Citation: *LB v Canada Employment Insurance Commission*, 2022 SST 1564

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. B.
Representative:	E. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (455763) dated February 14, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	April 4, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	April 7, 2022
File number:	GE-22-618

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.[1]

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she did not comply with the employer's COVID-19 policy (Policy) requiring disclosure of vaccination status, and vaccination or regular testing with negative results.

[4] The Claimant doesn't dispute that this happened. She said that the employer did not have the authority to impose the Policy. There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. She did not agree with or sign the Policy, so it did not apply to her. The Policy violated many of her rights, such as privacy, informed consent to medical treatment, human rights and her God-given inalienable rights. Her conduct did not amount to misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] One of the Claimant's emails in the Reconsideration File had a number of attachments. The attachments did not appear with that email. After the hearing, at my request, the Claimant emailed the Tribunal that the attachments did appear in the

[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Reconsideration File, at a different location. She gave the page numbers for those attachments. I have accepted her most recent email to the Tribunal as evidence in this matter.

Issue

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

Analysis

[8] 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 lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[9] I find that the Claimant lost her job because she refused to comply with the employer's Policy respecting disclosure of vaccine status, and vaccination or twice-weekly testing with negative results. The evidence supports this conclusion. The Claimant does not dispute this conclusion.

Is the reason for the Claimant's dismissal misconduct under the law?

[10] The reason for the Claimant's dismissal is misconduct under the law.

[11] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost willful.[3] 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.[4]

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] See *Attorney General of Canada v Secours*, A-352-94.

[12] 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.[5]

[13] 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.[6]

[14] The Commission says that there was misconduct because the Claimant knew the requirements of the Policy, knew the consequences of non-compliance, consciously chose not to comply, and her non-compliance caused her dismissal.

[15] She said that the employer did not have the authority to impose the Policy. There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. The Policy therefore invited a wrongful dismissal claim and a claim for a human rights code violation. She did not agree with or sign the Policy, so it did not apply to her. The Policy violated her rights to privacy, and to give informed consent to medical treatment rather than be forced into it. The Policy violated her human rights, particularly under the *Canadian Human Rights Act*. It violated her rights under international agreements and under the *Canadian Bill of Rights*, and her God-given inalienable rights. Her conduct did not amount to misconduct. She has paid EI premiums for many years, and should receive EI benefits.

[16] I find that the Commission has proven that there was misconduct, because it has proven the four elements of misconduct for EI purposes: interference with carrying out the duties the Claimant owed to the employer; willfulness; awareness that non-compliance with the Policy could lead to loss of the job; and the termination of the employment was caused by the non-compliance.

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

The Facts

[17] The Claimant was a long-time employee of the employer. She is a registered Early Childhood Educator. Her job required her to work with children, aged two ½ to four years of age on a full-time basis. She also had interactions with other staff, and with parents of the children. She was not a member of a union at her workplace.

[18] The seven-page employment contract sets out the terms of the Claimant's employment, and attaches a Job Description, with a detailed list of job duties. Both documents were signed by the Claimant and the employer. The contract allows the employer to end the contract at any time for just cause recognized at law or for a material breach of the contract. [GD6-7] The contract is the entire agreement between the Claimant and employer, and can only be changed by written agreement signed by both, or, if the change is to the employer's rules, regulations, or standard policies and procedures, signed by the employee alone. [GD6-9] The Job Description is for a Registered Early Childhood Educator. There are a number of job duties relevant to his appeal. The first is that the Claimant must ensure that the health, welfare and safety of the children remain the first priority of the employer. [GD6-11] That includes ensuring that the employer's Health Policy is followed. Another requires the employee to read the Health and Safety Manual, and keep abreast of any changes related to the Manual. [GD6-13]

