Citation: *KB v Canada Employment Insurance Commission*, 2022 SST 631

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (456875) dated February 22, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Teleconference
Hearing date:	April 22, 2022
Hearing participant:	Appellant
Decision date:	April 26, 2022
File number:	GE-22-874

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he refused to comply with the employer's COVID-19 policy (Policy).

[4] The Claimant doesn't dispute that this happened. He says that, among other reasons, the employer had no legal right to impose the Policy, because the Policy was a violation of his constitutional rights, and an invasion of his privacy. The employer had no right under the Constitution to ask for his medical information. The Policy discriminated against him on the basis of his medical information. The Policy was not reasonable. He had paid EI premiums for 11 and one half years, so was entitled to EI benefits. If he was not entitled to benefits, the Commission should pay back to him all the premiums he had paid.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matter I have to consider first

The requirements of natural justice at the hearing

[6] Natural justice requires that the Tribunal act with fairness in its procedure. It requires that the Claimant be told about the case against him. It requires that he be

[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

given the opportunity to give his evidence about what happened, to explain his reasons why he should get benefits, and to explain his reasons why the Commission's decision is wrong. For the reasons set out below, I find that the hearing does meet the requirements of natural justice.

[7] At the hearing, I explained the legal test for misconduct in the EI context. The Claimant said that he was relying on his grounds for the appeal as outlined above. I explained the limited jurisdiction of the Tribunal. Because of that limited authority, I could not rule on some of those grounds. I explained that my written decision would explain why that was so. I explained that I had to decide his appeal based on the evidence, on the EI definition of misconduct, and within the limits of the Tribunal's authority. The Claimant wanted to end the hearing and let me make a decision based on the documents in the file. I explained that the hearing was his opportunity to provide his evidence. Without his evidence, I could only decide based on the documents. This was his opportunity to challenge anything stated in the documents. He might also have evidence that was missing from the documents. As well, it was his opportunity to explain his reasons for the appeal more fully, and to respond to the Commission's reasons defending its decision. He agreed to continue. I asked questions about what happened around the Policy and his reaction to it. The Claimant did not have the appeal documents with him. I gave him opportunities to take a break to get the documents so he could refer to them. He declined to do so. I summarized what various documents said, to ask about their accuracy and completeness. I read to him parts of the Commission's reasons in support of its decision, then asked for his response. At the end of the hearing, I asked if there was anything else he wanted to say. He did not add anything.

Issue

[8] Did the Claimant lose his job because of misconduct?

Analysis

[9] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[10] I find that the Claimant lost his job because he did not comply with the Policy within the deadline, despite being given advance notice of the Policy and the deadline, and reminders to comply by the deadline.

Is the reason for the Claimant's dismissal misconduct under the law?

[11] The reason for the Claimant's dismissal is misconduct under the law.

[12] 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 Claimant 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.[4]

[13] There is misconduct if the Claimant 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.[5]

[14] The Commission has to prove that the Claimant lost his 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 Claimant lost his job because of misconduct.[6]

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

[15] The Commission says that there was misconduct because the Claimant did not comply with the Policy. He knew he would be dismissed if he did not comply. His con-compliance caused his dismissal. The non-compliance was a breach of his duties to the employer. The non-compliance was wilful.

[16] The Claimant says that there was no misconduct because the employer had no right to impose the Policy under the Constitution. The employer had no right to require that he disclose his private medical information about vaccination status. The Policy discriminated against him on the basis of his medical information. The Policy was not reasonable. He did not do anything that was misconduct.

[17] I find that the Commission has proven that there was misconduct, because it has proven all four of the elements of misconduct for EI purposes. I will set out the facts of this case first, then deal with the ruling on the misconduct issue. At the end, I will set out the reasons why I cannot deal with some of the Claimant's reasons in support of his appeal.

– The facts

[18] The Claimant is a medical technologist. He worked in a medical laboratory for the employer since 2010. In September 2021 the employer issued the Policy.

[19] The Policy set out the following requirements. It applied to employees, including the Claimant. It was designed to protect the welfare of its staff and balance the privacy rights of employees. To the extent permitted by applicable law, all employees are required to be fully vaccinated against COVID-19. All employees were required to document their vaccination status and upload vaccination certification in the employer's computer system, or to provide an approved accommodation for exemption from the Policy. The deadline for vaccination or exemption was October 15, 2021. Employees must receive their first dose of the vaccine by the deadline, and a second dose within the time frame recommended by health authorities. An employee was fully vaccinated two weeks after the second dose of the vaccine. Accommodation for exemption from the vaccine requirement could be obtained for a medical reason or for a sincerely held religious belief. Employees had to submit a written request for accommodation.

Employees who did not comply with the Policy may be subject to disciplinary action up to and including termination of employment. If an employee does not provide information about vaccination status, they will be assumed to be unvaccinated.

[20] The employer emailed a notice about the Policy to the employees on September 23, 2021. The Claimant received and read a copy of the Policy. He received a reminder email on October 1, 2021, which set out the steps that needed to be completed by October 15, 2021. The Claimant did not complete either of the two steps. The employer sent a reminder email on October 13, 2021. The email added that employees who chose to remain unvaccinated after October 15th will be put on unpaid lease and may ultimately lose their jobs. The Claimant did nothing. The employer dismissed the Claimant on October 20, 2021, for failing to comply with the Policy.

