



Citation: *NB v Canada Employment Insurance Commission*, 2023 SST 51

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 (490199) dated June 15, 2022
(issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: November 23, 2022

Hearing participant: Appellant

Decision date: January 20, 2023

File number: GE-22-2378

Decision

[1] I am granting N. B.'s appeal, in part.¹

[2] Her employer suspended her because she didn't follow its mandatory COVID vaccination policy.

[3] The Canada Employment Insurance Commission (Commission) has proven her employer suspended her for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. In other words, because she did something that caused her to be suspended. This means she is disentitled to Employment Insurance (EI) benefits during her suspension.²

[4] But her suspension ended on December 24, 2021, the last day of her employment contract.

[5] Under the EI Act, this means that her disentitlement ended on that day. So she is entitled to EI benefits after this date, as long as she meets all other conditions of eligibility.

Overview

[6] The Claimant worked for the Canada Revenue Agency (employer).

[7] In December 2021, her employer put her on administrative leave without pay—which the EI Act calls a suspension.³ The employer says it put her on leave because she didn't follow its mandatory COVID vaccination policy (vaccination policy).

¹ In my decision, I refer to N. B. as the "Claimant", rather than the "Appellant". I am doing this because the *Employment Insurance Act* (EI Act) uses the word "claimant", meaning a person who has made a claim for EI benefits. And she is appealing the Commission's decision to deny her EI claim.

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 Section 31 of the EI Act uses "suspension". In this decision, an administrative leave without pay means a suspension.

[8] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from her job for a reason the EI Act considers to be misconduct. Because of this, the Commission didn't pay her EI benefits.

[9] The Claimant says her employer unjustly and illegally placed her on an administrative leave without pay. She says the Commission hasn't proven her conduct is misconduct. She says she didn't know there was a real possibility she would be suspended. She complied with her employer's vaccination policy, and she thought her human rights would be protected. Finally, she argues that even if she was suspended for misconduct, her suspension ended when her contract ended. So she should be able to get benefits after that.

[10] I have to decide whether the Claimant got suspended from her job for misconduct under the EI Act. And if she was suspended for misconduct, whether that suspension ended.

Matters I have to consider first

Documents submitted to the Tribunal after the hearing

[11] The Claimant and the Commission submitted documents to the Tribunal after the hearing.

[12] The Claimant referred to her contract of employment during the hearing. I gave her the opportunity to send it in. And she did.⁴

[13] I am accepting this document into evidence for three reasons.

- she referred to it at the hearing
- I gave her the chance to send it in
- it is relevant to a legal issue in this case. One of the legal issues is about the Commission's decision to disentitle the Claimant beyond the date her contract

⁴ See GD7.

expired. The terms of her contract might be relevant to my decision on this issue.

[14] The Tribunal sent her employment contract to the Commission and gave it an opportunity to respond. And it did.⁵

[15] I am accepting the Commission's supplementary representations because I gave the Commission the opportunity to respond.

[16] The Claimant sent the Tribunal another document by email on January 5, 2023. There are two parts to this document.

- Recent decision of the Tribunal (*AL v CEIC*).⁶ I will consider it in my reasons (below), for two reasons. First, it was decided and released after I heard the Claimant's appeal. So she could not have sent it to the Tribunal before her hearing or referred to it at his hearing. Second, the legal issue in that appeal is similar to the Claimant's appeal. It is an appeal of the Commission's decision to disqualify a person from getting EI benefits for misconduct for not complying with the employer's COVID-19 vaccination policy. So the law that the Tribunal member interpreted and applied in *AL v CEIC* is relevant to the decision I have to make in the Claimant's appeal.
- Claimant's supplementary representations. Aside from a brief section on *AL v CEIC*, these representations repeat arguments the Claimant already made or could have made prior to the hearing or at the hearing. I will consider her argument about *AL v CEIC*. I will not consider the other sections of the document because her chance to make those arguments had passed.

⁵ See GD9, the Commission's Supplementary Representations.