[19] The Policy became effective on September 7, 2021. The Claimant became aware that the employer was preparing the Policy in late August. She received an email update on August 31, 2021. The Policy document [GD3-27] is identified as part of the Health and Safety Program Manual. The Policy required that all employees become fully vaccinated subject to approved medical or religious exemptions. The exemptions required either a doctor's note showing medical reasons for not taking the vaccine, or a letter signed by a religious leader, such as a cleric, priest, rabbi or others. Employees with medical or religious exemptions would not be disciplined for refusing the vaccine. Each employee who was fully vaccinated had to provide proof to the employer by September 13, 2021. Employees who simply refuse to be vaccinated may face other consequences as protocols became more developed. Unvaccinated employees had to

provide proof of a negative rapid test twice per week. That proof had to be given to the supervisor on Monday and Thursday to allow the employee to work their next scheduled shift. The testing was at the employee's expense, and on their own time. Unvaccinated employees also had to complete a vaccination educational session. Unvaccinated employees who refuse to provide proof of negative test results or miss a test date will not be permitted to work and will be placed on unpaid leave. Refusal to be tested for three or more consecutive workdays will be interpreted as job abandonment, leading to termination of employment. The privacy of employees' information will be protected.

[20] Between the release of the Policy on September 3rd, and the dismissal of the Claimant on September 27th, the following took place. On September 7th, the Claimant emailed the employer. [GD3-686] She was not going to disclose her vaccination status based on privacy of medical information. She was not going to consent to any type of COVID-19 testing because she does not give her informed consent to this medical treatment or procedure. She referred to God-given inalienable rights. Attached was a compilation of statements from religious sources in support of forbidding or recommending against COVID-19 vaccine. [GD3-687 to 700] Also attached is the Claimant's personal statement asserting her right to a religious exemption from the vaccine. [GD3-659] The Claimant did not include a letter signed by a religious leader to support a religious exemption, as required by the Policy. The employer responded by email on Monday September 13th at 7:42a.m. [GD3-642] with a letter dated Friday September 10th. [GD3-648] It said that the employer had received a clear mandate from the Ministry of Education and Ontario's Chief Medical Officer requiring it to obtain proof of vaccination from employees, or require regular rapid tests from employees not providing proof. The employer set out its reasons for deciding that her request for religious accommodation did not set out a valid basis for accommodation for refusing the vaccine or rapid testing. The employer said that the Claimant must provide proof of vaccination by September 13th, or start rapid testing on September 16th. Proof of a negative test had to be provided by the start of her shift on September 17th. If the Claimant continued to oppose vaccination or the rapid test accommodation, she will start an unpaid leave of absence on September 17th. The Claimant testified that she understood these deadlines. The Claimant did not provide any additional documents to

support a religious exemption. The employer later stopped allowing religious exemptions on legal advice that public health trumped the human rights law on accommodation on religious grounds.

[21] Over the course of the late afternoon and evening of September 13th, the Claimant and the employer exchanged emails about the employer's September 10th letter. The Claimant emailed the employer at 4:42 with a number of attachments, which she said were her response. [email GD3-642, attachments GD3-669 to 676 as confirmed by GD16] The attachments were the text of Canada's *Genetic Non-Discrimination Act.* The employer responded at 5:10 that the Act dealt with genetic testing, not with rapid testing. The employer stood by the Policy and the September 10th letter. It asked her to read it carefully so that she understood the consequences. [GD3-628] The Claimant responded at 6:03 saying why she thought the rapid testing was a genetic test. [GD3-628] At 6:35 the employer responded that she had no reason to refuse the testing, and reminded her to upload her first test on Thursday or she will not be paid for Friday as per the Policy. [GD3-628] At 6:43 the Claimant responded that she emailed her response on September 7th. [GD3-628] At 9:24 the Claimant re-sent her earlier email with the *Genetic Non-Discrimination Act* attached. [GD3-628]

[22] On the morning of September 17, 2021, the Claimant attended at work for her regular shift. She had not taken a rapid test, so had no test results to show. Her supervisor sent her home, without pay. At 10:42 a.m. the Claimant emailed the employer a link to the VAERS database. [GD3-636] The employer replied at 11:17, that it was not sure what the link was saying. It stated that the Claimant had an unpaid day because she had not provided a test result before her shift. If she had any questions about the consequences of her actions, please reach out so it could clarify. [GD3-635] The Claimant replied at 11:32, saying that the link showed that 14,000 were dead from the vaccine in the USA. She stated, "I am not taking any vaccine any test this is my final decision." [GD3-635]

[23] The employer emailed the Claimant on September 20th with a last warning letter attached. [email GD3-679, letter GD3-645] The letter said the employer was providing

one "final opportunity" [emphasis in original] to comply with the Policy. She had until 10a.m. on Tuesday September 21st to either provide proof of vaccination or return to work by submitting to twice weekly rapid testing and complete an education session. The first test had to be taken on Monday September 20th and proof of the negative test submitted to her supervisor no later than the start of her shift on Tuesday September 21, 2021. The letter concluded, "If you continue to oppose COVID-19 vaccination or the reasonable antigen test accommodations, [employer] will proceed to terminate your employment for just cause."

