Citation: *NB v Canada Employment Insurance Commission*, 2023 SST 1263

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (457368) dated March 15, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Teleconference
Hearing date:	May 8, 2023
Hearing participant:	(List roles of participants, not names. Add or delete as needed.) Appellant
Decision date:	June 20, 2023
File number:	GE-23-257

Decision

[1] The appeal is dismissed. The Tribunal disagrees 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). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said that she was put on a leave of absence without pay because she had failed to comply with its mandatory COVID-19 vaccination policy (Policy).

[4] The Commission accepted the employer's reason for the suspension. It decided that the Appellant had voluntarily taken a leave of absence from her job without just cause. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

Matters I have to consider first

The proper issue in this appeal

[5] It became apparent at the hearing that the Appellant had not requested a leave, nor was there an agreement on a date for her to return to work. Consequently, this was not a case of a voluntary leave without just cause, as alleged by the Commission in its decisions.[2]

[6] The proper legal category into which this case falls is a suspension for misconduct.[3] The Tribunal has the authority to consider both issues and to decide

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[1] Section 31 of the *Employment Insurance Act* says that Appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.
[2] Section 32 of the *Employment Insurance Act* requires that the leave of absence be voluntary on the part of the employee, be authorized by the employer, and the employer and the employee agree on the date of the employee's return to work. None of those conditions have been satisfied in this appeal. So this is not a case of voluntary leave of absence without just cause.
[3] Section 31 of the *Employment Insurance Act.*

which is the proper one in the individual case.[4] I will therefore deal with this appeal as involving the issue of suspension for misconduct, for reasons set out below on this page under the heading "Why was the Appellant suspended from her job?".

I will accept the documents sent in after the hearing

[7] At the conclusion of the hearing, I asked the Appellant to submit emails from August 2021. One was from the employer setting out continuing to operate in hybrid mode, that is, in person and remote attendances. The other was from the union director about accommodation for the Appellant for reasons not set out in the Policy. Since I requested these documents, I have accepted them for this appeal.

[8] The Appellant submitted these documents. The Tribunal forwarded them to the Commission for any response. The Commission has not responded to the date of the decision.

Issue

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

Analysis

[10] 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. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended from her job?

[11] I find that the employer placed the Appellant on an unpaid leave from her job because she had not complied with the Policy. She did not take the COVID-19 vaccine.

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[4] *Canada (Attorney General) v Easson*, A-1598-92.

[12] The Record of Employment (ROE) issued by the employer gave the reason for the ROE as “K – leave without pay, non-compliance with the vaccination policy”. The employer did not use the code “N” for leave of absence. The ROE does not have a code letter for misconduct.

[13] The Commission classified this matter as a voluntary leave of absence without just cause taken by the Appellant. The leave of absence was not voluntary on the part of the Appellant. She did not ask for or agree to a leave of absence. It was imposed on her by the employer. The leave does not fall within the terms of section 32 of the *Employment Insurance Act*, as claimed by the Commission. The leave must therefore fall within another section of the Act in order to justify the denial of EI benefits. That is section 31 of the Act. So the proper issue in this appeal is suspension for misconduct, rather than voluntary leave of absence without just cause. The Commission implicitly recognizes this in its Representations (GD4-3), where it refers to three of the four factors in assessing whether there is misconduct or not. They were wilfulness, impact on the employment relationship and cause of the suspension. But the Representations overall focus on voluntary leave of absence without just cause, rather than on misconduct.

[14] That Appellant says that the claim she had stopped working by voluntarily taking leave from work was false. She was forced on a leave of absence without pay because of the Policy. She had not been vaccinated against COVID-19. She does not dispute that this was the reason for the leave of absence.

[15] I find that the employer placed the Appellant on an unpaid leave from her job because she had not complied with the Policy. That reason is not a voluntary leave by the Appellant. In the circumstances of this appeal, that reason is, if proven, misconduct.

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] To be misconduct under the law, 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]

[18] 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]

[19] 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]

[20] The Commission says that there was misconduct because the factors of wilfulness, the impact on the employment relationship and cause of the loss were proven.

[21] The Appellant says that there was no misconduct because she was and remained available to work including teaching online. Most of her courses had been taught online since COVID-19 led to lockdowns. Once the employer placed her on leave, the courses she had taught online were given to other teachers and were taught online. She had offered to work with the employer to find a way to continue carrying out her duties while she remained unvaccinated. The employer would not agree.

[22] I find that the Commission has proven that there was misconduct, because it has proven all four of the factors in EI misconduct set out in the paragraphs above.

