



Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 1115

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

## Decision

**Appellant:** J. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (487017) dated June 21, 2022 (issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference

**Hearing date:** August 29, 2022

**Hearing participant:** Appellant

**Decision date:** September 7, 2022

**File number:** GE-22-2426

## 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 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 had valid reasons for not wanting to be vaccinated, and the employer's policy wasn't part of her terms and conditions of employment when she was hired. She feels that suspending her for her medical choices was not fair or 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 was put on an unpaid leave of absence (suspended) 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

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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.

her job. The Claimant didn't get vaccinated or get an exemption from the COVID-19 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, and was not necessary for her position.

[20] The Claimant worked as a teaching assistant. On October 6, 2021, the province put in place a COVID-19 Mandatory Vaccination Protocol in High-Risk Settings. The protocol required all employees of public schools to be fully vaccinated against COVID-19 or have an approved exception by November 30, 2021.<sup>10</sup> Employees who did not provide proof of their vaccination by the deadline would be placed on unpaid administrative leave.<sup>11</sup>

[21] The Claimant said that she was aware of the policy. The employer sent several emails announcing the policy and reminding employees of the requirements and deadlines. But, the Claimant didn't get these emails. She heard about the policy from co-workers, who then sent her the employer's email on October 25, 2021. So, the Claimant was aware of the policy and its requirements by this date.

[22] The Claimant didn't want to get vaccinated for personal reasons. She felt the vaccine was untested and unsafe. The employer asked employees to submit their proof of vaccination by October 27, 2021. The Claimant said that she waited until the last day, then told the employer that there was no scientific proof that the vaccine was safe. She said the employer understood and said "no hard feelings."

[23] The Claimant said that she knew by the end of October 2021, that she would be put on leave for not being vaccinated. On November 24, 2021, the employer sent the Claimant a letter advising that she was being placed on unpaid leave starting December

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<sup>10</sup> See GD3-20 to GD3-38.

<sup>11</sup> See GD3-27.

1, 2021, because she has not shown proof of vaccination in accordance with the provincial COVID-19 Mandatory Vaccination Protocol in High risk Settings.<sup>12</sup>

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

[25] 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.

[26] The Claimant was notified about the employer's policy in October 2021. She was required to provide proof of her vaccination to continue working in her job. She chose not to get her COVID-19 vaccination or get an approved exemption as required by the policy before November 30, 2021. This tells me the Claimant did not comply with the employer's policy.

[27] The Claimant knew that not complying with the policy would result in her being suspended from work. This tells me that the Claimant reasonably should have known that she could be suspended for not complying with the employer's policy.

[28] I understand the Claimant had concerns about the safety of the vaccine. But, the Claimant was aware that the employer had not exempted her from the vaccination requirement. 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.

[29] The Claimant said that the policy was not part of the terms of her employment at the time she was hired and that the employer's action of suspending her breached her collective agreement.

[30] 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.

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<sup>12</sup> See GD3-42 to GD3-43.

[31] 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.

[32] 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>13</sup>

[33] 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.

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

[34] Based on my findings above, I find that the Claimant was suspended because of misconduct. This means the Claimant is disentitled from EI benefits starting December 20, 2021.

[35] The law says that this disentitlement ends in certain circumstances, including when a claimant's suspension ends.<sup>14</sup> So, I will look at whether the Claimant meets the conditions to end this disentitlement.

### **The Claimant returned to work**

[36] The Claimant returned to her job as of March 21, 2022, when the provincial mandatory vaccine protocol was lifted.

[37] Since the Claimant's suspension ended as of March 21, 2022, I am satisfied that she meets the conditions to have her disentitlement ended as of that date.

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<sup>13</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>14</sup> See section 31 of the Act.

## **Conclusion**

[38] 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 from December 20, 2021, to March 20, 2022.

[39] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section