Citation: *DB v Canada Employment Insurance Commission*, 2023 SST 986

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (507849) dated July 18, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	In person
Hearing date:	February 15, 2023
Hearing participant:	Appellant
Decision date:	April 11, 2023
File number:	GE-22-2865

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits because he lost his job due to his own misconduct[1].

Overview

[3] The Appellant worked as a professor and was employed by X College (the employer). In August 2021, the employer implemented a mandatory vaccination policy requiring all employees working on campus to be fully vaccinated against Covid-19 by October 18, 2021 (the policy). The Appellant didn't want to comply with the policy by being vaccinated. From September to December 2021 (the fall term, the employer allowed him to undergo daily rapid testing rather than provide proof of vaccination. But that option was removed at the beginning of the winter term in January 2022.

[4] Starting on January 4, 2022, the Appellant was placed on an unpaid leave of absence due to non-compliance with the policy. On January 6, 2022, he applied for EI benefits.

[5] The Respondent (Commission) decided that he voluntarily took a leave of absence from his job without just cause[2] and could not be paid any EI benefits[3].

[6] The Appellant asked the Commission to reconsider. He said the employer forced him into an unpaid leave of absence for non-compliance with the policy. He explained that he was only asking for EI benefits from January 4, 1010 to March 6, 2022[4]; and

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[1] That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.

[2] See the May 18, 2022 decision letter at GD3-24.

[3] The *Employment Insurance Act* (EI Act) says a claimant is disqualified from receiving EI benefits if they voluntarily leave – or take a leave of absence – without just cause.

[4] The Appellant said he received vacation pay from March 7, 2022 to May 1, 2022 and then returned to work after that (see GD3-28 to GD3-28, as well as GD3-31).

argued he was willing and able to work the whole time, but the employer wrongfully prevented him from doing so.

[7] The Commission maintained the decision to deny EI benefits to the Appellant. But it changed the reason why. It now said the Appellant could not be paid EI benefits from January 3, 2022 to April 29, 2022[5] because he was suspended from his employment due to his own misconduct[6].

[8] The Appellant appealed this decision to the Social Security Tribunal (Tribunal).

[9] I must decide whether the Appellant lost his job[7] due to his own misconduct[8]. To do this, I have to look at the reason for his suspension between January 3, 2022 and April 29, 2022, and then determine if the conduct that caused his job loss is conduct the law considers to be "misconduct" for purposes of EI benefits.

[10] The Commission says the Appellant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with the policy. He knew he could be placed on an

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[5] See GD3-36 and the reconsideration decision letter at GD3-37. See also GD4-3, where the Commission says it limited the period of the disentitlement so that it only runs from January 4, 2022 to April 29, 2022 because after that date, the Appellant returned to work.

[6] Section 30 of the *Employment Insurance Act* (EI Act) says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct.

Section 29(b) of the EI Act says that loss of employment includes a suspension from employment.

Section 31 of the EI Act says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. **It doesn't matter whether the Record of Employment says suspension or leave of absence.** Where an employer unilaterally places an employee on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment and the Commission must determine if the reason for the unpaid leave is due to misconduct.

Since the Commission decided that the reason the Appellant was suspended and subsequently dismissed from his employment was due to his own misconduct, the combined effect of sections 29, 30 and 31 means he cannot be paid EI benefits starting from October 31, 2021 (his last day of work). However, since he did not apply for EI benefits until November 29, 2021, the disqualification on his claim is ***effective*** from November 28, 2021 (the start of the benefit period for his application).

[7] Job loss includes a suspension from employment (s. 29(b) of the EI Act).

[8] That is, misconduct a**s the term is used for purposes of EI benefits**. See Issue 2 below.

unpaid leave of absence from his job by making this choice – and that's what happened. The Commission says these facts prove the Appellant lost his job due to his own misconduct, which means he cannot receive EI benefits.

