



Citation: *BJ v Canada Employment Insurance Commission*, 2022 SST 1531

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

## Decision

**Appellant:** B. J.  
**Representative:** J. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (457392) dated March 18, 2022  
(issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference  
**Hearing date:** September 21, 2022  
**Hearing participant:** Appellant  
Appellant's representative

**Decision date:** October 10, 2022  
**File number:** GE-22-1447

## 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 due to misconduct (in other words, because he did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits for the period of time he was off work.<sup>1</sup>

## Overview

[3] B. J. is the Claimant in this case. He worked as a tool technician for a manufacturer. The employer put the Claimant on a mandatory and unpaid leave of absence because he did not comply with their covid19 vaccination policy at work. The Claimant then applied for EI regular benefits.<sup>2</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he was suspended due to his own misconduct.<sup>3</sup>

[5] The Claimant disagrees with the employer's policy he did not want to provide his personal medical information. The employer also failed to answer his questions, so there was no informed consent. Also, he says that he was wrongfully put on an unpaid leave of absence.

## Matter I have to consider first

### I asked the Commission for additional information

[6] Prior to the hearing, I wrote to the Commission asking them for additional information. I noted that they referred to the employer's policy but had not provided a copy of it.<sup>4</sup> I also wrote that there were conflicting dates in the file about when the

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<sup>1</sup> See section 31 of the *Employment Insurance Act (EI Act)*; the Claimant returned to work on June 27, 2022, so the disentitlement to EI benefits is removed from June 24, 2022.

<sup>2</sup> See application for EI benefits at GD3-3 to GD3-14.

<sup>3</sup> See initial decision at GD3-19 to GD3-20 and reconsideration decision at GD3-81 to GD3-82.

<sup>4</sup> See section 32 of the *Social Security Tribunal Regulations* at GD8-1 to GD8-3.

Claimant's unpaid leave started. Lastly, I asked them to provide submissions on whether the disentitlement to EI benefits should continue after the Claimant returned to work.

[7] The Commission responded in writing saying that they do not have a copy of the policy.<sup>5</sup> They submit that his unpaid leave of absence started on December 5, 2021, but that EI benefits were only refused beginning the week of January 10, 2022 (based on his application for EI benefits).<sup>6</sup>

[8] The Commission also submits that if the Claimant returned to work on June 27, 2022, then his disentitlement to EI benefits should be terminated as of June 24, 2022. A copy of the Commission's response was shared with the Claimant.

### **The Claimant submitted documents after the hearing**

[9] At the hearing, the Claimant talked about a few documents including a letter dated December 13, 2021; a copy of work his work schedule and written arguments to support his case.

[10] Since these documents were relevant, I asked him to submit them after the hearing. The Claimant submitted the above documents to the Tribunal and they were shared with the Commission.<sup>7</sup> No reply submissions were received as-of the date of this decision.

### **Issue**

[11] Was the Claimant suspended from his job because of misconduct?

### **Analysis**

[12] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.<sup>8</sup>

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<sup>5</sup> See Commission's response at GD9-1.

<sup>6</sup> The Claimant's application for EI benefits was made on January 8, 2022 at GD3-3 to GD3-14.

<sup>7</sup> See GD12-1 to GD12-8.

<sup>8</sup> Section 30 of the *Employment Insurance Act* (EI Act).

[13] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.<sup>9</sup>

[14] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.<sup>10</sup>

[15] 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?**

[16] The parties agree that the Claimant was put on a mandatory and unpaid leave of absence for not complying with the covid19 vaccination policy at work. However, they do not agree on when the Claimant's unpaid leave of absence started.

[17] The Commission says that the unpaid leave of absence started on December 5, 2021 because his last day of work was December 4, 2021.<sup>11</sup>

[18] The Claimant said that he took a sick leave from work due to stress from December 6, 2021 to December 18, 2021 after speaking with his doctor.<sup>12</sup> After that date, he said that he was supposed to be on a paid Christmas holiday.

[19] The Claimant explained that he tried to return to work in early January 2022 but was denied. He returned on January 5 or 6, 2022 and was told he was on an unpaid leave of absence. He found out that the employer put him on unpaid leave from

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<sup>9</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.

<sup>10</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>11</sup> See GD9-1.

<sup>12</sup> The Claimant previously told the Commission that his stress leave started on December 4, 2021 – see SROC at GD3-23.

December 18, 2021, so the employer was refusing to pay him for the Christmas holiday period. He has filed a grievance with his union about this issue.

