



Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 157

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

## Decision

**Appellant:** M. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (487422) dated June 30, 2022 (issued by Service Canada)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** Teleconference

**Hearing date:** November 10, 2022

**Hearing participant:** Appellant

**Decision date:** January 9, 2023

**File number:** GE-22-2449

## Decision

[1] I am dismissing M. B.' appeal.<sup>1</sup>

[2] The Canada Employment Insurance Commission (Commission) has proven he was suspended from his job because of misconduct. In other words, he did something that caused him to be suspended from his job.<sup>2</sup>

[3] This means he isn't entitled to receive Employment Insurance (EI) benefits.<sup>3</sup>

[4] So the Commission made the correct decision in his EI claim.

## Overview

[5] The Claimant was suspended from his job at X. He worked as a residential support worker in a group home.

[6] The Claimant's employer says it put him on an unpaid leave of absence because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] Although the Claimant originally gave the Commission different reasons why he wasn't working, he eventually agreed with the reason his employer gave.

[8] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission could not pay him EI regular benefits during his suspension (January 3, 2022 to March 18, 2022).

[9] The Claimant says the Commission's decision violates his religious beliefs and his rights. He didn't choose to go on unpaid leave, his employer forced him. He says he

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<sup>1</sup> In my decision, I refer to M. B. as the "Claimant", rather than the "Appellant". I am doing this because the *Employment Insurance Act* (EI Act) refers to the "claimant", meaning the person who has made a claim for EI benefits. And I am deciding his appeal about his EI claim.

<sup>2</sup> In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.

<sup>3</sup> Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.

should be able to get EI benefits because he paid into EI for over 30 years and is suffering extreme financial hardship.

[10] A little over two months after he was suspended, the Claimant was fully vaccinated, gave his employer proof of vaccination, and returned to work.

[11] I have to decide the reason the Claimant got suspended. And whether that reason is misconduct under the EI Act.

## **Issue**

[12] Did the Claimant get suspended from his job for a reason the EI Act says is misconduct?

## **Analysis**

[13] 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.

[14] I have to decide two things.

- the reason the Claimant was suspended from his job
- whether the EI Act considers that reason to be misconduct

## **The reason the Claimant was suspended from his job**

[15] I find the Claimant's employer suspended him because he didn't comply with its vaccination policy.

[16] The Claimant and the Commission agree about this.

[17] The Claimant originally gave the Commission a different reason why he wasn't working. He said there was a shortage of work. His employer was trying to limit the number of people in the building because of the Omicron variant of COVID.<sup>4</sup> But he

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<sup>4</sup> See GD3-38 and GD3-40.

eventually agreed that he was suspended because he didn't follow his employer's vaccination policy.<sup>5</sup>

[18] This is also what he testified to at the hearing. I asked him about his original reason he gave the Commission. He explained that he considered the Omicron variant of COVID, his employer's vaccination policy, and his refusal to be vaccinated "one in the same thing". But he was clear the reason he was not working was "me refusing to get vaccinated".

[19] His employer used code N (leave of absence) on his record of employment.<sup>6</sup> And his employer told the Commission it placed him on leave without pay because he didn't comply with its COVID vaccination policy.<sup>7</sup>

[20] I have no reason to doubt what the Claimant eventually said to the Commission and testified to at the hearing. What he said is supported by what his employer said. I accept his explanation for the different reason he originally gave. And there is no other evidence that goes against what he and his employer said.

### **The reason is misconduct under the law**

[21] The Claimant's refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

#### ***What misconduct means under the EI Act***

[22] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal issues I have to consider when making my decision.

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<sup>5</sup> See the Commission's notes of its call with the Claimant at GD3-42.

<sup>6</sup> See the record of employment at GD3-33. His employer filed and amended record of employment, with revised total insurable earnings, but kept the same reason for separation from employment, see GD3-35.

<sup>7</sup> See the Commission's notes of calls with the employer at GD3-39 and GD3-41.

[23] The Commission has to prove that it's more likely than not the reason he was suspended from his job is misconduct under the EI Act, and not another reason.<sup>8</sup>

[24] I have to focus on what the Claimant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.<sup>9</sup> I can't consider whether the employer's policy is reasonable, or whether suspension was a reasonable penalty.<sup>10</sup>

[25] The Claimant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.<sup>11</sup> To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.<sup>12</sup> And misconduct also includes conduct that is so reckless that it is almost wilful.<sup>13</sup>

[26] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer, and knew or should have known there was a real possibility of being let go because of that.<sup>14</sup>

[27] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.<sup>15</sup> I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement, or decide whether an employer breached a collective agreement.<sup>16</sup> I can't decide whether an employer discriminated against a claimant or should have accommodated

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

<sup>9</sup> This is what section 30 and 31 of the EI Act say.

<sup>10</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>12</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>13</sup> See *McKay-Eden v his Majesty the Queen*, A-402-96.

<sup>14</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>15</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

<sup>16</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

them under human rights law.<sup>17</sup> And I can't decide whether an employer infringed a claimant's privacy or other rights in employment, or otherwise.

***What the Commission and the Claimant say***

[28] The Commission and the Claimant agree on the key facts in this case. The key facts are those facts the Commission needs to prove to show the Claimant's conduct is misconduct under the EI Act.

[29] The Commission says that there is misconduct under the EI Act because the evidence shows:<sup>18</sup>

- the employer had a vaccination policy<sup>19</sup>
- under the vaccination policy the Claimant had to be fully vaccinated against COVID and provide accurate proof, or get an exemption from his employer, by the deadline (November 30, 2021)
- his employer made him aware of the vaccination policy—he knew what he had to do and had time to do it<sup>20</sup>
- he also knew his employer could suspend him if he didn't get vaccinated or get an exemption by the deadline<sup>21</sup>
- he applied for a religious exemption, but his employer denied it<sup>22</sup>

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<sup>17</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>18</sup> See the Commission's Representations at GD4.

