



Citation: *RZ v Canada Employment Insurance Commission*, 2022 SST 1384

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

## Decision

**Appellant:** R. Z.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (455945) dated February 10, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** August 25, 2022

**Hearing participant:** Appellant

**Decision date:** August 28, 2022

**File number:** GE-22-1159

## 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 his job because of misconduct (in other words, because he did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] R.Z. is the Claimant in this case. He worked as a station attendant for an airline. The employer put the Claimant on an unpaid leave of absence on October 30, 2021 because he did not comply with the “covid19 vaccination policy” (policy) at work.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he was suspended from his employment due to his own misconduct.<sup>4</sup>

[5] The Claimant disagrees because he did not consent to the employer’s new policy.<sup>5</sup> Also, he does not want to disclose his private medical information to this employer and vaccination was not part of his employment conditions.

## Matter I have to consider first

### **I asked the Commission for more information before the hearing**

[6] I wrote to the Commission before the hearing to ask them if they had a copy of the employer’s policy because it was mentioned in their documents.<sup>6</sup>

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<sup>1</sup> See section 31 of the *Employment Insurance Act* (EI Act).

<sup>2</sup> See record of employment at GD3-17 to GD3-18.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-16.

<sup>4</sup> See initial decision at GD3-22 and reconsideration decision at GD3-29 to GD3-30.

<sup>5</sup> See notice of appeal at GD2-1 to GD2-10.

<sup>6</sup> See GD4-1 to GD4-9; see GD7-1 to GD7-3 and section 32 of the *Social Security Tribunal Regulations*.

[7] The Commission wrote back providing a copy of the employer's policy.<sup>7</sup> The Tribunal shared it with the Claimant in advance of the hearing.<sup>8</sup>

### **The Claimant submitted a document after the hearing**

[8] After the hearing, the Claimant sent an email to the Tribunal providing "post-hearing arguments".<sup>9</sup>

[9] I accepted the Claimant's arguments because some of them were relevant and he was restating arguments he had already made in his appeal and at the hearing. A copy was shared with the Commission as well.

### **Issue**

[10] Was the Claimant suspended due to his own misconduct?

### **Analysis**

[11] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>10</sup>

[12] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>11</sup>

[13] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>12</sup>

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<sup>7</sup> See policy at GD8-1 to GD8-6.

<sup>8</sup> The Tribunal emailed it to the Claimant on August 24, 2022.

<sup>9</sup> See post hearing arguments at GD9-1 to GD9-2.

<sup>10</sup> See section 30 of the EI Act.

<sup>11</sup> See section 31 of the EI Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

<sup>12</sup> See section 32(1) and 32(2) of the EI Act; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer.

[14] To answer the question of whether the Claimant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant stop working?**

[15] I find that the Claimant was put on a mandatory and unpaid leave of absence with benefits on October 30, 2021 because he did not comply with the employer's policy.

[16] Specifically, the Claimant did not comply with the policy because he did not want to tell his employer about his vaccination status for covid19 because it was his private medical information.

[17] In my view, the Claimant's unpaid leave of absence was similar to a suspension because it was mandatory and imposed by the employer for six months.<sup>13</sup> During that time, the Claimant was not permitted to return to work or continue working.

[18] This is consistent with the Claimant's testimony, record of employment, discussions between the Claimant and Commission, as well as the employer, etc.<sup>14</sup>

[19] I also find that there was no evidence that the Claimant voluntarily left his employment or took a voluntary leave of absence.<sup>15</sup>

### **What was the employer's policy?**

[20] The employer implemented a policy effective September 10, 2021. A copy of the policy is included in the file.<sup>16</sup>

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<sup>13</sup> See section 31 of the EI Act.

<sup>14</sup> See record of employment at GD3-17 to GD3-18; GD3-19 and GD3-20.

<sup>15</sup> See section 29 and 32 of the EI Act.

<sup>16</sup> See policy at GD8-1 to GD8-6.

[21] The policy states that its purpose is to ensure a safe workplace for all employees, which includes addressing infectious diseases such as covid19.<sup>17</sup> It states that each employee plays a vital role in keeping their coworkers safe, including by helping prevent the spread of the covid19 virus in the workplace.

[22] The policy requires that employees obtain their first vaccination for covid19 by September 8, 2021.<sup>18</sup> The second vaccination dose must be obtained by October 8, 2021.

[23] The policy says that employees to report their vaccination status to the employer no later than September 8, 2021.

[24] The policy also provides for exceptions and accommodation for employees with medical, religious, or other reasons based on prohibited grounds of discrimination.<sup>19</sup>

### **Was the policy communicated to the Claimant?**

[25] The employer told the Commission that the policy was first communicated to employees on August 25, 2021.<sup>20</sup> The employer also said that followed by an email on September 9, 2021 to employees who had not provided their vaccination status. Another email was sent on October 22, 2021 to employees who had not disclosed their vaccination status or received a single dose of the vaccine reminding them they had until October 31, 2021 to do so.

[26] The Claimant testified that the employer was trying to ask for his private medical information around October 2021, but he never consented. He confirmed that he received emails from his employer, possibly in September 2021 but he was not sure. He later acknowledged that he was aware of the vaccination deadline.

[27] I find it more likely than not, that the policy was first communicated to the Claimant on August 25, 2021. I preferred the employer's discussion with the

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<sup>17</sup> See GD8-3.

