



Citation: *TR v Canada Employment Insurance Commission*, 2022 SST 827

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

## Decision

**Appellant:** T. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (462616) dated April 22, 2022 (issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference

**Hearing date:** June 14, 2022

**Hearing participants:** Appellant  
Appellant's spouse

**Decision date:** June 21, 2022

**File number:** GE-22-1605

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended 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 was put on an unpaid leave of absence from her job for not getting the COVID-19 vaccination. The employer implemented a policy that required employees to get vaccinated or have an approved exemption. The Claimant didn't get the vaccination or an approved exemption by the deadline, so she was placed on a mandatory unpaid leave of absence (suspension).

[4] The Commission decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[5] The Claimant disagrees that it is misconduct. She provided her employer with a test showing that she had COVID-19 antibodies. This should have been enough; she shouldn't be forced to take a vaccination if she has natural immunity. She was a good employee and being suspended from her job wasn't justified.

## Matters I have to consider first

[6] The Claimant has two separate appeal files. I chose to hear both appeals in the same hearing in the interest of proceeding as informally and quickly as circumstances, natural justice, and fairness permit.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits. The disentitlement is lifted when their period of suspension expires, or they lose or voluntarily leave their job, or they work enough hours with another employer after the suspension started.

[7] However, I did not join the appeals. I am only able to join appeals if a common question of law or fact arises in the appeals and no injustice is likely to be caused to any party.<sup>2</sup> In this case, the two appeals do not share a common question of law or fact. As such, I will issue two separate decisions.

### **The employer is not a party to this appeal**

[8] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

### **Issue**

[9] Was the Claimant suspended from her job because of misconduct?

### **Analysis**

[10] The law says that claimants who lose their job because of misconduct are disqualified from receiving benefits.<sup>3</sup>

[11] It also says that claimants who are suspended from their job because of their misconduct are disentitled from receiving benefits until one of the following conditions is met:

- their period of suspension expires; or,
- they lose or voluntarily leave their job; or,
- they work enough hours with another employer after the suspension started.<sup>4</sup>

[12] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the

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<sup>2</sup> See section 13 of the *Social Security Tribunal Regulations*.

<sup>3</sup> See section 30 of the Act.

<sup>4</sup> See section 31 of the Act.

Claimant was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended?**

[13] Both parties agree that the Claimant had to stop working because she did not comply with the employer's policy that required her to be vaccinated against COVID-19 or have an approved exemption. So, this is the conduct that caused her suspension.

### **Is the reason for her suspension misconduct under the law?**

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

[15] 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>

[16] 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>

[17] The Commission has to prove that the Claimant was suspended 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>

[18] The Commission says that there was misconduct because the Claimant was aware that she was required to comply with the employer's policy to continue working in her job. The Claimant didn't get vaccinated or get an exemption from the COVID-19

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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.

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

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

vaccination under the employer's policy. She willfully chose not to comply with the employer's policy.

[19] The Claimant says that there was no misconduct because the policy was not part of the terms of her employment when she was hired. Getting the vaccination was against her religious beliefs, and she provided an antibody test to the employer showing she had natural immunity. She was a good employee and it was not fair that she was suspended for this reason.

[20] The Claimant worked as a customer service agent for an airline. In September 2021, the employer put in place a policy requiring its employees to be fully vaccinated against COVID-19 by October 31, 2021.<sup>10</sup> This meant that employees had to have their first vaccination by September 8, 2021, and their second by October 16, 2021. They had to report their vaccination status to the employer by September 8, 2021.