[24] The Claimant did not disclose her vaccination status. She did attend the educational session in mid-September that the Policy required. She did not get the rapid test at any time before she was dismissed. She did attend for three consecutive shifts on September 17th, 20th and 21st, without any test results. The employer terminated her employment for cause by letter dated September 21st, then replaced that with a letter dated September 27th. [GD3-684 and 650] The reason in the September 27th letter was persistent insubordination and refusal to adhere to the Policy. I find that the only evidence of insubordination was the Claimant's non-compliance with the Policy.

[25] In addition to the information attached to the Claimant's emails noted in the previous paragraphs, she provided a large volume of information related to COVID-19 vaccine safety. Some of these had been sent to the Commission, and are part of its Reconsideration File. These were: the Health Canada "Canada Vigilance Summary of Reported Adverse Reactions" to the Pfizer vaccine [GD3-46 to 627]; and a YouTube video of a federal government whistleblower with secret recordings that the "vaccine is full of sh*t" [GD3-679]. After the Claimant filed her appeal to the Tribunal, she provided a number of other documents. These were: "Vaccine Notice of Liability" [GD2-10 to 14]; "Cumulative Analysis of Post-authorization Adverse Event Reports" for the Pfizer vaccine [GD8-2 to 39]; March 21, 2022, printout of the Government of Canada "COVID-19 daily epidemiology update" website [GD11-2 to 32]; and an undated media release "Grand Jury Proceeding by the People's Court of Public Opinion", and an undated, unattributed "COVID-19 Vaccine Q&A" chart. [GD12-1 to 8] The Commission received copies of these documents, and responded that its position had not changed.

The Claimant's arguments in support of her position

[26] Before dealing with the issue of whether the Claimant's conduct amounted to misconduct for the purposes of the EI program, I will deal with a number of the arguments raised that the Tribunal has no authority to deal with, and those that the Tribunal does have authority to deal with.

Arguments the Tribunal cannot deal with

[27] The starting point is the limited authority of the Tribunal in making decisions. Unlike the superior courts, the Tribunal does not have wide-ranging authority to deal with all legal issues that may be presented to it. The General Division EI Section of the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.[7] That limits what the Tribunal can do in EI matters to what the Commission can do in administering the *Employment Insurance Act* and its regulations. The Tribunal General Division has to work within that framework. The Tribunal's authority to decide any question of fact or law necessary for the disposition of the appeal is similarly limited.[8] The Tribunal lacks the authority to rule on many of the arguments advanced by the Claimant.

[28] The Tribunal has no authority to rule on the various laws, or international agreements and declarations cited by the Claimant (Universal Declaration on Bioethics and Human Rights, Nuremberg Code, and Helsinki Declaration). Nor does it have authority to deal with her God-given inalienable rights. The Tribunal also does not have authority to engage in the fact-finding to decide the questions about the vaccine's safety referred to in a number of the documents supplied by the Claimant, including the "Vaccine Notice of Liability". Nor does it have the authority to decide the employer's liability for the Claimant's financial losses set out in that notice of liability. Those matters are handled by the courts. That notice of liability also said the employer was unlawfully practising medicine. This includes the Claimant's arguments about her right to give

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[7] *Department of Employment and Social Development Act*, section 54(1).
[8] *Department of Employment and Social Development Act*, section 64.

informed consent to any medical treatment, rather than being forced into the treatment. Any issue of unlawfully practising medicine is dealt with by the provincial body that governs the medical professions, not by the Tribunal.

[29] The Claimant said that the employer's demand that she disclose her private medical information was a violation of her rights. The Tribunal does not have authority to rule on that issue. The proper authority is the provincial or federal privacy body that enforces privacy legislation, including medical issues. The Policy provides for the confidentiality of the Claimant's information in accordance with applicable privacy laws.