⁶ The decision hasn't been published, so it doesn't have a neutral citation and it refers to the claimant by their name. To respect the claimant's privacy, I am going to cite the decision as: *AL v CEIC* (SST file GE-22-1889, December 14, 2022, Mark Leonard). And I will refer to the decision as: *AL v CEIC*.

The decision the Claimant is appealing

[17] At the beginning of the hearing, the Claimant and I discussed the decision she is appealing. We reviewed the Commission's decisions in her EI claim.⁷

[18] I also summarized the Commission's position for the Claimant.⁸ It says it imposed a disentitlement under section 31 of the EI Act.⁹ It says a leave without pay is a suspension under section 31. And because she was suspended due to misconduct, the Commission decided she isn't entitled to benefits from when her employer placed her on unpaid leave.

[19] The Commission also responded to the Claimant's argument that she should only be disentitled to EI benefits up until her contract ended—and says again that it suspended the Claimant.¹⁰

[20] I find that the Commission disentitled the Claimant to EI regular benefits under section 31 of the EI Act. In other words, it treated her case as a suspension for misconduct. I base my finding on the words the Commission used in its decisions

⁷ **Original decision (April 8, 2021), see GD3-23:** You are not entitled to Employment Insurance benefits from December 12, 2021 because you lost your employment with GOUVERNEMENT DU CANADA / GOVERNMENT OF CANADA on December 10, 2021 as a result of your misconduct. To receive regular benefits ... You may be able to receive special benefits such as ... “**Original decision (April 11, 2021), see GD3-25:** You are not entitled to Employment Insurance benefits from December 12, 2021 because you lost your employment with GOUVERNEMENT DU CANADA / GOVERNMENT OF CANADA on December 10, 2021 as a result of your misconduct. To receive regular benefits ... “**Reconsideration decision (June 15, 2021), see GD3-100:** Issue: Misconduct. We are changing our decision to the following: You are not entitled to Employment Insurance regular benefits starting on December 13, 2021 because you stopped working for the GOVERNMENT OF CANADA, on December 9, 2021, due to misconduct under the *Employment Insurance Act*. [I have added the underlining.

⁸ See the Commission's representations at GD4.

⁹ See GD4-1, where the Commission says the “issue under appeal” is: “The claimant is appealing the Commission's decision resulting from her request for reconsideration under Section 112 of the Employment Insurance Act (the Act) regarding a disentitlement imposed pursuant to section 31 of the Act for having been suspended from her employment by reason of her own misconduct.

¹⁰ See the Claimant's argument in her appeal document GD2. The Commission's argument is at GD4-4 and GD4-5: “Although the claimant argues her suspension has terminated, there is no information or documentation to show this is the case. The Record of Employment shows that the claimant is on leave due to non-compliance with the vaccination policy (GD3- 18). Even if the suspension was terminated, the claimant was dismissed and would not be entitled to benefit as result of her misconduct.”

letters—"entitled" and the distinction between "regular benefits" and "special benefits".¹¹ I also base my finding on the Commission's representations, which say the decision the Claimant is appealing is a "disentitlement imposed pursuant to section 31".¹²

[21] So, the Claimant is appealing the Commission's disentitlement under section 31 of the EI Act.

[22] I also find the Commission didn't disqualify her for misconduct under section 30 of the EI Act. It didn't use the word disqualification in its decision letters or refer to a section 30 disqualification in its representations (GD4). This means I don't have the legal power to consider whether the Claimant should be disqualified for misconduct (or voluntary leaving without just cause) under section 30 of the EI Act.¹³

Issue

[23] There are two issues in this appeal:

- Did the Claimant get suspended from her job because of misconduct under section 31 of the EI Act?
- If she was suspended for misconduct, did her suspension end (and if it did, when)?

¹¹ Section 31 of the EI Act imposes a "disqualification" for all types of EI benefits. In other words, it doesn't distinguish between regular and special benefits. Section 31 imposes a "disentitlement" and a person who is disentitled can still receive special benefits.

¹² GD4.

