



Citation: *KB v Canada Employment Insurance Commission*, 2022 SST 673

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

Decision

Appellant: K. B.
Representative: E. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (452655) dated January 21, 2022
(issued by Service Canada)

Tribunal member: Candace R. Salmon
Type of hearing: Teleconference
Hearing date: March 30, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: May 6, 2022
File number: GE-22-562

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended, and later terminated, from her job because of misconduct (in other words, because she did something that caused her to be dismissed). This means that the Claimant is not able to receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer suspended her from her job for failing to comply with its policy respecting COVID-19 vaccination. The employer told the Commission that she violated its policies by refusing to be vaccinated. After a period of suspension, her employment was terminated due to non-compliance.

[4] The Claimant submits that while she did not comply with the vaccination policy, she has a medical reason for non-compliance and adds that the policy was not in place when she was hired.

[5] The Commission found that the Claimant was dismissed from her job due to her own misconduct. Because of this, the Commission found that the Claimant was not entitled to EI benefits.

Preliminary Issues

[6] The Claimant submitted additional documents to the Tribunal, which were not available to me at the time of hearing but which I received post-hearing and have considered in coming to a decision. The Claimant submitted 83 pages of documents on March 29, 2022, which are marked as GD-6. She submitted a copy of an email between her and her employer on March 29, 2022, which is marked as GD-7. On March 31, 2022, she submitted an email with medical notes and records attached. This is marked as GD-

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended for misconduct are not entitled to receive benefits.

8. Finally, the Commission replied to the Claimant's additional documents on April 5, 2022. This submission is marked as GD-9.

Issue

[7] Was the Claimant suspended and dismissed from her job as a result of her own misconduct, and does she qualify for EI benefits?

Analysis

[8] To answer the question of whether the Claimant was suspended and ultimately lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

[9] 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.⁴

[10] There is misconduct if the Claimant 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 let go because of that.⁵

[11] The Commission has to prove that the Claimant lost her job because of misconduct. It 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 her job because of misconduct.⁶

[12] The *Employment Insurance Act* also addresses cases where claimants are suspended from their jobs due to misconduct. This does not result in a disqualification,

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.

but a disentitlement from benefits.⁷ Depending on my decision, this distinction may be relevant.

Why did the Claimant lose her job?

[13] The Claimant was placed on a leave of absence on November 13, 2021. She was terminated from the employment on December 2, 2021.

[14] The Claimant and the Commission agree that the Claimant lost her job because she did not comply with the employer's policy on COVID-19 vaccination. The policy had a deadline for employees to prove they had been vaccinated. The Claimant did not comply with the policy by the deadline. The employer determined she could no longer work for the business after this date. I accept this is the reason she lost her job.

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

[15] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[16] It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.⁸

[17] The Commission says that the Claimant is unable to work because she refused to comply with the employer's COVID-19 policy. It adds that there was misconduct because the Claimant was aware of the employer's COVID-19 policy, its requirements, and the deadline for compliance. She was aware of the consequences of failing to comply. She chose not to comply, and was suspended from her employment as a result.

[18] The Claimant admits that she chose not to be vaccinated, but submits she has a serious medical reason to refuse the COVID-19 vaccination. She told the Commission that the employer was aware that she was not vaccinated against COVID-19 as of her hiring on June 10, 2021, and says she signed a form stating that if there was a COVID-19 outbreak, she would be assigned elsewhere since she wasn't vaccinated. She stated

⁷ *Employment Insurance Act*, section 31.

⁸ See *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6.

that when she was hired, being vaccinated against COVID-19 was not a condition of employment.

[19] The Claimant stated that on August 20, 2021, her supervisor informed employees that they would all have to be vaccinated or provide a formal document declining the vaccine. The Claimant submitted the form to decline the vaccine within a few days. This meant the Claimant had to do regular antigen testing twice per week and provide proof of negative tests to continue working.

[20] On November 2, 2021, the Claimant's manager advised her that the COVID-19 policy was changing. She advised that vaccination was becoming mandatory as of November 1, 2021. The employer gave the Claimant 10 days to receive the vaccine. On November 11, 2021, the Claimant emailed the employer asking for an extension to its deadline. She explained that she has had an uncontrolled thyroid autoimmune disorder since childhood. The employer advised her to contact Occupational Health and Safety (OHS) to discuss what they would accept as a medical exemption.

[21] On November 13, 2021, the Claimant was placed on an unpaid leave of absence due to a lack of compliance with the employer's policy. On December 1, OHS contacted the Claimant to ask if she obtained a medical exemption. The Claimant advised that she had not. She was then asked if she was going to receive the vaccine. She replied that she would no longer be disclosing her vaccination status. She was terminated the following day.

[22] The Claimant testified that she contacted doctors about a medical exemption, but was not able to obtain one. She added that she did not refuse the vaccine, but was hesitant because of her medical condition. She testified that the employer gave her very little time to obtain a medical exemption. She said it takes months to receive an appointment with a specialist, and the employer expected her to provide a note within 10 days. She added that doctors are not allowed to give medical exemptions unless a patient is allergic to an ingredient in the vaccine, or has a history of adverse reactions. She stated that her doctors couldn't give her an exemption because she did not meet either of these criteria.

