



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1748

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

## Decision

**Appellant:** S. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (461337) dated March 25, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** November 2, 2022

**Hearing participant:** Appellant (Claimant)  
Appellant's Witness, T.S.  
Appellant's Witness, R.F.

**Decision date:** November 7, 2022

**File number:** GE-22-1360

## 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 and lost 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] S.S. is the Claimant in this case. The Claimant worked as a Security Guard for around 7.5 years. The employer put the Claimant on an unpaid administrative leave and dismissed the Claimant he did not comply with the covid19 vaccination 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 and lost his employment due to his own misconduct.<sup>4</sup>

[5] The Claimant disagrees because his employer did not accommodate him and this has caused financial hardship.<sup>5</sup> He also says that the employer ignored his medical note which exempted from the covid19 vaccine.<sup>6</sup> Lastly, he has paid into EI benefits and argues that he should be entitled to receive it.

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<sup>1</sup> See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

<sup>2</sup> See record of employment at GD3-19 to GD3-20.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-15.

<sup>4</sup> See initial decision at GD3-27 and reconsideration decision at GD3-49 to GD3-50.

<sup>5</sup> See notice of appeal at GD2-1 to GD2-7 and GD2A-1 to GD2A-17.

<sup>6</sup> See medical note at GD9-2.

## Matters I have to consider first

### A request for confidentiality order was denied

[6] The Claimant submitted a medical note from his doctor and it was added to the file.<sup>7</sup> The Claimant asked the Tribunal Member (who was previously assigned this file) to make the medical note confidential and private.<sup>8</sup>

[7] The Tribunal Member wrote back to the Claimant and his legal representative<sup>9</sup> (at the time) explaining the “open court principle” and denying his request for a confidentiality order. The specific reasons for that decision was provided in the letter.<sup>10</sup>

### The Claimant decided not to proceed by Charter<sup>11</sup> appeal

[8] This file had been previously adjourned because the Claimant said that the Commission’s decision infringed on his Charter rights.<sup>12</sup> At a later date, the Claimant advised the Tribunal that he did not want to proceed with a Charter appeal, so the case was scheduled for a regular hearing. It was heard by teleconference on November 2, 2022.<sup>13</sup>

### The Claimant submitted some documents

[9] At the hearing, the Claimant talked about a letter provided by his doctor and some emails that he had sent to his employer. The Claimant referenced the Commission’s *Digest of Benefit Entitlement Principles* (Digest). I asked the Claimant to submit copies of these documents to the Tribunal so that I could review them.

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<sup>7</sup> See medical note at GD9-2.

<sup>8</sup> See Claimant’s request at GD7-1; GD9-1

<sup>9</sup> See GD14-1. The Tribunal was advised that the Claimant was no longer represented by counsel on August 3, 2022.

<sup>10</sup> See decision from Tribunal member letter dated July 12, 2022 at GD8-1 to GD8-3.

<sup>11</sup> See *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>12</sup> See GD1-1 to GD1-3; GD12-1 to GD12-3; GD15-1 to GD15-3; GD16-1 to GD16-3; GD17-1 to GD17-3

<sup>13</sup> See GD18-1 to GD18-4; GD20-1 to GD20-2 and GD21-1 to GD21-3.

[10] The Claimant submitted the above documents to the Tribunal and they were shared with the Commission.<sup>14</sup> As of the date of this decision, the Commission has not provided any comments about the Claimant's documents.<sup>15</sup>

## **Issue**

[11] Was the Claimant suspended and dismissed from his job due to his own misconduct?

## **Analysis**

[12] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>16</sup>

[13] To answer the question of whether the Claimant was suspended and lost his job 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?**

[14] I find that the Claimant was put on an unpaid leave of absence on October 16, 2021 and was dismissed from his job on December 9, 2021 because he did not comply with the employer's covid19 vaccination policy.

[15] The Claimant initially said that he was put on a leave of absence on October 11, 2021. However, he later explained that October 11, 2021 was actually his last day of work because he did not have any scheduled shifts that particular week.

[16] Given the above, I find that the Claimant was only put on the unpaid leave of absence effective October 16, 2021.

