



Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 1437

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

## Decision

**Appellant:** S. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (460189) dated March 13, 2022 (issued by Service Canada)

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**Tribunal member:** Leanne Bourassa

**Type of hearing:** Teleconference

**Hearing date:** July 12, 2022

**Hearing participants:** Appellant

**Decision date:** October 18, 2022

**File number:** GE-22-1290

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant, S. P.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was placed on a leave of absence (suspended) because of misconduct (in other words, because he did something that caused him to be put on a leave of absence). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant, a registered nurse, was put on a leave of absence from his job. The Claimant's employer said that he put on leave (suspended) because he failed to comply with their vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, he says that he was only put on a leave of absence and was not suspended for misconduct. He has personal reasons for not being vaccinated. He also says that he was under the belief he would receive an exemption from the policy.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits until the period of suspension expires, the claimant loses or voluntarily leaves the employment or has accumulated with another employer the number of insurable hours required to qualify to receive benefits.

## **Matters I have to consider first**

### **The appeal is not being summarily dismissed**

[6] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) says that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[7] Section 22 of the *Social Security Tribunal Regulations* says that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[8] In this case, I advised the Claimant on May 27, 2022 that I was considering summarily dismissing this appeal. The Claimant provided a written response on June 10, 2022 and the Commission was given a chance to respond. The Commission's response was received on June 13, 2022.

[9] In light of these responses, I decided that there was a reasonable chance of the appeal being successful. So, the appeal is not summarily dismissed. A hearing was heard on the merits of the claim and this decision deals with the matter on its merits.

### **The Employer is not a party to the appeal**

[10] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer such a letter. The employer did not reply to the letter.

[11] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in my file that suggests that my decision would impose any legal obligations on the employer.

## **The Issue before the Tribunal is a disentitlement because of misconduct**

[12] In its submissions, the Commission advises the Tribunal that there was a clerical error in the decision sent to the Claimant after reconsideration of his claim. While the letter says that the reason for the disentitlement is “Leave of Absence” the Commission explains that it should read “Misconduct”.

[13] Upon review of the file and the facts, I accept that this letter should read “Misconduct” as the reason for disentitlement. I also find that this correction would cause no prejudice to the Claimant, first because all parties agree that his leave of absence was not voluntary and second, because he was given the opportunity to provide arguments that were relevant to the issue of misconduct.

## **Issue**

[14] Was the Claimant suspended from his job because of misconduct?

## **Analysis**

[15] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was put on a leave of absence. Then, I have to determine whether the law considers that reason to be misconduct.

## **Why was the Claimant put on a leave of absence from his job?**

[16] I find that the Claimant was put on a leave of absence because he refused to be vaccinated according to his employer’s policy.

[17] The Claimant and the Commission don’t entirely agree on why the Claimant was suspended from his job.

[18] The Commission says that the reason the employer gave is the real reason for the suspension. The employer told the Commission that the Claimant was placed on a leave of absence because he failed to comply with the employer’s vaccination policy.

The Claimant was not vaccinated by October 19, 2021 and did not provide any medical or religious exemptions by the deadline.

[19] The Claimant disagrees. The Claimant says that he was not suspended but was involuntarily placed on a leave of absence because he did not comply with the employer's vaccination policy. He had personal reasons for not being vaccinated and his union was grieving the issue because there was a violation of his employment conditions.

[20] I find that the Claimant was placed on an involuntary leave of absence, which is the same as being suspended, because he did not comply with the employer's policy.

[21] The Claimant does not deny that he refused to be vaccinated. He acknowledges that he was placed on a leave of absence because he made a personal health choice, as was his right. There was no other reason that lead to his leave of absence.

### **Is the reason for the Claimant's leave of absence (suspension) misconduct under the law?**

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

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>4</sup>

[24] 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 being let go because of that.<sup>5</sup>

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[25] The Commission has to prove that the Claimant lost 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 lost his job because of misconduct.<sup>6</sup>

[26] The Commission says that there was misconduct because the Claimant was aware of his employer's policy and the date by which he needed to comply. He made no real attempt to explore the possibility of an exemption and willingly refused to be vaccinated, which was a violation of his employer's policy. He ought to have known that he risked suspension without pay as his employer had provided a clear warning.

[27] The Claimant says that there was no misconduct because the employer's policy was a violation of articles of his employment contract, the employer did not establish a bona fide occupational requirement for their mandatory policy and instead subjected him to discrimination based on a perceived disability of infectiousness. He also explains he was willing to undergo testing as prior to his leave of absence and he had indicated that he was seeking accommodation on various grounds.

[28] I find that the Commission has proven that there was misconduct, because the Claimant knew the employer had a vaccination policy in place and knew the consequences of failing to comply with it. He made a conscious and deliberate decision not to comply. He was suspended because he did not comply.

[29] The Claimant argues that his record of employment says that he was placed on an unpaid Leave of Absence and that this is not equivalent to being "suspended" due to "misconduct". He says that nowhere in the employer's policy is suspension due to misconduct indicated as a consequence of not being vaccinated for COVID-19. As such, he could not know that he could be suspended if he was not vaccinated.

[30] I find that the requirement to be vaccinated is set out clearly in the employer's policy. In the first paragraph of the policy it says that "This policy requires all [employer]

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<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

personnel to be vaccinated against COVID-19 and provide proof thereof as of October 19, 2021.” The Claimant says he read and understood the policy.

