Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 117

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (473391) dated June 30, 2022 (issued by Service Canada)

Tribunal member:	Bret Edwards
Type of hearing:	Videoconference
Hearing date:	February 28, 2023
Hearing participant:	Appellant
Decision date:	March 9, 2023
File number:	GE-22-2557

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that 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).[1] This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[2]

Overview

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

[4] The Appellant disagrees that she was suspended for this reason. She says that her employer failed to follow their own policy by not considering her accommodation request before they suspended her.

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

Matter I have to consider first

The hearing took place by teleconference instead of videoconference

[6] The Appellant requested a videoconference hearing. At the start of the hearing, I had problems with my video (computer camera). I couldn't resolve the issue quickly, so I gave the Appellant two options: proceed with the hearing and switch to teleconference

[1] In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.
[2] Section 31 of the *Employment Insurance Act* says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

instead or reschedule the hearing in order to stick with videoconference. The Appellant said she preferred to proceed and switch to teleconference.

[7] So, the hearing took place when it was scheduled, but by teleconference instead of videoconference.

Issue

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

Analysis

[9] 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.

Why was the Appellant suspended from her job?

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

[11] The Appellant and the Commission don't agree on why the Appellant was suspended from her job. The Commission says that the reason her employer gave (she didn't follow their mandatory COVID-19 vaccination policy) is the real reason for the suspension.[3]

[12] The Appellant disagrees. The Appellant says that the real reason she was suspended from her job was that her employer failed to follow their own policy by not considering her accommodation request until after they suspended her.

[13] I note the Appellant's employer sent the Appellant a letter denying her accommodation request, dated February 17, 2022. It says they had suspended her

[3] GD4-4.

earlier (on December 7, 2021) for not following their mandatory COVID-19 vaccination policy by not sharing her vaccination status.[4]

[14] On the other hand, I find the Appellant hasn't provided any evidence that her employer specifically suspended her because they didn't follow their own policy. I also find her argument for why she was suspended relates more to why she feels her employer should not have suspended her. But in this section, I am only looking at why the Appellant was suspended from her job, so I will address this argument later.

[15] So, while I acknowledge the Appellant believes her employer suspended her because they didn't follow their own policy, I find the evidence (what her employer told her) shows that she was suspended for not following her employer's mandatory COVID-19 vaccination policy.

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

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

[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 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.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[5] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] 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.[7]

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[4] GD3-39.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.

[19] 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.[8]

[20] The Commission has to prove that the Appellant was suspended from her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from her job because of misconduct.[9]

[21] 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 suspended or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[23] In response to Mr. McNamara's arguments, the Court stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act."

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[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[24] In the same case, the Court went on to note that the focus when interpreting and applying the Act is “clearly not on the behaviour of the employer, but rather on the behaviour of the employee.” It pointed out that there are other remedies available to employees who have been wrongfully dismissed, “remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers” through EI benefits.

[25] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General).*[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[13]

[26] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General).*[14] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[15]

[27] These cases are not about COVID vaccination policies. But the principles in those cases are still relevant. My role is not to look at the employer’s conduct or policies and determine whether they were right in suspending the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[28] The Commission says that there was misconduct because the Appellant knew her employer had a mandatory COVID-19 vaccination policy and knew she could be suspended for not following it, but she chose not to follow it anyway.[16]

[29] The Appellant says that there was no misconduct because she followed her employer's policy by submitting an accommodation request. She says that her employer didn't follow their own policy by suspending her before they had considered her request.[17]

[30] The Appellant's employer told the Commission[18] that:

- The Appellant didn't attest to being fully vaccinated and requested an accommodation from being fully vaccinated.
- They denied her request after reviewing the documentation she submitted.
- Employees could request accommodations for medical, religious, and other protected human rights grounds.

[31] The Appellant's employer's mandatory COVID-19 vaccination policy says the following:

- The policy takes effect on November 8, 2021 and applies to all employees.[19]
- The employer has a duty to accommodate employees for medical, religious, and human rights grounds under the policy.[20]
- Employees who are not fully vaccinated or unwilling to disclose their vaccination status will be placed on unpaid leave 2 weeks after the attestation deadline.[21]
- The attestation deadline for employees is November 22, 2021.[22]

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[16] GD4-4.
[17] GD2-34.
[18] GD3-29.
[19] GD3-52.
[20] GD3-45 to GD3-46.
[21] GD3-52 to GD3-53.
[22] GD3-57.

