



Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 1265

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

## Decision

**Appellant:** J. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (537028) dated September 27, 2022 (issued by Service Canada)

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**Tribunal member:** Nathalie Léger

**Type of hearing:** Teleconference

**Hearing date:** February 27, 2023

**Hearing participant:** Appellant

**Decision date:** March 11, 2023

**File number:** GE-22-3333

## 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 put on leave without pay because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant was put on leave without pay on March 25, 2022. The Appellant's employer says that he was put on leave because he refused to get vaccinated, which went against its vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He also says he should have been given two more weeks to comply. I will explain why later in this decision.

[5] The Commission accepted the employer's reason for the dismissal. It was decided that the Appellant was put on leave without pay because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] I have to decide if what the Appellant has done can be qualified as misconduct under the Act.

## Issue

[7] Did the Appellant lose his job because of misconduct?

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

## Analysis

[8] 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>

[9] To answer the question of whether the Appellant was put on leave without pay because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

### Why did the Appellant lose his job?

[10] I find that the Appellant was put on leave without pay because he went against his employer's vaccination policy.

[11] Both parties agree that this is the case and I see nothing in the evidence that could lead me to believe otherwise.

### Is the reason for the Appellant's leave without pay misconduct under the law?

[12] The reason for the Appellant's leave without pay is misconduct under the law.

[13] 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 leave without pay 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.

[14] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Appellant doesn't have to have

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

<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>5</sup>

[15] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.<sup>6</sup>

[16] The law doesn't say I have to consider how the employer behaved.<sup>7</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.<sup>8</sup>

[17] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>9</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[18] The Commission has to prove that the Appellant was put on leave without pay 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 put on leave without pay because of misconduct.<sup>10</sup>

[19] The Commission says that there was misconduct because

- the employer had a vaccination policy
- the policy was communicated to all employees, including the Appellant, and reminders about its application were sent

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<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See section 30 of the Act.

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

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the employer sent letters and exchanged emails with the Appellant to communicate what it expected
- the Appellant knew or should have known what would happen if he didn't follow the policy.

[20] The Appellant says that there was no misconduct because he could not reasonably know he could lose his job so soon after his second request for accommodation.

### **The employer's policy**

[21] The Appellant admits he was aware<sup>11</sup> of the policy<sup>12</sup> and knew that eventually, he could be put on leave without pay if he did not get vaccinated. He explained at the hearing that his employer's policy must be read together with the *Guide for implementation of the Policy on COVID-19 Vaccination and Testing*<sup>13</sup> (implementation guide) that his employer had also published.

[22] The Appellant relied heavily on both the policy and the guide to argue that his employer acted unfairly in not following its own protocol. For example, he says his employer should have answered his accommodation request through the dedicated system instead of by email, or that he should have been given more time after his second request for accommodation.

[23] Even if what I have to evaluate to decide the relevant issues in this case is not the conduct of the employer<sup>14</sup>, it seems important to review some elements. This is true

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<sup>11</sup> This was mentioned at the hearing and was said to the Commission's agents on several occasions. See GD3-19, GD3-26, GD3-27.

<sup>12</sup> GD3-28 to GD3-39

<sup>13</sup> GD3-40 to GD3-50

<sup>14</sup> See paragraph 16, above.

because they were pleaded by the Appellant but also because they will shed light on the issue of misconduct.

[24] The policy's objectives are clear. The main one, as stated at section 5.1.1 is: “[t]o take every precaution reasonable, in the circumstances, for the protection of the health and safety of employees. Vaccination is a key element in the protection of employees against COVID-19”.<sup>15</sup>

[25] The vaccination and attestation requirements are stated in the next section of the policy<sup>16</sup>. The first expectation is that all employees are fully vaccinated by the full implementation date. This date, and other ones relating to the implementation of the policy, are stated in the implementation guide. Those who can be accommodated based on a certified medical contraindication, religion or another prohibited ground for discrimination are not subject to this obligation. The approach to accommodation is dealt with in more details in the implementation guide. It will come back to this later.

[26] Furthermore, the policy provides an exception for those who are unable to be vaccinated and who must report to work on-site. Those employees are not required to be vaccinated but will be required to be tested regularly.<sup>17</sup>

[27] The second expectation is that all employees will disclose their vaccination status by providing an attestation in the designated system<sup>18</sup>.

[28] The consequences for non-compliance to both those requirements are clearly stated at section 6.7 of the policy.<sup>19</sup> Those consequences will apply either when an accommodation does not apply, when an employee is unwilling to be fully vaccinated or is unwilling to disclose his vaccination status.

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<sup>15</sup> GD3-29

<sup>16</sup> GD3-30

<sup>17</sup> GD3-30 at 6.1.4

<sup>18</sup> GD3-30 at 6.1.2

<sup>19</sup> GD3-31

[29] The main consequence is the following: two weeks after the attestation deadline, an employee who is non-compliant will be placed on administrative leave without pay until he or she becomes vaccinated, or an accommodation is approved.<sup>20</sup>

### **The implementation guide**

[30] The implementation guide provides for the details of the implementation of the policy. It contains a “Timeline for implementation and compliance”<sup>21</sup>. The first important date to take into consideration is November 26, 2021. That is the date by which employees must enter their vaccination status in the system.