<sup>18</sup> See GD8-4.

<sup>19</sup> See GD8-5.

<sup>20</sup> See GD3-20.

Commission contained in the file because it offered specific dates and details which support that the policy was communicated to the Claimant and other employees. I also note that the Claimant does not appear to dispute the policy was communicated to him.

### **What were the consequences of not complying with the policy?**

[28] The policy says that a failure to be fully vaccinated by October 31, 2021 will result in an unpaid leave of absence without benefits for six months after which period their continuing employment relationship with the airline will be reassessed.<sup>21</sup>

[29] The employer told the Commission that they sent an email to employees who had not yet complied with the policy on October 22, 2021, reminding them to provide their vaccination status by October 31, 2021.<sup>22</sup> A failure to do so, they said would result in being placed on an unpaid leave with benefits.

[30] The Claimant testified that non-compliance would result in an unpaid leave of absence on October 31, 2021. He felt that his employer was violating his own rights by imposing the unpaid leave of absence.

### **Is there a reason the Claimant could not comply with the policy?**

[31] As noted above, the policy provided for exceptions and accommodation for employees with medical, religious, or other reasons based on prohibited grounds of discrimination.<sup>23</sup> The employer requires employees to make a request and provide supporting information, which note they will review in a confidential and secure manner.

[32] The Claimant testified that he does not want to disclose whether he made a request for accommodation because that information is private.

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<sup>21</sup> See GD8-5.

<sup>22</sup> See GD3-20.

<sup>23</sup> See GD8-5.

## **Is it misconduct based on the law – the *Employment Insurance Act*?**

[33] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>24</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>25</sup>

[34] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>26</sup>

[35] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of suspended or let go because of that.<sup>27</sup>

[36] The Commission has to prove that the Claimant was suspended from his 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 from his job because of misconduct.<sup>28</sup>

[37] I find that the Commission has proven that there was misconduct for the following reasons.

[38] First, I find that the policy was communicated to the Claimant and he was aware of the deadline dates to comply. The Claimant also had enough time to comply with the policy.

[39] Specifically, the policy was communicated to employees on August 25, 2021. Based on the employer's discussion, this followed with two reminder emails to Claimant and other employees on September 9, 2021 and October 22, 2021.<sup>29</sup>

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<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>25</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>26</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>29</sup> See GD3-20.

[40] Second, I find that the Claimant willfully chose to not to comply with the policy for his own personal reasons. He decided that he did not want to provide his vaccination status to the employer by the initial deadline date of September 8, 2021, or by October 31, 2021.

[41] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>30</sup>

[42] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to a mandatory unpaid leave of absence and suspension for six months.

[43] The consequences were outlined in the policy.<sup>31</sup> As well, the employer communicated the consequences to employees, including the Claimant by email, on September 9, 2021 and October 22, 2021.<sup>32</sup> The Claimant confirmed receiving emails from the employer about the policy.

[44] I was not persuaded by the Claimant's testimony that he did not think the policy would apply to him because he did not consent to the policy.

[45] I generally accept that the employer has a right to exercise their management rights to develop and impose policies at the workplace. The employer does not need the Claimant's consent to develop and impose a policy at the workplace. Even if the Claimant does not agree or consent to the policy, it does not mean that he is not subject to the consequences of non-compliance. In this case, the consequence was an unpaid leave of absence for six months.

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<sup>30</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>31</sup> See GD8-5.

<sup>32</sup> See GD3-20.



[46] As well, I was not persuaded by the Claimant's argument that he did not consent to the deductions of EI premiums on his cheque. The Claimant works in insurable employment for large airline. This means that he has to pay EI premiums.

[47] Fourth, I find that the Claimant has not proven to me he was exempt from the policy. At the hearing, he explained that he did not want to disclose whether he made a request for an exemption because that information was private.

[48] Lastly, the Claimant was suspended because he refused to comply with the employer's policy that required him to disclose his vaccination status and to be vaccinated for covid19. He was told about the policy and given time to comply. He chose not to comply with the policy for his own reasons. This resulted in his suspension and he knew the consequences of non-compliance.

### **What about the Claimant's other arguments?**

[49] The Claimant raised other arguments in his documentation and at the hearing to support his position.<sup>33</sup> Some of them included the following:

- a) The employer wanted him to disclose his private medical information, which is protected
- b) There was no informed consent
- c) The employer's actions were against his civil rights
- d) He is invoking section 96(1) of the Common Law and Equity
- e) It was illegal for his employer to put him on a leave of absence
- f) He has constitutional rights and the bill of rights protect him

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<sup>33</sup> See GD3-28; GD9-1 to GD9-2.

[50] The court has said that this Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>34</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[51] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.

[52] At the hearing, the Claimant acknowledged that a union grievance was filed and the date of labour arbitration was postponed.

## **Conclusion**

[53] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence and suspension.

[54] The Commission has proven that the Claimant was suspended from his job because of misconduct from October 30, 2021 to May 11, 2022. Because of this, the Claimant is not entitled to receive EI benefits for this period.<sup>35</sup> However, since the Claimant returned to work on May 12, 2022 as the period of suspension expired after 6 months, the disentitlement to EI benefits is removed as he resumed his employment.<sup>36</sup>

[55] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>34</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>35</sup> See section 31 of the EI Act.

<sup>36</sup> See section 31(a) of the EI Act.