



Citation: *AS v Canada Employment Insurance Commission*, 2023 SST 813

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

## Decision

**Appellant:** A. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (515752) dated August 15, 2022 (issued by Service Canada)

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**Tribunal member:** Linda Bell

**Type of hearing:** In person

**Hearing date:** January 18, 2023

**Hearing participants:** Appellant  
Observer - Appellant's Spouse

**Decision date:** January 25, 2023

**File number:** GE-22-3260

## Decision

[1] I am dismissing the appeal, with modification to the end date of the disentitlement.

[2] I disagree with A.S. She is the Appellant (Claimant).

[3] The Canada Employment Insurance Commission (Commission) has shown the Claimant was suspended because of misconduct (in other words, because she did something that caused her to be suspended).

[4] The claim (benefit period) started on December 12, 2021. The Claimant's suspension ended on March 10, 2022. This means the Claimant is disentitled from Employment Insurance (EI) benefits from December 13, 2021, to March 11, 2022.<sup>1</sup>

## Overview

[5] The Claimant worked as a Registered Nurse at a hospital, for provincial health services. The employer put her on unpaid leave (suspended her) because she didn't comply with their COVID-19 vaccination policy.

[6] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[7] At first, the Commission determined the Claimant stopped working by voluntarily taking a period of leave from her job. Upon reconsideration, the Commission changed its decision to say the Claimant was on an involuntary leave of absence / suspended.

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

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended due to misconduct is disentitled from benefits until they return to their employment or are dismissed. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.

## **Matters I have to consider first**

### **Potential added party**

[9] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

### **Issues**

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

### **Analysis**

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you.<sup>2</sup>

[12] To answer the question of whether the Claimant was suspended because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended?**

[13] Both parties agree the Claimant was put on leave without pay (suspended) because she refused to submit her vaccination status by the deadline set out in the employer's mandatory COVID-19 vaccination policy.

[14] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended from her job because she refused to comply with the employer's mandatory COVID-19 vaccination policy.

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<sup>2</sup> See sections 30 and 31 of the Act.

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

[15] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[16] To be misconduct, the conduct has to be wilful. This means the Claimant's 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>

[17] 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>5</sup>

[18] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out the duties toward her employer and there was a real possibility of being suspended or let go because of that.<sup>6</sup>

[19] The Commission has to prove the Claimant was suspended or lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant was suspended or lost her job because of misconduct.<sup>7</sup>

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

- The Claimant was aware that all employees were required to disclose that they were fully vaccinated by October 31, 2021. This was extended to November 30, 2021. It was extended again to December 12, 2021.

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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 of Canada v Secours*, A-352-94.

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

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

- The Claimant knew she would be placed on unpaid leave (suspended) if she failed to disclose that she was fully vaccinated by the deadline.
- The Claimant refused to disclose her vaccination status, so she was suspended. Her last day worked was December 7, 2021.

[21] The Claimant says she received most of the papers that were sent by her employer notifying her of the policy. She was aware she would be put on unpaid leave (suspended) if she didn't comply. She requested religious exemption, but it was denied. She acted based on her own personal consciousness and personal beliefs (creed).

[22] The Claimant testified that her actions aren't misconduct because she didn't do any wrong behaviours; she asked to continue working; and her medical information is private. She questioned why her employer determined why she would be at a higher risk to provide patient care only once the policy was instituted. Because prior to the policy, she was allowed to work and provide care during the COVID-19 pandemic. She argued there was no scientific evidence that the vaccine prevented COVID-19.

[23] The Claimant says the Commission listed an incorrect date of when her suspension ended. She says the employer's policy may have been amended on March 9, 2022. Although her suspension ended March 9, 2022, she had until March 31, 2022, to return to work. She was able to schedule her return to work as of March 22, 2022.

[24] It is important to note that the law doesn't say I have to consider how the employer behaved when determining misconduct for the purpose of EI benefits<sup>8</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>9</sup>

[25] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law

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<sup>8</sup> See section 30 of the EI Act.

<sup>9</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.<sup>10</sup>

[26] It is also important to know that I can't make any decisions about whether the Claimant had 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>11</sup> I can consider only one thing: whether the Claimant's actions or inaction is misconduct under the EI Act.

[27] I find the Commission has proven misconduct because the Claimant's refusal to disclose whether she had been vaccinated against COVID-19 was deliberate or intentional. The Claimant was clearly warned that she would be placed on unpaid leave, or prevented from working (suspended), if she failed to disclose that she was vaccinated against COVID-19. There was a cause-and-effect relationship between her refusal to disclose her vaccination status and the suspension. So, I find the Claimant was suspended from her job because of misconduct.

[28] I recognize the Commission ended the disentitlement on March 9, 2022. But the Claimant states that once the policy was amended, she had until March 31, 2022, to return to work. She said she didn't return to work until March 22, 2022.

[29] There is no information on file that tells me the Commission determined whether the Claimant is disentitled to receive benefits for any other reason during the period from March 11, 2022, up to March 22, 2022. So I don't have jurisdiction to determine her entitlement to benefits during this period.

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<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[30] The claim (benefit period) started December 12, 2021. The Claimant's suspension ended March 9, 2022. So, I find the Claimant is disentitled from receiving EI benefits from Monday, December 13, 2021, to Monday March 9, 2022.<sup>12</sup>

## **Conclusion**

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

[32] The appeal is dismissed, with modification to the end date of the disentitlement.

Linda Bell

Member, General Division – Employment Insurance Section

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<sup>12</sup> The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.