



Citation: *LD v Canada Employment Insurance Commission*, 2023 SST 1206

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

Decision

Appellant: L. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (548418) dated November 14, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: June 6, 2023

Hearing participant: Appellant

Decision date: June 8, 2023

File number: GE-22-4105

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.¹

Overview

[3] The Appellant lost her job. The Appellant's employer (an airline) said she was let go because she didn't follow their mandatory COVID-19 vaccination policy (by getting vaccinated).

[4] Even though the Appellant doesn't dispute this happened, she says her employer acted unfairly by selecting applying their policy and treated her unfairly in the lead up to her dismissal. She also says the Commission didn't fairly assess her claim for benefits.

[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.

Issue

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

Analysis

[7] 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.

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

Why did the Appellant lose her job?

[8] I find the Appellant lost her job she didn't follow her employer's mandatory COVID-19 vaccination policy (by getting vaccinated).

[9] The Appellant and the Commission don't entirely agree on why the Appellant lost her job. The Commission says the reason the employer gave is the real reason for the dismissal. The employer told the Commission the Appellant lost her job because she didn't follow their mandatory COVID-19 vaccination policy, which the federal mandate required them (as an airline) to introduce.²

[10] The Appellant partially disagrees. She agrees she didn't get vaccinated but testified her termination letter only says she was let go for not following the federal vaccination mandate and doesn't mention her employer's vaccination policy.

[11] I note the Appellant's termination letter, dated January 10, 2022, says she was let go for "non-compliance with the Federal Vaccination Mandate." But I note it also says her 7 weeks of unpaid leave (which happened prior to her dismissal) gave her "an opportunity to comply with the Mandate and Porter's COVID-19 Vaccination Policy."³

[12] Based on this evidence, I find the Appellant's employer's mandatory COVID-19 vaccination policy sprang directly from the federal vaccination mandate. This is what her employer told the Commission, as discussed above. In my view, this also explains why her termination letter mentions both the policy and the federal mandate as the mandate was the reason the policy existed in the first place.

[13] In other words, I find the exact wording on the Appellant's termination letter doesn't change the fact there is evidence to show she was let go for not following her employer's policy (and by extension the federal mandate) as required.

² GD3-25, GD3-55.

³ GD3-53.

Is the reason for the Appellant's dismissal 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 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.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless it is almost wilful.⁵ 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.⁶

[16] There is misconduct if the Appellant knew or should have known 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.⁷

[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.⁸

[18] I only have the power to decide questions under the Act. 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.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[19] The Commission says there was misconduct because the Appellant knew her employer had a mandatory COVID-19 vaccination policy and knew she could be let go for not following it, but she chose not to follow it anyway.¹⁰

[20] The Appellant says there was no misconduct because her employer didn't apply their policy fairly to all employees and didn't address her concerns about the COVID-19 vaccine before she was let go. She also says the Commission didn't assess her claim fairly.¹¹

[21] The Appellant's employer told the Commission¹²:

- The federal vaccination mandate said all employees working in aviation industry (like the Appellant) must be vaccinated.
- They dismissed the Appellant for not following the vaccination mandate and their own vaccination policy.
- Their policy allowed for religious and medical exemptions, but the Appellant didn't ask for either.
- The Appellant knew she could be let go if she didn't get vaccinated or an approved exemption.
- They initially warned the Appellant in October that she needed to be vaccinated in order to keep working and, if she didn't do that, she would be placed on leave as of November 14, 2021.
- They then put the Appellant on unpaid leave to give her time to get vaccinated.
- But the Appellant didn't get vaccinated while on unpaid leave, so they let her go as of January 10, 2022.

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

¹⁰ GD4-3.

¹¹ GD2-6.

¹² GD3-25, GD3-55.

- It applies to all employees.¹³
- All employees must be fully vaccinated and provide proof of vaccination.¹⁴
- Medical and religious exemptions will be considered on an individual basis.¹⁵
- Employees who don't follow the policy may be subject to disciplinary action, up to and including termination of employment.¹⁶

[23] The Appellant's employer also sent the Commission the following evidence:

- An email to the Appellant, dated October 19, 2021. It says she must provide proof of her first COVID-19 vaccine dose by October 27, 2021 to ensure she follows their COVID-19 vaccination policy. Following a two-week transition period, employees who haven't submitted proof of at least their first dose will be initially placed on unpaid leave as of November 15, 2021. Beyond this date, employees who are still unvaccinated may be subjected to further disciplinary action, up to and including termination.¹⁷
- An email to the Appellant, dated November 9, 2021. It says they are hopeful she'll schedule her first vaccine dose and to send proof no later than November 14, 2021 to avoid being placed on unpaid leave.¹⁸
- A letter to the Appellant, dated November 12, 2021. It says she hasn't provided proof of her first COVID-19 dose, so she's being placed on unpaid leave as of November 15, 2021 for seven weeks (ending January 3, 2022) for non-compliance with their policy and the federal mandate.¹⁹
- The Appellant's termination letter, January 10, 2022. It says she was put on leave on November 15, 2021 and reminded on December 16, 2021 of the need

¹³ GD3-45.

