



[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2023 SST 761

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

**Decision**

**Appellant:** A. P.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (542684) dated October 20, 2022 (issued by Service Canada)

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**Tribunal member:** Guillaume Brien  
**Type of hearing:** Videoconference  
**Hearing date:** March 16, 2023  
**Hearing participant:** Appellant  
**Decision date:** March 24, 2023  
**File number:** GE-22-3771

## 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 because of misconduct (in other words, because he did something that caused him to get suspended from his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was suspended from his job from February 1, 2022, to July 10, 2022. His employer said that he was suspended because he refused to comply with its mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute what happened, he says that not getting vaccinated at his employer's request isn't misconduct under the *Employment Insurance Act* (Act). He says that his personal decision not to get vaccinated didn't affect his ability to do his job. He says he did nothing wrong.<sup>2</sup>

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. So, he was disqualified 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

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

<sup>2</sup> See Question #7 in the notice of appeal—GD2-6.

Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended from his job?**

[8] I accept that the Claimant was suspended from his job because he refused to comply with his employer's mandatory COVID-19 vaccination policy.

[9] The Commission and the Claimant agree on why the Claimant was suspended, and I see no evidence to contradict this. The reason for the suspension is therefore considered proven.

### **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] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</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>5</sup>

[12] 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>6</sup>

[13] 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.

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

This means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct.<sup>7</sup>

[14] The Commission says there was misconduct for the following reasons:

- The employer adopted a COVID-19 vaccination policy (vaccination policy) on September 1, 2021.
- All employees, including the Claimant, were notified of the vaccination policy on September 1, 2021. Employees were told that they had to be fully vaccinated against COVID-19 by October 31, 2021.
- The employees were given five months to comply with the vaccination policy—that is, until January 31, 2022.
- The Claimant knew the consequences of not complying with the employer's vaccination policy. He knew he would be suspended without pay on February 1, 2022.
- The Claimant was effectively suspended without pay on February 1, 2022, in accordance with the employer's vaccination policy for unvaccinated employees.

[15] The Claimant says the following:

- His employer repeatedly told him about the company's vaccination policy and the consequences of not complying with it.
- The Claimant had five months to comply with the company's vaccination policy, but he didn't.

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<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Claimant says that he didn't ask for an exemption to the vaccination policy because he had no reason to do so. He had no medical or religious reasons. His supervisor told him he had to comply.

[16] Even though the Claimant admits to the facts listed above, he doesn't consider not complying with the employer's vaccination policy to be misconduct. It was a personal decision that didn't affect his ability to do his job. He says he did nothing wrong.

[17] First, the fact that the Claimant doesn't **consider** his non-compliance with the employer's vaccination policy to be misconduct is irrelevant. I have to apply the Act and *Employment Insurance Regulations*. I also have to apply the case law of the higher courts, which says that there is misconduct if the Claimant knew or should have known that his conduct was such as to impair the performance of his duties toward his employer and that, as a result, there was a real possibility of being suspended.<sup>8</sup> I don't have to apply the law based on what the Claimant **considers** the law to be.

[18] Second, the fact that getting vaccinated is a **personal decision** doesn't change anything. The Claimant doesn't have a constitutional right to stay in his current job if he isn't satisfied with the requirements of the job. He doesn't have to shift the burden of his personal decisions onto all contributors to the EI program.

[19] Finally, the fact that the Claimant did **nothing wrong** is irrelevant. For there to be misconduct under the law, the Claimant doesn't have to have wrongful intent<sup>9</sup> (in other words, he doesn't have to mean to be doing something wrong).

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

- The employer adopted a vaccination policy on September 1, 2021.

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<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *Attorney General v Secours*, A-352-94.

- This vaccination policy was communicated to the Claimant several times as early as September 1, 2021.
- The Claimant had enough time (five months) to comply with the policy.
- The Claimant was aware that he would be placed on unpaid leave as of February 1, 2022, if he didn't comply with his employer's vaccination policy.
- The Claimant failed to comply with the vaccination policy and was effectively placed on unpaid leave from February 1, 2022.

[21] The Claimant was aware of the employer's vaccination policy. He was aware of the possible consequences of not complying. He had several months to comply. He could have asked for an exemption, but he didn't because he had no reason to. The Claimant wilfully chose not to comply with the vaccination policy. He was suspended without pay as a direct result of his non-compliance with his employer's vaccination policy.

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

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

### **Conclusion**

[23] 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.

[24] This means that the appeal is dismissed.

Guillaume Brien  
Member, General Division – Employment Insurance Section