



Citation: *BL v Canada Employment Insurance Commission*, 2022 SST 1741

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

## Decision

**Appellant:** B. L.  
**Representative:** A. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (504495) dated August 9, 2022  
(issued by Service Canada)

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**Tribunal member:** Susan Stapleton

**Type of hearing:** Videoconference  
**Hearing date:** November 9, 2022  
**Hearing participant:** Appellant  
Appellant's representative

**Decision date:** November 16, 2022  
**File number:** GE-22-2839

## 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 he is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer says that he was let go because he went against its Covid-19 (Covid) vaccination policy, by refusing to provide proof of being vaccinated, and not doing weekly testing instead.

[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 dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

## Issue

[6] Did the Claimant lose his job because of misconduct?

## Analysis

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

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (the Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

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

### **Why did the Claimant lose his job?**

[8] I find that the Claimant lost his job because he didn't follow his employer's vaccination policy. The parties agree that he was dismissed because he refused to provide proof of vaccination and didn't have weekly testing instead.

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

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

[10] 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 dismissal 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.

[11] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</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>4</sup>

[12] 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 dismissed from his job because of that.<sup>5</sup>

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<sup>2</sup> See *Mishibinijima v Canada* (Attorney General), 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada* (Attorney General), 2007 FCA 36.

[13] The law doesn't say I have to consider how the Employer behaved.<sup>6</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>7</sup>

[14] 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 whether the Employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>8</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[15] The Claimant says that there was no misconduct because there was a settlement agreement with the employer. He received a \$4,500 payment and a letter of reference from the employer. He told the Commission Officer that the settlement was partially because the employer didn't give him enough information about testing.<sup>9</sup> He said at the hearing that if the employer hadn't been wrong in dismissing him, there wouldn't have been a settlement.

[16] The Claimant's representative told the Commission Officer that the employer didn't want to accommodate the Claimant, which was why he got the settlement.<sup>10</sup> He said at the hearing that the employer not having a health custodian was one of the reasons for the settlement. He said that the employer not paying for the Claimant to have testing was another reason for the settlement. The representative told the Commission Officer that the settlement stated there was no cause for the Claimant's termination. He submits that the Claimant was wrongfully dismissed.

[17] When it comes to a settlement reached after a dismissal, the Tribunal is not bound by the manner in which the grounds for dismissal are characterized by the

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<sup>6</sup> See section 30 of the Act.

<sup>7</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>8</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> GD3-70.

<sup>10</sup> GD3-55.

employer or the Claimant. In other words, the mere fact that there is a written agreement between the Claimant and his employer does not necessarily resolve the question of whether the Claimant was dismissed because of his own misconduct.<sup>11</sup>

[18] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct which would contradict the position taken by the employer during the investigation by the Commission or at the time of the hearing.<sup>12</sup>

[19] The Claimant's representative submitted a copy of the settlement reached between the Claimant and the employer, as well as an email from the employer's lawyer.<sup>13</sup> There is nothing in the email or settlement document that contradicts the position taken by the employer during the initial investigation carried out by the Commission, or that could suggest that the employer has withdrawn with regards to the acts alleged against the Claimant when terminating his employment.<sup>14</sup>

[20] The same goes for the reference letter that the employer agreed to provide: the mere existence of this reference letter, drawn up as part of an out-of-court settlement between the parties, does not demonstrate that misconduct under the EI Act is not the cause of the loss of employment.

[21] The Commission has to prove that the Claimant lost his job because of misconduct. It 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 dismissed because of misconduct.<sup>15</sup>

[22] The Commission says there was misconduct because:

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<sup>11</sup> *Canada (Attorney General) v Boulton*, A-45-96 and *Canada (Attorney General) v Morrow*, A-170-98.

<sup>12</sup> *Canada (Attorney General) v Morrow*, A-170-98; *Canada (Attorney General) v Boulton*, A-45-96.

<sup>13</sup> GD2-16-18.

<sup>14</sup> See *Boulton* and *Morrow* above.

<sup>15</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the Employer had a vaccination policy;
- the Employer clearly notified the Claimant of its expectations about getting vaccinated, and disclosing whether he had been vaccinated;
- the Employer communicated to the Claimant that he could do weekly testing instead of being vaccinated;
- the Claimant knew or should have known that he would lose his job if he didn't follow the policy and either get vaccinated or do weekly testing; and
- the Claimant didn't get vaccinated or do weekly testing.

