



Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 485

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

# **Decision**

**Appellant:** A. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (443450) dated December 24, 2021 (issued by Service Canada)

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**Tribunal member:** Candace R. Salmon

**Type of hearing:** Teleconference

**Hearing date:** April 5, 2022

**Hearing participant:** N/A

**Decision date:** April 21, 2022

**File number:** GE-22-308

## 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), which was followed by termination from the employment due to her own misconduct. This means that the Claimant is not entitled to receive 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. The employer later terminated her employment due to misconduct.

[4] The Claimant states that she was illegally terminated from her job due to an illegal policy that does not align with employee rights. She also states that the vaccination policy was not in place when she was hired, and does not form part of her collective agreement.

[5] The Commission submits that the Claimant's suspension and subsequent dismissal were consequences of the same action; that is, refusing to comply with the employer's mandatory policy. It says the Claimant's action were wilful and deliberate, and that she knew she could lose her job for refusing to comply with the policy, but she still chose to not comply.

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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.

## **Matter I have to consider first**

### **The Claimant wasn't at the hearing**

[6] The hearing was scheduled for March 18, 2022. In a conversation with the Claimant on March 15, 2022, she asked Tribunal staff to adjourn the hearing to any date after March 29, 2022. I reviewed the Claimant's request and allowed the adjournment. The hearing was rescheduled to April 5, 2022, based on the Claimant's stated availability. 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 January 24, 2022, and consented to communication via email. The Tribunal sent hearing documents, including the notice of hearing, to that email address. In addition to rescheduling the hearing based on the Claimant's availability, the Tribunal also sent a reminder email to the Claimant.

[8] When the Claimant did not attend the hearing, I asked Tribunal staff to telephone her again and ask if she intended to participate. A Tribunal staff member telephoned the Claimant on April 5, 2022, 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] Was the Claimant suspended from her job as a result of misconduct, and does she qualify for EI benefits?

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<sup>2</sup> Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

## **Analysis**

[11] I have to decide two things. First, I have to determine why the Claimant was suspended from and eventually lost her job. Then, I have to determine whether the law considers the reason to be misconduct.

[12] In this case, it appears that the Claimant was initially suspended from her job on October 1, 2021.<sup>3</sup> It also appears she was later terminated from the job, as of November 1, 2021. If I find that the Claimant committed misconduct, the timing of the suspension and termination will become relevant.

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

[13] I find the Claimant was suspended from her job, and eventually terminated from it, because she refused to comply with the employer's policy on COVID-19 vaccination. The Claimant does not dispute this.

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

[14] The Claimant applied for regular EI benefits on October 11, 2021. She stated that she worked in home care and was employed from July 3, 2018, until October 1, 2021. She added that she was on a leave of absence due to her employer's vaccination policy.

[15] The Record of Employment (ROE) states the Claimant worked as a care coordinator, and was no longer working because she was suspended from the job as of October 1, 2021. On November 3, 2021, the employer told the Commission that the government mandated that employees had to be vaccinated to work in health care facilities. It submitted that on September 2, 2021,<sup>4</sup> employees were advised that a mandatory vaccination policy was being implemented and they had to be vaccinated or provide documents supporting an exemption by September 14, 2021.

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<sup>3</sup> See Record of Employment dated October 15, 2021 at GD3-14.

<sup>4</sup> A copy of the September 2, 2021, letter is included in the file starting at GD3-23. The subject of the memorandum is "Mandatory COVID-19 Vaccination Policy and Disclosure of Vaccination Status by September 9, 2021."

[16] The employer stated that the Claimant did not provide any information about her vaccination status. The employer sent a letter to the Claimant on September 15, 2021, stating she had to be vaccinated by September 30, 2021, or she would not be able to continue working. The Claimant did not provide any documentation confirming vaccination or supporting exemption, so she was put in a mandatory leave of absence as of October 1, 2021. She was told she had one month to become vaccinated or provide exemption documents, or her employment would be terminated effective November 1, 2021.

[17] The employer confirmed that the Claimant failed to follow the vaccination policy, so her employment was terminated on November 1, 2021.

[18] The Commission contacted the Claimant on November 3, 2021. She stated that the employer's information was correct and she was dismissed for not following the employer's vaccination policy. She added that she did not have any documentation to support a medical or other form of exemption.

[19] The Commission determined the Claimant lost her employment due to her own misconduct, so she was disqualified from receiving EI benefits. She requested reconsideration of that decision on November 16, 2021. She stated that she was illegally terminated from her job based on an illegal policy that doesn't align with employee rights. She added that she has paid into the EI program for several years, so she has a right as a Canadian citizen to collect EI benefits.

[20] The Commission spoke to the Claimant on December 22, 2021. The Commission reviewed all of the employer's letter to the Claimant and confirmed that she did not disagree that she received the letters and did not disagree with the Commission's summary of the contents. The Claimant stated that she was choosing to remain unvaccinated for personal reasons, and submitted an exemption request saying that it was her personal decision not to be vaccinated and it was not in her contract of employment. She confirmed to the Commission agent that her refusal to follow the vaccination policy was not related to any medical issue or human rights ground.