[11] The Appellant disagrees. He says he made a personal choice not to be vaccinated. He didn't ask the employer for a medical or religious exemption to the policy. Instead, he asked to "renew" the previous exemption the employer gave him that allowed him to continue working as long as he underwent daily rapid testing. He says the employer could have continued to accommodate him with rapid testing but decided not to do so. He also says his involuntary unpaid leave during the winter term was unlawful[9], and points out that he was reinstated to his job in the next semester.

[12] I agree with the Commission. These are my reasons.

Issue

[13] Did the Appellant lose his job due to his own misconduct?

Analysis

[14] To answer this question, I need to decide two things. First, I must determine why the Appellant was suspended from his job[10]. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

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[9] The Appellant told the Commission he has filed a grievance for the unpaid leave. He submitted a copy of his Notice of Grievance prior to his hearing at the Tribunal (see GD8-14).

[10] At GD2-4 in his Notice of Appeal, the Appellant said he is only asking for EI benefits from January 4, 2022 to March 6, 2022. He said the employer put him on unpaid leave starting January 4, 2021, but then placed him on paid vacation from March 7, 2022 until May 1, 2022 (see also GD3-19 and GD3-22 for the Appellant's explanation of the vacation pay arrangement). He also said he "began working for another employer" on March 28, 2022.

He filed a copy of his "Removal from Unpaid Leave" letter with the Tribunal prior to his hearing (at GD8-16 to GD8-17).

The law says the Appellant will be disentitled to EI benefits throughout the period of his suspension if he was suspended due to his own misconduct. This means I must look at the period of time the Appellant was placed on an involuntary unpaid leave of absence, because that is the period that is considered to be a suspension from employment for purposes of EI benefits. I will therefore consider the period from **January 4, 2022 to March 6, 2022** to be the period of the Appellant's suspension from employment.

Issue 1: Why was the Appellant suspended from his job?

[15] The Appellant was suspended from his job because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[16] The employer did not participate in the Commission's fact-finding about why the Appellant was separated from his employment.

[17] But the Commission has included a copy of the X College Covid-19 Vaccine Policy Statement in the reconsideration file[11]. It said:

- The policy was announced in August 2021 and applied to all employees working on campus.
- The policy would be in effect for the fall term.
- Employees had to declare their vaccination status by September 7, 2021 pursuant to the Fall 2021 Return to Campus acknowledgment.
- Those who were not partially or fully vaccinated were required to begin an application for exemption by September 7, 2021.
- Employees had until October 18, 2021 to provide proof they were fully vaccinated or obtain an exemption from the employer.
- There was a process for employees to request accommodation based on human rights (including medical) or conscientious grounds.
- The employer agreed to work with exempted employees on a "case-by-case basis" to find an accommodation, which may include "alternative health and safety requirements, like regular rapid testing, or a remote work where possible.

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[11] At GD3-35.

[18] The Appellant provided a copy of an e-mail the employer sent him on December 14, 2021 about the winter term (at GD3-30). The employer's e-mail said:

- The Appellant would be placed on an unpaid leave of absence effective January 4, 2022 due to non-compliance with the policy.
- His teaching assignment for the winter term would be assigned to other faculty.
- The unpaid leave of absence was being put in place "as an interim measure as we enter the Winter academic term 2022".
- The Appellant's employment status would be "reviewed" in April 2022[12].

[19] The Appellant admits he didn't provide proof of vaccination by the policy deadline. He has consistently said the employer refused to extend the rapid testing accommodation he had been given for the fall term, which meant he was prevented from working in the winter term. At the hearing, the Appellant confirmed the employer placed him on an unpaid leave of absence at the start of the winter term, but then reinstated him to his position for the spring term.

[20] The evidence shows the Appellant was suspended from his job starting on January 4, 2022 because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption for the winter term.

Issue 2: Is the reason for the suspension misconduct under the law?

[21] Yes, the reason for the Appellant's suspension (namely, his non-compliance with the policy) is misconduct for purposes of EI benefits.