[23] The Claimant says there was no misconduct because:

- the Employer's vaccination policy is unreasonable;
- the Employer's vaccination policy is against his religion;
- the Employer's vaccination policy is not part of his employment contract;
- the government of Ontario didn't mandate vaccinations for the private sector;
- his vaccination status is private medical information that he is not obligated to disclose;
- he didn't refuse to undergo testing, but couldn't afford to pay for testing himself;
- the Employer didn't give him any information about what testing he had to do; and
- he reached a legal settlement with his employer regarding his dismissal.

[24] The Claimant worked for the Employer as a bank teller, since July, 2020.

[25] The Claimant testified that an email was sent to employees around the second week of September, 2021. The email asked employees to fill out an online attestation saying whether or not they were vaccinated. He testified that there was no "prefer not to answer" option on the online form, which he felt violated his medical privacy. He had concerns about how his private medical information would be stored by the Employer.

[26] The Claimant's representative submitted that the Employer is required by law to have a health custodian to store and control health information collected from employees.

[27] The Employer put a mandatory vaccination policy in place on September 15, 2021.<sup>16</sup> Employees were required to be vaccinated by October 31, 2021. The Claimant confirmed at the hearing that the policy applied to all employees, including him. But, he didn't believe the policy was right, because it violated his medical freedoms and his rights.

[28] The Policy says:

- All employees must be fully vaccinated against Covid.
- All employees must provide proof of vaccination.
- In the case of an employee not being vaccinated, the Employer may implement necessary actions, including Covid testing, modified safety protocols, restricting access to the workplace, placing the employee on an unpaid leave of absence, and/or modifying or terminating their employment.
- Medical and religious exemption requests will be considered.
- For employees who have a medical or religious exemption from being vaccinated, the Employer will pay for any required Covid testing.
- Employees who are unvaccinated for reasons other than a medical or religious exemption will be required to pay for Covid testing.
- Employees who fail to follow the policy may be subject to disciplinary action, up to and including termination of employment.

[29] In an email to the Claimant sent on September 27, 2021,<sup>17</sup> the Employer noted that he hadn't completed the online vaccination attestation. The Employer asked him to complete the attestation before September 30, 2021. It said that if he was not and could not be vaccinated, he would be contacted to discuss the reason why. The Employer

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<sup>16</sup> GD3-33-GD3-35.

<sup>17</sup> GD3-42.

said it may be able to accommodate him, in which case he wouldn't have to get vaccinated.

[30] In an email sent to the Claimant on October 28, 2021,<sup>18</sup> the Employer noted that they had a meeting that day and that the Claimant continued to choose not to complete the vaccination attestation. It said it expected all employees to be fully vaccinated. As a "temporary exemption" from complying with the vaccination policy, the Claimant was asked to provide a weekly negative Rapid Covid test result before entering the workplace. The Employer detailed the steps the Claimant had to take to get tested. It said that the cost of the test was payable by the Claimant. It said if he didn't complete the weekly testing, he would be placed on an unpaid leave of absence on November 1, 2021. It gave him until the following day to decide what he wanted to do.

[31] In a letter dated October 29, 2021,<sup>19</sup> the Employer told the Claimant that he was being placed on a one-month unpaid leave of absence beginning on November 1, 2021, because he refused to attest that he was fully vaccinated by the required date, and he declined to do weekly testing. It said he was unable to enter the workplace, and so he couldn't perform his regular work duties. It said if the Claimant continued to refuse to comply with its vaccination policy beyond November 30, 2021, his employment may be terminated.

[32] The Claimant's unpaid leave of absence was extended to January 7, 2022. He was told in a November 26, 2021 letter from the Employer<sup>20</sup>, that in keeping with its vaccination policy, all employees entering the workplace had to be fully vaccinated by October 31, 2021. It told him again that he could do weekly testing instead of getting vaccinated. It noted that he refused to do weekly testing, and said that as a result, he couldn't go to the workplace, and couldn't perform his regular work duties. It said that if

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<sup>18</sup> GD3-31.

<sup>19</sup> GD3-32.

<sup>20</sup> GD3-27.



he continued to refuse to comply with the vaccination policy beyond January 7, 2022, his employment would be terminated.

