



Citation: *BA v Canada Employment Insurance Commission*, 2023 SST 1800

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

## Decision

**Appellant:** B. A.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (556021) dated December 7, 2022 (issued by Service Canada)

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**Tribunal member:** Edward Houlihan

**Type of hearing:** Videoconference

**Hearing date:** May 29, 2023

**Hearing participant:** Appellant

**Decision date:** August 24, 2023

**File number:** GE-23-66

## 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 his job and lost his job because of misconduct (in other words, because he did something that caused him to be suspended and to lose his job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits while he was suspended<sup>1</sup> and disqualified from receiving EI benefits after he was dismissed.<sup>2</sup>

## Overview

[3] The Appellant worked as a nurse in health care facility in British Columbia. When the Covid-19 pandemic began, his employer implemented a mandatory vaccination policy for all employees.

[4] All employees had to be vaccinated against Covid- 19 by October26, 2021.The Appellant was suspended from his job on October 25, 2021.He lost his job on December10, 2021. The Appellant's employer said that he was suspended and then dismissed because he refused to comply with their mandatory vaccination policy. He refused to be vaccinated against Covid-19.

[5] Even though the Appellant doesn't dispute that this happened, he says that he shouldn't have been suspended or dismissed because he wasn't vaccinated.

[6] He says he didn't get vaccinated because had concerns about how the vaccine would affect his health. It was also unfair that British Columbia was the only province that wouldn't allow unvaccinated nurses to return to work.

[7] The Commission accepted the employer's reason for the suspension and dismissal. It decided that the Appellant was suspended and then dismissed because of

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (the Act) says that Appellants that are suspended because of misconduct are not entitled to receive benefits.

<sup>2</sup> Section 30 of the Act says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

misconduct. Because of this, the Commission decided that the Appellant is disentitled to EI benefits while he was suspended and disqualified from receiving EI benefits after he was dismissed.

## **Issues**

[8] Was the Appellant suspended because of misconduct?

[9] Was the Appellant dismissed because of misconduct?

## **Analysis**

[10] For both of these questions I have to decide two things. First, I have to determine why the Appellant was suspended and why he was dismissed. Then, I have to determine whether the law considers the reasons for his suspension and dismissal to be misconduct.

### **Why was the Appellant suspended?**

[11] I find that the Appellant was suspended because he failed to comply with his employer's mandatory vaccination policy.

[12] The Appellant doesn't disagree that he was suspended because he didn't comply with the vaccination policy.

[13] The Commission says that his employer told him he had to provide proof that he was vaccinated by October 26, 2021, to continue working. If he didn't, he would be placed on a leave of absence without pay (that means suspended).<sup>3</sup>

[14] I find that The Appellant was suspended because he failed to provide proof that he was vaccinated by the deadline as required by the employer's vaccination policy. He knew what was required and he knew that he would be suspended if he didn't comply with the policy.

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<sup>3</sup> See GD3-31

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

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

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Appellant doesn't have to have 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>6</sup>

[17] 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>7</sup>

[18] The Commission has to prove that the Appellant was suspended 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 because of misconduct.<sup>8</sup>

[19] The Commission says that there was misconduct because the employer had implemented a mandatory vaccination policy and had communicated the policy to all the employees. The employer had made it clear that if they didn't comply with the policy they would be suspended.

[20] The Appellant knew that if he didn't comply with the vaccination policy, he would be suspended but he chose not to comply with the policy.

[21] The Appellant says that there was no misconduct intended because he had real concerns about how the vaccine could affect his health. The Appellant says there is a

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

history of heart problems in his family, and he was concerned about how the vaccine could affect him.

[22] The Appellant also says he felt being forced to be vaccinated interfered with the autonomy over his own body. However, the Appellant didn't apply for a medical or religious exemption from his employer.

[23] I find that the Commission has proven that there was misconduct. The Appellant's refusal to be vaccinated was a conscious and deliberate choice. He admits that he knew that if he wasn't vaccinated, he would be suspended and could be subject to discipline up to and including dismissal.<sup>9</sup>

[24] The Appellant was suspended because of misconduct. He is disentitled to receive EI benefits from October 25, 2021, until his dismissal on December 10, 2021.