[22] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[13]. Misconduct also includes conduct

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[12] Prior to the start of the Spring term, which went from May to August. I note that when the Appellant spoke with the Commission on April 22, 2022, he said he was still on the leave of absence the employer put him on (see GD3-19).

[13] See *Mishibinijima v. Canada (Attorney General),* 2007 FCA 36.

that is so reckless (or careless or negligent) that it is almost wilful[14] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[23] At the hearing, the Appellant argued he was an exemplary employee and did not engage in behaviour that could be considered misconduct – especially given the fact that he was reinstated to his position. But the law says the Appellant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct for purposes of EI benefits[15].

[24] There is misconduct if the Appellant knew ***or ought to have known*** his conduct could get in the way of carrying out his duties to the employer and there was a real possibility of being suspended because of it[16].

[25] The Commission has to prove the Appellant was suspended from his job due to misconduct[17]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

[26] The employer evidence is set out in paragraphs 16 to 18 above.

Evidence and Submissions from the Appellant

[27] The Appellant told the Commission that[18]:

- The employer introduced a mandatory Covid-19 vaccination policy in August 2021.
- He refused to disclose his vaccination status.

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[14] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

[15] See *Attorney General of Canada v. Secours*, A-352-94.

[16] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[17] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Appellant lost her job because of misconduct.

[18] See GD3-19 and GD3-22, the Request for Reconsideration (GD3-25 to GD3-29), and GD3-31.

- He was given an exemption to the policy ‘on bodily autonomy grounds’[19]. The exemption allowed him to work on campus during the fall term as long as he underwent daily rapid testing.
- The daily rapid testing was done on campus.
- He taught the whole fall term and did daily rapid testing up to December 13, 2021.
- In November 2021, he asked to renew his exemption for the winter term (January – April 2022).
- On December 14, 2021, his manager told him his exemption would not be extended and the employer no longer allowed the option of daily testing.
- The employer told him he would be put him on an indefinite involuntarily leave of absence if he failed to comply with the policy.
- He did not ask for a medical or religious exemption.
- He was not vaccinated.
- There were no accommodations offered to him, so he could not go to work.
- He was placed on an unpaid leave of absence for non-compliance with the policy.
- The employer didn’t offer him a chance to teach remotely online, even though many of his colleagues had that opportunity.
- He filed a grievance through his union.

[19] See GD3-31.

- On March 3, 2022, his manager contacted him with a proposal: he could take his vacation and get paid starting from March 7, 2022 (instead of the usually July/August months) and then return to work in the May – August term.
- He was wrongfully deprived his ability to provide for his family between January 4, 2022 and March 6, 2022.

[28] At the hearing, the Appellant said:

- If there was any misconduct committed, it was by the employer.
- The policy came into effect on September 7, 2021[20].
- He never told the employer he would be vaccinated.
- He asked for an exemption under part 4.1 of the policy and it was granted.
- In the fall term, he was exempt from providing proof of vaccination and continued working. He followed all of the additional health and safety steps required by the employer, including daily rapid testing.
- On October 18, 2021, he submitted the exemption request form for the winter term[21].
- On October 21, 2021, he was told his exemption request was approved[22] and the next step in the process was to do an education session pursuant to part 4.2 of the policy.
- He completed the education session and got a certificate of completion[23].

[20] The Appellant provided a copy of the policy prior to his hearing (see GD7-15 to GD7-18).
[21] See GD6-11 to GD6-12.
[22] See GD6-9.
[23] See GD6-13 and GD6-14.

- On November 5, 2021, the employer sent out a memo setting out the protocol for returning to campus beginning in January 2022[24].

- He signed it back on November 5, 2021 and asked for his exemption to be extended to the winter term[25].

- He did not get a written response to his request, but his manager told him verbally that his exemption was not extended.

- On December 14, 2021, he got the e-mail saying he would be put on leave[26].

- "Basically, the employer wanted proof of vaccination" and he was told he was "not allowed to choose option #4" in the November 5, 2021 memo.

