



Citation: *VM v Canada Employment Insurance Commission*, 2023 SST 1069

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

## Decision

**Appellant:** V. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (482418) dated June 29, 2022 (issued by Service Canada)

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**Tribunal member:** Elizabeth Usprich

**Type of hearing:** Teleconference

**Hearing date:** January 26, 2023

**Decision date:** January 30, 2023

**File number:** GE-22-2605

## 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 suspended from her job. The Claimant's employer said that she was suspended because she did not comply with a mandatory vaccination policy by providing proof of her vaccination status.

[4] Even though the Claimant doesn't dispute that this happened, she says that her medical information is private, and she should not be forced to share that information.

[5] The Commission accepted the employer's reason for the dismissal. 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.

## Matter I have to consider first

### The Claimant wasn't at the hearing

[6] The hearing was scheduled for January 26, 2023. The Claimant did not attend.

[7] A hearing can go ahead without the Claimant if she got the notice of hearing.<sup>2</sup> I find that the Claimant got the notice of hearing, because she provided the Tribunal an email address on August 5, 2022, and consented to communication via email. The Tribunal sent hearing documents, including the notice of hearing, to that email address. The Tribunal's records do not show that any of the emails were undeliverable. The

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

<sup>2</sup> See section 12 of the *Social Security Tribunal Regulations (Regulations)*.

Tribunal also telephoned the Claimant and left a detailed voicemail reminding the Claimant of the hearing date on January 19, 2023.

[8] When the Claimant did not attend the hearing, I asked Tribunal staff to telephone her and ask if she intended to participate. A Tribunal staff member telephoned the Claimant on January 26, 2023, but was not able to reach her and left a voicemail. As of the date of writing, the Tribunal has received no further communication from the Claimant.

[9] Since I am satisfied that the Claimant received notice of the hearing, the hearing took place when it was scheduled, even though the Claimant did not attend.

## **Issue**

[10] Did the Claimant get suspended from her job because of misconduct?

## **Analysis**

[11] 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>

[12] 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 was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

## **Why did the Claimant get suspended from her job?**

[13] I accept that the Claimant was suspended from her job because she did not follow her employer's mandatory vaccination policy. The Claimant does not dispute this. The Claimant does not feel that she should have to disclose her personal medical information.

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

[14] The Claimant says that she did not disclose her vaccination status or did not get fully vaccinated. The Claimant agreed that her employer's policy required employees to get fully vaccinated and disclose their vaccination status. The Claimant agrees that she was suspended from her job because she did not disclose her vaccination status or did not get vaccinated. The Claimant does not feel it is misconduct for not following the policy. The Claimant feels she should be entitled to benefits.

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

[15] The reason for the Claimant's dismissal is misconduct under the law.

[16] 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.

[17] 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 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>6</sup>

[18] 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>7</sup>

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<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.

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

[19] The law doesn't say I have to consider how the employer behaved.<sup>8</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>9</sup>

[20] 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. 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>10</sup>

[21] 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>11</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[22] 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>12</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.

[23] 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>13</sup>

[24] 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

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<sup>8</sup> See section 30 of the 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 *Minister of Employment and Immigration v Bartone*, A-369-88.

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

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

<sup>13</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

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>14</sup>

[25] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.<sup>15</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 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>16</sup>

[26] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.<sup>17</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>18</sup>

[27] These cases aren't 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.

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

- the employer had a vaccination policy;
- the employer clearly notified the Claimant about its expectations about getting vaccinated and/or telling it whether she had been vaccinated;

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<sup>14</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>15</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>16</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>17</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>18</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- the employer sent emails to the Claimant to communicate what it expected; and
- the Claimant knew or should have known the consequences of not complying with the policy.

[29] The Claimant says that there was no misconduct because the employer's vaccination policy did not have “informed consent or right, or other treatment options, in case [she was] to get sick”.<sup>19</sup> The Claimant further said “I am not going to disclose a vaccination status to [employer] as my medical health is protected by privacy laws. My medical health and choices are private and confidential and I am not required to disclose to anyone. The [employer] does not have the right to ask for a vaccination status”.<sup>20</sup> was never something that she agreed to, and it was not in her employment contract.

[30] The Claimant does not seem to be disputing that her employer had a vaccination policy and that she was aware of it. The Claimant does not seem to be disputing that the vaccination policy included that employees were required to disclose their vaccination status. The Claimant seems to take issue with having to disclose her status.

