



Citation: *DB v Canada Employment Insurance Commission*, 2022 SST 1604

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

## Decision

**Appellant:** D. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (482586) dated June 21, 2022  
(issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** November 29, 2022

**Hearing participant:** Appellant

**Decision date:** December 12, 2022

**File number:** GE-22-2210

## 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 his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was suspended from his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

## Issue

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

## Analysis

[7] 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>

[8] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

<sup>2</sup> See sections 30 and 31 of the Act.

Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended from his job?**

[9] I find that the Claimant was suspended from his job because he went against his employer's vaccination policy.

[10] The Claimant says his employer put him on an unpaid leave of absence. He says it did so because he refused to comply with his employer's COVID-19 vaccination policy. He says he was not prepared to assume the potential risks associated with the vaccine.

[11] The Commission says the Claimant refused to take the COVID-19 vaccine and didn't have an exemption to the requirement to do so. It concluded that this led to the Claimant's suspension.

[12] The Claimant doesn't dispute the reason his employer placed him an unpaid leave him. So, I find that the unpaid leave is the same as a suspension since the Claimant didn't do something his employer required him to do. I find that the Claimant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

### **Is the reason for the Claimant's suspension misconduct under the law?**

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

[14] 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.

[15] 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>5</sup>

[16] 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 being suspended because of that.<sup>6</sup>

[17] 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>

[18] I have to focus on the 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 dismissed (or in this case 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 consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[19] The Commission has to prove that the Claimant was suspended from his 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 from his job because of misconduct.<sup>10</sup>

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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.

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

[20] The Claimant says there was no misconduct because his decision not to take the COVID-19 vaccine was based on health concerns and informed consent. He says his employer violated his rights under the *Charter of Rights and Freedoms* (Charter).

[21] The Commission says there was misconduct because the Claimant didn't comply with his employer's COVID-19 vaccination policy. It says the Claimant knew about the policy and the consequences of non-compliance, so his conduct constitutes misconduct under the Act.

[22] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could be suspended from his job if he went against his employer's COVID-19 vaccine policy. But he chose not to take the vaccine.

[23] The Claimant testified that he learned in November or December 2021 that his employer required employees to get the COVID-19 vaccine by a certain date and to attest to it. He said that if employees didn't get vaccinated by the deadline, they could be suspended or the employer could take further action.

[24] The Commission's reconsideration file notes show that the Claimant said employees had to be vaccinated by February 1, 2022. The Claimant confirmed at the hearing that this is what he told the Commission.

[25] The Claimant testified that he opted not to be vaccinated for personal and health reasons. He explained that documentation for one brand of the COVID-19 vaccine speaks about infertility. He said he didn't want to compound an issue he was already dealing with.

[26] I asked the Claimant if he asked his employer to exempt him from having to take the vaccine such as on medical or religious grounds. The Claimant said the employer wasn't giving exemptions. He said they would only do so if an employee took the first dose of the vaccine and had a reaction to it. He said that in that case, the employee would not have to take the second dose.

[27] I find the Claimant's testimony about exemptions is inconsistent. While he said the employer wasn't giving any, he then cited a specific circumstance where the employer would do so. Also, in his notice of appeal, he said that most if not all accommodation requests were denied.

[28] I find that if the employer would accommodate someone who couldn't take the COVID-19 vaccine for medical reasons, they would likely accept requests for accommodation for other reasons. The Claimant's statement in his notice of appeal supports that the employer took and considered requests. But the Claimant said he did not ask for accommodation. He said his doctor wouldn't give him anything to support a request.

[29] The Claimant says that his Charter rights have been violated by the vaccine mandate. He referred to observed side effects of the vaccine and his right not to want to take it without consenting to be experimented on. The Claimant testified that there are no long-term studies on the COVID-19 vaccine and no one knows what could happen 10 years from now. He said he is not prepared to take the chance of facing severe illness if he takes the vaccine.

[30] 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 is one of these laws, and there are a number of provincial laws that protect rights and freedoms.

[31] The Tribunal is allowed to consider whether a provision of the Act or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter. But the Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction.

[32] The Claimant believes his employer has violated his Charter rights. But I don't have the power to decide this issue. The Claimant must go to a different tribunal or a court to address that.

[33] I find from the Claimant's testimony that he knew about his employer's COVID-19 vaccination policy. He knew about the deadlines and the consequences of not complying with the policy. Even though he said he had health concerns, he didn't ask his employer to accommodate him on medical grounds. So, I find that the Claimant knew that his conduct, namely not taking the COVID-19 vaccine, could result in his suspension.

[34] The Claimant testified that he has paid into the EI system for 14 years. He said it isn't right that he's paying for service that he doesn't get to use.

[35] I sympathize with the Claimant in the circumstances. But, the purpose of the Act is to compensate claimants who have lost their jobs involuntarily and are out of work.<sup>11</sup> I find that because the Claimant didn't do what his employer asked him to do, his job loss wasn't involuntary.

[36] I find that the Claimant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

[37] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

[38] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

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<sup>11</sup> See *Caron v Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.

## **Conclusion**

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

[40] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section