Citation: *JD v Canada Employment Insurance Commission*, 2024 SST 1066

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (640001) dated January 13, 2024 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	March 12, 2024
Hearing participant:	Appellant
Decision date:	March 26, 2024
File number:	GE-24-496

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't 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 suspended because she did not comply with a mandatory COVID-19 vaccination policy (Policy).

[4] The Appellant says that she did not refuse to take the vaccine. The employer had not answered her questions about her health and safety concerns relating to the vaccine. The employer had not given her a copy of the Policy prior to her last day of work. She had complied with health-related protocols such as testing and using PPE. There was no misconduct by her. The employer put her on a leave of absence without honouring due process.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended from her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits from October 25, 2021, to April 1, 2023.

Issue

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

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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.

Analysis

[7] To answer the question of whether the Appellant was suspended because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended from her job?

[8] I find that the Appellant was suspended from her job because she had not taken the COVID-19 vaccine. That is the reason given by the employer. There is no evidence to support the suspension being imposed for some other reason.

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

[9] The reason for the Appellant's suspension isn't misconduct under the law for the reasons set out below. I begin with the facts on which this decision is based, followed by the assessment of whether those facts support the four factors of EI misconduct. I find that the Commission hasn't proven that there was misconduct, because it hasn't proven all of the four factors needed to establish that there was misconduct.

[10] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] 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.[4]

[11] 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.[5]

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

[12] Finally, the Commission must prove that the alleged misconduct was the cause of the suspension. The Commission must prove all of the four above factors to succeed.

[13] 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.[6]

[14] The Commission says that there was misconduct because the Appellant's conduct was wilful. She knew or should have known that not being vaccinated could get in the way of carrying out her duties to the employer. She knew or should have known that there was a real possibility of being suspended as a result. Her failure to take the vaccine caused her suspension.

[15] The Appellant says that there was no misconduct for the following reasons. She did not refuse to be vaccinated. The employer did not answer her questions about working from home, or about the health and safety risks of the vaccine, and the adverse consequences that might happen. The Policy was not part of her employment contract, or of the collective agreement her union had with the employer. The employer did not provide her with a copy of the Policy prior to suspending her. The employer did not give her due process. She had complied with health-related protocols such as testing and PPE. She consistently showed good faith during her employment.

– Findings of fact

[16] The Appellant is a registered nurse. She was working in a long-term care facility. Her job included assessing the residents' physical, mental and emotional conditions. She would also administer medications and treat wounds.

[17] In early 2020, COVID-19 began spreading in Canada and around the world. Various governments issued directives to health care facilities about measures to take

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[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

in response to COVID-19. Long-term care facilities were sometimes included in these directives. There is no evidence in this appeal about such directives that would be applicable to the employer, or what they would require.

[18] The main source of the evidence about the employer's COVID-19 Policy is the copy of the Policy revised in October 2022 (revised Policy). That was one year after the Appellant's suspension. There is no copy of the earlier version of the Policy (pre-2022 Policy). Without evidence to show what the terms of the pre-2022 Policy was, I cannot rely on the copy of the revised Policy as evidence of the pre-2022 Policy terms in 2021 up to the Appellant's suspension.

[19] The main evidence of the pre-2022 Policy comes from the employer. In its letter dated October 18, 2021, suspending the Appellant, the employer says that the Policy "requires that all employees be fully vaccinated against COVID-19 by October 24th, 2021" unless there is a valid exemption on medical or human rights grounds. That information was repeated in the first two of the employer's later letters to the Appellant about reviewing her status.

[20] The Commission spoke with the employer on three occasions in late November 2023. They focused solely on getting documents about the vaccination policy and about the Appellant's leave of absence. The Commission spoke with the employer again in January 2024. That conversation focused on the change in the policy in April 2023 to drop the requirement to be vaccinated. That allowed the Appellant to return to work by April 17, 2023, without being vaccinated by. She did not respond as she said she did not get the employer's letter until later in 2023 when the union was involved. The employer terminated her employment then.

[21] The Appellant testified that she did not see a copy of the COVID-19 policy until she received the GD3 file in this appeal. The copy in the file is of the revised Policy from October 2022.

[22] The Appellant also testified that up to her suspension in October 2022, there had been no information from the employer about a mandatory vaccination policy. There

had been no posting of information about a mandatory vaccination policy in the facility. Nor was there verbal communication about such a policy. The employer had required that staff regularly test for COVID-19 and report the results. The employer also required the use of PPE. She complied with these measures. The employer also provided information about vaccinations being available in the facility for staff and residents. The employer recommended the vaccine but did not require staff to take it.