<sup>19</sup> The Claimant's employer followed the Alberta Health Service Policy, *Immunization or Testing of Workers for COVID-19* (effective September 14, 2021, revised February 8, 2022). The policy is at GD3-47 to GD3-58.

<sup>20</sup> See the Commission's notes of its call with the Claimant at GD3-59. See the Commission's notes of its call with the employer at GD3-41.

<sup>21</sup> See the Commission's notes of its call with the Claimant at GD3-59.

<sup>22</sup> See the Commission's notes of its call with the Claimant at GD3-59. See his exemption request at GD3-60 to GD3-70.

- he didn't get vaccinated by the deadline, so his employer suspended him<sup>23</sup>

[30] The Commission relies on evidence from the Claimant's employer. His employer told the Commission it suspended then dismissed him because he didn't comply with its vaccination policy.<sup>24</sup> The employer said it sent out memos about the vaccination policy in September and October 2021. And that the Claimant knew about the vaccination policy and the possibility of suspension because it had about 40 emails going back and forth with him specifically about the vaccination policy.

[31] The Claimant says that there was no misconduct. He was placed on leave by his employer, which was not his choice. At the hearing he testified his employer told him he was going to be able to get EI. He also testified he was on compassionate leave when his employer adopted the vaccine policy. And he said he was getting emails about it quite often.

[32] He also testified that he thought he would get a religious exemption. He has been attending church for 15 years and driving the Sunday school bus. So when he got hired he made sure he could get Sunday off work.

***The Commission has proven misconduct under the EI Act***

[33] I believe and accept the Claimant's evidence and the employer's evidence for the following reasons.

[34] I have no reason to doubt the Claimant's evidence (what he eventually said to the Commission, and what he said at the hearing). I accept his explanation for the apparent inconsistency in the reason he originally gave for not working compared to what he later admitted. He said essentially the same thing to the Commission and the Tribunal about the key facts. And there is no evidence that contradicts what he said.

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<sup>23</sup> See my analysis and finding about this, above, starting at paragraph 14..

<sup>24</sup> See the Commission's notes of calls with the employer at GD3-39, GD3-41.

[35] I accept the Commission's evidence about the key facts because it is consistent with the Claimant's evidence. And there is no evidence that contradicts it.

[36] So, I find that the Commission has shown it is more likely than not the Claimant was suspended due to misconduct because he:

- knew about the employer's vaccination policy, and his duty to get vaccinated and report his vaccination status (or get an exemption) by the deadline
- was denied his request for an exemption on religious grounds
- knew that his employer might suspend him if he didn't get vaccinated
- consciously, deliberately, and intentionally made the decision not to get vaccinated by the deadline
- was suspended from his job because he wasn't vaccinated

### ***The Claimant's other arguments***

[37] The Claimant made two other arguments why he should win his appeal.

[38] First, he says the Commission's decision violates his rights and beliefs.<sup>25</sup> He has belonged to the X Church, a denomination of Christianity, since birth. The basis for his exemption was that his body is his temple and he alone can decide what he is willing to put in his body.<sup>26</sup>

[39] Unfortunately for the Claimant, I can't accept this argument. I have to focus on what he did or failed to do, and whether that conduct amounts to misconduct under the EI Act. I can't apply human rights law, or the *Canadian Charter of Rights and Freedoms*, to the Commission's decision in his EI claim.<sup>27</sup>

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<sup>25</sup> See the Claimant's appeal notice at GD2-6.

<sup>26</sup> See the Commission notes of its call with the Claimant at GD3-59.

<sup>27</sup> I can't consider the *Canadian Charter of Rights and Freedoms* arguments he raised in his appeal notice because he didn't follow the proper procedure to raise *Charter* arguments at the Tribunal. And the law doesn't give me the power to decide whether the Commission discriminated against him.



[40] Second, the Claimant said I should allow his appeal because he has paid into the EI plan for over 30 years. And he needs EI benefits because of financial hardship.

[41] The EI Act is an insurance plan. Like other insurance plans, someone who makes a claim for a benefit needs to show that they meet all the conditions required to get that benefit.<sup>28</sup>

[42] Unfortunately for Claimant, section 31 of the EI Act says he isn't entitled to EI regular benefits.

[43] There is no question that the financial consequences of the Commission's decision are harsh for the Claimant. And the COVID pandemic made his life extremely stressful. Unfortunately for the Claimant, I have to follow the EI Act when I make my decision.<sup>29</sup> I have no power outside the EI Act to make my decision based on principles of fairness or equity, or on financial need

***Summary of my finding about misconduct***

[44] After considering and weighing all of the documents and testimony, I find the Commission has shown the Claimant was suspended from his job because of misconduct under the EI Act.

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<sup>28</sup> See *Pannu v. Canada (Attorney General)* 2004 FCA 90

<sup>29</sup> See *Canada (Attorney General) v Knee* 2011 FCA 301

## **Conclusion**

[45] The Commission has proven that the Claimant was suspended from his job because of misconduct under the EI Act.

[46] Because of this, the Claimant isn't entitled to receive EI benefits from January 3, 2022 to March 18, 2022.

[47] This means the Commission made the correct decision in his EI claim.

[48] So I am dismissing his appeal.

Glenn Betteridge  
Member, General Division – Employment Insurance Section