



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 953

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

# Decision

**Appellant:** J. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (513239) dated September 6, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** In person

**Hearing date:** March 8, 2023

**Hearing participants:** Appellant  
Appellant's witness

**Decision date:** March 20, 2023

**File number:** GE-22-3317

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job).<sup>1</sup> This means the Appellant is disentitled from receiving Employment Insurance (EI) benefits.<sup>2</sup>

## Overview

[3] The Appellant was suspended from her job. The Appellant's employer said she was suspended because she didn't follow their mandatory COVID-19 vaccination policy.

[4] The Appellant agrees she was suspended for this reason. But she says her employer treated her unfairly and didn't grant her a religious exemption from their policy.

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

## Issue

[6] Was the Appellant suspended from her job because of misconduct?

## Analysis

[7] To answer the question of whether the Appellant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

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<sup>1</sup> In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.

<sup>2</sup> Section 31 of the *Employment Insurance Act* says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

## **Why was the Appellant suspended from her job?**

[8] I find the Appellant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[9] The Appellant and the Commission agree on why the Appellant was suspended from her job. The Appellant says she was suspended for not following her employer's policy.<sup>3</sup> Her employer also says she was suspended for this reason.<sup>4</sup>

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

[10] The reason for the Appellant's suspension is misconduct under the law.

[11] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to decide whether the Appellant'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.

[12] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>6</sup> The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>7</sup>

[13] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being suspended because of that.<sup>8</sup>

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<sup>3</sup> GD3-19, GD3-21, GD3-34 to GD3-35.

<sup>4</sup> GD3-18, GD3-20.

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

<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[14] The Commission has to prove the Appellant was suspended from her 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 suspended from her job because of misconduct.<sup>9</sup>

[15] The law doesn't say I have to consider how the employer behaved.<sup>10</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.<sup>11</sup>

[16] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully suspended 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.

[17] The Commission says there was misconduct because the Appellant knew about her employer's mandatory COVID-19 vaccination policy and what could happen if she didn't follow it, but she chose not to follow it anyway.<sup>13</sup>

[18] The Appellant says there was no misconduct because her employer treated her unfairly and didn't grant her a religious exemption from their policy.<sup>14</sup>

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

- She was put on unpaid leave for not following their COVID-19 vaccine policy.
- All employees were given a deadline to get the COVID-19 vaccine and told if they didn't comply within that timeframe they could be dismissed.

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<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>10</sup> See section 31 of the Act.

<sup>11</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

<sup>13</sup> GD4-3.

<sup>14</sup> GD2-5.

<sup>15</sup> GD3-20.

- They couldn't provide a copy of their policy as it was just a mandate from corporate that employees had to follow.

[20] The Appellant told the Commission and testified:

- She was put on unpaid leave for not following her employer's policy (by getting vaccinated).<sup>16</sup>
- She knew about the policy.<sup>17</sup> There was no actual documentation of the policy because they were just following the federal vaccination mandate, but her employer sent out communications to employees about it.
- She requested a religious exemption from the policy, but her employer denied it.<sup>18</sup>
- She didn't get vaccinated after her employer denied her religious exemption request.<sup>19</sup>
- Her employer should have approved her religious exemption request.
- Her employer didn't approve any exemption requests.<sup>20</sup> She is part of a WhatsApp group of employees and doesn't know of anyone in the group who had their exemption requests approved.
- Her employer told her she could be suspended (put on unpaid leave) if she didn't follow their policy. She got an email saying she had to be vaccinated by a certain date or she could be dismissed.<sup>21</sup> She also got other warnings but couldn't remember how many.<sup>22</sup>

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<sup>16</sup> GD3-19, GD3-21.

<sup>17</sup> GD3-19, GD3-21, GD3-34 to GD3-35.

<sup>18</sup> GD3-21.

<sup>19</sup> GD3-19, GD3-21.

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

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

<sup>22</sup> GD3-19.

- But she didn't think she would be suspended because her original work contract and her employer's business code of conduct didn't require her to get vaccinated.<sup>23</sup>
- She shouldn't have had to get vaccinated because she worked from home full-time.<sup>24</sup>
- Some of her co-workers in the same situation had their EI claims approved, so hers should be too.<sup>25</sup>
- She's paid into EI for a lot of years and deserves to get it when she needs it. She has also faced financial hardship because the Commission denied her EI claim.<sup>26</sup>

[21] The Appellant's witness also testified:

- She and the Appellant were placed on unpaid leave the same day, but her EI claim was ultimately approved.
- The Commission's decision-making on EI claims isn't consistent and comes down to who you speak to about it.

