



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1103

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 (540592) dated October 7, 2022
(issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: In person

Hearing date: April 5, 2023

Hearing participant: Appellant

Decision date: May 17, 2023

File number: GE-22-3621

Decision

[1] I am dismissing J. B.'s appeal.

[2] The Canada Employment Insurance Commission (Commission) has proven he was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. In other words, he did something that caused his employer to suspend him from his job.¹

[3] This means he can't get EI regular benefits during his suspension.²

[4] So the Commission made the correct decision.

Overview

[5] J. B. (the Appellant) was suspended from his job in March 2022. He worked for the Government of Canada (employer) as a food inspector.

[6] His employer says it put him on an administrative leave without pay because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] The Appellant doesn't dispute this.

[8] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended from his job for a reason the EI Act considers to be misconduct. So it didn't pay him benefits during his suspension (April 18, 2022 to June 17, 2022).³

[9] The Appellant says there was no misconduct. He says his decision not to get vaccinated wasn't wilful or deliberate. He says his employer told him he could appeal its

¹ Section 31 of the EI Act refers to "suspension". In this decision, suspension includes a leave of absence, an unpaid leave of absence, and an administrative leave without pay.

² Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.

³ Under section 31(a) of the EI Act, the Appellant's period of disqualification ended when his suspension ended.

denial of his religious exemption request. And he did that. But his employer never responded. So his refusal to follow his employer's vaccination policy isn't wilful.

[10] I have to decide the reason the Appellant was suspended. And whether that reason counts as misconduct under the EI Act.

Matter I have to consider first

Documents sent to the Tribunal after the hearing

[11] At the hearing the Appellant said he had other documents that were important to his appeal. He briefly described the documents to me.

[12] I told the Appellant he could refer to the documents during the hearing and send them to the Tribunal after the hearing. I set a deadline for him to send them in.

[13] He sent the Tribunal:⁴

- a) a letter the Appellant's employer gave him during COVID (dated April 7, 2020) to help him gain access to locations where he needed to do inspections
- b) an email to the Appellant from the employers Centre of Excellence Vaccination Team (COE) (dated December 21, 2021) telling him decisions on accommodation requests will likely not be given until the new calendar year
- c) two emails to the Appellant from his supervisor (dated February 24, 2022) telling him what the COE said about his options to respond to the denial of his religious exemption
- d) the letter his employer sent to him (dated March 16, 2022) putting him on administrative leave without pay effective March 18, 2022

[14] The Tribunal sent the documents to the Commission with a deadline to respond.

[15] I will accept documents b, c, and d into evidence, for three reasons:

- I told the Appellant he could send documents in after the hearing

⁴ See GD6.

- they are relevant to a legal issue I have to decide—whether his conduct was misconduct
- it would not be unfair to the Commission because I gave the Commission an opportunity to respond

So I will consider documents b, c, and d when I make my decision.

Issue

[16] Did the Appellant get suspended from his job for a reason the EI Act says is misconduct?

Analysis

[17] 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.

[18] I have to decide two things.

- the reason the Appellant was suspended from his job
- whether the EI Act considers that reason to be misconduct

The reason the Appellant was suspended from his job

[19] I find the Appellant's employer suspended him because he didn't comply with its vaccination policy.

[20] The Appellant and the Commission agree about this.⁵ And there is no evidence that goes against this.

⁵ In his appeal notice, at GD2-12, the Appellant writes: "I acknowledge that I failed to attest my vaccination status, which resulted in my being forced to leave without pay."

The reason is misconduct under the law

[21] The Appellant's refusal to follow his employer's vaccination policy is misconduct under the EI Act. Here are the reasons why I reached that conclusion.

– What misconduct means under the EI Act

[22] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal issues I have to consider when making my decision.

[23] The Commission has to prove that it's more likely than not the reason he was suspended from his job is misconduct under the EI Act, and not another reason.⁶

[24] I have to focus on what the Appellant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.⁷ I can't consider whether the employer's policy is reasonable, or whether suspension was a reasonable penalty.⁸

[25] The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.⁹ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.¹⁰ And misconduct also includes conduct that is so reckless that it is almost wilful.¹¹

[26] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being let go because of that.¹²

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ This is what sections 30 and 31 of the EI Act say.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *McKay-Eden v His Majesty the Queen*, A-402-96.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[27] The recent Federal Court decision in the Cecchetto case says that in COVID vaccine misconduct cases under the EI Act, the Tribunal:¹³

- has an important, but narrow and specific role—to decide why an appellant was dismissed from their employment and whether that reason is misconduct
- can't consider or decide fundamental legal, ethical, and factual questions about COVID vaccines and COVID mandates put in place by governments and employers
- can't assess or rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic, and there are other ways an appellant can challenge these
- doesn't have to consider and decide arguments and questions outside its narrow and specific role, and courts won't interfere with its decisions if it doesn't

– **What the Commission and the Appellant say**

[28] The Commission says the employer's vaccination policy was a condition of employment.¹⁴ By March 3, 2022, the Appellant knew that he had to follow the policy (attest to being fully vaccinated) or face suspension by the final deadline of March 16, 2022. He had requested a religious exemption. But his employer refused his request, and he knew that.¹⁵ He didn't attest by the deadline. This was an intentional personal choice.