[23] The Appellant also testified that in 2021 there was talk among the staff about a COVID-19 policy to come, but no firm information. The employer held information sessions that dealt with safety measures such as PPE and isolation of infected residents. The sessions also recommended the vaccine to staff, but nothing beyond that. The employer gave the Appellant no warnings that she must take the vaccine in order to continue working.

[24] The Appellant did not seek any exemption based on medical or human rights grounds.

[25] I accept the Appellant's detailed testimony over the slim evidence provided by the employer. The Commission had few conversations with the employer. The employer provided a copy of the revised Policy. The Commission relied on that revised Policy to support its decision. As noted above, I cannot rely on the revised Policy to show what the terms of the pre-2022 Policy were.

[26] The only evidence from the employer about a pre-2022 mandatory COVID-19 vaccination requirement was its statement in the October 18, 2021, letter to the Appellant. That evidence does not persuade me that there was a mandatory vaccination requirement at the time of the Appellant's suspension. There is a total lack of evidence that the consequences of non-compliance with the purported policy were brought to the attention of the Appellant.

– Ruling on misconduct

[27] I must now use those findings of fact to determine if the Commission has proven the four factors that make up the EI meaning of misconduct.

[28] First, was the Appellant's conduct in not getting vaccinated wilful? Yes. It was an intentional, conscious and deliberate choice on her part. She had seen negative effects of the vaccine on people who had received the shot. She sought information from the employer about the health and safety impacts of the vaccine. She also asked about paid leave if she had to take time off due to the vaccine's aftereffects. Not receiving a response from the employer, she decided not to take the vaccine.

[29] Second, was the Appellant's conduct a breach of a duty owed to the employer? No. The evidence does not show that the Appellant was subject to a mandatory vaccine requirement in October 2021. The only mandatory vaccine requirement proven by the Commission was the one in the revised Policy of October 2022. So, the Commission has not proven that the Appellant did breach a duty to the employer by not being vaccinated in October 2021.

[30] Third, did the Appellant know, or should she have known, of the possibility of suspension for non-compliance? No. Even if there had been a mandatory vaccination requirement in October 2021, there is no evidence of any consequences being set out for remaining unvaccinated. As is clear from the Commission's Representations, the Commission relied on the revised Policy of October 2022 to support its claim that the Appellant was aware of the consequences of not being vaccinated.

[31] Fourth, was being unvaccinated the reason for the Appellant's suspension? Yes. That was the reason given by the employer. In the absence of evidence of any other reason for the suspension, and only on that basis, I accept the employer's reason.

[32] The Appellant cited a number of Tribunal decisions as supporting her position that there was no misconduct on her part. These decisions involved employer's COVID-19 policies and alleged misconduct. She said her case was similar to *AL v Canada Employment Insurance Commission*, 2022 SST 1428. Unfortunately, that decision was overturned by the Appeal Division of the Tribunal at *Canada Employment Insurance Commission* v *AL*, 2023 SST 1032. So that case does not assist her.

[33] She referred to *JP v Canada Employment Insurance Commission,* 2023 SST 627. That decision is by the Appeal Tribunal, setting aside the General Division decision that found against the claimant on the misconduct issue. The Appeal Division allowed the appeal on procedural grounds and sent the matter back to the General Division for a rehearing. The outcome of that rehearing has not been published.

[34] Next, the case of *FA v Canada Employment Insurance Commission,* 2023 SST 1116. This decision was based on a very different fact situation, so is not applicable to the Appellant's circumstances in this appeal. The claimant in *FA* had applied for a religious exemption. The employer suspended him before it made a decision on the exemption request. In that situation the claimant was complying with the mandatory vaccination policy by seeking an exemption. So, at the time he was suspended, there was no misconduct by failing to comply with the policy.

[35] Next, the case of *LN v Canada Employment Insurance Commission*, 2022 SST 1654, appears to be in the Appellant's favour. The General Division member found that the employer's mandatory COVID-19 policy did not impose a duty on the claimant to be vaccinated. This was because the policy was inconsistent with the employment contract and the collective agreement. The Appellant made a similar point in this case. This decision was not appealed, so stands. But this decision is in the minority in the Tribunal, so it does not assist the Appellant. The General Division decisions by the same member on the COVID-19 vaccination policy misconduct issue were reversed on appeal in the *AL* and *JB* cases.