[31] The policy also clearly says that failure to comply with the policy may result in an unpaid leave of absence or other action up and including termination of employment.<sup>7</sup> It is even more specific when it states that as of October 19, 2021, personnel who have not been fully vaccinated or who have not been granted an exemption would be considered non-compliant.<sup>8</sup> Non-compliant personnel would be placed on an unpaid leave and may be deemed in breach of their contract.<sup>9</sup>

[32] While the Claimant argues that this he was not suspended for misconduct, it is clear to me that he did not stop working of his own volition. It was his employer that decided he was not able to work because he had not complied with the policy. This means he was suspended from working.

[33] As the case law sets out, misconduct can occur even when a claimant does not have wrongful intent.<sup>10</sup> The Claimant says that he was exercising his personal right not to be vaccinated. He has that right. However, he also knew the consequences of exercising that right.

[34] The Claimant also argues that he believed he was complying with his employer’s policy because he had asked for an exemption from COVID-19 vaccination. The employer told the Commission that there was no record of a request for an exemption.

[35] I questioned the Claimant about his request for exemption. He told me that he had checked the boxes in the online disclosure form saying that he would like an exception for reasons of religion, medical reasons and reasons of creed. There was no communication from his employer about these boxes being checked.

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<sup>7</sup> This is set out in section 3.7 of the policy.

<sup>8</sup> Section 6.7 of the policy.

<sup>9</sup> Section 6.8 of the policy.

<sup>10</sup> See *Attorney General of Canada v Secours*, A-352-94.

[36] There is no evidence in the file showing what exactly the Claimant said in his online disclosure form. Because of that I have to rely on what is said in the employer's policy about exemptions. The policy says that personnel requesting an exemption from vaccination or testing must provide documentation in support of such a request.<sup>11</sup> The Claimant says that he was never asked for additional documentation and did not give anything to his employer other than the checkmarks on the online form.

[37] The employer's policy says that personnel would be advised of whether the exemption is approved or denied. The Claimant confirmed that after he submitted his online disclosure form, he didn't hear anything from his employer about an exemption. In fact he testified that the only conversation from his employer was trying to convince him to be vaccinated, reminding him that he didn't want to lose his job.

[38] The Claimant told me that he was aware that he would be put on a leave of absence and his hope was that the union would communicate with his employer and reach some kind of agreement. He was hoping the leave of absence wasn't going to happen.

[39] Since the Claimant knew that a leave of absence was the consequence of not being vaccinated by October 19, 2021, and he was deliberate in his choice not to be vaccinated, I have to conclude that his conduct in refusing to comply with the policy by getting vaccinated was willful.

[40] Even though the Claimant says he applied for an exemption, I see no evidence that he was granted one. In fact, from his testimony I understand that he did not really expect to get an exemption. So, he knew that he did not have an exemption and still chose not to comply with the employer's policy. Being placed on a leave of absence was a foreseeable consequence of this action.

[41] From the evidence before me, I find that the Claimant made the deliberate choice not to comply with his employer's mandatory vaccination policy. He knew what the consequences of non-compliance were and he continued to fail to comply. He was put

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<sup>11</sup> See section 6.4 of the policy.

on a leave of absence because he did not comply. So, for the purposes of the Employment Insurance Act, this is misconduct.

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

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

### **Other arguments**

[43] The Claimant also argues that his employer has not shown a bona fide occupational requirement for their mandatory policy and the policy contains multiple violations of articles of his employment contract.

[44] In deciding cases of misconduct, the Commission is not required to prove that an employer's policy is reasonable or fair. When deciding questions of misconduct for the purposes of Employment Insurance, the question of misconduct relates only to the claimant's own conduct.<sup>12</sup>

[45] The employer in this case is an Ontario public health organization. They are subject to the requirements set out by the Ontario Ministry of Health. In the face of a worldwide pandemic, the Ministry put in place Directive #6 for Public Hospitals which required these organizations to report on vaccinations. The employer's policy specifically references this directive and explains that the policy reflects its commitment to the health and safety of its clients/patients, personnel and the community at large.<sup>13</sup>

[46] The employer also provided employees with additional information and the Claimant confirms that he attended a training session about COVID-19 vaccines. While he may not have accepted the information that was given to him, I do not agree that in the context of a global pandemic and the Ministry of Health obligations, that the employer had not shown an occupational requirement for their policy.

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<sup>12</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282

<sup>13</sup> This is set out in section 1.0 of the policy.

[47] The Claimant has not provided any information about the terms of his employment contract. He confirmed that his union has filed grievances against the policy and also based on his personal circumstances. Employment arbitration between the union and the employer is the appropriate forum to deal with those issues. I have no authority to intervene to resolve any contractual disagreements between the Claimant and his employer.

[48] Finally the Claimant argues that he was subject to discrimination because he was treated differently by his employer because he was not vaccinated. He feels he was subjected to different treatment because of the perceived disability of infectiousness. While I see that before being placed on leave the Claimant was required to undergo testing prior to his shifts and this requirement was only for unvaccinated employees, possible infectiousness is not a ground of discrimination that can be considered in determining if a Claimant committed misconduct.

## **Conclusion**

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

[50] This means that the appeal is dismissed.

Leanne Bourassa  
Member, General Division – Employment Insurance Section