[31] The Claimant says that there were multiple communications about the vaccination policy. The Claimant provided emails and a copy of her employer's policy to the Commission. The policy has an effective date of September 21, 2021.<sup>21</sup> The policy itself applies to “client sites where employees are required to receive vaccinations”.<sup>22</sup> It also says, “employees not in compliance with the COVID-19 and other mandatory vaccination policy of the site where they work will be placed on unpaid leave until the human resources department determines their employment status”.

[32] The policy also says “employees are required to comply with the vaccination policy at Client sites and will, in most cases, be given up two weeks’ notice to comply

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<sup>19</sup> See GD2-9.

<sup>20</sup> See GD2-11.

<sup>21</sup> See GD3-25.

<sup>22</sup> See GD3-25.

[sic]. Employees who are not vaccinated will be removed from the site until they comply with the Client's Policy on vaccinations. Where exceptions are granted on medical grounds, the employee must comply with the COVID testing cycle at their own cost unless the client specifies that they will pay."<sup>23</sup>

[33] The policy includes non-compliance consequences: "Employees who do not comply with the Policy may be subject to discipline, up to and including dismissal".<sup>24</sup>

[34] The Claimant provided the Commission with a copy of an email that she received from her employer on October 12, 2021. This email reminded employees, as a follow-up to an October 1, 2021 email, that the employer was asking for copies of vaccination certificates.<sup>25</sup> The employer asked employees to provide this information on or before October 18, 2021.

[35] On October 27, 2021, the employer sent another reminder email to all staff. The email again asks for employees' vaccination status and asks for the information by end of day on October 28, 2021.<sup>26</sup>

[36] The Claimant received a personal email from her employer on November 19, 2021, about a particular location contract's end. The email specifically asks if the Claimant wants to continue working for the employer as there is other work available. The email also asks if the Claimant is fully vaccinated.<sup>27</sup>

[37] On December 13, 2021, the Claimant received a letter of suspension for failing to comply with the employer's vaccination policy.<sup>28</sup> The letter says that the Claimant is suspended without pay, until she provides proof of vaccination.

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<sup>23</sup> See GD3-25.

<sup>24</sup> See GD3-27.

<sup>25</sup> See GD3-31.

<sup>26</sup> See GD3-33.

<sup>27</sup> See GD3-34.

<sup>28</sup> See GD3-35.



[38] As noted above, in *McNamara, Paradis and Mishibinijima*<sup>29</sup> these Court cases make it clear that the focus must be on what a claimant has or has not done.

### **Elements of misconduct?**

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

[40] There is no dispute that the employer had a vaccination policy. The Claimant knew about the vaccination policy and knew that the consequences for not following the policy included being put on an unpaid leave of absence. I find that the Claimant made her own choice not to reveal her vaccination status or not get vaccinated. Disclosing vaccination status was part of her employer's policy. This means that the Claimant's choice to not disclose her vaccination status was conscious, deliberate and intentional.

[41] The Claimant's employer made it clear that an employee had to disclose their vaccination status or have an exemption. The Claimant did not ask for an exemption.<sup>30</sup> The Claimant's employer made it clear that, without an exemption, an unvaccinated employee, or an employee that did not disclose their vaccination status, could face discipline, including being found to no longer be fit to work for the employer.<sup>31</sup> The Claimant said that she was aware of this risk to her employment. I therefore find that the Claimant knew there was a real possibility that she could be let go for not following the policy.

[42] The Claimant refused to disclose her vaccination status and did not have an exemption. The policy required all employees to either have an exemption or get vaccinated. The Claimant was aware of these requirements. This means that she was not in compliance with her employer's policy. That means that she could not work and carry out her duties owed to her employer. This is misconduct.

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<sup>29</sup> See paragraphs 26 to 30 of this decision above.

<sup>30</sup> See GD3-38.

<sup>31</sup> See GD3-26.

[43] By not getting an exemption, or by not disclosing her vaccination status, the misconduct led to the Claimant losing her employment, or being placed on a leave of absence without pay.

[44] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant did not follow a mandatory vaccination policy or get an exemption for doing so and knew that, as a result, being put on a leave of absence was a real possibility.

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

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

[46] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to say whether she had been vaccinated was likely to cause her to be suspended.

### **Conclusion**

[47] 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.

[48] This means that the appeal is dismissed.

Elizabeth Usprich  
Member, General Division – Employment Insurance Section