[30] The Claimant refers to breach of the *Canadian Human Rights Act*, as amended by the *Genetic Non-Discrimination Act*. She says that the antigen rapid test is a genetic test, and therefore discriminatory. This does not assist the Claimant in this appeal. Paragraph 29(c) of the *Employment Insurance Act* deals with just cause for voluntarily leaving employment or taking leave from employment. It does not deal with suspension for misconduct. The concept of just cause, defined in paragraph 29(c) of the EI Act, does not apply to misconduct. The things that the Claimant has mentioned in this paragraph relate to possible just cause based on discrimination under the *Canadian Human Rights Act* or practices of an employer that are contrary to law.[9] In this appeal we are not dealing with just cause as understood in the EI Act. We are dealing with alleged misconduct. The Tribunal has no authority to deal with the human rights claims in this appeal. The Claimant has two possible remedies. She can deal with the appropriate government authority responsible for enforcing the human rights laws. Or she can sue in court for wrongful dismissal, including violation of the human rights law.

[31] The Claimant had cited the *Canadian Charter of Rights and Freedoms* in her notice of appeal. At the hearing her representative said she was not pursuing that matter, so I will not deal with it.

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[9] *Employment Insurance Act*, subparagraphs 29(c)(iii) and (xi). Practices of an employer contrary to law could include the matters referred to in the Claimant's "Vaccine Notice of Liability" discussed above.

Arguments the Tribunal can deal with

[32] The Tribunal can rule on the following of the Claimant's grounds for this appeal.

[33] The Claimant said that the employer did not have the authority to impose the Policy. There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. The Policy therefore invited a wrongful dismissal claim and a claim for a human rights code violation. That last point has been dealt with above. The claim that the employer did not have the authority to impose the Policy is incorrect. Employment law is based largely on the common law (that is, judge-made law found in court decisions over the years). Employment law is a part of contract law. There is some legislation that deals with employment law, such as occupational health and safety, or employment standards. Employment law recognizes an employer's right to make changes to the employment relationship on giving proper advance notice. That allowed the employer to create the Policy, and to require employees to comply with the Policy. That law also allows an employer to dismiss an employee, with or without just cause. That law does not require that there be legislation permitting an employer to dismiss an employee from a job.

[34] The rights and obligations between the employer and employee come largely from the employment contract. In this case, the written contract is quite detailed. The employer has the right to dismiss an employee for just cause recognized at law or for material breach of the contract. [GD6-7] The written contract and the job description attached to it are the complete agreement between the Claimant and the employer. No changes to the contract and job description can be made unless in writing and signed by both the employee and the employer. For changes to rules, regulations and standard policies and procedures, only the employee's signature is required. [GD6-9] The attached Job Description requires the Claimant to ensure that the health, welfare and safety of the children remain the first priority. That includes ensuring that the employer's Health Policy is followed. Another part requires the employee to read the Health and Safety Manual, and keep abreast of any changes related to the Manual. [GD6-13] Those three items place an obligation on the employee to prioritize health, ensure that the health policy is followed, and to know and keep abreast of changes in

the Health and Safety Manual. The employment contract documents allow the employer to unilaterally make changes to health policy and to the Health and Safety Manual. The contract does not require the employee's signature to such changes. She is bound by those changes. The Policy dealing with COVID-19 is a change to the Health and Safety Manual. It was a change that did not require the Claimant's signature. That disposes of her argument that the Policy does not apply to her because she did not sign it.

[35] The Claimant argued that her rights under the *Canadian Bill of Rights* had been violated. She claimed that the denial of EI benefits had deprived her of her right to life, liberty, security of the person and enjoyment of property without due process. She claimed that the denial was a violation of her freedom of religion because the denial was based on the Policy. Unlike the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* does not make laws unconstitutional, and therefore of no effect. The Bill of Rights simply directs that federal laws must be interpreted so as not to violate the rights named in the Bill of Rights. With respect to life, liberty and security of the person, Canadian law, even under the *Charter of Rights and Freedoms,* does not guarantee anyone a minimum income or standard of living. The denial of EI benefits does not breach the *Bill of Rights* standard of life, liberty and security of the person or enjoyment of property. Even if it did, the denial has been done by the due process of law. The Claimant has had the benefit of applying for benefits, having her application reviewed by a decision maker according to the requirements of the EI law, having her request for reconsideration considered and decided by a different decision maker, then having her appeal to the Tribunal decided by another decision maker who is independent of the Commission. The freedom of religion protects individuals in the free exercise of their religious faith. The Policy does not interfere with the Claimant's exercise of her faith. She is free to choose between her faith, and the demands of the Policy. The Claimant has made her choice, to continue to exercise her faith. Because the Claimant's rights under the Bill of Rights have not been violated, the interpretation of the EI Act does not need to be modified under the Bill of Rights.

