



Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 1074

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

## Decision

**Appellant:** C. B.  
**Representative:** M. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (456906) dated March 9, 2022  
(issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference  
**Hearing date:** August 29, 2022  
**Hearing participant:** Appellant  
**Decision date:** September 1, 2022  
**File number:** GE-22-1219

## Decision

[1] The appeal is dismissed. 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 disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant is a kinesiologist and worked at a hospital on a part-time basis. The employer dismissed her on October 22, 2021 because she did not comply with the covid19 vaccination policy at work.<sup>2</sup> The Claimant then applied for Employment Insurance (EI) benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she lost her employment due to her own misconduct.<sup>4</sup>

[5] The Claimant disagrees because she does want to provide her personal health information to her employer, specifically her vaccination status for covid19.<sup>5</sup> She also has other reasons.

## Matters I have to consider first

### There are two files

[6] The Claimant had two separate appeal files with the Tribunal.<sup>6</sup> Both files were heard together because it involved the same Claimant.

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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 EI benefits.

<sup>2</sup> See record of employment at GD3-20 to GD3-21.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-19.

<sup>4</sup> See initial decision at GD3-49 to GD3-50 and reconsideration decision at GD3-60 to GD3-61.

<sup>5</sup> See notice of appeal forms at GD2-1 to GD2-10.

<sup>6</sup> See Tribunal file numbers: GE-22-1219 and GE-22-1220.

[7] I explained to the Claimant that separate decisions will be issued because the legal issues<sup>7</sup> were different. I noted that given the complexity of each case and the submission of additional post-hearing documents may result in a decision being rendered on different dates.

### **This file was previously adjourned**

[8] Both files were first scheduled to be heard on August 17, 2022.<sup>8</sup> At the hearing, the Claimant explained that she was not aware she had two separate files with the Tribunal. However, she did understand that the Commission was arguing there was misconduct and was challenging her availability for work.

[9] I reviewed the file. It showed that the documents for both files had been previously emailed to her representative on file. However, the Claimant had also asked for them to be mailed, but it seems that the Tribunal only mailed the documents for one file to her.<sup>9</sup> Given that, the Claimant said that she could not reasonably proceed on August 17, 2022 because both files were connected and she wanted a chance to review the other first.

[10] I agreed to adjourn the hearing.<sup>10</sup> We discussed the scheduling of a new hearing date and I considered the availability of the Claimant and her representative. The Claimant asked for an expedited hearing date and preferably in the morning. She asked for a week to review the second file's documents. In the meantime, the Tribunal expedited a copy of documents by courier to the Claimant.

[11] The case was then rescheduled for August 29, 2022. I confirmed that the documents for the second file were mailed to the Claimant and received on August 22, 2022.<sup>11</sup>

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<sup>7</sup> This file deals with a disentitlement to EI benefits for "Availability for Work" and the other file is a disqualification to EI benefits for alleged "Misconduct".

<sup>8</sup> See notice of hearing at GD1-1 to GD1-5.

<sup>9</sup> The Claimant made a verbal request for documents to be mailed for file GE-22-1220 on May 17, 2022.

<sup>10</sup> See adjournment at GD6-1 to GD6-3.

<sup>11</sup> See proof of service in the file.

[12] A few days prior to the hearing, the Claimant asked for subsequent adjournment.<sup>12</sup> However, I denied that request because she had not established exceptional circumstances.<sup>13</sup> I provided further reasons in my denial letter.<sup>14</sup> As a result, the hearing proceeded on August 29, 2022 as scheduled.

### **Documents submitted after the hearing**

[13] At the hearing, the Claimant testified about some other documents she had. She mentioned a policy update sent by the employer, text messages with her supervisor, an email she sent to human resources, as well as another Tribunal case. I asked the Claimant to submit the documents because they were relevant to her case.<sup>15</sup>

[14] After the hearing, the Claimant submitted the above documents and they were shared with the Commission on the same date.<sup>16</sup> The Commission replied and it was shared with the Claimant as well.<sup>17</sup>

### **Issue**

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

### **Analysis**

[16] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>18</sup>

[17] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>19</sup>

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<sup>12</sup> A copy of this request can be found in the related Tribunal file GE-22-1220.