¹⁴ GD3-45.

¹⁵ GD3-45.

¹⁶ GD3-46.

¹⁷ GD3-49.

¹⁸ GD3-50.

¹⁹ GD3-51 to GD3-52.

to follow their policy and the federal mandate by getting vaccinated. But since she hasn't, she has now been terminated effective immediately.²⁰

[24] The Appellant says²¹:

- She knew about her employer's mandatory COVID-19 vaccination policy.
- She didn't ask for a medical or religious exemption. She had some medical concerns about getting the vaccine, but ultimately didn't pursue a medical exemption because the options for getting one were narrow.
- She didn't get vaccinated by her employer's policy deadline.
- She knew she could be let go if she didn't follow her employer's policy.
- But she was never told she would be let go and the policy didn't say that.
- She also hoped there would be another option for her to keep her job (such as staying on unpaid leave) instead of being let go.
- Her employer didn't apply their policy fairly to all employees. They dismissed her but didn't dismiss others who they had also put on unpaid leave for not getting vaccinated.
- She told her employer she wasn't refusing the vaccine; she just had some concerns she wanted to have addressed first. She sent them some questions about the vaccine, but they didn't respond.
- Her work environment got very stressful near the end. She noticed some hours missing from her pay, but her employer didn't correct it before they let her go. She's now submitted a complaint to another administrative body about it.
- She didn't work with the general public, so wasn't a risk to them as an unvaccinated person.

²⁰ GD3-53 to GD3-54.

²¹ GD3-29 to GD3-30, GD3-35, GD6-2, GD7-3 to GD7-4, GD-8 (audio recording), GD9-1 to GD9-28.

- Some unvaccinated employees returned to work for her employer after the federal vaccination mandate was lifted in June 2022 even though her employer still had a vaccination policy.
- The Commission didn't assess her claim fairly. Agents called her outside working hours (on the weekend) and included false information about her in their reports after speaking with her employer. The agent who made the initial decision to deny her benefits also made this decision without speaking with her employer first.

[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 not to follow 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.

[29] There is also evidence the Appellant chose not to follow her employer's policy. She said she didn't get vaccinated or have an approved exemption as the policy required, as noted above.

[30] I acknowledge the Appellant feels her employer didn't apply their policy fairly to all employees because they dismissed her but didn't dismiss others who were also on unpaid leave for not getting vaccinated.

[31] But I find this argument isn't relevant here. This is because the Act and the Court say I must focus on the Appellant's actions (and not the employer's conduct) leading up to her dismissal when analyzing misconduct, as discussed above. There's also no

evidence the Appellant's employer violated their own policy by dismissing the Appellant for not getting vaccinated since the policy says they could do this, as noted above.

[32] In other words, I can't consider why the Appellant's employer dismissed the Appellant but not other employees in the same situation. This relates to an issue (the employer's conduct) that goes well beyond what I can look at here. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[33] I also acknowledge the Appellant feels her employer acted unfairly by asking her to get vaccinated even though she wasn't a safety risk, not responding to her questions about the COVID-19 vaccine, and docking hours from her pay.

[34] But I find this argument isn't relevant here either, unfortunately. This is because I must look at the Appellant's actions (and not the employer's conduct) leading up to her dismissal when analyzing misconduct, as discussed above. This means I can't consider whether her employer acted unfairly for the reasons she says. If the Appellant wants to pursue this argument, she needs to do that through another forum too. She says she submitted a complaint about the pay issue to another administrative board, so it appears she has started this process.

[35] I acknowledge the Appellant also says some unvaccinated employees returned to work after the federal vaccine mandate was lifted in June 2022 even though her employer still had their policy in place.

[36] But once again, I find this argument isn't relevant here. This is because I must look at the Appellant's actions **leading up to** her dismissal when analyzing misconduct, as discussed above. In this case, she's referring to events that happened several months **after** she was let go (in November 2021). So, if the Appellant wants to pursue this argument further, she needs to do that through another forum too.