[23] The Claimant also testified that she had to receive some vaccinations to obtain the employment. The COVID-19 vaccination was not required when she was hired. She stated that to her knowledge she has never had an adverse reaction to a vaccine, but submitted that she gets tired after vaccines and cannot receive the influenza vaccine because it makes her sick.

[24] The Claimant submits that she should not have been dismissed because she is represented by a union and cannot be terminated without cause. She has filed two grievances with her union. She added that she is not seeking an exemption from receiving the COVID-19 vaccination, but wants more time for her doctors to ensure that she will not have an adverse reaction to it.

[25] The file contains a copy of the employer's COVID-19 Vaccination Surveillance Program, dated July 2021. The Claimant confirmed this is a copy of the employer's policy.

[26] It is clear that the conduct leading to the Claimant's suspension and dismissal was a refusal to follow the employer's COVID-19 vaccination policy. The Claimant admits that she refused to follow the employer's policy, and that it was the reason she was no longer allowed to work. She confirmed at the hearing that the only reason she did not follow the employer's policy was concern about how her thyroid condition would be affected by the vaccine.

[27] One element of a misconduct analysis is that I must consider whether the Claimant's conduct was wilful. The representative submitted that the Claimant's conduct was not wilful because she did not do anything to harm anyone and she had no intention of losing her job. She submitted the Claimant thought the employer would allow her to continue antigen testing and place her on a non-COVID-19 floor.

[28] Wilfulness requires that the action of the Claimant be conscious, deliberate, or intentional. For EI purposes, 'intentional' does not require proof of an intention to do something wrong. On the evidence, it is clear that the Claimant's action of not complying with the requirements of the vaccination policy was conscious, deliberate and intentional.

The employer required that she comply with the policy. Her response was to make the choice to not comply. That was wilfulness.

[29] While the representative submitted the Claimant thought she would be able to continue antigen testing and be moved to a non-COVID-19 floor, I find she knew or should have known that she could be terminated for refusing to follow the employer's policy. The Claimant acknowledged that she received and understood the employer's policy. She stated that her employer spoke to her to discuss the changes to the COVID-19 policy, and gave her 10 days to comply. A copy of the policy is in the Claimant's file. It states, "should evidence of first dose remain outstanding by November 26, 2021, staff will be terminated." It also says, "should evidence of second dose remain outstanding by December 21, 2021, staff will be terminated."⁹ The Claimant did not dispute that she was aware of this policy.

[30] The Claimant's action in refusing to comply with the employer's vaccination policy was misconduct for EI purposes. I find that the Commission has proven that there was misconduct, because it has proven that the Claimant committed the conduct of refusing to comply with the employer's vaccination policy, that refusal caused her suspension, her conduct was wilful, and she knew or should have known that she could be dismissed or suspended from her job if she did not comply with the employer's policy.

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

[31] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct on November 12, 2021. This means she is disentitled from EI benefits from this date until she was dismissed from her employment due to misconduct. Since she was dismissed on December 2, 2021, she is disqualified from receiving EI benefits from this date forward.

⁹ See GD3-28.

Other issues

[32] I appreciate that the Claimant has a unique medical situation. She provided significant evidence of her thyroid condition and its impact on her, and both she and her mother gave credible, consistent testimony regarding her condition and concerns about the COVID-19 vaccination. I have no doubt they are honest and have sincerely held concerns. I understand she also has had a change in doctors due to the physician most accustomed to her condition no longer practicing medicine at her clinic. I recognize she believes the Commission's decision is unfair. Unfortunately for the Claimant, she was not able to produce any medical evidence supporting that she could not receive the COVID-19 vaccination. Without that, or another medical or human rights-based reason, the Claimant wilfully refused to comply with the employer's policy.

[33] The Claimant also submitted that the employer's COVID-19 vaccination policy was not in place when she was hired. I note that if the Claimant has grievances through her union or a claim of constructive dismissal, those are issues for other processes.

[34] Finally, the Claimant submitted during reconsideration that the government declared that anyone who lost their job for non-compliance with a COVID-19 policy would not be able to collect EI and gave employers a new standard for issuing ROE's. I am unfamiliar with the alleged new standard for issuing ROE's. However, it is important to clarify that no level of government has dictated the outcome of this case. The decision is mine to make, based on the law and evidence in the file. I am free to determine whether the appeal is allowed or not; given a thorough consideration of the facts and submissions, I have found it must be dismissed.

Conclusion

[35] The Commission has proven that the Claimant was suspended from her job because of misconduct. Due to this, the Claimant is disentitled from receiving EI benefits as of November 12, 2021.

[36] I further find the Claimant was dismissed due to misconduct on December 2, 2021. Due to this, she is disqualified from receiving EI benefits from this date forward.

[37] This means that the appeal is dismissed.

Candace R. Salmon
Member, General Division – Employment Insurance Section