



Citation: *AF v Canada Employment Insurance Commission*, 2023 SST 360

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

## Decision

**Claimant:** A. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (502181) dated August 3, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** Videoconference

**Hearing date:** December 21, 2022

**Hearing participant:** Claimant

**Decision date:** January 6, 2023

**File number:** GE-22-2612

## Decision

[1] The appeal is dismissed. I disagree 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 him to be suspended from his job).<sup>1</sup> This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>2</sup>

## Overview

[3] The Claimant was suspended from his job. The Claimant's employer said that he was suspended because he didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, he says that his employer's mandatory COVID-19 vaccination policy was unfair because he feels it violated his original employment contract and the COVID-19 vaccine hasn't been proven to be safe or effective.

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

## Issue

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

## Analysis

[7] 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 suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

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<sup>1</sup> In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.

<sup>2</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.

## Why was the Claimant suspended from his job?

[8] I find that the Claimant was suspended from his job because he didn't follow his employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission agree on why the Claimant was suspended from his job. The Claimant says that he was suspended because he didn't follow his employer's COVID-19 vaccination policy.<sup>3</sup> His employer also says that he was suspended for this reason.<sup>4</sup>

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

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

[11] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[12] Case law says that, to be misconduct, 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>7</sup>

[13] 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 suspended because of that.<sup>8</sup>

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<sup>3</sup> GD3-21.

<sup>4</sup> GD3-44.

<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.

[14] 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>9</sup>

[15] The law doesn't say I have to consider how the employer behaved.<sup>10</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>11</sup>

[16] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>12</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] The Commission says that there was misconduct because the Claimant's employer had a mandatory COVID-19 vaccination policy, the Claimant knew about the policy, and he knew that he could be suspended if he didn't follow it, but chose not to follow it anyway.<sup>13</sup>

[18] The Claimant says that there was no misconduct because his employer's policy was unfair and he shouldn't have had to follow it.<sup>14</sup>

[19] The Claimant told the Commission<sup>15</sup>, submitted to the Tribunal<sup>16</sup>, and testified that:

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

<sup>10</sup> See section 31 of the Act.

<sup>11</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>13</sup> GD4-5.

<sup>14</sup> GD2-5.

<sup>15</sup> GD3-21.

<sup>16</sup> GD6-1 to GD6-2.

- He knew about his employer's mandatory COVID-19 vaccination policy and received several reminders about it in fall 2021.
- His employer's policy required that he share his vaccination status with them, but he refused to do that because it was his private medical information.
- His employer's policy allowed employees to submit medical and other exemptions.
- He asked his doctor if he could get a note for a medical exemption based on his health history (cancer and heart procedures), but his doctor got scared and said no, they weren't allowed to give any exemptions.
- His employer's policy was unfair because he feels it violated his original employment contract and the COVID-19 vaccine hasn't been proven to be safe and effective.
- He knew that he could be suspended if he didn't follow his employer's policy as the reminders he received mentioned this.

[20] The Claimant also argues that another Tribunal decision shows that he didn't commit misconduct because that appeal was similar to his.<sup>17</sup>

[21] I find that the Commission has proven there was misconduct for the following reasons:

[22] I find the Claimant committed the actions that led to his suspension, as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[23] I further find the Claimant's actions were intentional as he made a conscious decision not to follow his employer's policy.

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<sup>17</sup> GD6-2.

[24] There is clear evidence that the Claimant knew about his employer's policy. He said he was aware of it, as mentioned above.

[25] There is also clear evidence that the Claimant chose not to follow his employer's policy. He said he refused to share his vaccination status with his employer as their policy required, as mentioned above.

[26] I acknowledge that the Claimant feels his doctor should have given him a note for a medical exemption based on his health history. But unfortunately, this isn't relevant here. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I need to focus on the Claimant's actions leading to his suspension and whether he knew his actions could lead to him being suspended.

[27] In this case, what is relevant is that the Claimant still chose not to follow his employer's policy after his doctor wouldn't write him a note for a medical exemption.

[28] I also acknowledge that the Claimant argues his employer's policy was unfair because he feels it violated his original work contract and the COVID-19 vaccine hasn't been proven safe and effective.

[29] But, unfortunately, this isn't relevant here either. Once again, I can only look at the Claimant's actions leading to his suspension and whether he knew his actions could lead to him being suspended. If the Claimant wishes to pursue this argument further, he needs to do that through another forum.

[30] Additionally, I acknowledge that the Claimant feels that another Tribunal decision shows that he didn't commit misconduct because the situation in that appeal is similar to his.