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<sup>14</sup> See GD23-1 to GD23-28. The Tribunal received the Claimant's documents on November 2, 2022 and they were emailed to the Commission on November 3, 2022.

<sup>15</sup> Specifically, GD23-1 to GD23-28.

<sup>16</sup> See sections 30 and 31 of the EI Act.

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

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

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>17</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>18</sup>

[19] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>19</sup>

[20] 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>20</sup>

[21] The law does not say I have to consider how the employer behaved.<sup>21</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>22</sup>

[22] I have to focus on the EI Act only. I cannot make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.<sup>23</sup> I can

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<sup>17</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>18</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>19</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>20</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>21</sup> See section 30 of the EI Act.

<sup>22</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>23</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[23] The Commission has to prove that the Claimant was suspended and 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>24</sup>

### **The covid19 vaccination policy**

[24] The employer implemented a covid19 vaccination policy (policy) with an effective date of October 4, 2021. It states that the company has a legal obligation to take every reasonable precaution to protect its workforce from potential workplace risks. It also says that vaccination makes people less likely to contract the virus, transmit the virus or suffer serious symptoms of covid19.

[25] A copy of the policy is included in the file.<sup>25</sup>

[26] The policy applies to current employees. The emphasis added below is mine. The relevant sections of the policy state:

- a) *The company shall notify current and prospective employees of the vaccine requirement, after which an individual has **until October 15, 2021 to deliver acceptable proof of vaccination for covid19** approved by the World Health Organization<sup>26</sup>*
- b) *A vaccine exemption will be granted **for medical reasons**, as defined in this policy, or where necessary to respect an individual's personal characteristics that is protected by human rights legislation<sup>27</sup>*

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<sup>24</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>25</sup> See policy at GD3-33 to GD3-39.

<sup>26</sup> See GD3-34 under proof of vaccination. My emphasis is added.

<sup>27</sup> See GD3-35 under vaccine exemption.

- c) Where medical proof, **satisfactory to the company**, establishes an individual is likely to suffer a serious illness due to vaccination, they may be granted a vaccine exemption.<sup>28</sup> **An individual seeking such an exemption must:**
- i) Waive confidentiality with respect to medical and personal information relevant to the matter and authorize their treating practitioners to communicate directly with the company or its delegate;
  - ii) If asked, consent to be examined by a medical practitioner or other expert of the company's choosing, to assess the alleged risk from vaccination;
  - iii) Provide updated evidence of such risk when asked.
- d) Employees who intend to seek a **vaccine exemption shall provide proof of the reason for the request by October 22, 2021**, at which time the company will determine their eligibility for the exemption<sup>29</sup> Failure to do so will result in being placed on an unpaid administrative leave (ADMIN) until they provide justification.
- e) Where a proof of vaccination is not provided as per above, or a vaccine exemption is not sought or granted: **Employee shall be subject to termination from employment for willful misconduct and insubordination.**<sup>30</sup>

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

[28] First, I find that the policy was communicated to the Claimant by October 4, 2021. He received a copy of the policy emailed to him sometime between October 7, 2021-October 11, 2021 and agreed that he reviewed the policy.

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<sup>28</sup> See GD3-36 under medical reasons.

<sup>29</sup> See GD3-35 under non-compliance.

<sup>30</sup> See GD3-35 under non-compliance.

[29] I acknowledge that the Claimant may not have had enough time to comply with the policy by the deadline of October 15, 2021 and before he was put on a leave of absence on October 16, 2021. However, the employer did provide a grace period to comply by October 22, 2021.<sup>31</sup> As well, I accept that the Claimant had enough time to comply with the policy before his dismissal occurred on December 9, 2021.

[30] Second, the Claimant has not proven that he was exempt from the policy because it was not approved by his employer. His employer specifically asked him to have his health care provider complete their two-page medical exemption form on October 4, 2021, but he failed to do so.<sup>32</sup>

[31] Instead, the Claimant chose to rely on a medical note from his doctor to his employer on October 4, 2021. That medical note dated March 9, 2021 exempted him from the covid19 vaccine due to past history of allergic reactions to vaccines.<sup>33</sup>

[32] I asked the Claimant why the medical note was dated March 9, 2021 because it pre-dated the effective date of the policy (October 4, 2021). The Claimant explained that he went to see his doctor in March 2021 because he had allergic reactions to vaccines in the past, so his doctor wrote him a medical note exempting from the covid19 vaccine. He held on to the medical note for a few months and then submitted it to his employer once he knew the policy was in effect.