[20] The Claimant argues that he did not know that he was put on an unpaid leave until January 5 or 6, 2022. He did not receive any correspondence from his employer during his sick leave from December 6, 2021 to December 18, 2021, or over the holiday period that indicated he was on an unpaid leave of absence. He expected to be able to return to work and start in early January 2022.

[21] The employer told the Commission that the Claimant was off due to illness from December 6, 2021 to December 18, 2021. He was then put on an unpaid leave because he had not complied with their vaccination policy.<sup>13</sup> The letter from the union said that the Claimant tried to come into work on January 5, 2022 to clear medical and was given his final vaccination letter putting him on an unpaid leave.<sup>14</sup>

[22] The record of employment says that his last day paid was December 4, 2021 and the code reflected shows "illness or injury".<sup>15</sup>

[23] I was not persuaded by the Claimant's testimony on this issue for the following reasons.

[24] First, there is a letter in the file dated November 29, 2021 that says it was hand delivered to the Claimant, which he acknowledged receiving at work.<sup>16</sup> It says a failure to follow the policy by December 12, 2021 will result in being placed on an immediate unpaid leave of absence.

[25] Second, the Claimant submitted a copy of his work schedule to support that he was still on the work schedule in January 2022, so he did not know that he was put on an unpaid leave. However, the work schedule he submitted does not clearly identify the

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<sup>13</sup> See SROC at GD3-17; GD3-75;

<sup>14</sup> See GD6-1 to GD6-2.

<sup>15</sup> See GD3-15 to GD3-16.

<sup>16</sup> See November 29, 2021 letter at GD3-60 to GD3-61.

dates or months and the other document he submitted shows January “2021” which pre-dated the events in this case.<sup>17</sup>

[26] Third, I preferred the employer’s statement to the Commission that confirmed he was put on an unpaid leave of absence after his sick leave ended, which made it effective December 19, 2021. This also explains why he was not paid for the holiday period, which the Claimant has since grieved.

[27] Given the above, I was not persuaded by the Claimant’s testimony that he had no idea the employer put him on an unpaid leave of absence until he tried to return to work in early January 2022. Even if he was on a sick leave from December 6, 2021 to December 18, 2021, he knew about the deadline to comply with the policy was December 12, 2021 and that a failure to comply would result in an unpaid leave of absence. The letter says he would put on an unpaid leave if he did not comply, so he ought to have known. If he was unsure about the status of his employment after his sick leave ended, he could have contacted his employer to confirm the status of his employment.

[28] **Therefore, I find that it was more likely than not, that the Claimant was put on a mandatory and unpaid leave of absence on December 19, 2021 (after his sick leave ended).** The parties agree that he put on an unpaid leave of absence occurred because the Claimant did not comply with the terms outlined in the employer’s covid19 vaccination policy.

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

[29] The employer implemented a “*Mandatory Covid19 Vaccination and Reporting Policy*” (policy) on October 19, 2021. The Claimant submitted a copy of the policy to the Tribunal and it is included in the file.<sup>18</sup>

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<sup>17</sup> See GD12-5 and GD12-7 to GD12-8.

<sup>18</sup> See policy at GD10-2 to GD10-6.

[30] The policy says it is intended to support and enhance ongoing public health vaccination efforts, as one of the critical covid19 mitigation measures.<sup>19</sup>

[31] The policy requires employees to do the following:

- a) Beginning October 19, 2021, all employees are required to complete a confidential vaccination survey
- b) Effective December 12, 2021, all employees must be fully vaccinated<sup>20</sup> against covid19 prior to attending the workplace (subject to exemptions in policy)

[32] It states that employees on a leave of absence are required to complete the survey and be fully vaccinated (or have any approved exemption) upon the conclusion of their leave.<sup>21</sup>

[33] The policy also provided for exemptions and accommodation, including medical exemption and religious exemptions.<sup>22</sup> The policy also references special exemptions as well.

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

[34] I find that the policy was communicated to the Claimant on October 14, 2021. The parties agree that the policy was communicated. This is not disputed between the parties.

[35] The Claimant said that he heard rumours about the policy in October 2021. The Claimant wrote that the policy was announced on October 14, 2021.<sup>23</sup> He received a copy of the policy, as well as the letter dated November 29, 2021 outlining the policy requirements and deadline.<sup>24</sup>

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<sup>19</sup> See GD10-2.

<sup>20</sup> "Fully vaccinated" is defined in the policy at GD10-2.

<sup>21</sup> See GD10-2.

<sup>22</sup> See GD10-3 to GD10-4.

<sup>23</sup> See GD2-8.

<sup>24</sup> See November 29, 2021 letter at GD3-60 to GD3-61 and policy at GD10-2 to GD10-6.