[22] I sympathize with the Appellant but find the Commission has proven there was misconduct for the following reasons.

[23] I find the Appellant committed the actions that led to her suspension, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[24] I further find the Appellant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[25] There is evidence the Appellant knew about her employer's policy. She said she knew about it and had received communications about it, as noted above. She also said

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

<sup>24</sup> GD3-19.

<sup>25</sup> GD3-36.

<sup>26</sup> GD2-5.

she requested a religious exemption, which shows she was aware of the policy and its requirements.

[26] There is also evidence the Appellant chose not to follow her employer's policy. She said she didn't get vaccinated after her employer denied her religious exemption request, as noted above.

[27] I acknowledge the Appellant doesn't feel the Commission's decision to deny her EI benefits is correct because some of her co-workers in the same situation were approved for EI benefits. I also acknowledge the Appellant's witness was approved for EI benefits even though she and the Appellant were suspended the same day, as she testified.

[28] Unfortunately, I find this argument isn't relevant here. I'm not bound by the Commission's decisions on other EI applications and can't make assumptions about the specific information the Commission relied on to make these decisions. The Act and the Court says I can only look at the Appellant's actions in relation to what the law says about misconduct, as noted above. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[29] I also acknowledge the Appellant thinks her employer didn't approve any exemption requests.

[30] But I find there isn't enough evidence to show this happened.

[31] I asked the Appellant why she feels her employer hadn't approved any exemption requests and she said she doesn't think anyone in her WhatsApp group had their request approved. I asked her if she had any other evidence to show her employer didn't approve any exemption requests, but she said she didn't.

[32] Based on this evidence, I'm not persuaded the Appellant's employer didn't approve any exemption requests. The Appellant could only say she thought this might have happened based on what others in her WhatsApp group said, not that she knew

for sure it had happened to all employees. She also couldn't provide any evidence besides what she said. So, I don't give this argument much weight here.

[33] Additionally, I acknowledge the Appellant feels her religious exemption request should have been approved and she shouldn't have had to get vaccinated because she worked from home full-time.

[34] But I find these arguments aren't relevant here either. As noted above, the Act and the Court say I must focus on the Appellant's actions, not the employer's, when analyzing misconduct.

[35] In other words, I can't look at whether the Appellant's employer acted fairly in choosing to deny her religious exemption request and asking her to get vaccinated even though she worked from home full-time. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[36] So, while I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence shows she made a conscious decision not to follow it. She didn't get vaccinated after her employer denied her religious exemption request, which shows her actions were intentional.

[37] I also find the Appellant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being suspended.

[38] There is evidence the Appellant knew she could be suspended if she didn't follow her employer's policy. She said she knew because her employer had warned her several times that she wouldn't be able to keep working if she didn't get vaccinated, as noted above.

[39] I acknowledge the Appellant thought she wouldn't actually be suspended because her original work contract and her employer's business code of conduct didn't require her to get vaccinated.



[40] But I find this argument isn't relevant. The Appellant's original work contract and employer's business code of conduct aren't things I can look at here. This is because I have to focus on the Appellant's actions leading up to her suspension, as noted above.

[41] Also, I find that even if the Appellant thought she wouldn't be suspended for the reasons she mentioned, this doesn't mean she also couldn't have known she could be suspended. She said her employer had warned her in writing this could happen, as noted above.

[42] In other words, I find it was entirely possible for the Appellant to believe both things (that she would be able to keep her job but could also be suspended) at the same time, especially as she confirmed she knew about her employer's policy and what would happen if she didn't follow it.

[43] So, while I acknowledge the Appellant didn't think she would be suspended for not following her employer's policy, I find the evidence shows she did know she could be suspended for this reason.

[44] I therefore find the Appellant's conduct is misconduct under the law since she committed the conduct that led to her suspension (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known her actions would lead to her being suspended.

### **So, was the Appellant suspended from her job because of misconduct?**

[45] Based on my findings above, I find that the Appellant was suspended from her job because of misconduct.

[46] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew or ought to have known that refusing to get vaccinated after her employer denied her religious exemption request was likely to cause her to be suspended from her job.

[47] The Appellant says being suspended has hurt her financially and she is entitled to EI because she has been contributing to it for many years.

[48] I understand the Appellant's argument and sympathize with her financial situation. Unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to get benefits. In this case, I find she hasn't met those requirements for the reasons given above.

## **Conclusion**

[49] The Commission has proven the Appellant was suspended from her job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[50] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section