¹³ Under section 113 of the EI Act, the Tribunal can only hear appeals of reconsideration decisions made by the Commission under section 112(2) of the EI Act. The Commission didn't decide the Claimant's claim under section 30 of the Act. So I can't consider disqualification under section 30 in this appeal. The Federal Court of Appeal decisions in *Canada (Attorney General) v Easson*, A-1598-92, and *Canada (Attorney General) v Desson*, 2004 FCA 303 don't apply. These cases deal with the Tribunals' power to decide disqualification cases based on voluntary leaving or misconduct under section 30(1) of the EI Act. They don't give me the power to make a disqualification decision under section 30(1) in a case where the Claimant has appealed a disentitlement under section 31. I have also considered *Thibodeau v Canada (Attorney General)*, 2015 FCA 167. The court considered the interaction between disqualification under section 30(1) and suspension under section 31. The court said in passing (at paragraph 49) that under the EI Act a section 31 suspension that ends can be followed by a disqualification under section 30(1). However, in that case, the Commission had disqualified the claimant under section 30(1). The court ultimately decided that the Umpire was correct to uphold that disqualification.

Suspension for Misconduct

[24] 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.

[25] I have to decide two things:

- the reason the Claimant was suspended from her job
- whether the EI Act considers that reason to be misconduct

The reason the Claimant was suspended

[26] I find the Claimant's employer suspended her because she didn't comply with its vaccination policy.

[27] The Claimant says in her reconsideration request and her appeal she wasn't suspended—she was placed on involuntary unpaid leave of absence.

[28] I have to look at the facts through the EI Act. Under the EI Act an involuntary unpaid leave of absence means the same thing as a "suspension".¹⁴ Looking at it this way, the Claimant disagrees with the word "suspension". But she agrees with the underlying facts—her employer told her not to come to work and didn't pay her when she was not working.

[29] So the Claimant and the Commission agree that her employer suspended her (in the EI Act sense of that word) for not complying with its vaccination policy. That's what:

- the Claimant wrote in her EI application¹⁵
- she told the Commission¹⁶
- she wrote in her reconsideration request¹⁷
- she testified to at the hearing

¹⁴ 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.

¹⁵ See GD3-9.

¹⁶ See the Commission's notes of its phone call with the Claimant at GD3-21 and GD3-79.

¹⁷ See GD3-27, and GD3-29.

- her employer wrote on the record of employment¹⁸
- her employer wrote in the suspension letter¹⁹

[30] I have no reason to doubt the Claimant's evidence or what her employer wrote in the documents. And there is no evidence that goes against what they said.

The reason is misconduct under the law

[31] The Claimant's failure to comply with her employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[32] 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 issues I have to consider when making my decision.

[33] The Commission has to prove it's more likely than not she was suspended from her job because of misconduct, and not for another reason.²⁰

[34] I have to focus on what the Claimant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.²¹ I can't consider whether the employer's policy is reasonable, or whether a suspension was a reasonable penalty.²²

[35] The Claimant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct.²³ To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or

¹⁸ See GD3-18, where the employer wrote in the comments: "Leave due to non-compliance with the employer's vaccination policy, please treat as a code M".

¹⁹ See GD3-40 to GD3-43. That letter has the subject line, "Letter Placing Employee on Leave without Pay". It says, "...you are no compliant with the Policy and will be placed on administrative Leave Without Pay (LWOP) effective on the date of this letter until such time as you comply with the Policy". The letter is dated December 9, 2021.

²⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²¹ This is what sections 30 and 31 of the EI Act say.

²² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²³ See *Attorney General of Canada v Secours*, A-352-94.

intentional.²⁴ And misconduct also includes conduct that is so reckless that it is almost wilful.²⁵

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

[37] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.²⁷ I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or decide whether an employer breached a collective agreement.²⁸ I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.²⁹ And I can't decide whether an employer breached a claimant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Claimant say

[38] The Commission and the Claimant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Claimant's conduct is misconduct under the EI Act.

[39] The Commission says that there was misconduct under the EI Act because the evidence shows:³⁰

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ See *McKay-Eden v His Majesty the Queen*, A-402-96.

²⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

²⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

²⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁰ See the Commission's Representations at GD4.

- the employer had a vaccination policy and communicated that policy to all staff³¹
- under the vaccination policy the Claimant had to declare her vaccination status and be fully vaccinated, or get an exemption from her employer (by October 29, 2021)³²
- she knew what she had to do under the policy³³
- she also knew her employer could suspend her under the policy if she didn't give proof of vaccination (or get an exemption) by the deadline³⁴
- she didn't apply for an exemption³⁵
- she made a conscious and deliberate personal choice not to be vaccinated by the deadline³⁶
- so her employer suspended her because she didn't comply with its vaccination policy³⁷

The Commission has proven misconduct under the EI Act

[40] The Claimant says she didn't know there was a real possibility her employer would suspend her. She says she complied with her employer's vaccination policy, and

³¹ See at GD3-81 to GD3-97, Government of Canada, *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (eff October 6, 2021).

³² What employees had to do is set out in section 4.3 of the vaccination policy, at GD3-87. The deadline is included in Appendix A of the vaccination policy, at GD3-93.

³³ See the Commission's notes of its call with the Claimant at GD3-21.

³⁴ See section 7.1.2.2 of the vaccination policy under the heading "Consequences of Non-Compliance", at GD3-90: "For employees unwilling to be fully vaccinated or to disclose their vaccination status, as per Appendix A, the employer will implement the following measures: At 2 weeks after the attestation deadline: Place employees on administrative Leave Without Pay advising them not to report to work, or to stop working remotely, and taking the required administrative action to put them on Leave Without Pay".

³⁵ See the Commission's notes of its call with the Claimant at GD3-21, and her reconsideration request at GD3-29 to GD3-32.

³⁶ The Claimant was clear about her refusal. She thought her employer's vaccination policy and actions were illegal under many laws. She said this in her EI application, said this to the Commission at GD3-21, and wrote this to her employer in response to the suspension letter (at GD3-44).

³⁷ See the suspension letter and covering email at See GD3-40 to GD3-43. Above, I reviewed the evidence and decided that her employer suspended her for not complying with the vaccination policy.

she thought her human rights would be protected. Although the Claimant might have believed this, I find the policy is very clear about what she had to do, by when, and the consequences of not doing it. So, even if I accept that she didn't know, I find *she should have known* she could be suspended for not complying with the vaccination policy.

[41] Otherwise, the evidence in this appeal is consistent and straightforward. I believe and accept the Claimant's evidence and the Commission's evidence for the following reasons.

[42] I have no reason to doubt the Claimant's evidence (what she said to the Commission, wrote in her reconsideration request and appeal notice, and her testimony at the hearing). Her evidence is consistent. She said the same thing to the Commission and the Tribunal. And her story stayed the same from her first call with the Commission through the hearing.

[43] The Claimant and her employer told the Commission essentially the same thing. And there is no credible and reliable evidence that contradicts what she said.

[44] I accept the Commission's evidence because it's consistent with the Claimant's evidence. And there is no credible and reliable evidence that contradicts it.

[45] Based on the evidence I have accepted, I find that the Commission has proven the Claimant's conduct was misconduct because it has shown that she:

- knew about the vaccination policy
- knew, *or should have known* (because it was clearly written in the vaccination policy), about her duty to get fully vaccinated and give proof (or get an exemption) by the deadline
- knew, *or should have known* (because it was clearly written in the vaccination policy), that her employer could suspend her if she didn't get vaccinated

- consciously, deliberately, and intentionally made a personal decision not to get vaccinated and declare her vaccination status to her employer by the deadline
- was suspended from her job because she didn't comply with her employer's vaccination policy

My reasons for not following the Tribunal decisions in AL v CEIC

[46] The Claimant argues I should follow *AL v CEIC*, a decision of our Tribunal.³⁸ In *AL v CEIC*, AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job for a reason the EI Act considers misconduct, for two reasons:

