



Citation: *JB v Canada Employment Insurance Commission*, 2022 SST 993

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

Decision

Appellant: J. B.
Representative: Christopher Justice

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (443714) dated February 4, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference
Hearing date: August 8, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: September 7, 2022
File number: GE-22-1165

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended because of misconduct (in other words, because she did something that caused her to be suspended). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was put on an unpaid leave of absence from her job for not getting the COVID-19 vaccination. The employer implemented a policy that required employees to get vaccinated or have an approved exemption. The Claimant didn't get the vaccination by the deadline, so she was placed on a mandatory unpaid leave of absence.

[4] The Commission decided that the Claimant took a voluntary leave of absence from her job. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[5] The Claimant disagrees that she voluntarily took leave from her job. The employer mandated that she take the leave of absence because she didn't meet the requirements of the new vaccination policy. She didn't want to take the vaccine for several reasons and she believes it wasn't a reasonable or necessary safety measure for her job.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits. The disentitlement is lifted when their period of suspension expires, or they lose or voluntarily leave their job, or they work enough hours with another employer after the suspension started.

Matter I have to consider first

The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

[7] Did the Claimant take a voluntary leave of absence from her job or did the employer suspend her?

[8] Was the Claimant suspended because of misconduct?

Analysis

The Claimant was suspended from her job

[9] A claimant who voluntarily takes a leave of absence from a job is disentitled from receiving EI benefits, unless they can prove that they had just cause for taking leave.²

[10] Similarly, claimants who have been suspended from a job because of misconduct are also disentitled.³

[11] Sometimes it is not clear whether a claimant took a leave of absence voluntarily or the employer suspended them. Both of these notions are linked in the *Employment Insurance Act*. They relate to whether someone caused their own unemployment, either by initiating their separation from employment without just cause, or by losing their job due to misconduct.

² See section 32 of the Act.

³ See section 31 of the Act.

[12] Because the reasons for these disentitlements are linked, it is open to me to make a decision based on either of these grounds. In other words, where the reason for the Claimant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on a voluntary leave of absence or suspension due to misconduct.

[13] In this case, it is not clear that the Claimant took a voluntary leave of absence from her job. She has consistently stated to the Commission and the Tribunal that her leave was not voluntary. Rather, it was the employer who mandated that she take an unpaid leave of absence from her work. A mandatory unpaid leave of absence is another way of saying the Claimant was suspended from her job.

[14] I find the evidence on file supports that the employer initiated the Claimant's separation from employment. It is clear that the employer did not allow the Claimant to work any longer because it said she did not comply with its vaccination policy.

[15] As the Claimant was suspended from her job, I must decide whether she was suspended because of misconduct.

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

Why was the Claimant suspended?

[17] Both parties agree that the Claimant had to stop working because she did not comply with the employer's policy that required her to be vaccinated against COVID-19. So, this is the conduct that caused her suspension.

Is the reason for her suspension misconduct under the law?

[18] The reason for the Claimant's suspension is misconduct under the law.

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[20] 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.⁷

[21] The Commission has to prove that the Claimant was suspended 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 Claimant was suspended because of misconduct.⁸

[22] The Claimant worked in an administrative position at a golf club. In September 2021, the employer put in place a policy requiring its employees to be fully vaccinated against COVID-19 or have an approved exemption. Employees were required to show proof of their vaccination by September 27, 2021. Employees who did not comply with the requirements of the policy would be placed on an unpaid leave of absence (suspension).

[23] The Claimant said that she was aware of the policy and the consequences of not complying with it. The employer sent an email announcing the policy, and she had a meetings with the employer about the vaccination requirement.

[24] The Claimant didn't want to get vaccinated for several reasons. She was concerned about the vaccine's impact on her health, as she knew someone who had a

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

serious reaction to the vaccine. She also felt the employer's policy violated her right to privacy by asking her to share medical information (her vaccination status).

[25] The Claimant said that her doctor wasn't able to endorse a medical exemption for her. She asked the employer for an exemption on religious grounds, but the employer denied her exemption request.