- For employees who have submitted an accommodation request but ultimately receive a negative decision, the attestation deadline is 2 weeks after when they are told their accommodation is refused.[23]

[32] The Appellant testified that:

- She knew about her employer's policy and the attestation deadline.
- Her employer's attestation form required her to agree to their privacy policy, but she didn't agree to it and when she clicked 'no' (to say she disagreed), she wasn't able to fill out the rest of the form.
- If an employee didn't agree to the privacy policy, they had to speak to their manager to fill out another (PDF) form instead of using the online system. She submitted the PDF form after consulting with her manager.
- But she added a fourth box (option) to the vaccination status question on the PDF form because she wasn't willing to share her vaccination status. The way the form was originally created would have forced her to do that (share her vaccination status).
- Her employer kept insisting they wouldn't review her accommodation request unless she attested and were in a rush to put her on leave.
- She told her employer their vaccination policy wasn't going to override their own existing accommodation policy and submitted her accommodation request on December 6, 2021.
- Her employer put her on unpaid leave on December 7, 2021.
- Her employer told her on December 10, 2021 that they would review her accommodation request. She remained on leave while they reviewed her request, which they denied on February 17, 2022.
- She didn't think she would be suspended for not sharing her vaccination status. She thought she had followed their policy and done what they asked.

[23] GD3-57.

- Her employer’s policy says that employees whose accommodations were refused had two weeks from the date of the refusal to attest to their vaccination status.
- But her employer didn’t follow their policy in her case because she was already suspended when they refused her request.
- A chapter in the *Digest* (7.3.2) shows she didn’t commit misconduct.
- A Federal Court case (*Joseph v. CEIC*) also shows she didn’t commit misconduct.
- Two other Tribunal decisions (*S.B. v. Canada Employment Insurance Commission* and *A.L. v. Canada Employment Insurance Commission*) show she didn’t commit misconduct

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

[34] 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.

[35] I further find the Appellant’s actions were intentional as she made a conscious decision not to follow her employer’s policy as it was communicated to her.

[36] There is evidence the Appellant knew about her employer’s policy. She said she knew about it, as noted above.

[37] There is also evidence the Appellant chose not to follow her employer’s policy the way it was communicated to her. I find this includes not just the policy itself, but also subsequent emails between the Appellant and her employer leading up to when she was suspended.

[38] The Appellant argues she followed her employer’s policy by submitting an accommodation request as the policy allowed her to do. She argues her employer didn’t

follow their own policy by suspending her before they had considered her accommodation request.

[39] Unfortunately, I disagree. I find the evidence shows the Appellant's employer had made clear to her directly that she couldn't submit her accommodation request unless she did other things first. This evidence is:

- An email from the Appellant's manager, dated November 25, 2021. It says employees who don't share (attest to) their vaccination status are considered to be unvaccinated.[24]
- An email from the Appellant's manager, dated November 29, 2021. It says the Appellant has to complete the attestation form and share her vaccination status in order to be considered for an accommodation.[25]
- An email from the Appellant's manager, dated November 30, 2021. It says the Appellant has to acknowledge the privacy statement on the attestation form in order to request an accommodation and can't alter an employer form to suit her needs.[26]

[40] The Appellant then emailed a different person within her organization on December 1, 2021 and December 2, 2021. Both emails asked for clarification about how to proceed with her accommodation request.[27]

[41] I note that there is no information on file to show the Appellant heard back about her December 1, 2021 and December 2, 2021 emails. In my view, it is reasonable to believe that if the Appellant did hear back, she would have included these responses in her submissions since she provided copies of the other emails from her manager that I referenced above.

[24] GD2-29 to GD2-30.
[25] GD2-27.
[26] GD2-25.
[27] GD2-23 to GD2-25.

[42] I find it's reasonable to believe that if the Appellant didn't hear back about her December 1, 2021 and December 2, 2021 emails, this meant her employer's position hadn't changed from what they wrote in their earlier emails to her.

[43] I acknowledge the Appellant's employer's mandatory COVID-19 vaccination policy doesn't clearly say anywhere that employees had to attest to their vaccination status before they submitted an accommodation request.[28]

[44] But I find it's reasonable to believe the emails from the Appellant's manager can be considered extensions of that policy since they were sent by someone in a senior role who was familiar with the policy and how it should apply to employees in different situations.