- He has a right to bodily autonomy.

- The employer engaged in misconduct by not granting his second exemption request. This would have allowed him to continue teaching and daily rapid testing during the winter term.

- He complied with the policy by following the procedures and deadlines to ask that his fall term exemption to be extended to the winter term.

- He was "entitled" to that exemption because he was exempt the previous term and the employer never told him what changed or was different.

- He is a unionized employee.

- There is no provision of mandatory vaccination for Covid-19 in the collective agreement governing his employment.

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[24] See GD6-6 to GD6-8
[25] See GD6-8.
[26] See GD3-30.

- The employer unilaterally imposed the vaccine mandate without negotiating to reopen the collective agreement.
- He was not under an express or implied duty to get vaccinated against Covid-19.
- He followed his collective agreement and never breached his duties.
- He was not going to be “coereced” into getting vaccinated just to keep his job.
- The policy violated his constitutional rights.
- When his second exemption request was denied, it didn’t change anything for him.
- He did his own research and decided not to get vaccinated.
- He understood there would be consequences – unpaid leave – for exercising his rights, but that didn’t change his mind.
- If his conduct was so “egregious”, why would the employer reinstate him to his position?
- This is an admission by the employer that the involuntary unpaid leave was unlawful.
- His facts are the same as those of a claimant where the Tribunal member reversed the Commission’s finding of misconduct and said the claimant (AL) was not disentitled to EI benefits[27]. (*Note: I will refer to this as the AL decision*).

[29] The Appellant asks me to follow the AL decision.

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[27] The Appellant referred to the decision in *AL v Canada Employment Insurance Commission,* 2022 SST 1428. The claimant in the AL decision made similar arguments to the Appellant, namely that the employer breached the collective agreement because mandatory COVID vaccination wasn’t part of the collective agreement when she was hired. She also argued she had a right to refuse to get vaccinated. The Appellant filed a copy of that decision with the Tribunal prior to his hearing (see GD7-2 to GD7-18).

[30] I cannot do so. There is a federal court decision that goes against the AL decision and, unlike the AL decision, the federal court decision is binding on me.

[31] The facts AL's case are similar to the Appellant's. AL worked in a hospital, her employment was subject to a collective agreement, and she was suspended and later dismissed for non-compliance with her employer's mandatory Covid-19 vaccination policy. The Tribunal member found that AL did not lose her job for a reason the EI Act considers to be misconduct for two reasons:

- First, the member found the employer's mandatory Covid-19 vaccination policy was not an express or implied condition of AL's employment and, therefore, her refusal to get vaccinated was not misconduct.

- Second, the member found AL had a right to bodily integrity and exercised that right when she refused to get vaccinated. The member found that exercising a legal right can't be considered a wrongful act or conduct that should disqualify a claimant from EI benefits.

[32] I am not bound by decisions of other Tribunal members, but I can rely on them to guide me where I find them persuasive and helpful[28].

[33] I do not find the AL decision to be persuasive or helpful.

[34] I decline to follow the AL decision because it goes against binding caselaw from the Federal court about misconduct.

[35] That caselaw says the Tribunal does not have jurisdiction to interpret or apply a collective agreement or employment contract[29]. Nor does the Tribunal have legal

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[28] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I must follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. But I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[29] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should

authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act[30].

[36] Said differently, it is not the Tribunal's role to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal decide whether the penalty of being suspended or placed on an unpaid leave of absence was too severe. The Tribunal must focus on the reason ***the Appellant*** was separated from his employment and decide if the conduct that caused him to be suspended constitutes misconduct under the EI Act[31].

[37] I have already found that the conduct which led to the Appellant's suspension was his refusal to provide proof of vaccination as required by the policy, in the absence of an approved exemption.

[38] The uncontested evidence in the Commission's file and the Appellant's testimony at the hearing allows me to make these additional findings:

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have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits. Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and applying a collective agreement. This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. Where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement. This means that if a claimant (or their union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process is the proper legal avenue to make this argument.