[31] But it is also the date by which employees must have presented their accommodation requests to their managers. The Appellant pleaded at the hearing that delays for presenting accommodation requests were cumulative in the sense that once the delay expired after his request for accommodation based on religious grounds was refused, he then had more time to present a second request for accommodation, this time based on medical grounds.

[32] This is not what the implementation guide says. In the timeline section, it is written : “ Employees unable to be vaccinated should request accommodation no later than November 26, 2021”. Then, in the section on accommodation, at step one, it is written : “Employees should make the request for accommodation and provide supporting documentation to their managers at the earliest opportunity or by the attestation deadline”.

### **Analysis**

[33] To argue, as did the Appellant, that the delays are cumulative would result in an unfair and inefficient waiting game. What the policy and the implementation guide provided for was a clear, precise and orderly manner for dealing with genuine

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<sup>20</sup> GD3-31 at 6.7.1.2

<sup>21</sup> GD3-41

accommodation requests. The goal of the process was certainly not to grant an indefinite time to employees to comply as late as possible.

[34] The Appellant says he should not have been refused EI benefits because of misconduct because his employer has not followed its own policy in putting him on leave without notice less than two weeks after his second accommodation request was refused. Not only is this not how the policy and Implementation guide was written, it was also him who did not respect his obligation in not asking for both forms of accommodation (religious and medical) “at the earliest opportunity or by the attestation deadline”. This, in itself, is enough in my view to reject the Appellant’s arguments.

[35] Furthermore, it is not the timing of the sanction that is important in misconduct cases but the knowledge of the sanction for non-compliance. The Appellant does not deny that he knew he could be put on leave without pay if he did not meet the expectations stated in the policy. Therefore, the fact that he does not agree with the timing of the imposition of the sanction is irrelevant to this finding.

[36] The Appellant refers me to some decisions of the Tribunal that, in his view, support his case. It is important to mention here that I am not bound by decision from other Tribunal members. I can rely on them as precedent, but I am not bound to follow them.

[37] The first decision is *AL v Canada Employment Insurance Commission*<sup>22</sup>, a decision by my colleague Mark Leonard in another case about vaccination. This decision has facts that are quite different from those of this case. First of all, the collective agreement that applies to the Appellant does not contain a similar disposition about vaccination. Second, the Appellant has submitted a grievance contesting the validity of this employer’s policy. That grievance still has to be heard. Finally, I do not agree with my colleague that an employer can never add to the employment contract. But the validity or legality of this modification is for a labour arbitrator to decide, not the Tribunal.

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<sup>22</sup> *AL v Canada Employment Insurance Commission*, 2022 SST 1428



[38] The second decision is *DL v Canada Employment Insurance Commission*<sup>23</sup>, by my colleague Gary Conrad. The Appellant refers me more specifically to paragraphs 5, 15, 16, 20, 25 and 26. Again, this decision has facts that are different from those of the Appellant's case. In that decision, the Commission conceded the appeal, which means they agreed that they should not have found that misconduct had been proven in that instance. This is because the Commission – and the Tribunal member agrees with this – found that the appellant in that case had complied with her employer's policy. It is not the case in here.

[39] Finally, the Appellant refers me to *NE v Canada Employment Insurance Commission*<sup>24</sup>. This is a decision of the Appeal division, where it was decided that the appeal should not have been summarily dismissed by the General division. Janet Lew, the Appeal division member who wrote this decision, decided that the validity of an employer's vaccination policy could sometimes be examined by the Tribunal. But this was in the very specific and exceptional circumstance where an employer had not provided a possibility of accommodation based on religious grounds in its mandatory vaccination policy. It is not true in the Appellant's case, where the policy clearly provides for accommodation on religious grounds. The Appellant has even provided statistics to the effect that the employer has, even if not often, agreed to accommodate employees who refused to be vaccinated because of their religious beliefs.<sup>25</sup>

[40] Considering all of the above, I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that clearly explained the requirements in terms of vaccination and disclosure of vaccination status.
- the employer clearly explained in its policy the timeline for requesting accommodation based on medical OR religious ground.

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<sup>23</sup> *DL v Canada Employment Insurance Commission*, 2022 SST 281

<sup>24</sup> *NE v Canada Employment Insurance Commission*, 2022 SST 732

<sup>25</sup> GD3-62

- the employer clearly stated that all accommodation requests should be made as soon as possible or before November 26, 2021.
- the employer sent written communications (emails) to the Appellant to communicate what it expected and the consequences of not meeting the expectations.
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy, especially considering the employer's last email dated March 14, 2022.<sup>26</sup>

### **So, was the Appellant put on leave without pay because of misconduct?**

[41] Based on my findings above, I find that the Appellant was put on leave without pay because of misconduct.

[42] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be put on leave without pay.

### **Conclusion**

[43] The Commission has proven that the Appellant was put on leave without pay because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[44] This means that the appeal is dismissed.

Nathalie Léger  
Member, General Division – Employment Insurance Section

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<sup>26</sup> GD3-56-57