



Citation: *BA v Canada Employment Insurance Commission*, 2023 SST 861

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

## Decision

**Appellant:** B. A.  
**Representative:** N. A.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (539377) dated October 4, 2022  
(issued by Service Canada)

---

**Tribunal member:** Bret Edwards

**Type of hearing:** Videoconference  
**Hearing date:** March 28, 2023  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** April 6, 2023  
**File number:** GE-22-3694

## Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost his job. The Appellant's employer said that he was let go because he didn't follow their mandatory COVID-19 vaccination policy (he wasn't fully vaccinated by their deadline).

[4] The Appellant agrees he wasn't fully vaccinated by his employer's deadline. But he says he got his first dose and just wanted more time to get his second dose for health reasons. He also says he didn't know he could be let go for not being fully vaccinated until just before his employer dismissed him.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided the Appellant is disqualified from receiving EI benefits.

## Matter I have to consider first

### **The Appellant brought up an issue that isn't part of his reconsideration decision**

[6] At the hearing, the Appellant said he asked the Commission to antedate his EI benefits claim. He said he did this in February 2022 (several months before the Commission made its initial decision on his claim). He showed me a piece of paper with

---

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

a date stamp he says shows EI acknowledged his request. But he said he never heard back from EI about it.

[7] I told the Appellant I understood, but I only have jurisdiction over a decision that has been reconsidered by the Commission.<sup>2</sup>

[8] I see no evidence the Appellant ever asked for a reconsideration of the antedate. His reconsideration request doesn't say anything about it.<sup>3</sup> Neither does the Commission's reconsideration decision.<sup>4</sup>

[9] Since this issue (antedate) wasn't part of the Commission's reconsideration decision, this means I can't consider it here.

## **Issue**

[10] Did the Appellant lose his job because of misconduct?

## **Analysis**

[11] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

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

[12] I find the Appellant lost his job because he didn't follow his employer's mandatory COVID-19 vaccination policy.

[13] The Appellant and the Commission don't agree on why the Appellant lost his job. The Commission says the reason the employer gave is the real reason for the

---

<sup>2</sup> Sections 112 and 113 of the EI Act say that only decisions that have been reconsidered by the Commission can be appealed to the Tribunal.

<sup>3</sup> GD3-64 to GD3-74.

<sup>4</sup> GD3-80.

dismissal. The employer told the Commission they dismissed the Appellant because he didn't follow their mandatory COVID-19 vaccination policy.<sup>5</sup>

[14] The Appellant disagrees. He says he had complained about working conditions a few months before he was dismissed, and thinks his employer was looking for a reason to let him go. He also says he thinks his employer chose to dismiss him for not getting fully vaccinated so they didn't have to pay him severance and overtime he was owed.

[15] I note the Appellant's employer's letter, dated November 9, 2021, says they let him go for not following their mandatory COVID-19 vaccination policy.<sup>6</sup>

[16] On the other hand, I find the Appellant hasn't shown he was let go for any other reason. The employer's letter doesn't mention another reason, and he hasn't provided any evidence to counter what the letter says.

[17] So, while I acknowledge the Appellant believes his employer let him go for another reason, I find the evidence (his employer's letter) shows he was let go for not following his employer's mandatory COVID-19 vaccination policy.

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

[18] The reason for the Appellant's dismissal is misconduct under the law.

[19] 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 Appellant'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.

[20] Case law says that, to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>8</sup> The Appellant doesn't have to have

---

<sup>5</sup> GD3-55.

<sup>6</sup> GD3-29.

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

<sup>8</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>9</sup>

[21] There is misconduct if the Appellant 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 let go because of that.<sup>10</sup>

[22] The Commission has to prove that the Appellant was dismissed from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Appellant was dismissed from his job because of misconduct.<sup>11</sup>

[23] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>12</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[24] The Commission says there was misconduct because the Appellant knew his employer had a mandatory COVID-19 vaccination policy and knew he could be let go for not following it, but he chose not to follow it anyway.<sup>13</sup>

[25] The Appellant says there was no misconduct because he just wanted more time to get his second dose and his employer unfairly didn't allow that. He also says he didn't know he could be let go for not being fully vaccinated until just before he was dismissed.<sup>14</sup>

---

<sup>9</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>13</sup> GD4-4.

<sup>14</sup> GD2-3.

[26] The Appellant's employer told the Commission<sup>15</sup>:

- The Appellant was dismissed for not following their mandatory COVID-19 vaccination policy.
- The Appellant got his first COVID-19 vaccine dose, but employees had to be fully vaccinated by a deadline.
- They gave the Appellant extra time to get his second dose, but he didn't get it.