[30] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. 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.

[31] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 (FC), where the court confirmed the "important, but narrow and specific role" of the Tribunal in misconduct appeals in a case where the Commission denied EI benefits to a claimant who failed to comply with the employer's mandatory Covid-19 vaccination policy. The court said the Tribunal's role was to determine 2 things: why the claimant was dismissed and whether that reason is misconduct under the EI Act (at paragraphs 46 to 48).

a) the Appellant was informed of the policy and given time to comply with it.

b) his refusal to comply with the policy by providing proof of vaccination – in the absence of an approved exemption – was deliberate and intentional. This made his refusal to comply with the policy wilful.

c) he knew (or ought to have known) that his refusal to provide proof of vaccination in the absence of an approved exemption could cause him to be suspended from his job.

d) his refusal to comply with the policy was the direct cause of his suspension.

[39] The employer has the right to set policies for workplace safety. The Appellant had the right to refuse to comply with the policy. By choosing not to be vaccinated (and provide proof of same) – in the absence of an approved exemption, he made a personal decision that led to foreseeable consequences for his employment.

[40] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if a claimant's decision is based on privacy concerns, religious beliefs, medical issues or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits[32].

[41] These Tribunal cases are supported by a line of case law from the Federal Court of Appeal that says a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[33]. And a recent decision from the Federal

[32] See for example: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.

[33] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

Court affirmed this principle in the specific context of a mandatory Covid-19 vaccination policy[34]. ***This case is binding on me.***

[42] I therefore find that the Appellant's wilful refusal to provide proof of vaccination as required by the policy – in the absence of an approved exemption, constitutes misconduct under the EI Act.

[43] The Appellant argues the employer acted unlawfully when it suspended him.

[44] But I have no authority to decide whether ***the employer*** breached the Appellant's collective agreement or any of his rights. Nor do I have authority to decide if he was wrongfully suspended, or if the employer's accommodation request process was proper, or whether the employer should have allowed him to rapid test or provided some form of accommodation. The Appellant's recourse for his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.

[45] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights. He is free to make these arguments before the appropriate adjudicative bodies and seek relief there[35].

[46] However, none of the Appellant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that he was suspended and subsequently terminated because of conduct that is considered to be misconduct under the EI Act[36].

[47] And this means he cannot be paid EI benefits.

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[34] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.

[35] This includes the grievance process, as initiated by the Appellant's Notice of Grievance filed February 25, 2022 (starting at GD8-14).

[36] At the hearing, the Appellant argued that the Commission did not meet its burden of proof because the employer did not participate in the process. He says this meant the Commission did not do its due diligence to prove he engaged in misconduct. I disagree, and have addressed this argument in paragraphs 35 to 41 above.

[48] The fact that the Appellant was removed from unpaid leave[37] and eventually resumed his employment does not change the fact that, starting on January 4, 2022 and continuing to March 6, 2022, he was suspended[38] for conduct the law considers to be misconduct. This means he is disentitled to EI benefits during the period of his suspension.

[49] Finally, the Appellant submitted that he paid his “EI premiums”, worked during his qualifying period and was in need of financial assistance for the period he was “deprived” of his ability to provide for his family[39].

[50] Unfortunately for the Appellant, it is not enough to have paid into the EI program or to be in need of financial support. If a claimant is suspended from their employment due to their own misconduct, they are not entitled to EI benefits during the period of the suspension – regardless of how many years they have contributed to the program or how difficult their financial circumstances may be.

Conclusion

[51] The Commission has proven the Appellant lost his employment because of his own misconduct. This means he cannot receive EI benefits.

[52] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

[37] See “Removal from Unpaid Leave” letter at GD8-16.
[38] As set out in footnote 3 above, the law considers an unpaid leave of absence to be the same as a suspension and says that if an employee is suspended due to their own misconduct – they cannot receive EI benefits during the period of the suspension.

[39] See GD2-4.