[45] So, based on this evidence, I find the Appellant's employer clearly told the Appellant she could submit an accommodation request only if she first acknowledged the privacy statement and shared her vaccination status. The fact the Appellant chose to submit her accommodation request anyway a few days later (on December 6, 2021, as noted above) shows that she consciously chose not to follow what she had been asked to do.

[46] I acknowledge the Appellant feels her employer didn't act fairly by disregarding their own pre-existing policy about accommodating employees when she asked for accommodation under their mandatory COVID-19 vaccination policy.[29]

[47] Unfortunately, I find this argument isn't relevant here. As I noted above, the Act and the Court say that I must focus on the Appellant's actions, not the employer's, when analyzing misconduct.

[48] In other words, I can't look at whether the Appellant's employer acted fairly in telling her she couldn't submit an accommodation request unless she followed specific

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[28] GD3-41 to GD3-62.
[29] The Appellant included her employer's workplace accommodation policy in her submissions. See GD2-14 to GD2-21.

steps related to their COVID-19 vaccination policy. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[49] I also acknowledge the Appellant feels a chapter of the *Digest* (7.3.2 specifically) helps to show she didn't commit misconduct. She argues it says no misconduct exists if an employee may find it impossible to follow an employer's policy.

[50] But, unfortunately, I find this argument isn't relevant here either. I can rely on the *Digest* as an interpretive guide, but I'm not bound by it.

[51] *Digest* 7.3.2 is about an employee's motivation in not following an employer's request. It says, "no misconduct exists if the refusal or disobedience can be explained by a serious or genuine misunderstanding not involving bad faith on the part of either party."[30] I accept that it says this. But I also find the Court has said bad faith is not required when analyzing misconduct, as noted above.

[52] So, I don't give *Digest* 7.3.2 much weight here. Even though I accept the Appellant wasn't acting in bad faith, I still find her actions show she consciously chose not to follow her employer's mandatory COVID-19 vaccination policy based on what she had been asked to do.

[53] I also acknowledge the Appellant feels *Joseph v. CEIC* shows she didn't commit misconduct. She argues that *Joseph* basically says it's her choice to get vaccinated and it's an error to say this action is illegal and is misconduct within the meaning of EI law.

[54] Unfortunately, I disagree. I find *Joseph* was released in 1986 and has an older interpretation of misconduct (it must be shown that an employee should not have acted the way they did) that the Court cases I noted above have since moved away from and expanded on.[31]

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[30] See Chapter 7.3.2 of the *Digest of Benefit Entitlement Principles*.
[31] *Joseph v. C.E.I.C.*, A-636-85.

[55] For these reasons, I don't give much weight to *Joseph* here and instead give more weight to (and will focus my analysis on) what the Court has said in more recent decisions about how to analyze misconduct.

[56] I will now turn to the Appellant's arguments about the other Tribunal decisions I will refer to them as S.B. and A.L. respectively.

[57] The Appellant argues her situation is like the appellant in S.B. because their employer also suspended them before they had reviewed their accommodation request.

[58] The Appellant also argues her situation is like the appellant in A.L. because there is no evidence that she committed a breach of duty by not sharing her vaccination status with her employer.

[59] I note that I'm not bound by prior decisions of the Tribunal. This means I can decide for myself if I agree with these decisions and if they help support an appellant's appeal.

[60] I will look at S.B. first. I agree with the Member's reasoning there, but I find the Appellant's situation is different from what S.B. faced. This is because there is no evidence to indicate S.B. had submitted a religious exemption request without first following other requirements of their employer's mandatory COVID-19 vaccination policy. In fact, the evidence shows they attested to their vaccination status before submitting their exemption request.[32]

[61] On the other hand, as noted above, I find there is clear evidence the Appellant submitted an accommodation request even though she hadn't done what her employer asked her to do first (acknowledge their mandatory COVID-19 vaccination privacy statement and share her vaccination status).

[62] So, for these reasons, I don't give S.B. much weight here.

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[32] *S.B. v. Canada Employment Insurance Commission,* SST, paragraph 21.

