



Citation: *JB v Canada Employment Insurance Commission*, 2022 SST 1797

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

# **Decision**

**Appellant:** J. B.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (482739) dated July 29, 2022 (issued by Service Canada)

---

**Tribunal member:** Mark Leonard

**Type of hearing:** Teleconference

**Hearing date:** December 12, 2022

**Hearing participants:** Appellant

**Decision date:** December 28, 2022

**File number:** GE-22-2861

## Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant's (Claimant) Employer imposed unpaid leave (indefinite suspension) was for a reason that can be characterized as misconduct under the Act (in other words, because she did something wrong or engaged in undesirable conduct). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant's Employer says that she was not in compliance with its Covid-19 vaccination policy when the Claimant refused to be vaccinated and disclose her vaccination status. The Claimant's Employer placed her on an involuntary leave of absence. Essentially, she was given an indefinite suspension.

[4] The Commission accepted the employer's reason for the suspension. It decided that the Claimant's actions led to her suspension. It concluded that her actions constituted misconduct and disqualified her from receiving EI benefits.

[5] Even though the Claimant doesn't dispute that this happened, she says that despite her Employer's policy, her decision not to be vaccinated isn't misconduct.

## Issue

[6] Was the Claimant decision to not be vaccinated nor disclose her vaccination status to the Employer misconduct?

---

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

## Analysis

[7] 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.<sup>2</sup>

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

### Why did the Employer indefinitely suspend the Claimant?

[9] I find that the Employer suspended the Claimant was suspended because she chose not to be vaccinated and did not disclose this fact to her Employer which was in non-compliance with her Employer's Covid-19 vaccination policy.

[10] The Employment Insurance Act (Act) specifically notes that when a Claimant has been suspended from their employment by reason of their own misconduct, they will be disqualified from receiving EI benefits.<sup>3</sup> The Employer noted on the Claimant's Record of Employment (RoE) that the reason for issuing the RoE as "other" and added in the comments, "Leave due to non-compliance with the employer's vaccination policy, please treat as a code M." Code "M" in block 16 of the RoE is defined as dismissal or suspension.

[11] An indefinite suspension occurs when an employee is placed on involuntary, unpaid status, for an indeterminate period pending further investigation, inquiry, or further management action.

[12] Since there was no anticipated end date to the Claimant's period of leave, I am satisfied that the Employer's reason is consistent with an indefinite suspension. Further, I am satisfied that it meets the definition of suspension as defined in the Act.

---

<sup>2</sup> See sections 30 and 31 of the Act.

<sup>3</sup> See Section 31 of the *Employment Insurance Act*.

[13] The Commission submits that the reason the Claimant was given an indefinite suspension is that she was in non-compliance with the Employer's Covid-19 vaccination policy.

[14] The Claimant does not dispute this. She says that she decided not to be vaccinated and although she was surprised that the Employer followed through with her suspension, she was aware of the policy's content including the possibility of suspension or dismissal.

[15] I find that the Claimant was suspended because she was not in compliance with her Employer's Covid-19 vaccination policy. The Employer cited this reason for her suspension and the Claimant has not shown or even suggested her suspension was for any other reason.

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

[16] The reason for the Claimant's dismissal isn't misconduct under the law. I find that the Commission has not met its obligation to prove that the Claimant's actions are misconduct under the Act.

[17] 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.

[18] Case law says that the Commission must prove three elements in order to substantiate misconduct under the Act.

- The conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost willful.<sup>5</sup> The Claimant 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>6</sup>
- There must be a breach on an expressed or implied duty arising out of her employment contract.<sup>7</sup>
- The Claimant 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 let go because of that.<sup>8</sup>

[19] The law doesn't say I have to consider how the employer behaved.<sup>9</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>10</sup>

[20] 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>11</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This

---

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Canada (Attorney General) v. Lemire*, 2010 FCA 314

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

<sup>9</sup> See section 30 of the Act.

<sup>10</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.<sup>12</sup>

[22] The Commission says that there was misconduct because

- The Employer has the right to establish rules
- the Employer instituted a Covid-19 vaccination policy
- the Employer clearly notified the Claimant about its expectations surrounding Covid-19 vaccination and disclosing her vaccination status
- the Claimant knew or should have known what would happen if she didn't follow the policy

[23] The Commission concluded that the Claimant's suspension was a direct result of her decision not to comply with the Employer's Vaccination policy and it disqualified her from receiving EI benefits.