<sup>13</sup> See section 11(1) and 11(2) of the *Social Security Tribunal Regulations*.

<sup>14</sup> See adjournment denial at GD7-1 to GD7-3.

<sup>15</sup> The deadline to submit was September 7, 2021.

<sup>16</sup> See post-hearing submissions at GD8-1 to GD8-4, received by the Tribunal on August 30, 2022.

<sup>17</sup> See GD9-1 to GD9-

<sup>18</sup> Section 30 of the *Employment Insurance Act* (EI Act).

<sup>19</sup> See section 31 of the Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

[18] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>20</sup>

[19] To answer the question of whether the Claimant stopped working 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?**

[20] I find that the Claimant was dismissed on October 22, 2021 because she did not comply with the employer's covid19 vaccination policy. The Claimant does not dispute that she was not fully vaccinated by October 22, 2021.

[21] This is consistent with the Claimant's testimony, record of employment, discussions between the Commission and her employer, as well as discussions she had with the Commission, etc.<sup>21</sup>

### **What was the employer's policy?**

[22] The employer implemented a "*Mandatory Covid19 Vaccination*" (policy) an initial policy effective June 21, 2021. A copy of the revised policy dated September 21, 2021 is included in the file.<sup>22</sup>

[23] The policy states that its purpose was to outline updated organizational expectations with regards to covid19 vaccination of employees, physicians, contractors, volunteers and learners working at hospital.<sup>23</sup>

[24] The revised policy requires the following:

- a) The first covid19 vaccination dose must be obtained by September 24, 2021

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<sup>20</sup> See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

<sup>21</sup> See record of employment at GD3-20; GD3-22 and GD3-23.

<sup>22</sup> See policy at GD3-38 to GD3-43; the original and revised dates are listed on the policy.

<sup>23</sup> See GD3-38.

- b) Employees must be fully vaccinated for covid19 and provide proof by October 22, 2021.<sup>24</sup>

[25] The policy also provided for an exemption based on a medical contraindication with documentation and/or written request for an exemption on another ground based on the *Human Rights Code* with related documentation.<sup>25</sup> The deadline for making an exemption request was September 24, 2021.

### **Was the policy communicated to the Claimant?**

[26] The employer told the Commission that they communicated the policy by sending emails, letters and held open forums for all employees.<sup>26</sup> They also said that the revised policy was issued on September 21, 2021, but that employees were told in July 2021 that they would need to be vaccinated.

[27] The Claimant testified that there was a previous policy in place before the revised one effective September 21, 2021. She called it the “summer policy”. She explained that the summer policy provided 4 different options available for employees, including one that did not require vaccination and the disclosure of her vaccination status. She was also complying with the requirements to do rapid testing and completed an education session.

[28] The Claimant disputes that the revised policy was communicated to her in July 2021. In early August 2021, she had technical issues, so she was not able to access the employer’s intranet. She argues that she only became aware of the policy on October 3, 2022 when she received a pdf copy of the policy. She submits that it only left her with 18 days to comply with the policy because the deadline to be fully vaccinated and in compliance was October 22, 2021.

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<sup>24</sup> See GD3-38.

<sup>25</sup> See GD3-40; *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>26</sup> See GD3-56 to GD3-57.

[29] The Claimant later confirmed that a zoom meeting took place with her human resources manager on September 30, 2021. She agreed that she was told about the policy and consequences of non-compliance at that time.

[30] I find that the revised policy was communicated to the Claimant on two dates: September 30, 2021 and October 3, 2021. I acknowledge that the Claimant was experiencing technical issues and as a part-time employee, she may not have been able to access the hospital's intranet off-site. However, the policy was communicated to her during a zoom meeting with human resources on September 30, 2021 and again on October 3, 2021 when she received a copy of the policy. This is also consistent with a copy of the email sent by the employer on October 3, 2021 to the Claimant.<sup>27</sup>

[31] However, I note that the Claimant issued a notice of a notice of "non-consent and notice of personal liability" to the employer on September 20, 2021 – which was one day before the revised policy came into effect on September 21, 2021.<sup>28</sup> In that letter, she states that she will hold the CEO of the hospital personally liable for any financial injury and/or loss of personal income if her employment is terminated as a result of her decision to decline the covid19 vaccination status and decision to not disclose her vaccination status.<sup>29</sup> In my view, this suggests that she may have known about the revised policy and the consequences earlier than she claimed.