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

[23] I will begin with background evidence on the employment relationship between the Appellant and the employer, including the Policy and its communication to employees, and the actions of the employer and the Appellant. Then I will consider that evidence, and additional evidence, under the headings of the four factors that constitute misconduct for EI purposes. After that I will review a number of reasons the Appellant gave in support of her appeal that I cannot take into consideration and why that is so. These are reasons not dealt with under the next five subheadings as part of the misconduct analysis.

– **Background findings**

[24] The Appellant was a professor of practical nursing at a bilingual community college of applied arts from December 2017. She was fluent in both French and English, so could teach in either language. She was the main theory teacher for the employer in her program. Beginning in early 2020, when the government imposed COVID-19 lockdowns, the Appellant taught her theoretical courses remotely, over the internet. Practical courses she taught in-person, wearing personal protective equipment (PPE) and practising other safety measures such as distancing and disinfecting. In the 2020-2021 academic year, she taught most of her courses online, and taught the few in-person lab courses partly online, and partly in-person. The four courses she was scheduled to teach beginning on September 8, 2021, were theoretical and could be delivered by Zoom. The Appellant said that her employer changed her four courses to in-person just before the semester was to begin in September 2021. That testimony is contradicted by the Appellant's email to the employer on September 7, 2021 (GD3-57 translation to English; GD3-52, original French). At the conclusion of the email, she stated, "I teach the 4 classes face to face (my first class is tomorrow) please tell me how I will teach tomorrow if I don't have access to the site." I accept the Appellant's email statement, written the day before she courses started, over her testimony a year and a half later. Her four courses starting on September 8, 2021, were all in-person, not remote.

[25] The Appellant remained unvaccinated against COVID-19 during the remaining employment with the employer, ending in June 2022.

[26] The employer sent a memo to all concerned on August 16, 2021, giving information on the coming Policy (GD3-68). This was the first notice with any detail of what the Policy contained. Anyone wishing to have access to any of the employer's facilities must have received at least one dose of the vaccine by September 7, 2021, and two doses as of October 4, 2021. After October 4, 2021, anyone wishing to access the employer's facilities or campuses who "have not received the two doses of vaccine will be required to undergo increased health and safety measures, such as enhanced screening and regular COVID-19 testing, to gain access to campuses and facilities." The Appellant understood this to allow the unvaccinated to continue working by using these increased measures.

[27] On August 20, 2021, the employer sent a memo to all employees (GD7-2). The memo was about the return to work for the 2021-2022 school year. The employer was offering a hybrid program to students, with some courses being online and others being in-person. Recognizing that remote work was the best way to protect health, some work still needed to be done in-person to maintain quality. The purpose was to permit all employees to do their work in the best possible conditions, mindful of the health and safety of the school community.

[28] In August 2021, the employer announced that it had created a mandatory COVID-19 vaccination policy (Policy). The employer emailed a copy of the Policy to all concerned on August 27, 2021 (GD3-73). The copy of the Policy in the file (GD3-76, in French only) leaves the entry into force date blank, as well as the date of the next revision. It states that the date of the last revision was August 19, 2021. But it states that it does not replace a previous version. Supporting documentation on exemption was to come.

[29] The Policy defined 'campus' and 'sites' as physical locations where the employer provided education programs or other programs and services offered by the employer. The Policy required that all persons seeking access to the employer's campus, sites or establishments to live work or visit must be vaccinated. All persons seeking access to a campus or site had to provide proof of vaccination, either full vaccination or having the

first dose of a two-dose vaccine. Persons who provide false attestations or documents about vaccination will be subject to discipline, up to dismissal for employees. The Policy itself contains no deadline dates for receiving the vaccination.

[30] The "FAQ" document attached to the Policy (GD3-88 in English) sets out the deadlines: at least one dose of the vaccine by September 7, 2021, and two doses as of October 15, 2021. The latter date has been changed from October 4th in the memo of August 16th. The FAQ says that unvaccinated people will be required to undergo rapid testing, with details to come. The FAQ states, "Until further notice, all labs will be offered face-to-face (on campus) and theory courses will be given online through Zoom."

[31] On September 3, 2021 (the Friday before the Labour Day weekend) the employer notified the Appellant in a telephone conversation she was not to come onto campus for her classes starting on Wednesday, September 8, 2021.

[32] On September 3, 2021, the employer sent an email to all concerned to update them on specific requirements to access its sites and campuses (GD3-97). For employees not vaccinated for personal reasons, they can opt for a leave of absence without pay to give time to rethink their position on vaccination. A request to opt out had to be submitted. The Appellant did not submit a request. As of October 15, 2021, anyone seeking to access the employer's campuses or sites had to be fully vaccinated with two doses and had to wait for 14 days after the second dose for access.