[21] The Claimant testified that he understood that he would be fired if he did not comply with the Policy. That was his understanding, despite the Policy referring to disciplinary action up to termination of employment, and the email of October 13th referring to unpaid leave and possible loss of his job.

[22] The Claimant did not seek a medical or religious exemption. It was his personal choice to not comply with the Policy.

– The ruling on misconduct

[23] I find that the Commission has proven the four elements to show misconduct under EI law. This means that I cannot accept the Claimant's argument that he did not do anything that was misconduct. His understanding of misconduct is different from what misconduct means in the EI context.

[24] The first element of misconduct is whether the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer. The Policy required the Claimant to be vaccinated and to provide proof of vaccination to the employer. The Policy provided for discipline for non-compliance, up to termination of employment. The Claimant did not provide the required proof to the

employer, or seek an exemption from the Policy. The Claimant knew that if he was fired, he would no longer be able to carry out any of his duties toward the employer.

[25] The second element of misconduct is whether the Claimant knew or should have known that there was a real possibility of being dismissed for that conduct. The Claimant's statements to the Commission and his testimony shows that he knew that he would certainly be fired for non-compliance with the Policy.

[26] The third element of wilfulness is whether the Claimant's conduct was wilful, that is conscious, deliberate, intentional. The Claimant's statements to the Commission and his testimony shows that he made a personal choice not to comply with the Policy. That choice is wilfulness.

[27] The fourth element of misconduct is that the Claimant's conduct caused the loss of his employment. All the evidence confirms that the Claimant was dismissed because of his non-compliance with the Policy.

[28] Based on these reasons, the Commission has proven its case for misconduct.

– **Why I cannot deal with some of the Claimant's reasons in support of his appeal.**

[29] The jurisdiction of the Tribunal is limited, so that it does not have the legal authority to make orders to remedy all the matters raised by the Claimant. The Tribunal's jurisdiction is limited to reviewing most (but not all) decisions that the Commission may make in administering the *Employment Insurance Act* and the Regulations made under that Act. The Tribunal can only deal with appeals that involve a Commission decision under the Act and Regulations, followed by the Commission's reconsideration decision of the initial decision[7], followed by an appeal to the Tribunal. The authority of the Tribunal to grant a remedy is limited. It can dismiss the appeal. Or it can confirm, rescind or vary in whole or in part the Commission's decision, or give the decision the Commission should have given.[8] This authority must be exercised within

[7] *Employment Insurance Act*, sections 112 and 113.
[8] *Department of Employment and Social Development Act*, section 54(1).

the confines of the EI legislation and case law. The Tribunal does not have supervisory authority over the actions of the Commission. Nor does it have authority to order the Commission to do things outside its limited jurisdiction and the requirements of the EI law. Because of this, the Tribunal cannot order the Commission to refund to the Claimant the EI premiums he has paid over the years.

[30] The Claimant says that the Policy was a violation of his constitutional rights, and an invasion of his privacy. The employer had no right under the Constitution to ask for his medical information or to impose the Policy. The short answer is that the Constitution does not apply directly to private individuals or businesses. It does not prohibit the employer from imposing the Policy, or from gathering medical information from employees. Rules about what an employer can or cannot do will come from a federal or provincial law, such as occupational health and safety, or privacy laws. The Tribunal has no jurisdiction to rule on or to enforce those laws.

[31] The Claimant says that the Policy discriminated against him on the basis of his health status. Discrimination as defined in the *Canadian Human Rights Act* does not include health status, unless that status can be shown to be a disability. There is no evidence in this case of any disability. The Claimant's issue is that the employer wants him to disclose his health information, thus violating his privacy. The Tribunal does not have jurisdiction to deal with privacy issues. Those matters are handled by tribunals set up under privacy legislation.

[32] The Claimant says that the Policy was not reasonable. That is not a matter that I can rule on. In cases of a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration.[9] It is therefore not necessary for me to evaluate the Policy for reasonableness to make a determination on the issues of whether he was terminated for misconduct.

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[9] *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[33] The Claimant says that he had paid EI premiums for 11 and one half years, so was entitled to EI benefits. That is not a correct statement of the law. The EI scheme is not like a pension scheme, such as the Canada Pension Plan (CPP) retirement pension. Under the CPP retirement scheme, a contributor pays in over their working life, and on retirement is entitled to receive a monthly pension based on the contributions made over the years. The EI scheme does not provide automatic entitlement to EI benefits to a person who has contributed to the scheme and who has become unemployed. Under the EI scheme, the claimant must prove that he meets a number of qualification criteria, such as a minimum number of hours of insurable employment in the year before applying for benefits, or not being disqualified for being dismissed for misconduct. In this case, the Claimant has been disqualified for losing his employment for misconduct, so does not meet the qualification criteria to receive EI benefits.

So, did the Claimant lose his job because of misconduct?

[34] Based on my findings above, I find that the Claimant lost his job because of misconduct.

Conclusion

[35] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[36] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section