[27] The Appellant says:

- He knew about his employer's mandatory COVID-19 vaccination policy.<sup>16</sup>
- He got an email from his employer on September 3, 2021 and September 13, 2021 about the policy. But there was no information about what would happen to employees who didn't follow it.<sup>17</sup>
- He has some health issues and had asked his doctor for a medical exemption from getting the vaccine, but his doctor refused and told him he was okay to get it.<sup>18</sup>
- He got his first dose in September 2021. He felt weak afterwards, but his doctor told him that was normal.<sup>19</sup>
- He wasn't sure about getting his second dose because of how he felt after his first dose. He was stressed and tired from working long hours and his employer kept asking him about the second dose.
- He emailed his employer on October 21, 2021 to say he wouldn't get his second dose until a viral vaccine was approved because he was concerned about side effects from the available vaccines.<sup>20</sup>

---

<sup>15</sup> GD3-55.

<sup>16</sup> GD3-56, GD3-57.

<sup>17</sup> GD3-35, GD3-37.

<sup>18</sup> GD3-77.

<sup>19</sup> GD3-57.

<sup>20</sup> GD3-34.

- He got a letter from his employer on October 22, 2021. It included a copy of the full policy, including a section on the consequences of non-compliance, which he hadn't seen before.<sup>21</sup>
- The October 22, 2021 letter said he had been put on unpaid leave because he hadn't gotten fully vaccinated as the policy required.<sup>22</sup>
- The letter said they sent employees a copy of the full policy on September 5, 2021, but he never got that email.<sup>23</sup>
- The letter also said he had one week (until October 29, 2021) to get his second dose or he would be let go for not following the policy. He didn't know this could happen before he got the letter because he hadn't gotten the September 5, 2021 email.<sup>24</sup>
- The letter said he could get a new contract starting October 30, 2021 if he got fully vaccinated with the same terms and conditions as before. He didn't think was fair.<sup>25</sup>
- He didn't think one week was enough time to get the second dose. He wanted more time to get a different vaccine (one of the viral vaccines) than what was available at the time.<sup>26</sup>
- He emailed his employer on October 27, 2021 to ask for more time to get the second dose after speaking with a lawyer. They didn't respond other than to say they got his email.<sup>27</sup>
- He emailed his employer again on November 9, 2021 to ask about his work status. They responded by saying they had dismissed him on October 29, 2021 for not getting vaccinated by that date as the policy required.<sup>28</sup>

---

<sup>21</sup> GD3-39 to GD3-40.

<sup>22</sup> GD3-39.

<sup>23</sup> GD7-6.

<sup>24</sup> GD7-6.

<sup>25</sup> GD3-39.

<sup>26</sup> GD7-6.

<sup>27</sup> GD7-6, GD3-30 to GD3-31.

<sup>28</sup> GD7-6.

- His employer unfairly didn't give him more time to get fully vaccinated. They could have done that or put him on a paid leave of absence until he got his second dose, but they didn't do that.<sup>29</sup>
- His employer's policy violated his Charter rights. He shouldn't be forced to put something in his body he didn't trust.
- He never signed a new contract that included a vaccine policy.<sup>30</sup>
- His employer also changed his Record of Employment (ROE) from "Quit" to "K-Other", which shows he didn't commit misconduct.<sup>31</sup> This happened due to settlement negotiations with his employer that resulted in the Canada Labour Board paying him damages.

[28] I find the Commission has proven there was misconduct for the following reasons.

[29] I find the Appellant committed the actions that led to his dismissal, as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[30] I further find the Appellant's actions were intentional as he made a conscious decision not to follow his employer's policy.

[31] There is evidence the Appellant knew about his employer's policy. He said he knew about it and got multiple emails from his employer in September 2021, as noted above.

[32] There is also evidence the Appellant chose not to follow his employer's policy. He said he didn't get his second dose (to be fully vaccinated) as the policy required, as noted above.

---

<sup>29</sup> GD2-3.

<sup>30</sup> GD3-71.

<sup>31</sup> GD2-2.



[33] I acknowledge the Appellant feels his employer's policy violated his Charter rights by forcing him to put something in his body he didn't trust.

[34] But I find this isn't relevant here. This is because the Act and the Court say I must focus on the Appellant's actions (and not the employer's conduct) leading up to his dismissal when analyzing misconduct, as noted above.

[35] In other words, whether it was fair or reasonable for the Appellant's employer to ask him to get vaccinated to keep working goes well beyond what I can look at here. If the Appellant wants to pursue this argument (about his Charter rights) further, he needs to do that through another forum.

[36] I also acknowledge the Appellant feels his employer changing his ROE due to a settlement he received shows he didn't commit misconduct.