[24] The Claimant disagrees with the Commission's decision because

- The Employer should have offered alternates to vaccination
- The mandatory vaccination policy is unlawful, unconstitutional and violates her rights
- The policy violates international law
- The threat of loss of her job for non-compliance is intimidation and against the Criminal code
- The Employer does not have the right to violate her right to privacy of her medical information.
- There is no requirement to be vaccinated or disclose her vaccination status in her employment contract
- She has worked remotely without incident or jeopardizing workplace health and safety
- She has paid into EI since the 1980s

---

<sup>12</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[25] The Employer's vaccination policy detailed expected results that all employees are vaccinated against Covid-19 unless they are accommodated on a certified medical contraindication, religion, or other prohibited grounds defined under the Canadian Human Rights Act.

[26] The Claimant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. The employer notified the Claimant about the requirements and the consequences of not following them.

[27] The Claimant had until October 29, 2021, to confirm her vaccination status. She knew if she did not do this she would be dismissed by November 15, 2021.

[28] If the Claimant refused to confirm her vaccination status, she would be deemed unvaccinated and placed on administrative leave without pay (suspended).

[29] When the Claimant did not confirm her vaccination status, the employer notified her by e-mail that she was on administrative leave (suspended) and could not work any longer. The Commission looked at the reason for the suspension and determined that it was misconduct and disqualified her from receiving EI benefits.

[30] It says that the employer has the right to establish rules including the Covid-19 vaccination policy. It says that the Claimant ought to have known that non-compliance with the policy would result in loss of employment. It submits that her actions were willful in that they were deliberate and intentional. It also submits that her actions must constitute a breach of an expressed or implied duty arising out of the contract of employment and supports its decision, noting a Federal Court of Appeal case.<sup>13</sup>

[31] The Claimant does not dispute that she refused to be vaccinated nor that she refused to inform her Employer of her status. She says that demanding she reveals her vaccination status violated her right to medical information privacy. Further she says that demanding she be vaccinated to retain her employment is coercion and that she

---

<sup>13</sup> See (*Canada (A.G.) v. Lemire*, 2010 FCA 314)

does not have to get vaccinated. She says that there is no requirement in her employment contract to be vaccinated nor to disclose her vaccination status.

**Did the Claimant breach an expressed or implied duty arising from her contract of employment?**

[32] I find that the Commission has not proven that the Claimant breached an expressed or implied duty to be vaccinated against Covid-19 or disclose her vaccination status arising out of her employment contract.

[33] The Claimant detailed that she is a unionized federal government employee. She says that her employment contract (collective agreement) does not include a requirement to be vaccinated. To her knowledge, there have been no negotiations nor any agreement between her Bargaining Agent and the Employer to include a Covid-19 vaccination requirement in her collective agreement.

[34] The Commission submitted a copy of the Employer's Covid-19 vaccination policy.<sup>14</sup> The policy cites many references, including legislation, directives, and policies in support of the Employer's vaccination policy. The Claimant's collective agreement is not included as one of the cited documents. Further, none of the legislative references quoted contain a provision supporting mandatory Covid-19 vaccination for employees under the federal government umbrella.

**Is there an expressed duty arising out of her employment contract?**

[35] I find that the Commission has not shown that an expressed duty detailed in an employment contract existed that would support the premise that the Claimant was obligated to be vaccinated against Covid-19.

[36] An expressed duty is something specifically noted in an employment contract (collective agreement) or of such a fundamental nature, it is obvious that it exists. In other words, the employment agreement would need to contain an explicit expectation

---

<sup>14</sup> See "Policy on Covid-19 vaccination for the Core Public Administration Including the Royal Canadian Mounted Police" GD3-27 to 42.



that the Claimant be vaccinated against specific ailments and that the Claimant agreed to the requirement at her hiring or at some time later during her employment prior to her dismissal.

[37] The Claimant worked in administration for a federal government department. She confirmed that she was unionized employee working under a collective agreement. She stated that there was no provision within her collective agreement that requires her to be vaccinated against Covid-19.