[21] The Claimant reiterated that the employer's policy "went against" her collective agreement. The Commission asked her in what way the policy violated the agreement. The Claimant said she did not wish to comment and that the Commission agent could look up her collective agreement. The Commission advised that the onus was on the Claimant to produce the evidence she wanted to rely upon, and if she chose not to do so, a decision would be made based on the record and the statements of her and her employer. The Claimant replied that she did not understand why this was necessary, because the employer's actions were illegal, the policy was illegal, and she has a right to EI benefits.

[22] The Commission issued a decision on December 24, 2021, upholding its finding that the Claimant lost her job due to her own misconduct. She appealed to the Tribunal on January 24, 2022.

[23] In the Notice of Appeal, the Claimant states that the employer's policy violated her collective agreement because vaccinations were not mandatory or a requirement of her employment when she was hired in 2018. She adds that the collective agreement only references the influenza vaccination, where it states employees have the right to refuse any required vaccination and lists the options and consequences of that decision.

[24] The Claimant submits that it doesn't make sense that she can refuse a vaccination under this section of the collective agreement, but is not allowed to refuse the COVID-19 vaccination.

[25] The Employer's policy, as communicated on September 2, 2021, states that a mandatory COVID-19 vaccination policy has been adopted effective immediately. It states that all employees must be fully vaccinated against COVID-19 and must provide proof of vaccination, unless there is a valid medical or human rights ground in which case exemption documentation must be provided.

[26] A letter was sent to the Claimant on September 16, 2021. In the letter, the employer reiterated that its mandatory COVID-19 vaccination policy was in effect and she had not provided evidence of vaccination or requested an exemption. The employer

states that the Claimant is required to report vaccination status via a secure reporting web link by September 30, 2021, and if she did not comply she would be subject to progressive discipline up to and including an unpaid leave and/or termination.

[27] The employer wrote to the Claimant on September 24, 2021. It confirmed that she had requested an exemption from the mandatory COVID-19 vaccination policy on human rights grounds. The employer advised that it reviewed her request, and found it did not meet the criteria to allow an exemption because the reasons she cited in support of an exemption were not based on an enumerated ground under the Ontario *Human Rights Code*. This letter also reminded the Claimant that she had until September 30, 2021, to provide evidence of her vaccination status, or she would be subject to discipline up to and including an unpaid leave of absence and/or termination.

[28] The employer wrote to the Claimant on October 1, 2021, confirming she did not comply with its policy. The letter states the Claimant is in violation of the employer's policy, so she was placed on an unpaid leave as of October 1, 2021. It stated that she would remain on unpaid leave until she provided proof of vaccination, or was terminated from the job.

[29] The employer followed up on November 1, 2021, with a letter confirming the Claimant did not comply with its vaccination policy and was terminated from her job effective immediately.

[30] To be misconduct under the law, 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 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>7</sup>

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<sup>5</sup> See *Mishibinijima 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.

[31] 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>8</sup>

[32] It is clear that the Claimant knew she could lose her job if she refused to comply with the employer's policy. It was stated on numerous occasions by the employer to the Claimant. She made a personal decision to not get the COVID-19 vaccine, which violated her employer's policy. She did not present any medical or human rights grounds to support an exemption, so she was not given one.

[33] In the notice of appeal, the Claimant says that her employer violated the collective agreement by implementing a policy unilaterally. This is something best left to a labour board or tribunal. While the Supreme Court of Canada has issued a decision addressing whether a workplace safety policy is reasonable and what must be considered in making that decision,<sup>9</sup> I am not a labour board arbitrator and the Claimant would have to make her arguments about the collective agreement and its potential violation to another body.

[34] I am empowered to make a decision on the Claimant's EI claim. It is clear the Claimant refused to comply with an employer policy, and that her conduct caused her termination. Since her employer instituted a policy on COVID-19 vaccination, and she knew she could lose her job if she did not comply with the policy but acted wilfully in refusing to comply, I find the Commission has proved that the legal elements of misconduct exist in this case.

[35] I further find the Claimant was suspended from her job due to misconduct on October 1, 2021. She was terminated due to misconduct on November 1, 2021. This means she is disentitled from EI benefits between October 1, 2021, and October 31, 2021, and disqualified from receiving EI benefits as of November 1, 2021.

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<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> *Communications, Energy, and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.* [2013] 2 SCR 458.



[36] I note that the Claimant submitted during reconsideration that she should be entitled to EI benefits because she paid into the program. I disagree. Even though the Claimant contributed to the EI program, this does not automatically entitle her to receive benefits. The *Employment Insurance Act* is an insurance plan and, like other insurance plans, claimants must meet the conditions of the plan to obtain benefits.<sup>10</sup> In this case, the Claimant lost her job due to misconduct, so she cannot meet the requirements to receive benefits.

## **Conclusion**

[37] The appeal is dismissed. I find the Claimant was suspended from her job due to her own misconduct, and later terminated from her job for the same misconduct.

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

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<sup>10</sup> *Pannu v. Canada (Attorney General)*, 2004 FCA 90, at paragraph 3