[36] The Claimant said that she has paid EI premiums for many years, and should therefore receive EI benefits. That is not a correct statement of the law. The EI scheme is not like a pension scheme, such as the Canada Pension Plan (CPP) retirement pension. Under the CPP retirement scheme, a contributor pays in over their working life, and on retirement is entitled to receive a monthly pension based on the contributions made over the years. The EI scheme does not provide automatic entitlement to EI benefits to a person who has contributed to the scheme and who has become unemployed. Under the EI scheme, the claimant must prove that she meets a number of qualification criteria. In this case, the Claimant has been disqualified for losing her employment for misconduct, so does not meet the qualification criteria to receive EI benefits.

[37] The Claimant said that her conduct did not amount to misconduct. I will deal with that issue under the next heading.

The ruling on misconduct

[38] There are four things the Commission must prove to show that the Claimant's conduct was misconduct. They are: interference with carrying out the duties the Claimant owed to the employer; willfulness; awareness that non-compliance with the Policy could lead to loss of the job; and the termination of the employment was caused by the non-compliance. The misconduct alleged in this case is the decision of the Claimant not to comply with the Policy.

[39] The duties owed to the employer by the Claimant were, most importantly, giving priority to the health, welfare and safety of the children. This required that the Claimant abide by the Health and Safety Manual and its requirements. The Policy was part of that Manual. Failure to abide by the requirement of vaccination or twice-weekly testing put the health of the children at risk, due to the possibility of the Claimant spreading COVID-19 to the children, and others. If the Claimant did not comply with the Policy, she would be sent home without pay, or dismissed from the job. Absence from work because of non-compliance, or dismissal, totally interfered with the duties owed to the employer. She would be absent from class, and would have to be replaced.

[40] Willfulness requires that the Claimant make a conscious, deliberate or intentional decision respecting the alleged misconduct. The evidence is clear. The Claimant stated to the employer that she would not comply with the vaccination or testing components of the Policy. That is clear in her letter of September 7, 2021. [GD3-686] She stated it uncategorically in her email of September 17, 2021: "I am not taking any vaccine any test this is my final decision." [GD3-635] The Claimant testified that it was her own choice not to comply with the requirements of the Policy. The Claimant put her words into action on September 17, 20 and 21, 2021, when she attended for work without having taken any antigen tests as required under the Policy.

[41] The Claimant must be proven to have an awareness that non-compliance with the Policy could lead to loss of the job. Again, the evidence is clear. The Policy stated that unvaccinated employees who refuse to provide proof of negative test results or miss a test date will not be permitted to work and will be placed on unpaid leave. Refusal to be tested for three or more consecutive workdays will be interpreted as job abandonment, leading to termination of employment. The employer told the Claimant on a number of occasions in their communications from September 7th to September 21st, that she was facing unpaid leave or dismissal if she did not comply with the Policy requirements. Under the employment contract, the employer had the right to dismiss the Claimant for material breach of the contract. Failure to abide by the Policy, which was part of the employer's Manual, was such a material breach.

[42] With respect to whether the termination of the employment was caused by the Claimant's non-compliance with the Policy requirements, there can be no doubt. The communications between the employer and the Claimant between September 17th and 21st, together with the letters of September 21st and 27th, 2021, clearly connect the non-compliance to the dismissal. In addition, the Claimant did not dispute that the non-compliance led to the dismissal.

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

[43] Based on my findings above, I find that the Claimant lost her job because of misconduct.

Conclusion

[44] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[45] This means that the appeal is dismissed.

Paul Dusome
Member, General Division – Employment Insurance Section