[26] The Claimant also asked the employer for other accommodations, such as continuing the COVID-19 safety measures in place rather than being vaccinated. She felt the requirement to be vaccinated wasn't necessary for her position. But, the employer told her that there was no alternative to the vaccination.

[27] The Claimant told the employer that she was not going to disclose her vaccination status. Around September 22, 2021, she met with the employer and said that she wasn't refusing the vaccine. She would get vaccinated if the employer would accept liability. The employer said no.

[28] The Claimant was suspended as of September 24, 2021.

[29] The Commission says that there was misconduct because the Claimant was aware that she was required to comply with the employer's policy to continue working in her job. The Claimant didn't get vaccinated or get an exemption from the COVID-19 vaccination under the employer's policy. She willfully chose not to comply with the employer's policy.

[30] The Claimant says that there was no misconduct because she didn't breach her contract. The employer's mandatory vaccination policy was not part of the terms and conditions at the time she was hired. The vaccination was not required for her to perform her job duties, and the employer could have accommodated her using other COVID-19 safety measures that were already in place.

[31] The Claimant's representative argues that there are significant policy considerations in disentitling individuals from EI benefits for not being vaccinated. It can be viewed as the government endorsing companies for terminating non-vaccinated

persons. In the Claimant's case, she had valid reasons for not wanting to be vaccinated and this choice should not be viewed as misconduct.

[32] I find that the Commission has proven that there was misconduct.

[33] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.⁹

[34] The Claimant wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in losing her job.

[35] The Claimant was notified about the employer's policy in September 2021. She chose not to get her COVID-19 vaccination as required by the policy. She knew that not complying with the policy would result in her being suspended from work.

[36] The Claimant said that the Claimant never refused to comply with the policy. However, the Claimant had to provide proof of vaccination to comply with the policy. Her actions of not providing the proof of vaccination result put her in non-compliance with the policy. If the Claimant intended to comply with the policy, she could have communicated that to her employer and asked for an extension of time to do so.

[37] I understand that the Claimant asked for an exemption or accommodation from the employer's policy. But, the employer denied these requests. The Claimant was aware that she was not exempted from the vaccination requirement. Regardless, she chose not to comply with the policy.

[38] The Claimant said that the policy was not part of her terms and conditions of employment when she was hired.

[39] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer

⁹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[40] I understand the Claimant's concerns that the employer's policy did not give her any option other than to get vaccinated. I acknowledge that she disagrees with the employer's policy and feels that the loss of her employment was unjustified.

[41] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.¹⁰

[42] The Claimant may have recourse to her claims that the employer's policy violated her privacy rights. But, she must raise that issue with the correct court or tribunal.

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

[43] Based on my findings above, I find that the Claimant was suspended because of misconduct. This means the Claimant is disentitled from EI benefits starting September 26, 2021.

[44] The law says that this disentitlement ends in certain circumstances, including when a claimant loses or voluntarily leaves their job. So, I will look at whether the Claimant meets the conditions to end this disentitlement.

The Claimant lost her employment

[45] The Claimant's representative said that the Claimant has permanently lost her employment. He testified that he spoke to the employer in the middle of March 2022, and the employer confirmed that the Claimant is not able to return to her employment. He said the employer declined to re-issue the Claimant's record of employment (ROE).

¹⁰ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[46] I think the representative's testimony is reliable evidence that the Claimant has lost her employment as of March 2022. So, I am satisfied that the Claimant meets the conditions to have her disenitlement ended at that point.

[47] The representative didn't provide an exact date for when the Claimant lost her employment. He said the discussions with the employer occurred in the middle of March 2022, and that this is when it was confirmed that the Claimant's job had ceased. Based on this, I think it is reasonable to say that the Claimant lost her employment by March 15, 2022. So, the Claimant's disenitlement should end on March 15, 2022.

Conclusion

[48] The Commission has proven that the Claimant was suspended because of misconduct. Because of this, the Claimant is disenitled from receiving EI benefits from September 26, 2021, to March 15, 2022.

[49] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section