[31] I asked the Claimant why he feels the situation is similar and he testified it is because the claimant in that appeal has a health history like his.

[32] I note that I'm not bound by prior decisions of the Tribunal and must decide each case based on the facts before me. Even though I am not bound by other Tribunal

decisions, I also find that the one the Claimant cites doesn't sufficiently support his argument.

[33] It is true that the claimant in the other Tribunal decision has a similar health history to the Claimant. But I find this wasn't the reason why their appeal was allowed. Instead, I note that the Tribunal Member made their decision based on the Claimant's collective agreement and what it did and didn't say with respect to vaccinations.<sup>18</sup>

[34] Even if the Claimant had argued that the other Tribunal decision shows he didn't commit misconduct because of what the Tribunal Member said about collective agreements, I would still disagree. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I can't interpret and apply other things, like employment contracts. There are other options available for pursuing this matter further, like filing a grievance.

[35] So, I don't give the other Tribunal decision much weight here.

[36] While I acknowledge the Claimant's concerns about his employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that he made a conscious decision not to follow the policy. He didn't declare his vaccination status as the policy required him to do, which shows that his actions were intentional.

[37] I also find the Claimant knew or should have known that not following his employer's mandatory COVID-19 vaccination policy could lead to him being suspended from his job.

[38] I find there is clear evidence that the Claimant's employer told him more than once that he could be suspended if he didn't follow their policy.

[39] I note that the Claimant's employer's policy states the following:<sup>19</sup>

- All employees are required to be fully vaccinated as of October 31, 2021.

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<sup>18</sup> GD6-117.

<sup>19</sup> GD3-31 to GD3-33.

- All employees are required to submit a vaccination attestation and if they don't, they will be considered to not be fully vaccinated or unvaccinated.
- As of December 1, 2021, all unvaccinated employees have until January 31, 2022 to submit proof of full vaccination or they will be placed on unpaid leave as of February 1, 2022.
- Employees on unpaid leave who remain unvaccinated may be terminated without further notice.

[40] I also note that an email from the Claimant's employer, dated December 2, 2021, states that any employees who aren't fully vaccinated will be placed on unpaid leave as of February 1, 2022.<sup>20</sup>

[41] I further note that another email from the Claimant's employer, dated December 3, 2021, states that employees who haven't attested to being fully vaccinated by January 31, 2022 will be placed on unpaid leave the next day (February 1, 2022).<sup>21</sup>

[42] The email also states that since the Claimant hasn't attested to being fully vaccinated, he's required to immediately start his vaccination process if he wants to avoid being placed on unpaid leave. To do this, he has to send proof of his first vaccination dose no later than December 10, 2021 and proof of his second dose no later than January 17, 2022.<sup>22</sup>

[43] Additionally, I note that the Claimant said he knew he could be suspended for not following his employer's policy as he received multiple reminders about it in fall 2021, as mentioned above.

[44] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his suspension (he didn't follow his employer's

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<sup>20</sup> GD3-36 to GD3-37.

<sup>21</sup> GD3-39.

<sup>22</sup> GD3-39.



mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being suspended.

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

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

[46] The Claimant testified that being suspended has hurt him financially and he is entitled to EI because he has been contributing to it for many years.

[47] I understand the Claimant's argument and sympathize with his financial situation. Unfortunately, however, Employment Insurance isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. The Commission has proven that the Claimant was suspended from his job because of misconduct. This means that he isn't entitled to receive EI benefits.

### **Additional Considerations**

[48] The Commission proposes an amendment to its initial decision. It proposes that the end of the Claimant's disentitlement period should be changed to July 15, 2022.

[49] The Commission argues that although the Claimant's employer's mandatory COVID-19 vaccination policy was lifted as of June 30, 2022, the Claimant remained suspended until July 18, 2022, so the end of his disentitlement period should be changed to July 15, 2022.<sup>23</sup>

[50] I agree with the Commission. Emails between the Claimant and his employer clearly show that the Claimant returned to work on July 18, 2022.<sup>24</sup> There is also no evidence to indicate that this return date is incorrect.

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<sup>23</sup> GD4-5.

<sup>24</sup> GD3-48 to GD3-49.

[51] I therefore find that the end of the Claimant's disentitlement period should be changed to July 15, 2022, as proposed by the Commission.

### **Conclusion**

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

[53] This means that the appeal is dismissed.

Bret Edwards  
Member, General Division – Employment Insurance Section