



Citation: *JD v Canada Employment Insurance Commission*, 2023 SST 902

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

## **Decision**

**Appellant:** J. D.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (498879) dated July 29, 2022 (issued by Service Canada)

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**Tribunal member:** Marc-André St-Jules

**Type of hearing:** Teleconference

**Hearing date:** December 7, 2022

**Hearing participant:** Appellant

**Decision date:** January 18, 2022

**File number:** GE-22-2820

## Decision

[1] The appeal is dismissed with modification. Disentitlement dates have been changed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was first suspended without pay from her job then terminated. The Claimant's employer told the Commission that the Claimant was suspended without pay because she went against its vaccination policy: she refused to reveal her vaccination status.

[4] The Claimant does not agree. It was not misconduct. Her employer broke the law and she has the right to refuse any medical procedure. Her previous COVID infection provides her natural immunity which is better than vaccines.

[5] The Commission accepted the employer's reason for the suspension and termination. The Claimant knew, or ought to have known, that the consequences of refusing to comply included unpaid leave. The Commission decided that the Claimant was suspended then terminated from her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits effective February 8, 2022, then disqualified effective February 21, 2022, upon her termination from employment.

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

## **Matter I have to consider first**

### **The Claimant has two appeals before the Tribunal and separate decisions are being issued for each**

[6] I have two separate appeals before me with the same Claimant. I am writing a separate decision for each appeal. This current decision deals with a disentitlement and disqualification following a suspension and termination. The other decision is regarding an availability disentitlement. To minimize the Claimant's time and avoid delays, I scheduled one hearing for both issues

## **Issue**

[7] Did the Claimant lose her job because of misconduct?

## **Analysis**

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

[9] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended without pay then terminated from her job. I then have to determine whether the law considers that reason to be misconduct.

## **Why did the Claimant lose her job?**

[10] I accept that the Claimant was suspended then terminated from her job because she did not comply with her employer's vaccination policy.

[11] This is uncontested by both parties to the appeal. The Claimant testified she agrees this is why she is no longer working. However, she does not agree with the policy. She argues that she should not have been suspended and should not have been terminated.

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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?

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

[13] 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.

[14] Case law says that, to be misconduct, 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>5</sup>

[15] There is misconduct if the Claimant 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 let go because of that.<sup>6</sup>

[16] The law doesn't say I have to consider how the employer behaved.<sup>7</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>8</sup>

[17] I have to focus on the EI 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>9</sup> I can

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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 section 30 of the Act.

<sup>8</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</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.

[18] The Commission has to prove that the Claimant lost her 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 her job because of misconduct.<sup>10</sup>

[19] The Commission says that there was misconduct because:<sup>11</sup>

- The employer had a vaccination policy which states unpaid leave and termination for individuals who do not comply.
- The employer communicated the policy to all staff.
- The communication clearly notified the Claimant about its expectations regarding vaccination.
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[20] The Claimant says that there was no misconduct because:

- The employer broke the law and should not have suspended her and should not have terminated her for refusing to comply with the policy.
- She has natural immunity from a previous infection. This provides greater protection than a vaccine would.<sup>12</sup>
- Denying her religious exemption is discrimination which is against the *Charter of Rights and Freedoms* (Charter)<sup>13</sup>

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<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>11</sup> See GD4 page 5.

<sup>12</sup> See GD2 page 22.

<sup>13</sup> See GD2 page 22.

- Vaccination in Canada is not mandatory.<sup>14</sup>
- Denying benefits discriminates on the basis of religion.
- Neither her work contract nor her collective agreement specify or imply that she must provide or in any way divulge her immunization or vaccination status. It was not a term or condition of employment. By case law definition it would therefore not be a breach of duty.<sup>15</sup>
- Under the Employment Insurance Digest paragraph 7.3.4 “an employer has the right to establish rules in an employment relationship, as long as they comply with any legal requirements set out by legislation... and those set out in a collective agreement.”<sup>16</sup>

[21] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said employees must be in compliance or may be suspended or terminated.
- The employer clearly advised the Claimant about what it expected of its employees in terms of vaccination.
- The employer communicated the policy to all staff to explain what it expected.
- The Claimant knew or should have known about the consequence of not following the employer’s vaccination policy.

[22] For reasons set out below, I find the Claimant knew or ought to have known the consequences for non-compliance with the employer’s vaccination policy. The Claimant acknowledged receipt of the policy and testified she did discuss with her manager. In addition, the Claimant did not believe she could lose her job. She argues this in her

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<sup>14</sup> See GD3 page 51.

<sup>15</sup> See GD3 page 51.

<sup>16</sup> See GD3 page 50

request for reconsideration to the Commission.<sup>17</sup> In that document she admits she read the policy and did not think she would be let go. This is because it says that human rights would be protected via accommodations.

[23] I have to focus on the EI Act only. I can't make any decisions about whether the Claimant has other options under other laws or contracts. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>18</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[24] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The *Charter of Rights and Freedoms* is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms

[25] I am not allowed to consider whether an action taken by an employer violates a claimant's Charter rights. I am also not allowed to make rulings on the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant's recourse for those cases are with a different tribunal or a court.