- First, the collective agreement didn't include COVID-19 vaccination when it was signed, and the employer had not bargained with the union to include one. The Tribunal member reasoned that the employer could unilaterally impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee." And he found that there was no such legislation in the case. This meant that the employer's mandatory vaccination policy was not an express or implied condition of AL's employment. So AL's refusal to get vaccinated was not misconduct.
- Second, AL had a "right to bodily integrity". It was her right to choose whether to accept medical treatment—in this case, the COVID-19 vaccine. If her choice went against her employer's policy and led to her dismissal, exercising that right can't be a wrongful act or undesirable conduct worthy of punishment

³⁸ The Claimant in this appeal made similar arguments. His employer breached the collective agreement because mandatory COVID vaccination wasn't part of his collective agreement when he was hired. He also argued he had a right to refuse to get vaccinated.

or disqualification under the EI Act. In other words, her refusal to get vaccinated was legally justified so it can't be misconduct under the EI Act.

[47] The Commission says the *AL v CEIC* decision makes no difference in the Claimant's appeal.³⁹ It says there are many other Tribunal decisions that have decided that a claimant's failure to comply with their employer's vaccination policy is misconduct under the EI Act. It says the Claimant's conduct was misconduct.

[48] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.⁴⁰

[49] I am not going to follow *AL v CEIC*. With the respect owed to my colleague who decided *AL v CEIC*, I am not persuaded by his findings and the reasoning he relied on to arrive at those findings. In my opinion, his decision goes against the legal test the Federal Court has set out in its decisions about misconduct.⁴¹

[50] Our Tribunal does not have the legal authority (in law we call this "jurisdiction") to do two things the Member did in his decision:

- First, he should not have interpreted and applied the collective agreement to find the employer had no authority to mandate that employees get vaccinated against COVID-19.⁴²

³⁹ See GD22, the Commission's Supplementary Representations.

⁴⁰ This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I have to follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority as I have.

⁴¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

⁴² Our Tribunal members' legal authority doesn't include interpreting and apply a collective agreement. The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For example, where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement.

- Second, he should not have found that the claimant had a right—in the employment context—to refuse to comply with the employer’s vaccination policy based on the law of informed consent to medical treatment.⁴³ In other words, he had no legal authority to add to the collective agreement an absolute right for a worker to choose to ignore the employer’s vaccination policy based on a rule imported from a distinct area of law.

[51] My reasons for not following *AL v CEIC* flow from our Tribunal’s jurisdiction. My reasons aren’t based on the specific facts of that appeal *versus* the Claimant’s appeal. So my reasons aren’t limited to the circumstances and arguments the claimant made in *AL v CEIC*.⁴⁴ As I understand the Federal Court cases, when I am deciding whether a claimant’s conduct is misconduct, I don’t have the legal authority to interpret and apply an employment contract, privacy laws, human rights laws, international law, the Criminal Code, or other laws.

My reasons for not following the Tribunal decisions in GC v CEIC

[52] The Claimant argues I should follow *GC v CEIC*, a decision of our Tribunal.⁴⁵ It’s also a COVID vaccination misconduct appeal. The member allowed the appeal because the Commission didn’t prove two parts of the legal test for misconduct:

- The claimant didn’t know and could not have known that failing to disclose his vaccination status could get into the way of his duties to his employer. The

⁴³ In other words, when deciding whether there was misconduct, he focused on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. He should have focused on the conduct of the claimant. Once again, if the claimant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

⁴⁴ The Federal Court decisions I have cited also make practical and institutional sense. It doesn’t make sense for our Tribunal to interpret and apply long and complicated collective agreements (or other laws) to decide issues under the EI Act. Labour law (like privacy law, human rights law, and criminal law) is a specialized area of law. We don’t have the expertise or the resources to interpret and apply a collective agreement, an employment contract, or other laws. When we limit our role to interpreting and applying the EI Act, this allows our Tribunal to “conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit”. (This is what section 3(1)(a) of the Social Security Tribunal Regulation says our Tribunal should do.) Ultimately, this benefits the people who file appeals with our Tribunal. It also avoids situations where our Tribunal decides a collective agreement says one thing, and a labour arbitrator decides it says something else.

