



Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 1277

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

Decision

Appellant: C. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (473530) dated June 17, 2022
(issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: November 10, 2022

Hearing participant: Appellant

Decision date: December 2, 2022

File number: GE-22-2400

Decision

[1] I am dismissing the Claimant's (C. B.'s) appeal.¹

[2] I agree with the Canada Employment Insurance Commission (Commission). The Commission has proven the Claimant was suspended from her job because of misconduct. In other words, because she did something that caused her to be suspended.

[3] This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.²

Overview

[4] The Claimant worked as a flight attendant until X put her on unpaid leave of absence. She applied for EI regular benefits.

[5] Her employer had a mandatory COVID vaccination policy (vaccination policy).³ The Claimant had to be vaccinated and give proof, or apply for and receive a medical exemption, by the deadline. Her employer says she didn't do this. So it put her on unpaid leave of absence.

[6] The Commission accepted the employer's reason for the leave of absence. And the Commission decided that the Claimant had voluntarily taken a leave from her job by not following the vaccination policy. Because of this, the Commission disentitled her from getting EI benefits.

[7] The Claimant says she didn't voluntarily leave her job and there's no misconduct. Her employer forced her onto an unpaid leave of absence.

¹ In my decision, I refer to the Appellant as the "Claimant". 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.

² Section 31 of the EI Act says that claimants who are **suspended** because of misconduct are **disentitled** from receiving benefits for a period of time.

³ The employer's vaccination policy is at GD3-20 to GD3-22.

[8] She says she didn't refuse to get vaccinated. She was transparent and co-operated with her employer all along. At the time her employer placed her on unpaid leave of absence she was waiting to see her specialist doctors. She wanted their opinions about whether it was safe for her to be vaccinated against COVID. So she says EI should at least give her benefits from the start of her unpaid leave (October 31, 2021) until she got advice from her specialists (February 3, 2022).

[9] I have to decide if the reason the employer put the Claimant on unpaid leave of absence is misconduct under the *Employment Insurance Act* (EI Act).

[10] In this decision, "suspension" means the same thing as leave of absence and unpaid leave of absence.

Matters I have to consider first

The Claimant sent the Tribunal documents after the hearing

[11] At the hearing the Claimant talked about an email from her family doctor, and the form she needed to have her doctor(s) complete to apply for a medical exemption. Those documents were not in the appeal file. So I asked her to send them to the Tribunal. And she did.⁴

[12] The Commission hadn't seen the documents. So the Tribunal sent them to the Commission and gave it an opportunity to respond.⁵ The Commission responded that it had nothing to say about these documents.⁶

[13] I accept these documents as evidence in this appeal, for three reasons. First, I asked the Claimant to send them to the Tribunal. Second, the Commission had an opportunity to respond to it. Third, they might be relevant to the legal issues I have to decide.

[14] This means I will consider these documents when I make my decision.

⁴ See GD9 for both documents.

⁵ See GD7.

⁶ See the Commission's Supplementary Representation, GD8.

The decision the Claimant is appealing

[15] The Commission changed the reason it disentitled the Claimant—after its reconsideration decision. So at the beginning of her hearing the Claimant and I clarified the legal issue in her appeal.

[16] The Commission's reconsideration decision maintains its original decision.⁷ Its original decision says the Commission is unable to pay the Claimant benefits because she stopped working by voluntarily taking leave from her job.

[17] The Claimant appealed the reconsideration decision. In her notice of appeal she says she didn't take a voluntary leave, her employer forced her onto unpaid leave.⁸

[18] Then the Commission changed the reasons for its decision. In its representations the Commission says the circumstances show the Claimant was suspended from her position due to misconduct.⁹ And the Commission argues the appeal under the suspension for misconduct section of the EI Act.¹⁰

[19] I explained to the Claimant that I have the legal authority to decide her appeal under the voluntary leaving or the misconduct rules. I told her I agreed with her and the Commission—the evidence in the appeal file shows me she didn't voluntarily leave her job. So the Claimant and I agreed the legal issue in her appeal was suspension for misconduct.

[20] Then I summarized the law of misconduct under the EI Act, so she could focus her case on this.

Issue

[21] Is the reason the Claimant was suspended from her job misconduct under the EI Act?

⁷ See GD3-27 for the original decision, and GD3-46 for the reconsideration decision.

⁸ See GD2-6.

⁹ See GD4-1.

¹⁰ See section 31 of the EI Act.

