



Citation: *JB v Canada Employment Insurance Commission*, 2022 SST 1085

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

Decision

Appellant: J. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (459649) dated March 8, 2022
(issued by Service Canada)

Tribunal member: Leanne Bourassa

Decision date: May 17, 2022

File number: GE-22-1019

Introduction

[1] The Appellant's employer put in place a policy aimed at protecting their employees, visitors and business partners from the Covid-19 virus. Although it did not require employees to be vaccinated, employees who chose not to be vaccinated had to submit to twice-weekly antigen testing and abide by masking rules. The Appellant did not comply with the employer's Policy. His employer terminated his job. The Respondent refused to pay him Employment Insurance (EI) benefits because he had been dismissed for his misconduct.

Issue

[2] The Tribunal must decide whether the appeal should be summarily dismissed.

The law

[3] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[4] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[5] Section 30(1) of the Employment Insurance Act states that a claimant is disqualified from receiving any benefits if they lost their employment because of their misconduct.

Evidence

[6] The file includes a Record of Employment issued by the employer on October 25, 2021. I see that this record was issued because of a "Dismissal" and there are no additional comments on the document itself.

[7] The Respondent's notes from discussions with the employer show that the Appellant was dismissed because he refused to comply with the company's COVID

Policy. He had refused to wear a mask and refused to be vaccinated. Employees were informed of the Policy in August 2021 verbally and by letter. Employees were to be vaccinated by October 25, 2021. Employees could be accommodated with twice-weekly antigen tests and the Appellant refused to do those tests.

[8] The Respondent's notes from conversations with the Appellant show that he refused to get a COVID-19 vaccine. He also felt his employer was violating the law by requiring him to do a nasal swab test. He did not want to do the swab but was willing to provide sputum, but his employer would not accept that test.

[9] A copy of the employer's Policy is on file. This Policy called the Covid-19 Prevention and Vaccination Policy includes the following information:

- The Policy applies to all employees, visitors and others providing services to the company;
- The safety plan is posted within the workplace and is available to any employee who requests a copy;
- Employees are expected to read, understand and follow the guidelines of the plan;
- The plan would be reviewed and updated according to government guidelines, medical advice or other reliable information;
- By October 25, 2021, all employees are required to demonstrated their fully vaccinated status to the company;
- Those employees who fail to demonstrate their fully vaccinated status by October 25, 2021 would be required to undergo regular Covid-19 Rapid Screening Tests twice weekly;
- The tests would be provided by the company.

[10] A letter titled "Termination of Employment" dated September 30, 2021, was sent the Appellant. This letter says the employer has decided to terminate the Appellant's employment without cause effective October 22, 2021. The Appellant is required to continue working up to and including the termination date.

[11] A letter dated October 1, 2021, was sent to the Appellant reminding him of the October 25th deadline. The Appellant's personal decision to remain unvaccinated was being respected. However, as of October 25th, unvaccinated individuals would be subject to routine testing to satisfy Public Health requirements. It was noted that the Appellant had previously expresses concerns about this. The company remains committed to providing any assistance required to meet that requirement.

[12] The Appellant was advised by a letter dated April 26, 2022 that the Tribunal was considering summarily dismissing his appeal. He provided comments that have been taken into consideration in this appeal.

[13] The Appellant has also provided the Tribunal with several documents that he says were posted at his employer's business with the aim of encouraging him to be vaccinated. While I have reviewed these documents, they do not relate to the question of his own conduct, which is what is relevant when deciding if there has been misconduct under the law.

[14] I have also reviewed the documentation that the Appellant submitted with respect to Covid-19 vaccines themselves. In this case, it is not argued that the Appellant was dismissed because he did not take the vaccine, rather he did not accept the testing requirements. So, information about the vaccines are not helpful in determining if the Appellant respected the employer's policy. It is clear that he did not want to take the vaccine and no one is arguing that he had to.

Submissions

[15] The Appellant submitted that his employer and the government were acting illegally by harassing him and coercing him to be vaccinated against Covid-19. He alleges his employer did not want to let him go, but was forced to by the government.

[16] The Respondent submitted that the Appellant was dismissed because he failed to comply with the employer's Covid-19 vaccination policy and that he should have known this could lead to his dismissal.

Analysis

[17] For there to be misconduct under the Employment Insurance Act, I would have to see that the Appellant engaged in wilful conduct that he knew or should have known could get in the way of carrying out his duties to his employer and there was a real possibility of being let go because of that.¹

[18] Wilful conduct is conduct that is conscious, deliberate or intentional.² There does not have to be wrongful intent for behavior to be misconduct under the law.³

[19] It is not the Tribunal's role to evaluate the efficacy of vaccines or the fairness of the employer's Policy. There are other forums for those questions such as the Human Rights Tribunals. If the Appellant feels he was unjustly dismissed, then he can take action before the courts under employment standards legislation. For the purposes of EI eligibility, I am limited to reviewing the conduct of the Appellant and determining if it meets the criteria of misconduct set out in the case law related to the EI Act.

[20] From the documentation already in the file, I see that the employer had instituted a Covid-19 vaccination policy. The policy required that those who were not vaccinated submit to COVID-19 Rapid Screening Tests twice weekly, with tests provided by the company.

[21] The Appellant was notified of the requirements under the Policy. He was told he would be fired effective October 22, 2021, and then offered assistance to meet the testing requirements so he could keep his job. He did not accept that help. He continued to refuse the testing his employer was offering. So, his termination took effect.

¹ This is set out in the Federal Court of Appeal case of *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

³ See *Attorney General of Canada v Secours*, A-352-94

[22] The Appellant has made it clear he would not be vaccinated. He has written that he would not do the 'swab' tests. When he was let go, he was not in compliance with the employer's Policy and he had no intention to become compliant. There is no evidence or testimony he could provide that would change that. So, this claim has no reasonable chance of success and I must dismiss it.

Conclusion

[23] The Tribunal finds that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section