⁴⁵ *CG v Canada Employment Insurance Commission*, 2022 SST 356 (*CG v CEIC*)

member found it was impossible for the claimant to comply with the employer's policy based on when it came into effect. And the employer could have allowed the claimant to continue working until he was fully vaccinated, rather than dismiss him.⁴⁶

- The claimant didn't know and could not have known there was a real possibility of being let go for not complying with the policy. The Tribunal concluded that, based on the policy and his role, he didn't know and could not have forecast what this employer would do to him.⁴⁷ In other words, the policy didn't clearly deal with his circumstances, and didn't clearly say he could be dismissed in his circumstances.

[53] I disagree with the Claimant's argument about *GC v CEIC*.

[54] The member's reasons in *GC v CEIC* don't help the Claimant. Her circumstances are different in two relevant and important ways:

- I found that her employer's policy is clear.
- So, I found that she knew or should have known what she had to do and knew or should have known the consequences of not doing it.

[55] This means the legal reasons why the claimant's conduct was not misconduct in *GC v CEIC* don't apply to the Claimant's conduct in her appeal. In other words, the Tribunal's decision in *GC v CEIC* makes no difference to my conclusion that her conduct was misconduct under the EI Act.

⁴⁶ See *CG v CEIC* at paragraph 28.

⁴⁷ See *CG v CEIC* at paragraph 28.

The Claimant's other arguments about misconduct⁴⁸

[56] The Claimant says that a number of subsections in section 7 of the Employment Insurance *Digest of Benefit Entitlement Principles* (Digest) support her argument that her conduct was not misconduct:⁴⁹

[57] I don't agree, for two reasons:

- First, the Digest isn't law, so I don't have to follow it. The Digest is the Commission's internal policy. In other words, it's the Commission's rule book for staff to use when they decide EI claims. The Digest can't tell me how to decide cases.
- Second, I have to follow the EI Act, based on the plain meaning of the Act and what the courts have said about the EI Act. I have applied the legal test for misconduct –based on the court decisions—in this appeal. And I concluded that the Claimant's conduct was misconduct under the EI Act.

[58] In her appeal notice and at the hearing the Claimant also said her conduct wasn't misconduct, so the Commission should pay her EI regular benefits, because:

- her employer's vaccination policy was illegal and unreasonable
- she thought her human rights would be protected under the *Canadian Human Rights Act* and *The Canadian Bill of Rights*, employment standards law, the *Canadian Charter of Rights and Freedoms*, the *Privacy Act*, and the *Personal Information Protection and Electronic Documents Act*
- a letter from Justice Centre for Constitutional Freedoms (June 6, 2022)
- she was “constructively dismissed” under employment law, based on a *Law Times* article

⁴⁸ See GD2, GD2A, GD2B, and GD6.

⁴⁹ The Digest is available online: [Digest of Benefit Entitlement Principles - Canada.ca](https://www.canada.ca/en/ei/digest.html). The Claimant makes arguments based on section 7 of the Digest in GD2, GD2A, and GD6.

- her employer engaged in an unfair labour practice under the *Public Sector Labour Relations Act*
- Supreme Court of Canada decision about informed consent to medical treatment
- A statement from a Public Health Agency of Canada report on immunization
- the Federal government didn't invoke the *Emergencies Act*
- the UN *Declaration of Human Rights*

[59] Unfortunately for the Claimant, this doesn't change the law I have to apply, which clearly tells me I can't consider these arguments. I can only decide whether her conduct is misconduct under the EI Act. I can't make my decision based on other laws.⁵⁰

[60] The Claimant might be able to make these arguments in another type of legal case.

[61] Finally, the Claimant argued that the Commission didn't treat her claim properly or fairly and didn't follow the *Digest*.

[62] I can't accept this argument. My job in a misconduct appeal is to review the decision the Commission made, not the steps it took to arrive at that decision. I don't have the legal authority to review the Commission's conduct (acts and omissions). The Federal Court can do that, in an application for judicial review.