Analysis

[22] 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.¹¹

[23] I have to decide two things. First, I have to decide the reason the Claimant was suspended from her job. Second, I have to decide whether the EI Act considers that reason to be misconduct.

The reason the Claimant was suspended

[24] I find the Claimant's employer suspended her because she didn't comply with its vaccination policy.¹²

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

[26] It's what the Claimant told the Commission and testified to at the hearing.¹³ It's what she wrote on her EI application, in her reconsideration request, and on her notice of appeal.¹⁴

[27] Her employer used code N (Leave of absence) on her record of employment.¹⁵ Her employer emailed her to tell her it had placed her on an unpaid leave of absence because she had not "completed, reported and documented full vaccination status".¹⁶ In other words, because she didn't follow its vaccination policy.

[28] I have no reason to doubt what the Claimant and her employer said. And there is no evidence that goes against what they said.

¹¹ See sections 30 and 31 of the EI Act.

¹² See her employer's vaccination policy at GD3-20 to GD3-22.

¹³ See the Commission's notes of calls with the Claimant at GD3-23 and GD3-44.

¹⁴ See her EI application at GD3-7, where she wrote "leave of absence" and "not vaccinated". See her reconsideration request at GD3-30. And see her appeal notice at GD2-6.

¹⁵ See the record of employment at GD3-17.

¹⁶ See the email at GD3-34 and GD-35.

The reason is misconduct under the law

[29] The Claimant's failure to comply with her employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

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

[31] I have to focus on what the Claimant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.¹⁷ I can't consider whether the employer's policy is reasonable, or whether suspension was a reasonable penalty.¹⁸

[32] The Claimant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct.¹⁹ To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or intentional.²⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.²¹

[33] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer, and knew or should have known there was a real possibility of being let go or suspended because of that.²²

[34] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.²³ So, for example, I can't decide whether the Claimant was wrongfully dismissed under employment law. I can't decide whether her employer

¹⁷ This is what section 30 and 31 of the EI Act say.

¹⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁹ See *Attorney General of Canada v Secours*, A-352-94.

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

should have accommodated her under human rights law. And I can't decide if her employer breached a collective agreement.

[35] Finally, the Commission has to prove that it's more likely than not she was suspended from her job because of misconduct.²⁴

What the Commission and the Claimant say

[36] The Commission and the Claimant agree on the key facts and evidence I have to consider when I decide whether her conduct is misconduct under the EI Act.

[37] The Commission says that her conduct is misconduct under the EI Act because:²⁵

- the unpaid leave of absence counts as a suspension under section 31 of the EI Act
- the employer adopted the vaccination policy, which it had the right to do
- the Claimant knew about the vaccination policy and knew she had to be vaccinated against COVID and prove it to her employer, or get an exemption from her employer, by the deadline (October 30, 2021)
- she also knew the policy said her employer would put her on unpaid leave of absence if she didn't get vaccinated or get an exemption by the deadline
- she applied for a medical exemption but her employer denied her application
- she didn't get vaccinated by the deadline, so her employer put her on unpaid leave of absence

[38] The Commission relies on evidence from the Claimant.²⁶ She told the Commission her employer informed her about its vaccination policy. She knew what she

²⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁵ See the Commission's Representations at GD4.

²⁶ See the Commission's notes of calls with the Claimant at GD3-23 and GD3-44.

had to do by the deadline. She applied for an exemption. But her employer denied her application. She knew her employer would suspend her if she didn't get vaccinated. She didn't get vaccinated by the deadline.

[39] But the Claimant says that there was no misconduct.²⁷ She was not choosing to be defiant or non-compliant. She was transparent with her employer all along. She cooperated and even proposed alternatives to vaccination. She provided it with information about her health conditions.

[40] She testified she didn't refuse to get vaccinated. She was scared to be vaccinated against COVID. She has a family history of deep vein thrombosis, and had already suffered a stroke. Her family doctor would not complete the medical form to support her exemption request.²⁸ So she wanted to see her specialists before she decided. She couldn't take the risk of getting vaccinated without seeing them.

[41] At the hearing she testified she was waiting to see her specialist doctors when the deadline passed and her employer suspended her. She wanted their opinions about whether it was safe for her to be vaccinated against COVID. By February 3, 2022, her specialists gave her clearance to get vaccinated against COVID.

