



Citation: *SR v Canada Employment Insurance Commission*, 2022 SST 1521

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

## **Decision**

**Appellant (Claimant):** S. R.

**Respondent (Commission):** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (474217) dated June 3, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy

**Type of hearing:** Videoconference

**Hearing date:** September 21, 2022

**Hearing participant:** Appellant

**Decision date:** September 29, 2022

**File number:** GE-22-2208

## Decision

[1] The appeal is dismissed.

[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 from her job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant worked as a business analyst and was placed on an unpaid leave of absence by the employer effective February 1, 2022. The Claimant's employer ("Bell Canada") said the Claimant was placed on an unpaid leave of absence because she didn't comply with their vaccination policy by January 31, 2022.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. The Commission considered the Claimant's unpaid leave of absence to be equivalent to a suspension, because the leave without pay was for failing to comply with the employer's mandatory vaccination policy.

[5] The Commission decided the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits as of February 7, 2022.

[6] The Commission says the Claimant wasn't fully vaccinated before the deadline of January 31, 2022, and her actions were in breach of the employer's policy.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from her employment because of her misconduct is not entitled to receive EI benefits until the claimant meets one of the provisions which are: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by section 7 to qualify to receive benefits.

[7] The Claimant says she couldn't take the risk of being vaccinated for health reasons. She further says her doctor wasn't able to provide a letter supporting a medical exemption.

## **I will accept the documents sent in after the hearing**

[8] The Claimant submitted additional documents that were received by the Tribunal post-hearing. I have accepted these documents as evidence, because they were relevant to the appeal. The Claimant's additional documents have been listed as GD6-1 to GD6-16 and GD7-1 to GD7-10.

## **Issue**

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

## **Analysis**

[10] 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 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?**

[11] I find the Claimant was suspended from her job, because she failed to comply with the employer's vaccination policy by January 31, 2022.

[12] The Commission says the reason the employer gave is the reason for the Claimant's suspension. The employer told the Commission that the Claimant wasn't fully vaccinated by January 31, 2022, as required by their policy.

[13] The Claimant doesn't dispute that she was placed on unpaid leave of absence because she wasn't fully vaccinated by January 31, 2022. However, the Claimant says she wasn't ready to be vaccinated and the employer denied her request for a medical exemption.

[14] I find the Claimant was placed on an unpaid leave of absence because she failed to comply with the employer's vaccination policy by January 31, 2022.

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

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

[16] 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>4</sup>

[17] 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 suspended or let go because of that.<sup>5</sup>

[18] 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 from her job because of misconduct.<sup>6</sup>

[19] The Commission says there was misconduct because the Claimant's actions were in breach of the employer's vaccination policy.

[20] The Claimant says there was no misconduct because she couldn't take the risk of being vaccinated.

[21] I find the Commission has proven there was misconduct, because they showed the Claimant was fully aware of the employer's vaccination policy and the consequences for not complying with the policy (GD3-31). Furthermore, the

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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.

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

Commission provided a copy of the employer's vaccination policy which stated what the consequences would be for failing to comply with the policy by January 31, 2022 (GD3-34 to GD3-36). I realize the Claimant testified she couldn't take the risk of vaccination and was denied a medical exemption by the employer. However, the matter of determining whether the employer's vaccination policy was fair or reasonable was beyond my jurisdiction. Other avenues existed for the Claimant to make these arguments.<sup>7</sup>

### **Additional Testimony from the Claimant**

[22] I recognize the Claimant further argued that in June 2022 the Service Canada website indicated her termination of employment was no longer due to misconduct (GD6-13 to 14). However, the Commission explained in their representations that the reconsideration officer learned the Claimant was suspended and not dismissed from her employment (GD4). As a result, the Commission submitted that the Commission officer input the *disentitlement for the suspension* on June 5, 2022, and rescinded the disqualification on June 6, 2022. The Commission explained that once the officer made the changes in the EI system, the Claimant would be able to see the changes through her "My Service Canada Account" (G4). On this matter, I'm satisfied the Commission has reasonably accounted for the change on the Claimant's Service Canada account.

[23] Finally, I realize the Claimant testified that she was called back to work by the employer on July 11, 2022 (even though she was still unvaccinated). I recognize the Claimant was confused by the employer's return-to-work call. However, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable was beyond my jurisdiction. In short, the only issue before me was whether the Claimant was suspended from her job on February 1, 2022, because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even for compassionate reasons.<sup>8</sup>

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<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

<sup>8</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.

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

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

**Conclusion**

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

[26] This means the appeal is dismissed.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section