



Citation: *TW v Canada Employment Insurance Commission*, 2022 SST 345

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

## **Decision**

**Appellant:** T. W.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (450317) dated January 11, 2022 (issued by Service Canada)

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**Tribunal member:** Candace R. Salmon

**Type of hearing:** Teleconference

**Hearing date:** February 22, 2022

**Hearing participant:** Appellant

**Decision date:** March 22, 2022

**File number:** GE-22-281

## 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 be suspended). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant's employer suspended her from her job for failing to comply with its policy respecting COVID-19 vaccination. The employer told the Commission that she violated its policies by refusing to be vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that the demand that she comply with the vaccination policy is wrong and submits she should have a choice. The Claimant says that she is entitled to receive EI benefits.

[5] The Commission accepted the employer's reason for termination. It decided that the Claimant had voluntarily left her employment without just cause. Because of this, the Commission found that the Claimant was not entitled to EI benefits.

[6] After the Claimant filed an appeal to the Social Security Tribunal (Tribunal), the Commission changed its reason for the disentitlement. It now submits that the Claimant is unable to work because she was suspended from her position due to misconduct.

## Issue

[7] Was the Claimant suspended from her job as a result of voluntary leaving or misconduct, and does she qualify for EI benefits?

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended for misconduct are not entitled to receive benefits. Section 32 of the Act says that claimants who take a leave of absence without just cause are not entitled to receive benefits.

## The Law

[8] The *Employment Insurance Act* contains two distinct notions that result in a disqualification from benefits: voluntary leaving and misconduct.<sup>2</sup> Both notions are linked as it may not be clear whether the unemployment resulted from the employee being dismissed due to misconduct or from the employee's decision to leave. It is open to me to make a finding based on either of the two grounds.<sup>3</sup> Put another way, where the reason for the Claimant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on voluntary leaving or misconduct as it does not matter who took the initiative in severing the employment relationship because both issues relate to a disqualification.<sup>4</sup>

[9] In this case, it is not clear that the Claimant was dismissed from her job. It is clear that she refused to comply with the employer's vaccination policy, which is the conduct that caused the employer to not allow her to work any longer. Since the employer's decision to stop the Claimant's employment was caused by her refusal to comply with a policy, I find the issue is misconduct. Further, the Claimant testified that she "assumed" she was being dismissed from her job, but she also stated that after her employer told her she could no longer attend work, her manager sent her a text message asking her to get vaccinated and return to work. This suggests the Claimant's job would still be available to her if she was in compliance with the employer's policies.

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<sup>2</sup> *Employment Insurance Act*, section 30.

<sup>3</sup> See *Canada (Attorney General) v. Borden*, 2004 FCA 176 at paragraph 6.

<sup>4</sup> Both issues relate to disqualification under section 30(1) of the *Employment Insurance Act*. This is also reflected in the Court's findings in *Canada (Attorney General) v. Easson*, A-1598-92 at paragraph 5 (unnumbered) and *Canada (Attorney General) v. Desson*, 2004 FCA 303 at paragraph 4. While these cases address voluntary leaving and misconduct in the context of disqualifications under section 30(1) of the *Act*, I find the same logic applies to issues of disentitlement due to suspensions for misconduct or periods of leave without just cause under sections 31 and 32. These sections all relate to the Claimant's action causing her to lose her job in some way, whether it be by voluntarily choosing to leave or by acting in a way that causes the employer to suspend or terminate the employment. The Court's logic in *Easson* and *Desson* applies equally to the circumstances described in sections 31 and 32 of the *Act*.

[10] The Act also considers cases where claimants are suspended from their job due to misconduct. This does not result in a disqualification, but a disentitlement from benefits.<sup>5</sup>

[11] Given the above, I find the issue is not misconduct resulting in disqualification, but whether the Claimant is disentitled from EI benefits due to a suspension for misconduct.<sup>6</sup>

## **Analysis**

[12] The Commission is now submitting that the Claimant was suspended from her job due to her own misconduct.

[13] 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 lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant lose her job?**

[14] I find that the Claimant lost her job because she did not comply with the employer's policy on vaccination for COVID-19.

[15] The Claimant and the Commission agree on why the Claimant lost her job. They agree that it was because the employer implemented a new COVID-19 vaccination policy. The policy had a deadline for employees to prove they had been vaccinated. The Claimant did not comply with the policy by the deadline. The employer determined she could no longer work for the business after this date.

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

[16] The reason for the Claimant's suspension is misconduct under the law.

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<sup>5</sup> *Employment Insurance Act*, section 31.

<sup>6</sup> *Employment Insurance Act*, section 31.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>7</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>8</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 disciplined or let go because of that.<sup>9</sup>

[19] The Commission has to prove that the Claimant 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 Claimant lost her job because of misconduct.<sup>10</sup>

[20] It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.<sup>11</sup>

[21] The Commission says that the Claimant is unable to work because she refused to comply with the employer's COVID-19 policy. It adds that there was misconduct because the Claimant was aware of the employer's COVID policy, its requirements, and the deadline for compliance. She was aware of the consequences of failing to comply. She chose not to comply, and was suspended from her employment as a result.

[22] The Claimant says that there was no misconduct for a number of reasons. First, she submits that she was informed of the COVID-19 vaccination policy an hour before she was supposed to work. She stated that she was on vacation from July 26, 2021, until August 3, 2021. She stated that her first call from the employer was on August 3, 2021, shortly before she was supposed to open the store. She added that when the employer

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<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>8</sup> See *Attorney General of Canada v Secours*, A-352-94 at paragraph 2 (unnumbered).