[33] The policy specifically states that where an employee is asking for an exemption based on medical reasons, they must do the following:

- a) *Where medical proof, **satisfactory to the company**, establishes an individual is likely to suffer a serious illness due to vaccination, they may be granted a vaccine exemption.*<sup>34</sup> **An individual seeking such an exemption must:**

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<sup>31</sup> The employer referred to a grace period until October 22, 2021 in their termination letter at GD3-41.

<sup>32</sup> See GD23-14 to GD23-22.

<sup>33</sup> See October 4, 2021 GD23-14 to GD23-22 and medical note at GD9-2.

<sup>34</sup> See GD3-36 under medical reasons.



- i) *Waive confidentiality with respect to medical and personal information relevant to the matter and authorize their treating practitioners to communicate directly with the company or its delegate;*
- ii) *If asked, consent to be examined by a medical practitioner or other expert of the company's choosing, to assess the alleged risk from vaccination;*
- iii) *Provide updated evidence of such risk when asked.*

[34] As noted above, the policy provided a two-page medical exemption form that must be completed by a physician or medical practitioner.<sup>35</sup> The Claimant said that he spoke to his doctor again, but his doctor was unwilling to complete the two-page medical exemption form. Instead the Claimant's doctor gave him a copy of a letter from the *College of Physicians and Surgeons* dated September 1, 2021 that provided information about covid19 medical exemptions update.<sup>36</sup>

[35] The Claimant agreed that he did not submit the two-page medical exemption form to his employer, instead he chose to rely on the medical note dated March 9, 2021, which the employer did not accept. As well, the Claimant admitted that he was not prepared to comply with the other listed criteria above, such as waive confidentiality, etc.

[36] Given the above, the Claimant did not have an approved medical exemption from the employer. The policy says that the medical proof must be satisfactory to the employer and the medical note he submitted was not.

[37] Third, I find that the Claimant knew or ought to have known that non-compliance with the policy would lead to an unpaid leave of absence and his termination. I was not persuaded by the Claimant's testimony that he did not know the consequences because it was stated in the policy, which he received a copy of. He knew what he had to do

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<sup>35</sup> See medical exemption form at GD3-38 to GD3-39

<sup>36</sup> See GD23-11 to GD23-12.

under the vaccination policy and what would happen if he did not follow it - an unpaid leave of absence and termination from his job.

[38] The Claimant relied on the Digest, but this is not law. The Digest provides information on how the Commission interprets its policies and law. I am bound by the law. In any event, the section of the Digest referenced by the Claimant is not applicable in this case (this case dealt with misconduct, not voluntary leave, so a “significant change in work duties” is not applicable).<sup>37</sup>

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

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

[40] This is because the Claimant’s actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

[41] The Federal Court of Appeal has already said that a deliberate violation of the employer’s policy is considered misconduct based on the EI Act.<sup>38</sup> Even though the Claimant did not have wrongful intent, it was still misconduct.

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

[42] The Claimant had two witnesses (T.S. and R.F.) testify about his character and various hardships. I acknowledge that the Claimant is a hard worker and it is clear that he cared deeply about his job. However, I do not have the authority in law to grant him EI benefits for compassionate reasons.

[43] The Claimant also made other arguments about his case: the employer’s failure to accommodate him; harassment and intimidation by the employer and wrongful termination, etc.

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<sup>37</sup> See Digest GD23-1 to GD23-10; sections 31 and 32 of the Act and section 29(c)(ix) of the Act.

<sup>38</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[44] I am bound by Federal Court decisions. The court has already said that the 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>39</sup> In this case, I have already decided that the Claimant's conduct amounts to misconduct based on the EI Act.

[45] I acknowledge the Claimant's additional arguments, but his recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.

## **Conclusion**

[46] The Commission has proven that the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[47] This means that the appeal is dismissed.

Solange Losier  
Member, General Division – Employment Insurance Section

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<sup>39</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.