[36] Next, the case of *JB v Canada Employment Insurance Commission*, 2022 SST 1797. The General Division allowed the claimant's appeal against denial of benefits for non-compliance with a mandatory COVID-19 policy. The Appeal Division reversed that decision and found the claimant was not entitled to receive EI benefit because of misconduct: *Canada Employment Insurance Commission v JB*, 2023 SST 1062.

The Appellant's other reasons in support of her appeal that I do not have the authority to deal with

[37] The starting point here is the Tribunal's limited jurisdiction (or authority) to decide matters involving EI. Unlike the superior courts, the Tribunal does not have wide-ranging jurisdiction to deal with all factual or legal issues that may be presented to it. The Tribunal only has jurisdiction to deal with a specific reconsideration decision made by the Commission.[7] And its review of that reconsideration decision is limited to what employment insurance law provides. Many of the Appellant's other reasons raise matters outside the jurisdiction of the Tribunal. Some of those matters fall within the jurisdiction of the courts or other tribunals or boards.

[38] The following matters are outside the Tribunal's jurisdiction. The interpretation and enforcement of a collective agreement between a union and an employer. Those matters are dealt with through arbitration or labour board processes. Cases of wrongful dismissal of an employee are dealt with by the courts. The law of wrongful (or unjust) dismissal as developed by the courts does not apply to the EI interpretation of misconduct. This answers the Appellant's statement that "Asking questions to provide informed consent does not imply "misconduct" as per employment standard definition." Issues involving alleged breaches of occupational health and safety law are handled by the relevant board, not the Tribunal or courts.

[39] Continuing with matters outside the Tribunal's jurisdiction, the Appellant relied on informed consent to medical treatment. She alleges that the failure of the employer to answer her questions about the safety of the vaccine deprives her of the right to give informed consent. Informed consent relates to medical treatment. That involves medical professionals as the persons giving the information to the patient. The Appellant implicitly recognized this when she stated that she would take the employer's information and review it with a physician. The patient can then give or withhold consent to the proposed treatment. The Appellant had the option of consulting a physician in the absence of any information from the employer. The Appellant also

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[7] *Employment Insurance Act,* sections 112 and 113.

stated that in the absence of informed consent, administering the vaccine is the offence of assault under the *Criminal Code*, and is contrary to the Nuremberg Code. Matters relating to either of those Codes must be dealt with by the courts.

[40] Continuing with the matters outside the Tribunal's jurisdiction is the issue of overseeing the employer's actions. The Tribunal's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by an unjustified suspension or dismissal of the employee. Rather the Tribunal is restricted to deciding whether the claimant was guilty of misconduct and whether this misconduct led to her suspension or dismissal.[8] The focus is on the conduct of the employee, not on the conduct of the employer. The Appellant referred to her good conduct while working. She had complied with health-related protocols such as testing and PPE. She had consistently shown good faith during her employment. But good conduct does not cancel alleged misconduct for EI purposes.

[41] The Appellant also relied on her statement that the employer did not give her due process. This would include the employer's non-response to her inquiries. It is outside the Tribunal's jurisdiction to rule on that. She also asked how an employer could unilaterally decided to add the Policy as a term of the requirements to maintain employment when the Policy is not part of the employment contract or collective agreement. Employers have a wide scope for determining their policies and deciding on suspension or dismissal. An employer can suspend or dismiss a non-unionized employee at any time. The employer has the right to amend its policies. The employee is bound by those amendments. This answers the claimant's argument that the vaccine requirement was not part of her initial contract so that she does not have to comply with it. She does have to comply with the vaccination policy if it is proven. The employee's remedy is a lawsuit for wrongful dismissal, or a complaint filed under employment standards law, or a grievance under the collective agreement, followed by arbitration under labour relations laws. The Appellant referred to decisions of arbitrators in support of her reasons. Those decisions relate to labour relations law, so are not relevant to EI

[8] *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

law. This also answers the Appellant's argument based on the employer's 2023 cancellation of the Policy. She said that the temporary change in policy to require vaccination shows this is not a case of misconduct. EI misconduct is decided on the facts and policies at the time of the events. In this case, that was leading up to October 2021. The 2023 change in policy is irrelevant to deciding the misconduct in 2021.

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

[42] Based on my findings above, I find that the Appellant wasn't suspended from her job because of misconduct.

Conclusion

[43] The Commission hasn't proven that the Appellant was suspended from her job because of misconduct. Because of this, the Appellant isn't disentitled from receiving EI benefits.

[44] This means that the appeal is allowed.

Paul Dusome
Member, General Division – Employment Insurance Section