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88 at paragraph 1 (unnumbered).

<sup>11</sup> See *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6.

announced the COVID-19 policy she was on vacation, so she did not get any notice. She submitted that this meant she was not given any time to make a decision.

[23] She added that she had followed all COVID-19 procedures, such as wearing a mask, distancing, screening customers, and clearing. She submits that on August 3, 2021, she was told not to return to work unless she is vaccinated.

[24] The Claimant also stated that because she is a healthy person she chose not to be vaccinated. She added that she should have a choice about whether to take the COVID-19 vaccine.

[25] The Claimant spoke to a Commission agent on November 5, 2021. At the hearing, she confirmed that the Commission's record of the conversation was an accurate representation of the information she provided. She told the Commission that she is not vaccinated and is not going to get the COVID-19 vaccine. The Commission asked her if she had any medical reasons, religious grounds, or other reasons for refusing the vaccine. She stated that she did not, but decided she didn't want the vaccine because she is healthy and doesn't need it. She also said there were no other reasons she did not comply with the employer's vaccination policy.

[26] The Claimant spoke to another Commission agent on January 11, 2022. At the hearing, she agreed that the Commission's record is an accurate representation of her statements. She told the Commission that she received a call on August 3, 2021, and was told that she could not return to work unless she was vaccinated. She told the employer that she was not going to get the vaccine.

[27] The employer told the Commission that employees had a grace period until August 19, 2021, to be vaccinated. The Claimant testified that she was not given any notice about this date. She added that she spoke to two managers on August 3, 2021, and they did not tell her about the grace period. She added that she did not ask what her options were because she was frustrated and upset. She stated that after August 3, 2021, there were "a couple calls or text messages" from her employer but she did not ask if there were any

routes available for her to return to work. She stated that in one of the text messages, her supervisor asked her to get vaccinated so she could return to work.

[28] The Claimant testified that she “didn’t know what to expect,” but didn’t think she would lose her job for failing to get vaccinated. She stated she did not know she could lose her job until she received the call on August 3, 2021.

[29] The Claimant testified that refusing the COVID-19 vaccination was a personal choice, and did not relate to any medical issues or religious or other beliefs. She stated that she:

doesn’t believe in the vaccine. It’s an experimental vaccine and we don’t know a lot about it and I chose not to get it. I workout, eat healthy, take vitamins, I don’t get sick, I’m a healthy individual. I decided that I don’t need it or want it and I think everyone should have that right and I shouldn’t lose my job because of it.

[30] It is clear that the conduct leading to the Claimant’s suspension was a refusal to follow the employer’s COVID-19 vaccination policy. The Claimant admits that she refused to follow the employer’s policy, and that it was the reason she was no longer allowed to work.

[31] One element of a misconduct analysis is that I consider whether the Claimant’s conduct was wilful. Wilfulness requires that the action of the claimant be conscious, deliberate, or intentional. For EI purposes, ‘intentional’ does not require proof of an intention to do something wrong. On the evidence, it is clear that the Claimant’s action of not complying with the requirements of the vaccination policy was conscious, deliberate and intentional. She told the employer that she would not comply. The employer still required that she comply with the policy. Her response was to make the choice not to comply. That was wilfulness.

[32] Further, I find the Claimant knew or ought to have known that she could be terminated for refusing to follow the employer’s policy. While she submits that she did not know there was a grace period until August 19, 2021, and was only informed of the employer’s policy on August 3, 2021, she made it clear to the employer that she would

not comply with its policy. She did not ask any questions about other options. She stated that she was aware, or “presumed”, as of August 3, 2021, that she could lose her job if she did not comply with the policy, because her employer told her that she would not be able to work without the COVID-19 vaccine. It is reasonable to believe the Claimant knew or ought to have known that she could lose her job if she refused to follow the employer’s policies, and she was told she could not return to work without adhering to this one. While she may not have had as much notice as other employees, because she was on vacation when the policy was introduced, she was told about the policy and refused to comply. Whether she was told about the grace period is irrelevant. While the Claimant submits she was not given any time to make a decision, it is clear from her statements on the record and at the hearing that she had already made a decision and the decision was to not comply with the policy.

[33] The Claimant’s action in refusing to comply with the employer’s vaccination policy was misconduct for EI purposes. I find that the Commission has proven that there was misconduct, because it has proven that the Claimant committed the conduct of refusing to comply with the employer’s vaccination policy, that refusal caused her suspension, her conduct was wilful, and she knew or ought to have known that she could be dismissed or suspended from her job if she did not comply with the employer’s policy.

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

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

### **Other issues**

[35] The Claimant stated during reconsideration that she paid into EI, so she is entitled to receive it and it is her money and illegal to deny her benefits. At the hearing, she said that she wasn’t sure if it was illegal for the Commission to deny EI benefits, but she assumed that she was entitled to EI because she paid into the program.

[36] Paying into the EI program does not automatically entitle a person to receive EI benefits when they are unemployed. Like other insurance programs, the individual must



qualify for the benefits. The Appellant does not qualify because was suspended from her job due to her own misconduct, so she does not meet the requirements of the law.

## **Conclusion**

[37] The Commission has proven that the Claimant was suspended from her job because of misconduct. Due to this, the Claimant is disentitled from receiving EI benefits until she meets one of the three conditions set out in section 31 of the *Employment Insurance Act*.

[38] This means that the appeal is dismissed. My finding replaces the Commission's disqualification for voluntary leaving decision with a disentitlement for suspension due to misconduct.

Candace R. Salmon  
Member, General Division – Employment Insurance Section