[33] The Claimant's unpaid leave of absence was extended again, until January 28, 2022. The Employer said that if he continued not to comply with its vaccination policy beyond January 28, 2022, his employment would be terminated.<sup>21</sup>

[34] In a January 27, 2022 letter,<sup>22</sup> the Employer told the Claimant that his employment was terminated effective February 1, 2022, due to his continued non-compliance with its mandatory vaccination policy.

[35] The Commission Officer spoke to the Claimant on April 28, 2022.<sup>23</sup> The Claimant said that he didn't comply with the Employer's vaccination policy because it was against his religion. He said that he didn't apply for a religious exemption from being vaccinated, because he would have had to provide official documentation, which he didn't have. He said he didn't do weekly testing instead of being vaccinated, because he didn't want to pay for the testing himself.

[36] In his request for reconsideration,<sup>24</sup> the Claimant said that he never denied testing. He said at the hearing that he couldn't afford to pay for weekly testing. The Claimant's representative submitted that the cost of testing and associated travel expenses should have been paid for by the Employer.

[37] On June 7, 2022, the Commission Officer spoke to the Claimant and his representative by phone.<sup>25</sup> The Claimant said that the Employer gave him the option of doing weekly testing instead of being vaccinated, but that he would have had to pay for it himself. The Claimant's representative said that the Claimant was "OK doing the testing," but was never told what testing he had to do. The Claimant also said that he

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<sup>21</sup> GD3-23.

<sup>22</sup> GD3-24-GD3-26.

<sup>23</sup> GD3-21.

<sup>24</sup> GD3-46.

<sup>25</sup> GD3-53-GD3-55.

believed he submitted a religious exemption request form, probably to his manager, but that he never heard back from the Employer about it.

[38] The Commission Officer spoke to the Employer on August 2, 2022.<sup>26</sup> The Employer said the Claimant didn't request a religious exemption from being vaccinated. It said it didn't have a form to fill out to request an exemption. It said that if the Claimant had completed the online vaccination attestation and said that he wasn't vaccinated, it would have reached out to him by email and asked if he had a medical or religious reason. If the Claimant had said he had a religious reason for not getting vaccinated, the Employer would have told him what information he had to provide, for it to consider giving him an exemption. If he was approved for an exemption, the Employer would have paid for testing. But, the Claimant never completed a vaccination attestation. He didn't tell the Employer he had a religious reason not to get vaccinated. The Employer said that the Claimant was very private and refused to answer any of its questions.

[39] The Commission Officer spoke to the Claimant on August 9, 2022, about whether he had requested a religious exemption from being vaccinated. He noted that the Claimant had initially said that he didn't request a religious exemption from his employer because he "would have had to provide all this official documentation," which he didn't have.<sup>27</sup> He noted that the Claimant later said that he believed he filled out a form requesting a religious exemption, and probably sent it to his manager, but never heard back.<sup>28</sup> The Commission Officer noted the Employer's statement that there was no form to fill out to request an exemption from being vaccinated. The Claimant said "I don't know what it was, I signed something."<sup>29</sup>

[40] The Claimant testified at the hearing that he didn't know his employer would have paid for testing if he had a religious exemption from being vaccinated. He said he didn't

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<sup>26</sup> GD3-58-GD3-59.

<sup>27</sup> GD3-21.

<sup>28</sup> GD3-54-GD3-55.

<sup>29</sup> GD3-68.

see the statement in the policy that says the employer will pay for testing of employees who have a medical or religious reason not to be vaccinated.

[41] The Employer told the Commission Officer that it would have allowed to Claimant to do weekly Covid testing instead of getting vaccinated.<sup>30</sup> It said it was explained to the Claimant verbally, and in a letter, how to go about being tested. But the Claimant said going to a pharmacy once a week to be tested would put him at greater risk of being exposed to Covid. The Employer said that the Claimant didn't say he didn't want to get tested because he would have to pay for it himself.

[42] The Claimant told the Commission Officer, and also testified at the hearing, that the Employer should have paid for the required testing. He only worked part-time and paying for testing would have taken a large portion of his paycheck. He said if the company had paid for testing, he would have considered it. The Commission Officer referred to the Employer's letter explaining how to go about getting tested, and asked the Claimant about his statement that he didn't know how to get tested. The Claimant said the Employer didn't give him as much information as he was looking for about testing.<sup>31</sup>

[43] It is clear that the Claimant made a conscious and deliberate choice not to comply with his employer's requirements under the mandatory vaccination policy.