Summary of my finding about misconduct

[63] After considering and weighing the documents and testimony in this appeal, I find the Commission has shown the Claimant was suspended from her job for a reason the EI Act considers to be misconduct.

⁵⁰ See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.

The Period of Disentitlement: End Date

[64] I find that the Claimant's suspension ended on December 24, 2021, which is the date she lost her job because her employment contract came to an end.

[65] The Claimant says her suspension ended when her contract ended on December 24, 2021.⁵¹ She says her employer didn't offer to renew her contract. She argues that her disentitlement to EI regular benefits ended when her contract ended, under section 33(1)(a) and (2) of the EI Act.⁵²

[66] The Commission says that the end date in her contract makes no difference. It says the Claimant told it her employer extended the contracts of her colleagues who were vaccinated. She could have had her contract extended if she had complied with the vaccination policy, but she didn't, and her non-compliance resulted in her loss of employment.

[67] I find that the Claimant's employment contract was for a fixed term (September 20, 2021 to December 31, 2021). And I find her contract in fact ended on December 24, 2021. I have no reason to doubt that the contract she sent to the tribunal is real and legally valid. That contract clearly states that it is for "temporary" employment. It sets out

⁵¹ See her contract of employment at GD7. The contract says at GD7-2): "On behalf of the Canada Revenue Agency (CRA), I am pleased to provide you a temporary offer of employment in the above-noted position from September 20, 2021 to December 24, 2021. However, this period may be lengthened or shortened, depending on operational requirements and your performance." And it says at GD7-3: "Nothing in this document should be construed as a permanent offer of employment, nor should you in any way plan or anticipate continuing employment with the CRA as a result of this offer."

⁵² She makes this argument at GD6-6. Section 33 says:

33(1) A claimant is not entitled to receive benefits if the claimant loses an employment because of their misconduct or voluntarily leaves without just cause within three weeks before

- (a) the expiration of a term of employment, in the case of employment for a set term; or
- (b) the day on which the claimant is to be laid off according to a notice already given by the employer to the claimant.

(2) The disentitlement lasts until the expiration of the term of employment or the day on which the claimant was to be laid off.

the start and end dates. And says it is definitely not a permanent offer of employment, and she should not in any way plan on permanent employment.

[68] My findings about the contract are supported by her testimony. She says that her employer made her give back all her work “tools,” revoked access to her computer accounts, and did not offer to extend her contract. I have no reason to doubt her testimony about this, and there is no evidence that goes against what she says.

[69] I disagree with the Claimant’s argument that her disentitlement came to an end under section 33 of the EI Act. The Commission didn’t disqualify the Claimant under section 30(1), so section 33 doesn’t apply. Section 33 is an exception to disqualification for voluntary leaving or misconduct under section 30(1).

[70] Above, I found the Commission disentitled the Claimant under section 31 of the EI Act.

[71] Section 31(b) says that a claimant who is suspended due to misconduct isn’t entitled to receive benefits *until the claimant loses or voluntarily leaves the employment*.

[72] I find that the Claimant’s period of disentitlement came to an end on December 24, 2021 when she lost her job because her contract ended.

[73] Under the EI Act, the Commission can decide a claimant should be disqualified once a disentitlement ends under 31(a) or (b).⁵³ It is up to the Commission, not the Tribunal in this appeal, to decide whether, and if so how, to apply sections 30 and 33 to the Claimant.

⁵³ See *Thibodeau v Canada (Attorney General)*, 2015 FCA 167.

Conclusion

[74] The Commission has proven that the Claimant was suspended from her job for misconduct under the EI Act.

[75] Because of this, the Claimant is disentitled from receiving EI benefits for the period of her suspension.

[76] But I have found that her suspension ended on December 24, 2021.

[77] This means that she is entitled to EI benefits after this date, as long as she meets all other conditions to get benefits under the EI Act.

Glenn Betteridge
Member, General Division – Employment Insurance Section