### **What were the consequences of not complying with the policy?**

[32] The policy says that non-compliance with the terms of the policy may result in discipline up to and including termination of employment for cause and/or revocation of hospital privileges.<sup>30</sup>

[33] It also says that if a staff member without an approved exemption refuses to be fully vaccinated after October 22, 2021, they will be terminated with cause.<sup>31</sup>

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<sup>27</sup> See GD8-2.

<sup>28</sup> See GD3-26 to GD3-31.

<sup>29</sup> See GD3-30.

<sup>30</sup> See GD3-42.

<sup>31</sup> See GD3-43.

[34] The employer told the Commission they had reached out directly to the Claimant to advise her about policy, expectations and consequences of not complying with the policy.<sup>32</sup>

[35] The Claimant testified that she had a meeting with her human resources manager on September 30, 2021 via zoom. This was the first time she was told that she could be terminated if she did not comply with the policy.

[36] The Claimant also sent the employer an email on October 12, 2021 confirming that she understood the hospital was threatening to terminate her employment for not disclosing her vaccination status and/or not submitting to mandatory vaccination.<sup>33</sup>

### **Is there a reason the Claimant could not comply with the policy?**

[37] As noted above, the policy provided for exemption based on a medical contraindication with documentation and/or written request for an exemption on another ground based on the *Human Rights Code* with related documentation.<sup>34</sup>

[38] The employer told the Commission that the Claimant asked for a medical exemption by email on September 28, 2021.<sup>35</sup> The employer said that the Claimant was advised about the requirement to obtain a medical note, which she did not have.

[39] The Claimant testified that she had written to the general email inbox around September 28, 2021 asking for an accommodation and to speak with human resources. The following day, she obtained the contact information for human resources and asked for a meeting. A zoom meeting was scheduled with the human resources manager on September 30, 2021. The Claimant said they discussed a medical exemption, but did not discuss any other types of exemptions available under the *Human Rights Code*.<sup>36</sup>

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<sup>32</sup> See GD3-56 to GD3-57.

<sup>33</sup> See GD8-2.

<sup>34</sup> See GD3-40; *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>35</sup> See GD3-56 to GD3-57.

<sup>36</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.



[40] The Claimant later confirmed that she did not request a medical exemption, but that she was seeking an exemption under the *Human Rights Code*.<sup>37</sup>

[41] I asked the Claimant to provide more information about the exemption she requested. She explained that she asked on basis of “bodily integrity, the right to choose your own medical procedures and to have informed consent”. She said that the employer never responded to her exemption request.

### **Is it misconduct based on the law – the *Employment Insurance Act*?**

[42] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>38</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>39</sup>

[43] The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>40</sup>

[44] 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 let go because of that.<sup>41</sup>

[45] 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>42</sup>

[46] I find that the Commission has proven that there was misconduct for the following reasons.

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<sup>37</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>38</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>39</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>40</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>41</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>42</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

***The policy was communicated to the Claimant***

[47] I find that the policy was communicated to the Claimant and she was aware of the deadline dates to comply. Specifically, she knew about the revised policy on September 30, 2021 at the zoom meeting and by email on October 3, 2021<sup>43</sup>, as well as the requirement to be fully vaccinated by October 22, 2021. As noted above, it is possible she knew about the policy as early as September 20, 2021, which was when she issued the non-consent and notice of personal liability to the CEO.<sup>44</sup>

[48] I was not persuaded by the Claimant's argument that she did not have enough time to comply with the revised policy. In my view, the Claimant did not demonstrate any intention to comply with the policy, even after she spoke to her human resources on September 30, 2021 or when she emailed on October 12, 2021. For example, if she wanted to disclose her vaccination status and/or did not have enough time to be fully vaccinated, she could have discussed it with her human resources manager and asked whether an extension was available. She did not do so.