[42] The Claimant argues she should be entitled to get EI benefits from the date her employer put her on leave of absence (October 31, 2021) until her specialists cleared her to get vaccinated (February 3, 2022).²⁹ She says she had a right to see her specialists before making a decision. So her refusal to follow the vaccination policy was not conscious, deliberate, intentional or reckless to the point of being wilful.

The Commission has proven misconduct under the EI Act

²⁷ See what she wrote in her reconsideration request at GD3-30, in her notice of appeal at GD2-6 and GD2-8 to GD2-10, and in GD6.

²⁸ See the "To Whom It May Concern" email her family doctor gave to her, at GD9-2. The doctor says they are sending her for specialist consultations.

²⁹ She makes this argument at GD6-2, and made it at the hearing.

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

[44] I have no reason to doubt the Claimant's evidence (from her EI application, what she said to the Commission, what she wrote in response to the Commission's representation, and what she said at the hearing). Her evidence is consistent. She said the same thing to the Commission and the Tribunal. And her story stayed the same from her EI application through the hearing.

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

[46] So, I find that the Commission has shown it's more likely than not the Claimant:

- knew about the employer's vaccination policy, and her duty to get vaccinated (or get an exemption) by the deadline
- knew that her employer would suspend her if she didn't
- consciously, deliberately, and intentionally made the decision not to get vaccinated by the deadline
- was suspended from her job by her employer because she didn't do what she had to do under the vaccination policy (in other words, because she didn't comply with the vaccination policy)

[47] I don't accept the Claimant's argument that she is entitled to EI benefits while she was waiting to get clearance from her specialists (from October 31, 2021 to February 3, 2022).

[48] I really appreciate that she faced an incredibly difficult decision about her health. I understand why she feared getting vaccinated given her medical history and her family's medical history. But I can't decide whether she had such a right under her collective agreement or another law to see her specialist before deciding whether to get vaccinated.

[49] Under the EI Act I have to focus on her conduct and what she knew about her employer's vaccination policy—not her reasons or justifications for not getting vaccinated. Above I found that she consciously, deliberately, and intentionally chose not to get vaccinated by the deadline. And she chose not to get vaccinated even after she got clearance from her specialists. She didn't do what she had to do to stay at work, or to get back to work after the suspension started. So, she is disentitled from getting EI benefits from the start of her suspension (October 31, 2021).

[50] Her employer might have had a legal duty to give her time to see her specialists before suspending her. She might have this right under her collective agreement or under human rights law, or both. She might be able to make this argument in another legal case, like the grievance her union has filed.

The Claimant's other arguments

[51] The Claimant argues the Commission was wrong to refuse her benefits because she contributed to the EI program her whole career. She says EI benefits are for people when they are off work and at their most vulnerable, in stressful times of life. These were her circumstances during COVID.

[52] There is no question that the financial consequences of the Commission's disqualification decision are harsh for the Claimant. And the COVID pandemic made her life and her working life extremely stressful. Unfortunately for the Claimant, I have to follow the EI Act when I make my decision.³⁰ I have no power outside the EI Act to make my decision based on principles of fairness or equity.

[53] The EI Act is an insurance plan. Like other insurance plans, someone who makes a claim for a specific benefit needs to show that they meet all the conditions required to get that benefit.³¹ Unfortunately for Claimant, section 31 of the EI Act disentitles her from to getting EI regular benefits.

³⁰ See *Canada (Attorney General) v Knee* 2011 FCA 301

³¹ See *Pannu v. Canada (Attorney General)* 2004 FCA 90

[54] The Claimant also argues that her conduct is not misconduct because her employer let her return to work without getting vaccinated or getting an exemption.³² She said nothing in her situation or her behaviour changed—and her employer let her go back to her job—so the conduct that lead to her suspension isn't misconduct.

[55] I don't agree with this argument. I believe her that she went back to work without being vaccinated, or getting a medical exemption. I have no reason to doubt her evidence about this. However, I have to consider her conduct measured against her employer's vaccination policy, not in abstract. Her employer charged its vaccination policy. She no longer had to be vaccinated to work.³³ This means that her conduct (not getting vaccinated and giving proof) was *no longer* misconduct under the EI Act. But *at the time her employer suspended her*, her conduct was misconduct under the EI Act.

My conclusion about misconduct

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

Conclusion

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

[58] This means the Claimant is disentitled from receiving EI benefits.

[59] So I am dismissing her appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

³² See GD7.

³³ See the announcement of this change, which she sent to the Tribunal, at GD8-3.