



[TRANSLATION]

Citation: *FD v Canada Employment Insurance Commission*, 2023 SST 746

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

**Decision**

**Appellant:** F. D.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (513611) dated August 23, 2022 (issued by Service Canada)

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**Tribunal member:** Josée Langlois  
**Type of hearing:** Teleconference  
**Hearing date:** March 7, 2023  
**Hearing participant:** Appellant  
**Decision date:** March 8, 2023  
**File number:** GE-22-3124

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant stopped working because of misconduct (in other words, because she did something that caused her to lose her job). This means that she isn't entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant is a personal support worker at X. The employer issued a Record of Employment (ROE) due to illness or injury as of January 4, 2022, but the Appellant told a Commission employee that she wasn't sick. After stating that she stopped working because of a shortage of work, she explained to a Commission employee that she no longer wanted to be tested for COVID-19, which the employer required three times a week, and that she had voluntarily left her job.

[4] The Commission initially accepted the reason the Appellant stopped working. It found that she had voluntarily left her job and disqualified her from receiving benefits. After the Appellant asked for reconsideration, the Commission issued a reconsideration decision saying that the Appellant was suspended from her job. The Commission imposed a disentitlement from January 3, 2022, to January 24, 2022, because of actions from December 29, 2021, and imposed an indefinite disentitlement from January 6, 2022, because the Appellant refused to comply with the employer's vaccination directive.

[5] The Appellant disagrees with the Commission's decision. She admits that she didn't wear a mask properly and that she didn't want to get tested anymore like her employer required. But, she says that she didn't intend to commit misconduct. For

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that a claimant who is suspended from their job because of their misconduct is not entitled to receive EI benefits until the end of the suspension period.

personal reasons, she didn't want to wear a mask over her nose at all times, get the COVID-19 vaccine, or submit to testing.

[6] I have to decide whether the Appellant was suspended from her job because of misconduct.

## Issues

[7] For the disentitlement from January 3, 2022, to January 24, 2022: Did the Appellant refuse to wear a mask the way the employer required?

[8] For the disentitlement imposed as of January 6, 2022: Did the Appellant refuse to comply with the employer's vaccination directive?

[9] If so, do these acts constitute misconduct?

## Analysis

[10] To decide whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to decide why the Appellant lost her job. Then, I have to decide whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

### **Did the Appellant refuse to wear a mask the way the employer required, and did she refuse to comply with the employer's vaccination directive?**

[11] I find that the Appellant was suspended from her job between January 3, 2022, and January 24, 2021, because she didn't wear a mask the way the employer required her to, and that she was suspended from her job from January 6, 2022, because she refused to comply with the employer's vaccination directive.

[12] In accordance with this directive, unless she provided a COVID-19 vaccination attestation, she was required to submit to three COVID-19 tests per week. She refused to do so. Also, the facts show that, on December 29, 2021, the Appellant didn't wear a mask the way the employer required.

[13] The employer's first ROE issued on January 25, 2022, says that the Appellant stopped working on January 4, 2022, because of an illness or injury.

[14] A Commission employee contacted an official at the employer who said that the Appellant had been suspended from her job with pay on December 29, 2021.

[15] A letter dated January 7, 2022, says that the Appellant is [translation] "removed from work with pay for investigation." This letter says that the Appellant acted inappropriately. A second letter, dated January 7, 2022, indicates an [translation] "unpaid withdrawal" from work, since the Appellant said she no longer intended to be taking the tests required by Ministerial Order 2021-081 regarding mandatory testing for employees who aren't adequately vaccinated.

[16] The Appellant admits that she refused to comply with the COVID-19 vaccination directive. She indicated that she no longer wanted to get tested like the employer required. She also admits that she didn't wear a mask over her nose while feeding a resident.

[17] The Commission and the Appellant agree on why the Appellant stopped working.

[18] I find that the Appellant refused to wear a mask the way the employer required her to—over her nose—and that she didn't comply with the employer's vaccination directive when she refused to take three tests per week because she wasn't vaccinated against COVID-19. The Appellant acted like the employer says she did.

### **Is the reason for the Appellant's suspension misconduct under the Act?**

[19] A worker who is suspended because of misconduct isn't entitled to receive EI benefits until the end of the suspension period.<sup>2</sup>

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<sup>2</sup> Section 31 of the Act.

[20] The reason for the Appellant's suspension is misconduct under the Act. A worker who is suspended from their job because of their misconduct can't receive EI benefits until the end of the suspension period.

[21] To be considered misconducted under the Act, 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 Appellant 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>5</sup>

[22] There is misconduct if the Appellant 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>6</sup>

[23] The Commission has to prove, on a balance of probabilities, that the Appellant stopped working because of misconduct. This means that she has to show that it is more likely than not that the Appellant was suspended because of misconduct.<sup>7</sup>

[24] A letter dated January 24, 2022, shows that, after an investigation, the employer imposed a disciplinary measure and suspended the Appellant for five days. This letter indicates that, given the context of the COVID-19 pandemic and in accordance with public health guidelines, employees at X are required to wear personal protective equipment according to their job type and their proximity to clients. This letter, signed by the community manager, says that, on December 15, 2021, he caught the Appellant walking down the hall without the required mask. The manager says that he had warned the Appellant many times to wear a mask. Also, witnesses reported seeing the Appellant feeding people while wearing her mask under her chin with her nose and mouth uncovered.