[21] The Claimant had contracted COVID-19 earlier in the year. She had an antibody test done to show that she still had COVID-19 antibodies. The Claimant provided this test to her employer. She wanted them to exempt her from the vaccination requirement because she had natural immunity.<sup>11</sup>

[22] On October 12, 2021, the Claimant sent the test results to her employer and her union. She stated that she was "deeply upset" by the vaccine mandate. She stated that she was not refusing to be vaccinated at that time, but she wanted the employer to provide studies on the safety and efficacy of the vaccine over the long term, as well as studies on natural immunity and the vaccination. She also wanted them to provide studies related to adverse outcomes of COVID-19 vaccines in people who have recovered from COVID-19, as that is her specific case.<sup>12</sup>

[23] The Claimant told the Tribunal that she couldn't get the COVID-19 vaccination because of her religious beliefs. But, she didn't ask for a religious exemption to the employer's vaccination policy before she was suspended. She thought the antibody test

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<sup>10</sup> See GD3-29 to GD3-33.

<sup>11</sup> See GD3-16

<sup>12</sup> See GD6-1.

would be enough for the employer to give her an exception to the mandatory vaccination. However, she said the employer rejected that documentation.<sup>13</sup>

[24] On October 29, 2021, the Claimant's legal representative sent a letter to the Claimant's employer and her union. It stated that the Claimant wasn't refusing the "vaccination request" at this time. It requested the employer provide scientific studies related to the safety and efficacy of the vaccine, justification for requiring vaccination for someone that has natural immunity, and other information.<sup>14</sup>

[25] The Claimant was placed on an unpaid leave of absence as of October 30, 2021.

[26] I find that the Commission has proven that there was misconduct.

[27] The Claimant wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in losing her job.

[28] The Claimant was notified about the employer's policy in September 2021. The Claimant's letter dated October 14, 2021, and the letter from her legal representative dated October 29, 2021, state that she was not refusing to be vaccinated at that time. But, she was required by the employer's policy to provide proof of her first dose of COVID-19 vaccination by September 8, 2021, and proof of her second dose by October 16, 2021. She chose not to get her COVID-19 vaccination or get an approved exemption as required by the policy before these deadlines. This tells me the Claimant did not comply with the employer's policy.

[29] The Claimant knew that not complying with the policy would result in her being suspended from work. This is acknowledged in the letter dated October 29, 2021.<sup>15</sup> This tells me that the Claimant reasonably should have known that she could be suspended for not complying with the employer's policy.

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<sup>13</sup> See GD3-26.

<sup>14</sup> See GD6-24 to GD6-26.

<sup>15</sup> See GD6-25.

[30] I understand the Claimant had concerns about the safety of the vaccine. She also felt that she had sufficient immunity from having COVID-19 earlier in the year. But, the employer's policy was not based on her potential immunity. The policy required her to be vaccinated against COVID-19. The Claimant was aware that the employer had not exempted her from the mandatory vaccination policy because she had previously had COVID-19. Regardless, she chose not to comply with the policy. This tells me that the Claimant's wilfully chose not to comply with the employer's policy.

[31] The Claimant said that the policy was not part of the terms of her employment at the time she was hired and that it violates her collective agreement.

[32] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[33] I understand the Claimant's concerns that the employer's policy did not give her any option other than to get vaccinated. I acknowledge that she disagrees with the employer's policy and feels that her suspension was unjustified.

[34] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>16</sup>

[35] I do not have the authority to decide whether the employer breached her collective agreement by suspending the Claimant from her job. The Claimant said that she has asked her union to pursue a grievance for her suspension. That is a more appropriate venue to address allegations that the employer breached her collective agreement.

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<sup>16</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

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

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

### **Other matters**

[37] After the hearing, the Claimant provided a letter from her employer dated June 16, 2022. It said the employer was going to suspend and review their COVID-19 vaccination policy in response to the federal government's announcement that it will suspend vaccination requirements for employees working in the transportation sector. The letter states the Claimant will remain on her current leave of absence until given a return to work date based on the employer's requirements.<sup>17</sup>

[38] I understand that the suspension of the employer's vaccination policy means the Claimant may be reinstated in her position. However, this doesn't change the facts around the Claimant's suspension from work in October 30, 2021. So, her potential reinstatement to work in or after June 2022, isn't relevant to whether the Claimant was suspended on October 30, 2021, because of misconduct.

## **Conclusion**

[39] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[40] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section

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<sup>17</sup> See GD7.