



Citation: *SA v Canada Employment Insurance Commission*, 2022 SST 693

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

## Decision

**Appellant:** S. A.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (452324) dated January 26, 2022 (issued by Service Canada)

---

**Tribunal member:** Candace R. Salmon

**Type of hearing:** Teleconference

**Hearing date:** March 31, 2022

**Hearing participant:** Appellant

**Decision date:** May 20, 2022

**File number:** GE-22-579

## 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. The employer told the Commission that she violated its policy by refusing to be vaccinated against COVID-19.

[4] The Claimant doesn't dispute that she refused to be vaccinated. She says that her employer cannot force vaccination on employees, and says the policy was not part of her employment agreement so shouldn't be enforceable. She added that she is entitled to EI benefits because she has contributed to the program for a long time.

[5] The Commission accepted the employer's reason for suspension. It decided that the Claimant was suspended from her employment due to misconduct. Because of this, the Commission found that the Claimant was not entitled to EI benefits.

## Issues

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

## The Law

[7] In this case, the Claimant was not initially dismissed from her job. The Record of Employment (ROE) states she was placed on a leave of absence. The Claimant testified that she feels she was dismissed, because the employer is not allowing her to go to work.

---

<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.

The employer told the Commission that the Claimant is able to return to work when she complies with the COVID-19 policy.<sup>2</sup>

[8] The parties agree that the Claimant refused to comply with the employer's COVID-19 policy, which is the conduct that caused the employer to not allow her to work any longer.

[9] The *Employment Insurance Act* addresses cases where claimants are suspended from their jobs due to misconduct, instead of being dismissed. This does not result in a disqualification, but in a disentitlement from benefits.<sup>3</sup>

[10] Given the above, I find the issue is whether the Claimant is disentitled from EI benefits due to a suspension for misconduct.<sup>4</sup>

## **Analysis**

[11] The Commission submits that the Claimant was suspended from her job due to her own misconduct.

[12] 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 was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended from her job?**

[13] I find the Claimant was suspended from her job because she did not comply with the employer's COVID-19 policy.

[14] The employer told the Commission that the Claimant was placed on a leave of absence because she isn't fully vaccinated. It added that employees were advised "several months" before December 2021, that they would be subject to a vaccination

---

<sup>2</sup> This is correct as of the date the employer made the statement. The Claimant testified that employees who do not comply with the COVID-19 policy will be terminated from the employment as of May 1, 2022.

<sup>3</sup> *Employment Insurance Act*, section 31.

<sup>4</sup> *Employment Insurance Act*, section 31.

policy. The policy was publicly announced on August 25, 2021, and required all employees to be fully vaccinated by October 30, 2021. If they were not fully vaccinated by this date, they would be placed on a leave of absence as of October 31, 2021.

[15] The Claimant told the Commission that she was placed on a leave of absence as of October 31, 2021, because she wasn't fully vaccinated. She added that she received the policy by email on August 25, 2021, and confirmed it stated that staff had to be vaccinated by October 30, 2021, or they would face consequences up to and including unpaid leave and termination.<sup>5</sup>

[16] The Claimant confirmed she did not submit a medical or religious exemption to her employer, but she did email her employer saying she did not need to be vaccinated and is a Canadian citizen. The employer refused to provide an accommodation for her.

[17] The Claimant added that the employer emailed her on October 22, 2021, restating the requirement to be vaccinated by October 30, 2021. The email reminded employees that they were informed of the policy on August 25, 2021, and of the consequences for non-compliance. The consequences included that employees would not be allowed to enter the workplace, and would be considered unavailable to fulfill their duties. The Claimant was not scheduled for work after October 31, 2021, so she "assumed that it was because she was not vaccinated." She testified that as of May 1, 2022, employees who didn't comply with the COVID-19 policy would be terminated from the employment.

[18] I find the evidence supports that the Claimant was suspended from her job because she refused to comply with the employer's COVID-19 policy.

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

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

---

<sup>5</sup> Unless they qualified for an accommodation.

[20] The Claimant argued that she did not commit misconduct because she did nothing wrong. I find there is a difference between the common use of the word “misconduct”, and the legal meaning of that word in EI law.

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<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>

[22] 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>8</sup>

[23] The Commission has to prove that the Claimant was suspended from 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 was suspended because of misconduct.<sup>9</sup>

[24] It is not the role of the Tribunal to determine whether the suspension was justified, or was the appropriate sanction.<sup>10</sup>

[25] The Commission says it is an undisputed fact that the Claimant failed to adhere to the employer’s COVID-19 vaccination policy by October 30, 2021. It says that the Claimant made a personal decision to not comply with the employer’s policy, and knew she would be placed on an unpaid leave of absence or be dismissed from her job.

[26] The Claimant says that there was no misconduct because she didn’t do anything wrong. She said that she refused to receive the COVID-19 vaccine, but her employer

---

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94 at paragraph 2 (unnumbered).

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88 at paragraph 1 (unnumbered).

<sup>10</sup> See *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6.

didn't offer her any alternatives, such as rapid testing. She also submitted that there is nothing in her initial employment contract stating she must receive a vaccination to work.

[27] It is clear that the conduct leading to the Claimant's suspension was a refusal to follow the employer's COVID-19 policy.

[28] I find the content of the employer's policy is not before me. Whether the employer could have provided rapid testing options in the specific circumstances of its field of work is not a question for this Tribunal. Additionally, the Claimant stated she is part of a union, but her union is not assisting members with issues relative to the vaccination policy. If the Claimant has concerns that her collective agreement is being violated by the employer, the process to appeal that issue lay within the collective agreement. This Tribunal is not the right forum for that argument.

[29] One element of a misconduct analysis is that I must 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 vaccination requirements of the employer's policy was conscious, deliberate and intentional. The employer required that she comply with the policy. Her response was to make the choice not to comply. That was wilfulness.

[30] Further, I find the Claimant knew that she could be placed on an unpaid leave of absence for refusing to follow the employer's policy. She was informed of this in the August 25, 2021, email from her employer and acknowledged at the hearing that she knew this could happen. Therefore, I find that she knew the result of her decision to refuse to follow the policy could be an unpaid suspension.

[31] The Claimant's action in refusing to comply with the employer's policy is 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 COVID-19 policy, that refusal caused her suspension, her

conduct was wilful, and she knew that she could be dismissed or suspended from her job if she did not comply with the policy.

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

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

### **Other issues**

[33] The Claimant stated that she paid into EI, so she is entitled to receive it.

[34] 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 she was suspended from her job due to her own misconduct, so she does not meet the requirements of the law.

[35] On the request for reconsideration, the Claimant stated that vaccination cannot be made mandatory, and testing options exist which were not offered by her employer. To support her statement regarding mandatory vaccination, she included a one-page section of a report titled "Canadian National Report on Immunization, 1996." This document says that immunization is not mandatory in Canada, and cannot be made mandatory because of the Canadian Constitution.

[36] There is no evidence that the Claimant was forced to receive a vaccination. She was told that her employer instituted a policy, and she had the choice of complying and continuing to work there, or refusing to comply and no longer being able to work.

[37] The Commission submitted that the purpose of the EI program is to protect those who, through no fault of their own, become temporarily unemployed. EI is not designed to protect those who choose to become unemployed, and shift the burden of that decision onto the Canadian taxpayer. In this case, the Claimant chose not to comply with her employer's policy, even though she knew she could be suspended or dismissed due to that choice.

## **Conclusion**

[38] 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.

[39] This means that the appeal is dismissed.

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