[44] The Employer told the Commission Officer<sup>32</sup> that the Claimant didn't disclose his vaccination status and didn't do weekly testing.

[45] The Claimant confirmed in his testimony at the hearing that he refused to disclose his vaccination status to his employer. He also confirmed that he didn't do weekly testing, which was an alternative to being vaccinated that the Employer would have accepted.

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<sup>30</sup> GD3-58-GD3-59.

<sup>31</sup> GD3-68-GD3-70.

<sup>32</sup> GD3-58-GD3-59.

[46] I must also consider whether the Claimant knew, or ought to have known, that not following his employer's vaccination policy would interfere with carrying out his job duties.

[47] The Employer advised the Claimant in its emails and letters, that if he wasn't vaccinated and didn't do weekly testing, he couldn't enter the workplace and would be unable to perform his regular work duties.

[48] The Claimant testified that he knew that unvaccinated employees who didn't have an exemption were not allowed to work after October 31, 2021, unless they had weekly testing. So, he knew that not being vaccinated, not having an exemption, and not doing weekly testing, meant that he couldn't carry out his duties toward the Employer.

[49] Another thing I have to consider when deciding whether there has been misconduct is that the Claimant must have known, or ought to have known, that there was a real possibility of being dismissed from his job if he didn't follow his employer's vaccination policy.

[50] The Employer told the Commission Officer<sup>33</sup> that it told the Claimant his employment would be terminated if he didn't get vaccinated or do the weekly testing.<sup>34</sup>

[51] The Claimant told the Commission Officer<sup>35</sup> on April 28, 2022 that he knew he risked losing his job by not complying with the Employer's mandatory vaccination policy, but he thought the Employer would revoke the vaccination requirement. He said he "never thought it would go this far."

[52] At the hearing, the Claimant testified that he was unclear of the consequences for not complying with the Employer's policy, other than knowing that he'd be put on unpaid leave. He said he thought there was a chance he would be called back from

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<sup>33</sup> GD3-58-59.

<sup>34</sup> GD3-23, GD3-27.

<sup>35</sup> GD3-21.

unpaid leave. He said he “had no idea at any point” that he would be dismissed from his job for not complying with the vaccination policy.

[53] On October 28, 2021, the Employer told the Claimant that if he didn’t meet its vaccination policy requirements, he would be placed on unpaid leave starting November 1, 2021. The Employer extended the deadline for the Claimant to meet the policy’s requirements, to January 28, 2022. It told him that if he didn’t get vaccinated or have weekly testing by then, his employment would be terminated.

[54] I don’t accept that the Claimant had no idea at any point that he would be dismissed from his job if he didn’t follow the employer’s vaccination policy.

[55] I find that the Claimant knew, or ought to have known, that there was a real possibility he would lose his job if he didn’t follow the Employer’s vaccination policy. This is because the Employer’s communications to the Claimant clearly stated that he would be dismissed if he didn’t comply with its vaccination policy by providing proof of vaccination or doing weekly testing.

[56] Finally, the alleged misconduct must have caused the Claimant to lose his job. The parties agree that not following the Employer’s vaccination policy is why he lost his job.

[57] I find that the Commission has proven that there was misconduct, because it has proven that:

- the Employer had a vaccination policy that said all employees had to attest to being fully vaccinated;
- the Employer gave the Claimant the alternative option of doing weekly testing;
- the Employer clearly told the Claimant about what it expected of him in terms of providing proof of vaccination or doing weekly testing;
- the Claimant knew or should have known that he could be dismissed from his job if he didn’t provide proof of vaccination or do weekly testing;

- the Claimant didn't report his vaccination status or do weekly testing, which he knew meant that he couldn't do his job;
- his conduct was wilful;
- his failure to be vaccinated or do weekly testing caused him to lose his job.

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

[58] While I am sympathetic to the Claimant's circumstances and his concerns about the vaccine, I cannot change the law. Based on my findings above, I find that the Claimant lost his job because of misconduct.

[59] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew or should have known that refusing to provide proof of vaccination, or get weekly testing, was likely to cause him to lose his job.

### **Conclusion**

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

[61] This means the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section