[33] The Appellant wrote to the employer on September 7, 2021, stating her position on vaccination for COVID-19, and asking how she is to teach her in-person classes starting the next day, in light of the employer's September 3rd emailed update (GD3-57 English translation; original French GD3-52). The employer responded on September 10th stating that she was placed on an unpaid leave of absence because she was unfit to work under the Policy (GD3-58, English translation; original French GD3-51). This was despite a letter of support for the Appellant from a colleague (GD3-59, English translation; original French GD3-46).

[34] The employer's further email on September 14, 2021, clarified the earlier email (GD3-105). Access to a site of the employer required having received two doses of the vaccine by October 15, 2021. The email did not mention access to a campus. Waiting 14 days after the last dose was no longer required.

[35] On September 22, 2021, the employer sent a memo to students, staff and clients about mandatory proof of vaccination (GD3-119). The memo referenced access to the employer's campuses and sites, as previously communicated. It required that proof of vaccination be downloaded to the employer's mobile application.

[36] On September 30, 2021, the employer sent a letter to the Appellant placing her an unpaid leave of absence from September 12, 2021, to December 31, 2021 (GD3-38 English translation; original French, GD3-26 and 120). The employer recognized her choice not to be vaccinated. The unpaid leave was based on the Appellant's inability to work based on her non-compliance with the Policy. If she decided to comply, the employer requested that she notify it by November 19, 2021, to allow for scheduling her classes for the winter semester. If she remained non-compliant with the Policy for the winter semester, her continued inability to work because of the Policy could lead to consequences for her employment including termination of employment. On November 30, 2021, the employer emailed the Appellant to extend her leave without pay until the end of the winter semester (GD3-27).

[37] The Appellant filed a grievance against the leave without pay through her union. The matter was delayed until June 2022. The matter was settled by a confidential agreement. The Appellant's employment ended on June 8, 2022.

– **Wilfulness**

[38] I find that the Appellant's decision not to be vaccinated against COVID-19 was wilful, that is intentional, conscious and deliberate. The Appellant gave testimony about her reasons for not taking the COVID-19 vaccine, based on health risks, privacy concerns, and her lack of informed consent to the vaccine. The testimony confirms the Appellant's statements in her September 7th email to the employer about returning to work the following day (GD3-57, English translation; GD3-52, original French).

[39] It is well-established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the Employment Insurance Act (EI Act).[10]

– **Impairment in carrying out duties owed to the employer**

[40] I find that the Appellant's non-compliance with the Policy did impair her in carrying out her duties to the employer. The Appellant says quite correctly that despite not being vaccinated her ability to do the work of teaching was not impaired. But the impairment in carrying out the duties in this case arose from the Appellant's non-compliance with the Policy. By not being vaccinated, she was not permitted to be on campus to teach in-person courses. The four courses she was to teach starting on September 8th were all in-person. The Appellant recognized this problem in her email to the employer on September 7th, asking how she will teach tomorrow if she does not have access to the site.

[41] The Appellant submitted that the Policy was unreasonable. The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.[11]

[42] It was not necessary for me to evaluate the employer's policy for reasonableness, or to assess the safety of the vaccines or the privacy or consent issues raised, in order to make a determination on the issue of whether the Appellant was suspended for misconduct.

– **Knew or should have known of the real possibility of suspension**

[43] I find that the Appellant should have known of the real possibility of suspension. She testified that she was not aware of the consequences for not taking the vaccine. This was because the Policy requirements kept changing. The changes were noted

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[10] *Canada (Attorney General) v Bellevance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[11] *Canada (Attorney General) v Marion,* 2002 FCA 185.

above under the heading, “Background findings”. The second deadline changed from October 4th to October 15th. The 14-day waiting period after getting the vaccination was dropped. From August to September, the statements about working with employees became more restrictive. The August 16th memo and the Policy deal with access to the employer’s facilities. They do not deal with employees working remotely. The memo stated that unvaccinated persons would be required to undergo increased health and safety measures such as enhanced screening and regular testing to gain access to the facilities. The Appellant testified that she was willing to undergo rapid testing and to comply with other measures, such as PPE, distancing and disinfection steps. Her efforts to work with the employer on that issue were rejected. The Policy only mentioned discipline up to termination of employment for those who submitted false attestations or documents. There was no mention of discipline for those who remained unvaccinated and unaccommodated for medical or human rights reasons. The FAQ attached to the Policy restricted the other health and safety measures in the August 16th memo to those who had been granted accommodation for medical or human rights reasons. The Appellant did not request any accommodation. The FAQ also stated that all labs will be offered face-to-face (on campus) and theory courses will be given online through Zoom. The August 20th memo was again supportive of employees, in general terms. It did require employees to work in a hybrid model of personal attendance and remote work.