[38] The Commission did not submit a copy of that collective agreement nor refer to a provision within that collective agreement that supports the obligation imposed by the vaccination policy. There is no evidence of a resolution between the Employer and the Bargaining Agent (Union) that suggests it agreed to a new essential condition of employment imposed upon the Claimant and others within the bargaining unit.

[39] To that end, there is no evidence that there existed any expressed (explicit) requirement that the Claimant accept vaccination for Covid-19, nor any other type of vaccination or medical treatment that the Employer might require. It offered no evidence in the form of an employment contract or memorandum of understanding or other addendum to her collective agreement from which to draw a conclusion there was an expressed duty. There is no evidence that the Claimant agreed to be bound within her employment agreement by a vaccination requirement, because she never agreed to be vaccinated prior to her suspension. There is no evidence that the Claimant's bargaining agent negotiated with the Employer and agreed to the Employer's vaccination policy.

**Is there an implied duty arising out of her employment contract?**

[40] I find that the Commission has not shown that an implied duty existed within her collective agreement or other employment contract that the Claimant accept vaccination or disclose her vaccination status.

[41] An implied duty would be something one can infer from an employment agreement that would cover instances not specifically (expressly) detailed. There was no evidence presented by the Commission that the Claimant was required by a blanket

requirement or expectation to accept all the Employer's policies that one could reasonably infer covered a vaccination requirement. The Claimant worked in administration. She had been working from home prior to her suspension. She testified that she had never needed to prove any type of vaccination to hold her employment.

[42] The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols. This is not the same as expecting an employee to wash their hands before handling food or wearing a safety vest. To accept the premise that the employer can institute a policy demanding a specific type of medical treatment or face dismissal, changes a mere expectation of compliance with general health and safety protocols, to an essential condition of employment.

### **Imposed Essential Condition of Employment**

[43] There is no evidence that the Employer opened a negotiation with the bargaining agent, or specifically with the Claimant, to amend her employment agreement to include a vaccination requirement. There is no evidence that the Claimant explicitly agreed to the change or accepted to work under the policy before she was dismissed.

[44] Essentially, the Employer unilaterally reopened the Claimant's employment agreement and imposed a new essential condition of employment without either her consent or the agreement of her bargaining agent.

[45] The requirement to be vaccinated or provide a valid exemption was not an essential condition of employment established at the time she was hired, nor agreed to by the Claimant at some later time during her employment but prior to her dismissal. Therefore, it cannot be said that her employment contract contained a provision that established an expressed or implied duty to comply with the Employer's vaccination policy.<sup>15</sup>

---

<sup>15</sup> See (*Canada (A.G.) v. Clark*, 2007 FCA 181)

[46] The Commission suggests that the mere existence of a policy, which the Claimant failed to comply with, is enough to be a breach of a duty owed her employer. It supports its claim quoting FCA case “*Lemire*.”

[47] I am not satisfied that the circumstances upon which the Justices relied in “*Lemire*” are consistent with those in the Claimant’s case. In “*Lemire*”, the employee sold contraband cigarettes while wearing his employment uniform on the employer’s premises in violation of the employer’s policy. While it is not specifically stated that the policy existed at the time of his hiring, the dismissed employee admitted he was aware of the policy, and it is apparent that he had willingly accepted and worked under that policy when he was caught. In other words, the policy existed as part of an employment contract he agreed to prior to the contravention that led to his dismissal.

[48] Further, it is evident that the Justices in “*Lemire*” referred to the provisions of the dismissed employee’s **collective agreement** to address issues surrounding the sanction applied. Clearly, the Justices benefitted from access to that collective agreement in considering the case.<sup>16</sup>

[49] In the present case, there was no provision in her collective agreement or policy in existence that the Claimant previously agreed to be bound by, nor did she accept the new policy and work under it only to be found in non-compliance at a later time. She expressed her unwillingness to accept the policy immediately upon its implementation and never agreed to be bound by it.

[50] Lastly, despite the numerous legislative references noted in the Employer’s policy, there is no evidence of either Federal or Provincial legislation that demands employees to be vaccinated against Covid-19. It was simply the Employer’s choice to implement the policy it did without consulting the Claimant’s bargaining agent.