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

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

[25] The letter also says that the Appellant refused to attend a meeting about her alleged behaviour. The manager says that the context of the COVID-19 pandemic is exceptional and temporary, but that the Appellant has a duty to follow public health guidelines. The manager says that if the Appellant doesn't comply with the guidelines, stricter measures could be taken next time.

[26] The Appellant admits that she wore a mask under her chin, but she argues that it wasn't dangerous to others because she was tested for COVID-19 three times a week. She also says that wearing a mask made her dizzy and that she could not wear it for 7 hours a day.

[27] Also, the Appellant admits that she was told about the vaccination directive and that she knew that she had to take three COVID-19 tests per week because she wasn't vaccinated. But, she says that she was angry at the time because she felt that public health officials weren't treating health workers properly. She explains that she refused to get vaccinated and that she refused to get tested as of January 7, 2022, because the centre where she had to get tested was too far and she didn't have a vehicle to travel. She says that, by bus, it would have taken her 2.5 hours to get tested.

[28] The Appellant also explains that she was working three days a week and that she would have liked to get tested only twice a week, but that the employer refused.

[29] The Commission says that the employer has the right to establish rules, directives, or policies in an employment relationship and that refusing to obey or comply with a directive may constitute misconduct under the Act. It argues that, if the Appellant became dizzy and could not wear a mask, she could have seen a doctor and/or told the employer about that.

[30] Also, the Commission says that the Appellant deliberately refused to comply with the employer's vaccination directive by refusing to submit to testing. A Commission employee explains that he simulated going from the Appellant's residence to a testing centre and that going there from the Appellant's residence took 40 minutes. The Commission argues that the Appellant knew that she had to wear a mask and that she

had to take three rapid tests per week if she wasn't vaccinated, and that she deliberately didn't do so. So, it argues that these acts constitute misconduct.

[31] Finally, the Commission says that the Tribunal doesn't have jurisdiction to determine whether the employer's mandatory vaccination policy was fair or reasonable and whether it should have proposed other alternatives.<sup>8</sup>

[32] I agree with the Commission. Because she refused to comply with the employer's vaccination directive and because she didn't properly wear a mask, the Appellant was suspended. I don't have to decide whether the employer had to accommodate her regarding the testing requirement.

[33] While I understand the Appellant's explanations, choices, and the anger she might have felt, the employer asked her to wear a mask over her nose and to take three tests because she wasn't vaccinated against COVID-19. The Appellant knew that she had to comply with these guidelines and she refused to do so.

[34] The employer's vaccination directive provides for accommodation if an employee has a vaccination exemption for medical or religious reasons, for example. The employer also allowed an unvaccinated employee to get tested which the Appellant did for a time. But, the Appellant didn't meet with a doctor for testing, an exemption for medical reasons, or about wearing a mask that made her uncomfortable.

[35] The employer has responsibilities when it comes to the health and safety of its employees, and it can implement related directives or policies. And my role isn't to determine whether the suspension was an appropriate measure.<sup>9</sup> When an employee deliberately violates a directive from their employer, this behaviour gets in the way of carrying out their duties toward their employer.

[36] In light of this, the Appellant acted deliberately and breached her duties toward her employer. At the hearing, she admitted that her not wearing a mask was thought out

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<sup>8</sup> *Paradis v Attorney General of Canada*, 2016 FC 1282.

<sup>9</sup> *Attorney General of Canada v Marion*, 2002 FCA 185 (CanLII).

and that she had refused to continue testing even though she wasn't vaccinated. Even though I understand that the testing centre she had gone to had closed and that the bus ride was longer to get to the other testing centre, by not following the employer's instructions, the Appellant committed misconduct under the Act. Especially since she admits that she didn't discuss how she wore the mask with the employer. As she explained to the Commission about her absence at the meeting she was called to, the Appellant assumed what the employer would say to her and she disagreed with it. The Appellant knew that she could be suspended from her duties if she didn't properly wear a mask and if she didn't comply with the employer's vaccination directive and, in both cases, she deliberately failed to do so.

[37] So, by refusing to comply with the employer's directives, the Appellant could assume that she could be suspended from her duties.

[38] Wrongful intent doesn't have to be proven to find misconduct under the Act. In other words, I don't have to decide whether the Appellant did something wrong.

[39] The employer suspended the Appellant because she didn't follow its rules. She refused to comply with the mandatory vaccination directive for staff (unless she provided a medical or religious exemption), and she didn't wear a mask properly. By refusing to get tested when she hadn't provided a COVID-19 vaccination attestation, and by refusing to properly wear a mask, the Appellant isn't complying with the employer's rules and she is in breach of her job duties.

[40] The Appellant had received clear directives from the employer about wearing a mask and testing while not vaccinated. The Appellant knew the rules and chose not to comply with them. That deliberate act constitutes misconduct.

### **So, did the Appellant lose her job because of misconduct?**

[41] The Appellant can't receive regular benefits if she is suspended for misconduct. When an employee doesn't follow their employer's rules, they can assume that they will be suspended or even let go.



[42] Based on my findings above, I am of the view that the Appellant acted as the employer says she did and that refusing to wear a mask properly and to comply with the employer's mandatory vaccination directive constitutes misconduct under the Act.

## **Conclusion**

[43] The Commission has proven that the Appellant stopped working because of misconduct. Because of this, she can't receive EI benefits.

[44] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section