[44] From that brief review, it would not be clear to the Appellant that she could be suspended. There was no mention of discipline for not being vaccinated.

[45] Those reasons supporting the Appellant’s position are opposed by the evidence supporting the Commission’s position. There was mention from the beginning of the employer’s communication that persons would not be allowed on campus if they were not vaccinated. The FAQ attached to the Policy states that the employer has the right to determine the schedule and work location of employees. That means that a supervisor has the right to require an employee to return to the office. The employer’s email of September 3, 2021, provided notice that those employees not vaccinated for personal reasons, had the option or requesting an unpaid leave of absence to think it

over. Also on September 3rd, the employer told the Appellant by phone that she was not to come onto campus for her classes starting on Wednesday, September 8, 2021. Those two events on September 3rd made it clear to the Appellant that she had to be vaccinated to return to her in-person classes, and that unpaid leave was a possibility, even though it was phrased as the employee's request. The Appellant emailed the employer on September 7th asking how she could teach the next day in-person. The employer responded on September 10th, putting her on a leave of absence. The employer's letter of September 30th formalized the leave of absence effective September 12, 2021.

[46] The reasons on each side are close. But there is one piece of evidence that tilts the scales in the Commission's favour. That is an email from the Director of the Appellant's union to her on August 31, 2021 (GD7-4, French only). That precedes the events of September 3rd, 7th and 10th. The Director was very clear. The Appellant could ask whatever she wished, but the employer had no obligation to accommodate her request outside of the accepted grounds of exemption. If the employer accepted that she could teach all your courses remotely, all would be well. But the employer had no authority to allow her on campus if she did not meet the criteria in the Policy. He stated, "Differently, I cannot be more clear that you put your employment at risk, or at least, your salary for the semester." (my translation). He said that the arguments she gave will probably not be accepted by the employer, an arbitrator or a court. Legal opinions he has seen, and his understanding of the opinions colleges have received, say that the colleges are within their right to implement such policies. She could pursue a grievance against the employer if it refused to change her teaching from in-person to remote. The union would support such a grievance but could guarantee nothing.

[47] For most of August, the Policy and documents from the employer did not clearly bring home to the Appellant the risk of leave without pay, or anything worse. The union Director's email of August 31st clearly communicated that risk to the Appellant. That risk was confirmed to the Appellant by the events of September 3rd to 10th. The employer formalized the unpaid leave without pay effective September 12, 2021.

[48] Based on the above analysis, I find that the Appellant should have been aware of the risk of suspension before it happened.

– **Cause of the suspension**

[49] I find that the Appellant choosing not to be vaccinated against COVID-19 was the cause of her suspension. The Appellant does not dispute that cause, and there is no evidence to show some other cause.

– **The Appellant's other reasons in support of her appeal that I cannot take into consideration**

[50] The Appellant said that because she had paid into the EI program for 25 years, she is entitled to receive EI benefits. Employment insurance is not an automatic benefit. Like any other insurance scheme, you must meet certain requirements to qualify. If you are disentitled from receiving EI benefits because of misconduct, you do not meet those requirements. The Commission has proven that the Appellant was suspended from her job because of misconduct. This means that the Appellant is disentitled from receiving benefits, even though she has paid into the EI program for many years.

[51] The Appellant said that she was put out of work from September 2021 to May 2022 for no valid reason, because she could have worked remotely. If misconduct is proven, as it has been in this appeal, then that is a valid reason for the suspension from work for that period.

[52] The Appellant said that the Policy did not allow other suitable options and did not allow dialogue. An employer has the right to create policies and to craft the terms to its business requirements. It does not have an obligation to allow employees to modify the terms, or to allow for dialogue, though it is free to do either. The employer did neither in this case.

[53] The Appellant said that the Policy was a breach of her employment contract. The issue in misconduct matters is the conduct of the employee, not the conduct of the employer. If there was a breach of that contract, her remedy lies with the courts, or with the grievance process under a collective agreement.

[54] The Appellant said that the courses she had taught online were given to other teachers in September 2021 and were taught online by them. She also said that there were other employees who were not vaccinated, but who were allowed to work remotely after she was put on leave without pay. Assuming that this is true, it is not relevant to the EI misconduct issue, which focuses on the claimant's actions, not on the employer's actions. This conduct of the employer may have been unfair or worse, but the remedy lies with the courts, the grievance process, or a human rights body.

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

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

Conclusion

[56] 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.

[57] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section