[63] I will now look at A.L. In this case, I disagree with the Member's reasoning. Even if I apply their misconduct analysis here, I still find the Appellant committed misconduct. This is because there is clear evidence that her employer introduced their mandatory COVID-19 vaccination policy as a requirement for all its employees, as noted above. Since this is what happened, I find the policy did become an express condition of the Appellant's employment. She then later breached the policy when she chose not to follow it after her religious accommodation request was denied.

[64] I also note that in A.L., the Member applied their misconduct analysis when looking at the appellant's collective agreement and what it did and didn't say about vaccinations.[33]

[65] But I disagree with this approach too. I find the Act and the Court haven't given me the authority to apply a collective agreement (or an employment contract, in this case) and decide whether the employer rightfully dismissed or suspended an appellant, as mentioned above. This means that the Tribunal isn't the right forum to decide whether an appellant was wrongfully dismissed or suspended. If I start doing this, I exceed my authority as a decision-maker.

[66] Also, I note the Court has recently said in another decision that A.L. doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.[34]

[67] So, for these reasons, I won't follow A.L. and don't give it much weight here.

[68] While I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence clearly shows she made a conscious decision not to follow it. She submitted an accommodation request even though she didn't first do what her employer asked (acknowledge their privacy statement and share her vaccination status), which shows her actions were intentional.

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[33] *A.L. v. Canada Employment Insurance Commission*, SST, paragraphs 29 to 67.
[34] See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

[69] 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.

[70] I acknowledge the Appellant feels she didn’t think she would be suspended when she was because she had submitted an accommodation request and hadn’t heard back about it yet, so she thought a different (later) attestation deadline should have applied to her based on what her employer’s policy said.

[71] I agree with the Appellant that her employer’s policy had different attestation deadlines. The policy says the attestation deadline for all employees was November 22, 2021 unless they fell into one of several groups. One of those groups was employees who had submitted an accommodation request. For them, the policy says if their accommodation request was denied, their attestation deadline was 2 weeks after that decision was made.

[72] But I disagree with the Appellant that her employer used the wrong attestation deadline in her case.

[73] As I have already found, the evidence shows the Appellant’s employer told her she couldn’t submit an accommodation request unless she first did other things (acknowledge their privacy statement and share her vaccination status). In my view, this should have signalled to the Appellant that the regular attestation deadline (November 22, 2021) would apply in her case because she hadn’t done what her employer had asked.

[74] I also find the same evidence shows the Appellant’s employer told her she would be suspended in early December 2021 if she didn’t follow their policy, which should have made her realize they were using the November 22, 2021 attestation deadline in her case. This evidence is:

- An email from the Appellant’s manager, dated November 25, 2021. It says if she’s unwilling to share her vaccination status, she’ll be placed on unpaid leave as of December 7, 2021.

- An email from the Appellant's manager, dated November 30, 2021. It reiterates that if she's unwilling to share her vaccination status, she'll be placed on unpaid leave as of December 7, 2021.

[75] I also find the fact the Appellant went ahead and submitted an accommodation request anyway after receiving these emails doesn't change the fact that she didn't do what her employer asked before submitting that request. In my view, this means that she should have known she could be suspended for not following her employer's policy as they had made this clear to her in the emails discussed above.

[76] I also acknowledge the Appellant feels her employer acted unfairly by deciding to review her accommodation request after they suspended her.

[77] Unfortunately, I find this argument isn't relevant here. The Appellant was already suspended when her employer decided to review her accommodation request. This is significant because I have to focus on the events leading up to the Appellant's suspension when analyzing misconduct, not what happened afterwards.

[78] Also, as noted above, the Act and the Court say that I must focus on the Appellant's actions, not the employer's, when analyzing misconduct.

[79] In other words, I can't look at why the Appellant's employer decided to review her accommodation request after they had suspended her. If I do this, I exceed my decision-making authority. If the Appellant wants to pursue this argument further, she needs to do that through another forum.

[80] So, while I understand the Appellant didn't think she would be suspended because she had submitted an accommodation request, I find the evidence shows that she should have known she could be suspended because she didn't do what her employer asked before she submitted that request and had been told she would be suspended for this reason.

[81] 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?

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

[83] This is because the Appellant's actions led to her suspension. She acted deliberately by not acknowledging her employer's privacy statement or sharing her vaccination status as they asked before submitting her accommodation request. She knew or ought to have known that refusing to do this was likely to cause her to be suspended from her job.

Conclusion

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

[85] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section