***The Claimant was not exempt from the policy***

[49] I find that the Claimant has not proven she was exempt from the policy. The Claimant confirmed that she did not submit a medical exemption.

[50] Ontario's *Human Rights Code* provides that every person has a right to freedom from discrimination and harassment based on specific protected grounds that are listed.<sup>45</sup> The Claimant did not identify which protected ground she was asked for an exemption from, but reiterated her right to bodily integrity, the right to choose her own medical procedures and to have informed consent.

[51] Given that, I was not persuaded by the Claimant's argument that she submitted an exemption based on the *Human Rights Code* or that the employer simply did not respond to her request. I note there was no supporting evidence to show that she made

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<sup>43</sup> See GD8-2.

<sup>44</sup> See GD3-26 to GD3-31.

<sup>45</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19.

a specific exemption request to the employer based on a protected ground or that the employer refused to acknowledge or respond to her request.

***The Claimant's conduct was willful misconduct***

[52] I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons.

[53] It is clear that the Claimant disagreed with the employer's policy because she did not want to disclose her vaccination status and/or be fully vaccinated for covid19. Even if she did not have wrongful intent, her refusal to comply with the employer's policy was still willful misconduct because she became aware of the revised policy and then chose not to comply.

[54] This was a deliberate choice she made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the *Employment Insurance Act*.<sup>46</sup>

[55] The Claimant submitted a case to support her position, however the facts of that case distinguishable from this case.<sup>47</sup> For example, in that case, that person was dismissed before the policy was in effect.

***The Claimant knew there were consequences to non-compliance***

[56] I find that the Claimant knew or ought to have known the consequences of not complying with the policy would lead to dismissal. As of September 30, 2021, the Claimant knew that she would be terminated for cause if she did not comply with the policy. She was also reminded by email on October 3, 2021. As well, she received a copy of the policy.

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<sup>46</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>47</sup> See Tribunal file GE-22-511 and weblink at GD8-1.

[57] I was not persuaded by the Claimant's argument that the policy said it "may result"<sup>48</sup> to termination because she ought to have known it would lead to termination after the human resources manager wrote that she would be terminated with cause. The policy also states "if a staff member without an approved exemption (medical or other ground pursuant to the Human Rights Code) refuses to be fully vaccinated after October 22, 2021 (without both vaccine shots), they will be terminated with cause".<sup>49</sup>

[58] I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. So, this became a condition of her employment when they introduced the policy. Directive 6<sup>50</sup> was legally binding on the hospital, as well it was within the employer's discretion to impose consequences for non-compliance.

[59] The Claimant breached the policy when she chose not to comply with it and that interfered with her ability to carry out her duty to the employer. The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a dismissal.

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

[60] The Claimant raised other arguments and filed evidence to support her position. Some of them included the following:

- a) The employer went beyond the scope of "Directive 6"
- b) The employer failed to accommodate her
- c) The employer did not consider or approve her exemption request
- d) She does not want to provide her personal medical information to the employer
- e) The vaccine for covid19 does not prevent transmission

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<sup>48</sup> See GD3-42.

<sup>49</sup> See GD3-43.

<sup>50</sup> See Directive 6 at GD3-33 to GD3-36.

- f) She has serious concerns about the health and safety of the vaccine
- g) The employer's policy was unreasonable
- h) There was no vaccine mandate she first signed her employment contract
- i) The covid19 vaccine is experimental

[61] The court has already established that the Tribunal cannot determine whether the dismissal or penalty was justified. So, even though the Claimant says she was wrongfully dismissed and that the employer should have accommodated her with other options, I do not have the authority to decide that.<sup>51</sup>

[62] The court says that I have determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>52</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act because she knew about the policy, willfully breached it and knew the consequences.

[63] I acknowledge the Claimant's additional arguments and that she was a hard worker who enjoyed her job. It is clear that she worked during difficult times throughout the pandemic. However, the Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments in order to obtain a remedy.

## **Conclusion**

[64] The Commission has proven that the Claimant was dismissed from her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[65] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>51</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>52</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.