[29] The Commission says the Appellant admitted he was aware that not following the vaccination policy could result in suspension. Here is the key part of the Commission's notes of its call with the Appellant [I have added the **bold**]:

At that time notified of the consequence for further non-compliance being a leave of absence and the new deadline of March 3rd 2022 to sign the attestation? Client agreed that they had until March 3rd to do the attestation and that the letter also stated that if

¹³ See [Cecchetto v Canada \(Attorney General\), 2023 FC 102](#) (Cecchetto), at paragraphs 46 through 49.

¹⁴ See the Commission's representation at GD4-4 to GD4-6.

¹⁵ See the Commission's notes of its call with the employer at GD3-38. The Appellant's manager read from the letter the employer sent to the Appellant, dated February 17, 2022, denying his religious exemption request. The letter also says if he didn't comply with the policy by March 3, 2022, he would be placed on leave without pay until he complied with the policy.

they were still not in compliance by March 17, 2022 they would be placed on an Administrative leave of absence either until they are in compliance or until the policy is rescinded. Received the final letter informing that the leave of absence would begin on March 18th on March 16th? **Client stated that it was after March 17th - on March 28th that they resubmitted their religious exemption and they were already off on the leave by that time.** The client states that the resubmission is still not settled yet.¹⁶

[30] So the Commission says the Appellant's conduct counts as misconduct under the EI Act.

[31] The Appellant says there is no misconduct. At the hearing he testified:

- although his employer denied his religious exemption request, his supervisor told him he could re-submit that request
- he did but his employer never responded
- he couldn't make the decision whether to get vaccinated because he was still waiting to find out if his employer would grant his religious exemption request

[32] So the Appellant argued his decision not to follow his employer's vaccination policy wasn't wilful. He put it this way at the hearing: How can it be wilful when he didn't have an answer to his appeal. Without that answer he couldn't decide whether to get vaccinated. He needed to know the outcome of his appeal because they were asking to be something that he believed was unlawful and against his religious beliefs. He said he was stuck in limbo—waiting for an answer to make a decision.

[33] I asked him if he knew that suspension was a possibility. He answered he knew it was a possibility. He said he knew about the vaccination policy and the possibility of suspension in the fall of 2021. Then employees got a letter around Christmas of 2021. But he was waiting for his employer's appeal decision on his religious exemption.

[34] Finally, he testified that his employer's request to get vaccinated and attest was unlawful, and tantamount to extortion and intimidation, as a man, not as an employee.

¹⁶ See GD3-36.

– **My findings and decision**

[35] The Commission and the Appellant agree on the key facts and evidence in this case—except for one, which I will consider in the next paragraph. So I accept the Commission’s evidence and the Appellant’s evidence: he knew about the policy, he knew what he had to do under the policy (get vaccinated and attest), he knew the deadline for doing that, he didn’t comply by the deadline, and his employer suspended him as a result.

[36] The Commission says the Appellant knew that there was a possibility his employer would suspend him if he didn’t follow its vaccination policy. So his refusal to follow the vaccination policy was an intentional personal choice. The Appellant disagrees. He says his conduct wasn’t wilful because he was waiting for his employer to decide his appeal about his religious exemption.

[37] I prefer the Commission’s evidence to the Appellant’s evidence about this. And I find that his refusal to follow his employer’s vaccination policy was wilful.

[38] The Commission’s evidence shows he appealed his employer’s denial of his religious exemption request **after** he had been suspended. I have no reason to doubt the notes of what the employer told the Commission. The Appellant didn’t contradict what his employer told the Commission about this. And there isn’t any other evidence that goes against this.

[39] So I find he knew he would be suspended if he didn’t comply with his employer’s vaccination policy by the deadline. He decided not to comply. And his employer suspended him as a result of that.

[40] I also reject his argument that his conduct wasn’t wilful for another reason. The Federal Courts have said I should not focus on his employer’s conduct.¹⁷ His employer’s

¹⁷ In misconduct cases, the general rule says the Tribunal should focus on the employee’s conduct, not the employer’s conduct. In *Astolfi v Canada (Attorney General)*, 2020 FC 30, the Federal Court narrowed that general rule. It says the Tribunal consider whether an employer’s conduct **before** the conduct led to the employee’s alleged misconduct. If it did, the employee’s conduct might not be wilful (conscious, deliberate, intentional) or reckless to the point of being wilful.

failure to respond to his religious exemption appeal didn't cause him to do something that led to his suspension. When his employer suspended him, he hadn't made his appeal. This tells me his conduct—not his employer's—was the cause of his suspension.

[41] So, I find that the Commission has shown it is more likely than not the Appellant made a personal and deliberate choice not to follow his employer's vaccination policy. In other words, his conduct was wilful.

[42] Based on the Cecchetto decision, I don't have to consider the Appellant's arguments that his conduct wasn't misconduct because:

- his faith doesn't permit him to be vaccinated, and his employer was wrong to refuse his religious exemption request
- what his employer was asking him to do was unlawful under his collective bargaining agreement, his rights under the *Canadian Charter of Rights and Freedoms*, his God-given rights, and Ontario's *Personal Health Information Protection Act*
- forced vaccination goes against the *Canadian National Report on Immunization (1996)*

Conclusion

[43] The Commission has shown the Appellant made the personal and deliberate choice not to follow his employer's vaccination policy. The Commission has also shown his employer suspended him because he didn't comply with its vaccination policy.

[44] This counts as misconduct under the EI Act.

[45] Because he was suspended for misconduct, he can't get EI regular benefits during his suspension (April 18, 2022 to June 17, 2022).

[46] So the Commission made the correct decision.

[47] I am dismissing his appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section