



Citation: *JB v Canada Employment Insurance Commission*, 2022 SST 1582

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

## Decision

**Appellant:** J. B.  
**Representative:** L. T.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (456954) dated February 17, 2022  
(issued by Service Canada)

---

**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference  
**Hearing date:** April 21, 2022  
**Hearing participant:** Appellant

**Decision date:** June 1, 2022  
**File number:** GE-22-750

## Decision

[1] The appeal is dismissed.

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

## Overview

[3] The Claimant was put on an unpaid leave of absence from her job for not getting the COVID-19 vaccination. The employer implemented a policy that required employees to get vaccinated. The Claimant didn't get the vaccination by the deadline, so she was placed on a mandatory unpaid leave of absence (suspension).

[4] The Commission decided that the Claimant took a voluntary leave of absence from her job. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[5] The Claimant disagrees that she voluntarily took leave from her job. The employer mandated that she take the leave of absence because she didn't meet the requirements of the new vaccination policy. She didn't want to take the vaccine for several reasons and was forced to be off work for that reason.

## Matters I have to consider first

### The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not

---

<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits. The disentitlement is lifted when their period of suspension expires, or they lose or voluntarily leave their job, or they work enough hours with another employer after the suspension started.

respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

## Issue

[7] Did the Claimant take a voluntary leave of absence from her job or did the employer suspend her?

[8] Was the Claimant suspended because of misconduct?

## Analysis

### Why did the Claimant stop working?

[9] A claimant who voluntarily takes a leave of absence from a job is disentitled from receiving EI benefits, unless they can prove that they had just cause for taking leave.<sup>2</sup>

[10] Similarly, claimants who have been suspended from a job because of misconduct are also disentitled.<sup>3</sup>

[11] Sometimes it is not clear whether a claimant took a leave of absence voluntarily or the employer suspended them. Both of these notions are linked in the *Employment Insurance Act*. They relate to whether someone caused their own unemployment, either by initiating their separation from employment without just cause, or by losing their job due to misconduct.

[12] Because the reasons for these disentitlements are linked, it is open to me to make a decision based on either of these grounds. In other words, where the reason for the Claimant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on a voluntary leave of absence or suspension due to misconduct.

---

<sup>2</sup> See section 32 of the Act.

<sup>3</sup> See section 31 of the Act.

[13] In this case, it is not clear that the Claimant took a voluntary leave of absence from her job. She has consistently stated to the Commission and the Tribunal that her leave was not voluntary. Rather, it was the employer who mandated that she take an unpaid leave of absence from her work. A mandatory unpaid leave of absence is another way of saying the Claimant was suspended from her job.

[14] I find the evidence on file supports that the employer initiated the Claimant's separation from employment. It is clear that the employer did not allow the Claimant to work any longer because it said she did not comply with its vaccination policy. She is able to return to work when she meets the vaccination requirements or the requirements are modified to allow her to return to work.

[15] As the Claimant was suspended from her job, I must decide whether she was suspended because of misconduct.

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

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

[17] Both parties agree that the Claimant had to stop working because she did not comply with the employer's policy that required her to be vaccinated against COVID-19. So, this is the conduct that caused her suspension.

### **Is the reason for her suspension misconduct under the law?**

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

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have

---

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>6</sup>

[20] 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>7</sup>

[21] The Commission has to prove that the Claimant was suspended 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 was suspended because of misconduct.<sup>8</sup>

[22] The Claimant worked as a nurse aide at a long-term care home. In September 2021, the employer put in place a policy requiring its employees to get their COVID-19 vaccination by October 12, 2021.<sup>9</sup> The Claimant testified that she was notified about the policy by letter and through company newsletters posted in the staff room.

[23] On September 30, 2021, the Claimant received a letter from the employer stating that she is going to be placed on an unpaid leave of absence effective October 12, 2021, under the COVID-19 immunization policy because she has not been fully vaccinated and does not fall within an exemption.

[24] The Claimant testified that she understood that she would be put on an unpaid leave of absence if she didn't get vaccinated.

[25] The Claimant didn't want to get vaccinated. She didn't feel the vaccine was safe. She also had contracted COVID-19 earlier that year. She felt that she had enough antibodies to provide the same immunity as the vaccine would offer.

---

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See GD3-25.

[26] The Claimant was scheduled to work up until October 8, 2021. She spoke to her union about the mandatory vaccination policy and the union told her that she would finish her shifts until October 8, 2021, and then she would be done working.

[27] The Commission provided its submissions on the issue of whether the Claimant had just cause to voluntarily take leave from her employment. However, its submissions include the factors to be considered when deciding if the Claimant was suspended due to misconduct. Specifically the Commission says the Claimant was aware that she was required to comply with the employer's policy to continue working in her job. The Claimant chose not to take the vaccine for personal reasons. In doing so, she willfully made the choice not to comply with the employer's policy.

[28] The Claimant says that there was no misconduct because she was a good employee with no performance or attendance issues. The employer's mandatory vaccination policy was not part of her collective agreement. She feels that she should have been accommodated because she had previously had COVID-19. But, the employer's policy required her to be vaccinated.

[29] I find that the Commission has proven that there was misconduct.

[30] The Claimant wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in losing her job.

[31] The Claimant was notified about the employer's policy in September 2021. She chose not to get her COVID-19 vaccination as required by the policy. She knew that not complying with the policy would result in her being suspended from work.

[32] I understand the Claimant had concerns about the safety of the vaccine. She also felt that she had sufficient immunity from having COVID-19 earlier in the year. But, the employer's policy was not based on her potential immunity. The policy required her to be vaccinated against COVID-19. The Claimant was aware that the employer had not exempted her from the mandatory vaccination policy because she had previously had COVID-19. Yet, she chose not to comply with the policy, regardless. If the Claimant

intended to comply with the policy, she could have communicated that to her employer and asked for an extension of time.

[33] The Claimant said that the policy was not part of her collective agreement.

[34] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[35] I understand the Claimant's concerns that the employer's policy did not give her any option other than to get vaccinated. I acknowledge that she disagrees with the employer's policy and feels that the loss of her employment was unjustified.

[36] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>10</sup>

[37] I do not have the authority to decide whether the employer breached her collective agreement by suspending the Claimant from her job. The Claimant said that she is currently pursuing a grievance with the employer through her union. That is a more appropriate venue to address allegations that the employer breached her collective agreement.

### **So, was the Claimant suspended because of misconduct?**

[38] Based on my findings above, I find that the Claimant was suspended because of misconduct.

---

<sup>10</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

## **Conclusion**

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

[40] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section