at GD3-29.

<sup>16</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

<sup>17</sup> In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found that it was a matter for another forum. See also *GD v Canada Employment Insurance Commission*, 2022 SST 957.

[35] Questions about whether the employer's policy had any effect on occupational health and safety, whether it violated her contract of employment, or whether it breached the Appellant's human rights are not matters for me to decide.<sup>18</sup>

[36] I find that the Commission has proved there was misconduct because the employer had a vaccination policy that required all employees to be vaccinated against COVID-19.

[37] The employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated. So, the Appellant knew or should have known the consequence of not following the employer's vaccination policy.

[38] I have compassion for the Appellant's situation and understand why she declined to take the COVID-19 vaccine. But I have to follow the rules set out in the EI Act and cannot make exceptions for special cases, even on the basis of compassion.<sup>19</sup>

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

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

[40] This is because the Appellant'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.

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<sup>18</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102. In *Cecchetto* the Applicant argued that the Tribunal had failed to address issues including bodily integrity, consent to medical testing, and the safety and efficacy of the COVID-19 vaccines. The Court stated that "the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address."

<sup>19</sup> In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).



## **Conclusion**

[41] The Commission has proved that the Appellant lost her job because of misconduct. Because of this, the Appellant is disentitled from receiving EI regular benefits from November 25, 2021, to December 2, 2021, and disqualified from receiving benefits from December 3, 2021.

[42] The law requires me to dismiss the appeal.

Suzanne Graves  
Member, General Division – Employment Insurance Section