[51] Contrary to the Commission’s assertion, I am satisfied the Commission has not met the burden of proof to substantiate that the Claimant breached an expressed or

---

<sup>16</sup> See (*Canada (A.G.) v. Lemire*, 2010 FCA 314) Analysis - paragraph 21.

implied duty owed the Employer when she chose not to be vaccinated or provide an authorized exemption.

### **Other Elements to support a conclusion of Misconduct**

[52] The Commission submits that the Claimant's actions were willfully in that they were intentional and deliberate when she chose not to comply with her Employer's vaccination policy.

[53] Further, it submits that she knew or ought to have known that her decision would lead to her dismissal. There is no dispute that the Claimant was both aware of the policy requirements and the likely consequences if she did not comply. She admits that her choice was a personal decision.

[54] However, I find the neither her intention nor the knowledge of the consequences are relevant. All three elements as expressed above must be proven for a finding of misconduct. I have already found that the Commission has not met its burden to prove that there was a breach of an expressed or implied duty arising out of the Claimant's employment contract.

[55] Regardless of whether the Claimant's action can be characterized as willfully or that she knew her decision would likely lead to her suspension or other disciplinary action, the Commission has not proven that she owed her Employer a duty to accept vaccination to remain employed. In fact, the Claimant had every right not to consent to the Employer's unilateral demands.

### **Does Vaccination Policy violate the Claimant's rights?**

[56] The Claimant suggests that the Employer's policy is illegal and violates her rights.

[57] As I noted above, it is not the actions of the Employer that are in question. Whether the Employer's policy is legal or not is a matter to be addressed in another forum. My jurisdiction is limited to whether the Claimant's actions are misconduct that warrants a disqualification from receiving EI benefits under the Act.

[58] However, since it is the Claimant's conduct that is in question, I will examine the issue of legality of the Claimant choosing not to take the vaccine. The Claimant was clear that she was exercising her rights not to be vaccinated and not disclose medical information.

[59] As I noted above, there is no Federal or Provincial legislation that demands Covid-19 vaccination. Therefore, since there is no legal obligation founded in legislation, vaccination for Covid-19 is voluntary.

[60] It is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies.<sup>17</sup> The individual has the final say in whether they accept any medical treatment.<sup>18</sup>

[61] The Commission even noted in its submissions that the Claimant has every right to refuse the Employer's request to provide proof of vaccination.<sup>19</sup> Yet, it determined that in exercising those rights, the Claimant's actions constituted misconduct.

[62] I disagree with the Commission. The common law confirms that the Claimant has a legal basis or "*right*" not to accept any medical treatment, which would include vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then it challenges the conclusion that her actions can be characterized as having done something "wrong" or "something she should not have done," whether willfully or not, that would support misconduct and disqualification within the meaning of the EI Act?<sup>20</sup>

[63] The issue of the Covid-19 vaccinations and the effects resulting from non-compliance is an emerging issue. No specific current case law exists on the matter that guides decision makers.

---

<sup>17</sup> See *Hopp v. Lepp*, [1980] 2 SCR 192 wherein the Supreme Court weighs in on Informed Consent

<sup>18</sup> See *Malette v. Schulman* (1990), 72 O.R. (2d) 417

<sup>19</sup> See GD3-5

<sup>20</sup> See *Canada Employment Insurance Commission v. Dubinsky*, A-636-85

[64] Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and that action was still found to be misconduct simply because it was deemed willful.

[65] In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's policy, and led to her suspension, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the Act.

### **So, was the Claimant's suspension the result of misconduct?**

[66] Based on my findings above, the Commission has not met the burden of proof to establish a finding of misconduct. It has not shown that there was a breach of an expressed or implied duty arising out of her employment contract.

[67] Further, given the common law right to choose whether to accept any medical treatment including vaccination, the Claimant's decision not to be vaccinated nor disclose her vaccination status is a reasonable and acceptable explanation supported in law for not complying with the Employer's vaccine policy. Regardless of the fact that the Claimant was suspended, her actions are not misconduct under the Act.

### **Conclusion**

[68] The Commission hasn't proven that the Claimant's suspension is as a result of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[69] This means that the appeal is allowed.

Mark Leonard  
Member, General Division – Employment Insurance Section