[37] But I disagree. I understand the Appellant got a settlement from her employer through another forum, but it's not my role to look at whether unjust or wrongful dismissal occurred in deciding if the Appellant committed misconduct. It's also not my role to decide if the employer's penalty against the Appellant was too harsh or the wrong thing to do.

[38] In other words, I can consider the ROE only as it relates to whether the Appellant committed misconduct under the law.

[39] In this case, there is clear evidence the Appellant didn't follow his employer's mandatory COVID-19 vaccination policy and was let go for this reason, as noted above.

[40] I therefore don't agree with the Appellant that a change to his ROE shows he didn't commit misconduct. This is because I give more weight to other evidence on file, specifically the Appellant's termination letter, which clearly says he was let go for not following the policy, as noted above.

[41] So, while I acknowledge the Appellant's concerns about his employer's policy, I find the evidence shows he made a conscious decision not to follow it. He said he didn't get fully vaccinated as the policy required, which shows his actions were intentional.

[42] I also find the Appellant knew or should have known that not following his employer's mandatory COVID-19 vaccination policy could lead to him being let go.

[43] There is evidence the Appellant was aware he could be let go if he didn't follow his employer's policy. He said he got a letter on October 22, 2021 about this. I note the letter says he is being placed on unpaid leave immediately and will be let go on October 29, 2021 if he isn't fully vaccinated by then.<sup>32</sup>

[44] I accept the Appellant's argument that he didn't know he could be let go for not being fully vaccinated until he got the October 22, 2021 letter. This is because I believe him when he says he never got a full copy of the policy before October 22, 2021 even though his employer (in the October 22, 2021 letter) said they sent it on September 5, 2021. I found his testimony to be credible overall and have no reason to doubt what he told me.

[45] I also acknowledge the Appellant thinks he didn't have enough time to decide whether to follow his employer's policy because there was only one week between when he found out he would be let go if he didn't get fully vaccinated (October 22, 2021) and when he would be let go for this reason (October 29, 2021).

[46] Unfortunately, I disagree. I find there is evidence the Appellant had already decided to not get his second dose (and therefore be fully vaccinated) until a viral vaccine was available and told his employer this before their October 29, 2021 deadline. This evidence is:

- An email to his employer, dated October 21, 2021. It says he has decided to postpone getting his second dose until a viral vaccine is approved because he's concerned about the side effects from Pfizer.<sup>33</sup>
- An email to his employer, dated October 27, 2021. It reiterates he has decided to postpone getting his second dose until a viral vaccine is approved.<sup>34</sup>

---

<sup>32</sup> GD3-39.

<sup>33</sup> GD3-34.

<sup>34</sup> GD3-30 to GD3-31.

[47] Based on this evidence, I find the Appellant did in fact have enough time to decide whether to follow his employer's policy. The evidence shows he told his employer he would be postponing his second dose even before they told him he would be let go if he didn't get fully vaccinated. He then told them the same thing (he would be postponing his second dose) two days before he was supposed to be let go, which clearly shows he had made his decision by then.

[48] I also find there is evidence the Appellant was aware his decision to postpone his second dose could lead to him being let go. In his October 27, 2021 email to his employer, he says he hopes that when his employer decides to end his employment, he will be treated fairly.<sup>35</sup> I find this statement shows he was aware he could lose his job if he didn't get his second dose by October 29, 2021 but had chosen to stick with that decision anyway.

[49] I acknowledge the Appellant feels his employer unfairly didn't give him more time to get his second dose and didn't consider other ways he could continue to work until he was fully vaccinated (such as a paid leave or regular testing).

[50] I also acknowledge the Appellant feels his employer unfairly offered him a new contract if he got fully vaccinated with the same terms and conditions as before.

[51] But again, I find these arguments aren't relevant here. This is because the Act and the Court say I must focus on the Appellant's actions (and not the employer's conduct) leading up to his dismissal when analyzing misconduct, as noted above.

[52] In other words, whether it was fair or reasonable for the Appellant's employer to not give him more time to get his second dose, not consider other options for him to keep working, and offer him a new contract if he got fully vaccinated goes well beyond what I can look at here. If the Appellant wants to pursue these arguments further, he needs to do that through another forum.

---

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

[53] So, I find the evidence shows the Appellant's employer told him he would be let go if he didn't get fully vaccinated by their deadline and the Appellant had decided before then not to get his second dose. This means he knew or should have known he could be let go for that reason.

[54] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he didn't follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known his actions would lead to him being let go.

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

[55] Based on my findings above, I find the Appellant lost his job because of misconduct.

[56] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew or ought to have known that not getting fully vaccinated as his employer's policy required was likely to cause him to be dismissed from his job.

### **Conclusion**

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

[58] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section