[26] The same principle from the preceding paragraphs applies to religious beliefs and their exemptions. I can only consider one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[27] The Claimant submitted a decision from the General Division of the Tribunal that she says is similar to her case.<sup>19</sup> In that decision, the Tribunal Member found the claimant's employer verbally told him of its vaccination policy two days before he had to be vaccinated against COVID-19 and that the Claimant didn't know he could be fired if he wasn't vaccinated.

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<sup>17</sup> See GD3 page 51.

<sup>18</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>19</sup> See GD6 pages 2-10. It contains the full decision to Tribunal file number GE-22-829.

[28] In the Claimant's case, she testified she became aware of a policy in early September, 2021. She says she also received emails at the time but did not pay attention to them. She testified she was aware of the policy. She stated that initially, it was that non-compliant people would be placed on unpaid leave of absence. It was then changed to termination after the leave of absence.

[29] I am not bound by previous Tribunal decisions. I can review them and can be persuaded by them if the circumstances are similar. I found a number of differences between it and the Claimant's case. The Claimant was given months of notice on a clearly written policy. The earlier decision was a few days notice on a verbal policy. There was no way for this person to comply within two days.

[30] The Claimant testified that as of October 1, 2021, she was on paid medical leave of absence. She had accumulated sick time which she used. The Claimant stated that her manager called her while on leave in early October to advise of the vaccine requirements. She was informed that vaccination was mandatory to be in compliance with the policy.

[31] The Claimant says that the threshold for misconduct has not been met. I accept the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent for there to be misconduct.<sup>20</sup> It is sufficient that the conduct be conscious, deliberate, or intentional.

[32] I agree the Claimant can decline vaccination. I accept that vaccination is not mandatory. I also agree a person can refuse disclosing their actual vaccine status. Those are personal decision. In her case, her reason is religious.<sup>21</sup> This is her right. But she knew there were consequences if she refused to follow the vaccination policy. In this case, it was an unpaid suspension and then dismissal from her employment.

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<sup>20</sup> See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

<sup>21</sup> See GD3 page 27 for her religious exemption request.



[33] I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[34] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable. I also can't determine if a claimant's dismissal or suspension was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.<sup>22</sup>

[35] I find the Claimant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issue. I have no doubt the Claimant was a valuable employee. She stated she had an excellent work history with no disciplinary record. Nothing in the file contradicts this.

[36] I understand that the Claimant feels that because she paid into the employment insurance fund, she should receive benefits. This belief goes against the fundamental principle of employment insurance, that is, an employee must not voluntarily place herself in a position of unemployment.

[37] I understand the Claimant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fair to the Claimant.<sup>23</sup>

[38] The evidence before me shows the Claimant made a personal and deliberate choice not to follow the employer's policy. She was aware that non-compliance may lead to unpaid leave and possible termination.

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

[39] Based on my findings above, I find that the Claimant was first suspended then terminated because of misconduct. The Claimant's actions led to her suspension

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<sup>22</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>23</sup> See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.

without pay. She acted deliberately. She knew that refusing to get vaccinated or refusing to disclose her vaccination status was likely to cause her to lose her job.

### **Dates of disentitlement**

[40] The Commission is requesting that the disentitlement start on February 7, 2022.<sup>24</sup> This is the date the Claimant requested her benefits to be converted from illness benefits to regular benefits. The doctor's note supports this day as the Claimant's return-to-work date.<sup>25</sup>

[41] The Claimant was questioned why her unpaid leave of absence only started at the end of December, 2021. The vaccine policy required proof of vaccination by October 26, 2021.<sup>26</sup> The Claimant testified that she was on sick leave at the time. She started her sick leave on October 1, 2021. She continued on sick leave until December 27, 2021. She had sick time banked.

[42] The Claimant then applied for EI sickness benefits and was paid illness benefits until the date the doctor stated she had recovered. The claim for illness benefits was established effective January 2, 2022.<sup>27</sup>

[43] I do not agree with the Commission regarding the start date of the disentitlement. The suspension from work started effective December 28, 2021.<sup>28</sup> The disentitlement should start January 2, 2022, and not February 7, 2022. This is because the claim for benefits started effective January 2, 2022.

[44] This decision to start the disentitlement on January 2, 2022 is to comply with the law and to keep an accurate history. This should not change the payment of illness benefits already paid. Disentitlements do not prevent the payment of special benefits.<sup>29</sup>

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<sup>24</sup> See GD4 page 9.

<sup>25</sup> See GD3 page 32.

<sup>26</sup> See GD3 page 34.

<sup>27</sup> See GD4 page 1.

<sup>28</sup> See GD3 page 22.

<sup>29</sup> See section 34 of the Act.

[45] The Commission is asking for the suspension disentitlement to end February 18, 2022.<sup>30</sup> It is also asking that the disqualification from benefits starts effective February 21, 2022. This coincides with the termination date. I agree with this part.

## **Conclusion**

[46] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits **regular** (my emphasis) from January 1, 2022, until February 18, 2022.

[47] Effective February 21, 2022, the Claimant is disqualified from regular benefits for misconduct following her termination.

[48] This means the appeal is dismissed with modification.

Marc-André St-Jules  
Member, General Division – Employment Insurance Section

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<sup>30</sup> See GD4 page 9. Disentitlements are for weekdays only.