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

[36] The policy says that an employees who fail to comply with the policy will be subject to any one of, or the combination of the following actions: *termination of employment for cause, loss or reduction of benefits, unpaid leave, formal letter to file, safety and compliance discussion.*<sup>25</sup>

[37] The employer told the Commission that the Claimant was put on unpaid leave of absence after his sick leave ended on December 18, 2021.<sup>26</sup>

[38] The November 29, 2021 letter says that a failure to follow the policy by December 12, 2021 will result in being placed on an immediate unpaid leave of absence.<sup>27</sup> There is another letter in the file dated December 13, 2021, however the Claimant said he did not receive that one until January 2022 when he tried to return to work.<sup>28</sup>

[39] I asked the Claimant what he thought might happen if he did not comply with the policy. The Claimant said that he was not 100% certain of the consequences because the policy provided for five different options.

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

[40] As noted above, the policy provided for exemption and accommodation for medical reasons, religious grounds and special exemptions. It says that requests will be reviewed by Human Resources along with medical and executive leadership.<sup>29</sup>

[41] The Claimant testified he was aware of the exemptions available in the policy, but did not ask his employer for one. This is consistent with his previous discussion with

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<sup>25</sup> See GD10-4.

<sup>26</sup> See GD3-75 to GD3-76.

<sup>27</sup> See See November 29, 2021 letter at GD3-60 to GD3-61.

<sup>28</sup> See December 13, 2021 letter at GD10-4.

<sup>29</sup> See GD10-3 to GD10-4.



the Commission.<sup>30</sup> As well, the employer spoke to the Commission and confirmed that he had not requested an exemption from the policy.<sup>31</sup>

### **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>32</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>33</sup>

[43] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>34</sup>

[44] 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 suspended or let go because of that.<sup>35</sup>

[45] The Commission has to prove that the Claimant was suspended 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 was suspended because of misconduct.<sup>36</sup>

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

[47] First, I find that the policy was first communicated around October 14, 2021 and he was aware of the December 12, 2021 deadline date to comply. The Claimant also had enough time to comply with the policy.

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<sup>30</sup> See SROC at GD3-23.

<sup>31</sup> See SROC at GD3-75.

<sup>32</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>33</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>34</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>35</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>36</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[48] Second, I find that the Claimant willfully and consciously chose to not to comply with the policy for his own personal reasons. The policy required that employees were fully vaccinated by December 12, 2021. He did not feel comfortable providing his medical information to his employer, so he chose not to comply. Because of this, the employer determined that he was unvaccinated and not in compliance with their policy.

[49] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>37</sup>

[50] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence. The consequences were clearly communicated to him by letter dated November 29, 2021. The policy itself listed an unpaid leave of absence was one of the consequences.

[51] I was not persuaded by his testimony that he thought the employer would "drop" the whole thing and let him continue working. The evidence shows that the employer did intend to put him on unpaid leave of absence if he did not comply by December 12, 2021. He was still required to comply with the policy, even though he was a sick leave from December 6, 2021 to December 18, 2021.

[52] Fourth, I find that the Claimant has not proven he was exempt from the policy. The Claimant did not ask the employer for an exemption from the policy, even though he had serious medical concerns about the covid19 vaccination.

[53] The *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human*

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<sup>37</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

*Rights Code*<sup>38</sup> as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.<sup>39</sup>

[54] Lastly, 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 his employment when they introduced the policy. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duties at work and to the employer.

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

[55] The Claimant raised other arguments to support his position. Some of them included the following:

- a) He was unwilling to share his medical information with his employer
- b) The employer failed to answer his questions and concerns
- c) There was no informed consent
- d) The employer used coercion and threats of termination
- e) The employer was not liable for an adverse effects from the vaccination
- f) It was against the Genetic Non-Discrimination Act, the Nuremberg Code and the Criminal Code

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<sup>38</sup> See Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>39</sup> See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at [https://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates).

[56] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.<sup>40</sup> I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act, even if he did not have wrongful intent.

[57] I acknowledge the Claimant's additional arguments, but his recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.<sup>41</sup> I note that the Claimant has filed a union grievance for the unpaid leave of absence and the employer's failure to pay him over the holiday period. He is waiting to find out the status of that grievance.

## **Conclusion**

[58] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence.

[59] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits for the period he was suspended.

[60] However, since the Claimant returned to work on June 27, 2022, I find that the disentitlement to EI benefits should end.<sup>42</sup> The Commission agrees that it should end on the prior weekday on June 24, 2022.<sup>43</sup>

[61] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>40</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

<sup>41</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>42</sup> See GD6-3 to GD6-4.

<sup>43</sup> See GD9-1.