



Citation: *YS v Canada Employment Insurance Commission*, 2023 SST 1779

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

Decision

Appellant: Y. S.
Representative: Karl Sadowski

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (595594) dated June 1, 2023
(issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: In writing

Decision date: September 11, 2023

File number: GE-23-1722

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost 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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant is a registered nurse. She was dismissed from her job on October 22, 2021.²

[4] The Appellant's employer told the Commission that she was dismissed for not following its COVID-19 vaccination policy.³

[5] The Appellant agrees that she didn't get vaccinated. She knew that this went against her employer's policy.⁴ She says going against her employer's vaccination policy isn't misconduct under the *Employment Insurance Act* (Act) because individuals have rights to bodily autonomy.⁵

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

Issue

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

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

² See record of employment on page GD3-21.

³ See page GD3-23 and GD3-31.

⁴ For example, see page GD3-25.

⁵ See page GD3-25.

Analysis

[8] 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.⁶

[9] I have to answer these two questions: Why did the Appellant lose her job? Was the reason misconduct under the law?

Why the Appellant lost her job

[10] It is undisputed that:

- The employer had a vaccination policy.
- The vaccination policy said that employees had to provide proof that they had received the COVID-19 vaccination. If they did not do so, they would be dismissed.
- There were some exemptions to the vaccination policy.
- The Appellant knew about the policy. She asked for an exemption. The employer refused her request.
- The Appellant didn't get vaccinated. This violated the vaccination policy.
- The Appellant knew she would be terminated if she didn't get vaccinated.⁷
- The employer dismissed the Appellant because she violated its vaccination policy.
- The Appellant's union has filed a grievance on her behalf.⁸

⁶ See sections 30 and 31 of the Act.

⁷ See page GD3-11.

⁸ See page GD6-70.

[11] I find that the Appellant lost her job because she didn't follow her employer's vaccination policy.⁹ This violated the employer's vaccination policy. So the employer dismissed her.

What misconduct under the law means

[12] 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 means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.¹⁰

[13] The 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.

[14] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹¹ Misconduct also includes conduct that is so reckless that it is almost wilful.¹² 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.¹³

[15] 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.¹⁴

What the Commission says

[16] The Commission says that there was misconduct because:¹⁵

⁹ This is what the employer told the Commission, and what the Appellant said on her application form.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹³ See *Attorney General of Canada v Secours*, A-352-94.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁵ See pages GD4-2 to GD4-4.

- The employer had a vaccination policy.
- The Appellant knew about the employer's mandatory vaccine policy, its deadlines, and the consequences of non-compliance.
- The Appellant didn't get vaccinated, even though her exemption request was denied.
- The Appellant chose not to comply with the policy before the deadline because of her beliefs.
- The Appellant knew that she would be terminated if she didn't follow the employer's vaccination policy.

What the Appellant says

[17] The Appellant says that she didn't want to get vaccinated because she was concerned the vaccination would affect her health.¹⁶ When she talked to her manager, she was told that she had to have the vaccination or be terminated.¹⁷

[18] The Appellant argues that:¹⁸

- She worked for the employer for about 23 years. She was hardworking, with an unblemished work record.
- The employer accommodated her during the peak of the pandemic.
- She was terminated because she exercised her right to bodily autonomy and didn't comply with the employer's policy. This doesn't amount to misconduct under the law. The employer didn't have just cause to terminate her.

¹⁶ See page GD3-10 of the Appellant's application form.

¹⁷ See page GD3-11 of the Appellant's application form.

¹⁸ The Appellant's written submissions start on page GD6-60.

- Non-compliance with the employer's policy or breach of contract does not disqualify her from her right to collect EI benefits.
- There was no implied duty to get vaccinated when she was hired, and it isn't a bona fides condition of employment.
- There was no contractual or other legal obligation (either through the collective agreement or by law) for the Appellant to be vaccinated.
- The employer isn't allowed to insert new conditions arbitrarily and unilaterally into the employment contract. So the Appellant's non-compliance was constructive dismissal.
- She continues to litigate the employer's change to her record of employment, which if corrected, will change her entitlement to EI benefits.