[37] I also acknowledge the Appellant feels the Commission didn't assess her claim fairly for the reasons she says, as noted above.

[38] As discussed above, I must focus only on applying the legal test for misconduct (based on the court decisions) here, which means looking at the Appellant's actions leading up to her dismissal, as discussed above. This means I **can** look at whether the Commission made a mistake in how it applied that same legal test when it assessed the Appellant's claim for benefits. But it also means I **can't** look at whether the Commission treated the Appellant unfairly in some other way unrelated to the legal test when it assessed her claim.

[39] In this case, I understand the Appellant feels the Commission didn't fairly assess her claim. But I find she hasn't shown the Commission made a mistake in how it applied the legal test for misconduct here. I make this finding for two reasons.

[40] First, the Appellant says the Commission relied on incorrect information from her employer about why she didn't get vaccinated.²² I believe her as I find her to be credible and have no reason to doubt what she says. But I find the Appellant has also confirmed she chose not to get vaccinated, as discussed above, and this choice is what the legal test focuses on, not her specific reasons for why she didn't get vaccinated.

[41] In other words, even though I accept the Commission's record doesn't accurately show why the Appellant didn't get vaccinated, I find this doesn't change the fact the Appellant made a personal choice not to get vaccinated, which shows her decision not to follow her employer's policy (by getting vaccinated) was intentional. This means I find the Commission didn't make any mistake in how it applied the legal test here.

[42] Second, I find the Appellant's other reasons for why the Appellant didn't fairly assess her claim don't relate to how it applied the legal test for misconduct. In my view, these reasons (the Commission called her on the weekend and made an initial decision on her claim without first speaking to her employer) don't touch on any aspect of the Commission's specific analysis of the evidence. Instead, they focus on other issues related more to client service and transparency, which goes well beyond what I can look at here, unfortunately.

²² GD3-25.

[43] Also, I note the Commission's records indicate it spoke to the Appellant's employer on August 22, 2022²³, which was one day **before** it made its initial decision on her claim (August 23, 2022).²⁴ This means I find the Commission did speak to the Appellant's employer before it made its initial decision, contrary to what the Appellant says.

[44] So, I find the Appellant hasn't shown the Commission made a mistake in how it applied the legal test for misconduct. But I understand she still feels the Commission didn't treat her fairly when it assessed her claim, so she might wish to reach out to the Commission directly to discuss these concerns further.

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

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

[47] There is also evidence the Appellant's employer told her she could be let go if she didn't get vaccinated by their policy deadline. They sent her emails on October 19, 2021 and November 9, 2021 and a letter on November 12, 2021 about it, as noted above.

[48] I acknowledge the Appellant also says she didn't know she would be let go if she didn't follow her employer's policy because the policy only says she could be let go in that situation, not that she would be let go, and nobody ever told her she would be let go.

[49] I note the Appellant is correct in saying that her employer's policy doesn't specifically say she would be let go if she didn't follow the policy. But I find the case law on misconduct doesn't say that specific threshold needs to be met. Instead, as discussed above, case law says there is misconduct if the Appellant knew or should

²³ GD3-25.

²⁴ GD3-26.

have known there was a real possibility of being let go because of her actions. And I find the evidence shows this was the situation the Appellant faced prior to being let go.

[50] In other words, I find the Appellant knew or should have known she could be let go if she didn't follow her employer's policy. Her employer's policy said she could be let go for this reason and she was aware of that, which I find shows she should have known at the very least that there was a real possibility she could in fact be let go.

[51] I also acknowledge the Appellant says she hoped there might be another way for her to keep her job (such as staying on unpaid leave) instead of being let go.

[52] But I find this doesn't mean the Appellant couldn't have still known she could be let go for not following her employer's policy. In other words, it was entirely possible for her to believe both things (hoping she could keep her job and knowing she could be let go) at the same time, especially as she knew about her employer's policy and what could happen to employees who didn't follow it, as discussed above.

[53] So, I find the evidence shows the Appellant knew or should have known she could be let go for not following her employer's policy.

[54] 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 dismissed.

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

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

[56] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew or ought to have known that not getting vaccinated (as her employer's policy required) was likely to cause her to be let go from her job.

[57] The Appellant says she's entitled to EI because she has been contributing to it for many years.²⁵

[58] I understand the Appellant's argument and sympathize with her situation. But Employment Insurance isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to get benefits. In this case, the Appellant doesn't meet those requirements as she was dismissed from her job because of misconduct.

Conclusion

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

[60] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section

²⁵ GD2-6.