### **Why was the Appellant dismissed?**

[25] I find that the Appellant was dismissed because he failed to comply with his employer's vaccination policy.

[26] The Appellant doesn't disagree that he was dismissed because he failed to comply with the employer's vaccination policy.

[27] The Appellant says that his employer shouldn't have dismissed him for not being vaccinated. He says that the employer went beyond the government mandate for health care facilities by dismissing employees.

[28] The Commission says that the Appellant was aware of the vaccination policy and the requirement that he be vaccinated by the deadline. He was also aware that if he didn't comply with the policy he would be suspended and could be dismissed.

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<sup>9</sup> See GD3-37

[29] The Commission says that the Appellant didn't change his position when he was suspended. He continued to refuse to be vaccinated and provide proof of vaccination to his employer.

[30] The Commission also says that the Appellant was dismissed because the bond of trust between him and the employer had been broken.

[31] I find that the Appellant was dismissed because he failed to comply with the employer's mandatory vaccination policy.

[32] The Appellant knew that if he wasn't vaccinated, he would be suspended and could be dismissed.<sup>10</sup> The employer chose to dismiss the Appellant.

[33] The Appellant says that his dismissal was more than the government mandate required for health care facilities. I understand the concern of the Appellant, but I don't have jurisdiction to determine whether the employer's vaccination policy that included dismissing employees exceeded the government mandate or not. The Appellant can pursue this issue in other venues including perhaps the grievance procedure or the courts.

[34] The employer's policy was clear and communicated to the Appellant that if he failed to comply with the policy he could be dismissed.

### **Is the reason for the Appellant's dismissal misconduct under the law?**

[35] I find the reason for the Appellant's dismissal is misconduct under the law.

[36] As set out above, to be misconduct under the law, the conduct has to be wilful. This means it was conscious, deliberate, or intentional. It could also have been so reckless it is almost wilful.

[37] Again, the Appellant doesn't have to mean to do something wrong for his behaviour to be misconduct under the law. It is misconduct if the Appellant knew or

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<sup>10</sup> See GD3-37

should have known that his conduct could get in the way of carrying out his duties for his employer and there was a real possibility of being dismissed because of that.

[38] The Appellant says that it is unfair that only his province, the province of British Columbia, would not allow unvaccinated nurses to return to work after the pandemic restrictions were relaxed. He says that if even he was suspended and was still not vaccinated, he should have been able to return to his job when the restrictions were relaxed.

[39] There was no evidence regarding the rules and regulations of the province of British Columbia regarding unvaccinated nurses. However, even if there was, I have no jurisdiction to address the fairness or unfairness of the provincial government's rules and regulations regarding unvaccinated nurses.

[40] The Commission has proven that there was misconduct. The Appellant knew that he had failed to comply with his employer's mandatory vaccination policy when he didn't get vaccinated. He was suspended when he wasn't vaccinated by the deadline.

[41] The Appellant knew that in addition to the suspension, the employer's policy set out that he could be dismissed for not complying with the policy.

[42] The Appellant made a conscious and deliberate choice not to be vaccinated and he continued to refuse to be vaccinated after he was suspended.

[43] The Commission pointed out that they made a clerical error regarding the dates when they notified the Appellant that he was disqualified from receiving EI benefits because of his misconduct. They said it was effective October 2, 2021, when it should have been October 24, 2021.<sup>11</sup>

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<sup>11</sup> See GD3-26.

[44] I find that this error did not cause prejudice to the Appellant. He was suspended and disentitled to EI benefits at the time. The mistake on the date of disqualification was a minor mistake that the law says isn't fatal to the Commission' decision.<sup>12</sup>

## **Conclusion**

[45] The Commission has proven that the Appellant was suspended from his job for misconduct and is disentitled to EI benefits. The Commission has also proven that the Appellant lost his job because of misconduct and is disqualified from receiving EI benefits.

[46] This means that the appeal is dismissed.

Edward Houlihan  
Member, General Division – Employment Insurance Section

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<sup>12</sup> See *Desrosiers v. Canada (AG)*, A-128-89