The Appellant's actions led to her dismissal

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

- The employer had a vaccination policy that said employees who didn't provide proof of vaccination would be dismissed.
- The Appellant knew about the policy.
- She chose not to get vaccinated. She chose not to follow the policy.
- Her decision not to follow the policy was a conscious, deliberate and intentional act.
- She knew that she'd be dismissed if she didn't follow the policy.¹⁹

¹⁹ On her application for benefits (page GD3-11) she wrote that her employer told her she'd be dismissed unless she had the medical procedure (vaccination).

Some recent case law

[20] I reviewed all cases the parties mentioned.

[21] In *AL v Canada Employment Insurance Commission*, 2022 SST 1428, a member of the Tribunal's General Division decided that the claimant hadn't been suspended from her job because of misconduct when she went against the employer's vaccination policy. That Tribunal member found that the claimant had a right to decide whether to accept medical treatment, and that even though exercising that right went against the employer's policy, it wasn't misconduct under the Act.

[22] I am not going to follow the AL decision, because:

- I don't agree with the rational. My focus isn't on whether the employer was allowed to adopt the policy or whether it was fair. I have to focus on what the Appellant did or didn't do, and whether that is misconduct under the Act.
- The AL decision isn't binding upon me because it was written by my peer at the General Division.
- There is a recent Federal Court decision called *Milovac v Attorney General of Canada*, 2023 FC 1120, that goes against the rational in AL. I have to follow Federal Court decisions when the facts are similar, which they are in this case.

[23] In the Milovac case, the Federal Court agreed that the claimant lost his employment as a result of his misconduct because he was aware of the Employer's vaccination policy and the consequences that would result from refusing to comply. The court says that whether the employer's policy was unfair or went against the collective agreement or *Charter* were not matters for the Tribunal to decide.

The policy and the employment contract

[24] The Appellant argues that the policy wasn't just or binding upon her. She made various arguments about the employer's right to enact the policy and change the terms of her employment contract. She says that she was constructively dismissed.

[25] But the legal test for misconduct doesn't ask me to look behind the policy and decide whether it was reasonable for the employer to impose that duty or policy. To do so would shift the focus to the employer's behaviour, and away from what the employee did. I have to look at the conduct of the employee, not the conduct of the employer.²⁰

[26] My focus is on the Act. I can't make decisions about whether the Appellant has options under other laws or legal avenues, such as through her union. Issues about whether the employer should have allowed the Appellant's exemption request, the employer's decision about the exemption request, and whether the policy breached the collective agreement or other laws, aren't for me to decide.²¹ I can consider only one thing: whether what the Appellant did or didn't do is misconduct under the Act.

[27] However, an employer's behaviour could be important when deciding if the Appellant's actions were wilful. For example, if the employer hasn't told the Appellant about the policy or didn't give the Appellant time to comply, then non-compliance may not be wilful. But as I found above, the Appellant's actions were wilful. She knew of the policy, had time to comply, and knew or should have known the consequences of her choice not to comply. It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the Act.²²

The Appellant's work history, EI premiums and record of employment

[28] The Appellant said that she should be entitled to EI benefits because she worked for over 23 years and never collected EI benefits.²³

[29] The Commission says that paying EI premiums doesn't in itself give a right to benefits.

[30] The Commission is right. Not everyone who pays EI premiums is entitled to receive EI benefits. Like any insurance policy, a claimant still has to meet all eligibility

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²² *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²³ See page GD3-29.

conditions. And in this case, the Appellant is disqualified because she lost her job due to misconduct.

[31] The Appellant says that she is litigating the employer's change to her record of employment. It isn't clear what she means by this. There is only one record of employment in the file, and it is not an amended record of employment.²⁴

[32] In any case, the record of employment is only one part of the evidence before me. The most significant evidence is that the Appellant admits that she knew she'd be dismissed if she didn't comply with the vaccination policy, and then chose not to comply.²⁵ This is misconduct under the Act, no matter what the record of employment says.

The Appellant lose her job because of misconduct

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

[34] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated went against the employer's policy and was likely to cause her to lose her job. She still chose not to get vaccinated.

Conclusion

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

[36] The appeal is dismissed.

Angela Ryan Bourgeois

Member, General Division – Employment Insurance Section

²⁴ See the record of employment on page GD3-21, specifically box 2, which shows whether it is an amended or replaced record of employment.

²⁵ For example, see her application form where she indicates that she refused to have the vaccination (medical procedure) and she knew she would be terminated by not doing so. Also see her arguments on page GD6-63, where she argues why her non-compliance wasn't misconduct.