



Citation: *VM v Canada Employment Insurance Commission*, 2023 SST 1715

**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:** Kristen Thompson

**Type of hearing:** In writing

**Decision date:** October 25, 2023

**File number:** GE-23-2270

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant 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 Appellant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant was suspended from her job. The Appellant's employer says that she was suspended because she went against its vaccination policy: she didn't get vaccinated or didn't say whether she had been vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. She says that the employer's policy is unreasonable, and against several laws and legal principles.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended from her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

## Issue

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

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits, until certain conditions are met.

## Analysis

[7] 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>2</sup>

[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 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 that the Appellant lost her job because she went against her employer's vaccination policy.

[10] The Appellant told the Commission that her employer implemented a vaccination policy, and she was suspended for not following the policy.<sup>3</sup>

[11] The employer told the Commission that the Appellant was suspended because she didn't follow its vaccination policy.<sup>4</sup>

[12] The Commission says that the Appellant lost her job because she went against her employer's vaccination policy.

[13] I find that it's undisputed between the parties that the Appellant lost her job because she went against her employer's vaccination policy.

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

[14] The reason for the Appellant's suspension is misconduct under the law.

[15] 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

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<sup>2</sup> See sections 30 and 31 of the Act.

<sup>3</sup> See GD3-17.

<sup>4</sup> See GD3-35 and 36.

Appellant's suspension 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.

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

[17] 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 suspended because of that.<sup>8</sup>

[18] 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>

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

[20] The Commission has to prove that the Appellant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This

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<sup>5</sup> See *Mishibinjima 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 *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See section 30 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.

means that it has to show that it is more likely than not that the Appellant was suspended from her job because of misconduct.<sup>12</sup>

[21] The Commission says that there was misconduct because:<sup>13</sup>

- the employer had a vaccination policy
- the employer clearly notified the Appellant about the policy, deadlines, and consequences for not following the policy
- the employer sent the Appellant multiple reminders of the policy and its deadlines
- the Appellant didn't seek a medical exemption from the policy
- the Appellant knew or should have known what would happen if she didn't follow the policy

[22] The Appellant says that there was no misconduct because:<sup>14</sup>

- the policy is unreasonable and not part of her employment contract
- other safety measures are available, including the use of personal protective equipment and working outdoors
- there is no long-term data on the vaccine's efficacy or safety
- the policy is against several laws and legal principles, including informed consent, bodily integrity, privacy laws, the Criminal Code, the Nuremburg Code, and the Employment Standards Act
- there is no federal or provincial legislation demanding vaccination

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<sup>12</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>13</sup> See GD4-3 and 4.

<sup>14</sup> See GD2, AD6, and RGD4.

[23] The employer's COVID-19 vaccination policy is dated September 21, 2021. It says that:<sup>15</sup>

- employees who aren't vaccinated will be removed from the workplace until they comply with the policy
- medical accommodation to the policy may be approved by the employer
- employees that don't follow the policy will be placed on unpaid leave

[24] The Appellant says that she didn't disclose her vaccination status to her employer.<sup>16</sup> She told the Commission that she didn't speak with her doctor about getting a medical exemption to the policy.<sup>17</sup>

[25] The Appellant told the Commission that the employer implemented its vaccination policy in September 2021. She says that the employer delayed the deadline to comply from October 2021 to November 15, 2021.<sup>18</sup>

[26] On the following dates, the employer told the Appellant about the requirements and the consequences of not following the policy:

- the employer emailed the Appellant on October 12, 2021, to say that employees are to send copies of their vaccination certificates by October 18, 2021<sup>19</sup>
- the employer emailed the Appellant on October 27, 2021, to remind employees to send their vaccination certificates by October 28, 2021<sup>20</sup>

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<sup>15</sup> See GD3-25 to 27.

<sup>16</sup> See GD2-11.

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

<sup>18</sup> See GD3-24.

<sup>19</sup> See GD3-31.

<sup>20</sup> See GD3-33.

- the employer sent a letter to the Appellant on December 13, 2021, to say that she didn't follow the policy and she is suspended until she can provide proof that she is fully vaccinated against COVID-19<sup>21</sup>

[27] I find that the Commission has proven that there was misconduct because:

- the employer had a policy that required employees to be vaccinated against COVID-19 and prove that they are vaccinated, or face suspension
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated and telling it whether they have been vaccinated
- the employer sent written correspondence to the Appellant several times to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

[28] The question of whether the employer changed the Appellant's employment contract isn't for me to decide. This was recently confirmed by the Federal Court. The Court said that by making a personal and deliberate choice not to follow the employer's vaccination policy, the employee breached duties owed to his employer and lost his job because of misconduct under the EI Act. The Court said that there are other ways the employee's claim can be brought forward in the legal system.<sup>22</sup>

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<sup>21</sup> See GD3-35.

<sup>22</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

### **So, was the Appellant suspended because of misconduct?**

[29] Based on my findings above, I find that the Appellant was suspended because of misconduct.

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

### **Conclusion**

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

[32] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section