



Citation: *BS v Canada Employment Insurance Commission*, 2022 SST 1268

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

Decision

Appellant: B. S.
Representative: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (473246) dated May 20, 2022
(issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference

Hearing date: October 4, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: October 11, 2022

File number: GE-22-2091

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 her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked for the employer as a Billing Supervisor for nearly 15 years.

[4] A policy was put into place by the Claimant's employer in September, 2021. It required all employees to be vaccinated against Covid-19 by December 31, 2021. The employer sent employees an email. It said not complying with the policy would result in termination of employment.

[5] The Claimant didn't get vaccinated and her employment was terminated on December 31, 2021.

[6] The Commission decided that the Claimant was not entitled to receive EI benefits because she lost her job due to her own misconduct.

[7] The Claimant doesn't dispute that this happened. But she says that her employer's policy was unfair and unreasonable because it didn't include an option for testing, which she was willing to do.

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

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

[9] The Claimant doesn't agree that not following her employer's vaccination policy is misconduct. She feels that the vaccine hasn't been sufficiently tested. She did an exemplary job for 15 years. She feels that her rights have been violated. She feels she should be entitled to benefits.

Issue

[10] Did the Claimant lose her job because of misconduct?

Analysis

[11] To answer the question of whether the Claimant 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.

Why did the Claimant lose her job?

[12] I find that the Claimant lost her job because she didn't comply with her employer's vaccination policy. The parties agree that she was dismissed because she refused to be vaccinated.

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

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

[14] 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

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

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

[15] 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 dismissed from her job because of that.⁵

[16] The Commission has to prove that the Claimant lost 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 dismissed because of misconduct.⁶

[17] The Commission says the Claimant lost her job due to misconduct, because she didn't comply with her employer's Covid-19 vaccination policy. She knew she had to be vaccinated. She knew that not getting vaccinated would result in her being dismissed from her job. She didn't comply and was therefore dismissed.

[18] It is clear that the Claimant made a conscious and deliberate choice not to comply with her employer's vaccination requirement. She says she never told her employer her vaccination status, although they asked on a few occasions. She told them "I like my job, I want to stay." She thinks her employer might have known her vaccination status through office gossip, or they might have assumed that she wasn't vaccinated. The VP of the company came to her office and asked her if he had permission to post her job. She told him she wasn't changing her mind. That was wilfulness.

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

[19] I must also consider whether the Claimant knew, or ought to have known, that not following her employer's vaccination policy would interfere with carrying out her job duties.

[20] The employer's policy said that employees couldn't return to work if they weren't vaccinated and didn't have an exemption by December 31, 2021. The Claimant testified that she read the policy. So, she knew that if she wasn't vaccinated against Covid-19 by December 31, 2021, she couldn't carry out her job duties.

[21] Another thing I have to consider when deciding whether there has been misconduct is that the Claimant must have known, or ought to have known, that there was a real possibility of being dismissed from her job if she didn't follow her employer's vaccination policy.

[22] The Claimant said that she didn't know until her last day of work that her employer would follow through with terminating her employment. She received an email on December 31, 2021, telling her not to come back to work. She couldn't recall her employer telling her the reason for her termination. She doesn't recall receiving a termination letter.

[23] She testified that the policy said all employees had to have two doses of the Covid-19 vaccination by December 31, 2021, or their employment would be terminated.

[24] She testified that the vaccination policy applied to her. She said she knew not complying with the policy would result in her being dismissed from her job.

[25] The Claimant told the EI Officer on May 18, 2022 (GD3-36 – GD3-37) that she was told on or around September 26, 2021 that employees needed to get two doses of the vaccine by January 1, 2022 or risk being terminated.

[26] I find that the Claimant knew there was a real possibility she would lose her job if she didn't follow her employer's vaccination policy.

[27] The Claimant says that she requested a religious exemption from taking the vaccine. She completed her employer's exemption request form and submitted it HR, but it was rejected. She said that her Pastor wouldn't provide a document to support her religious exemption request, as it would require him to lie (GD3-36 – GD3-37). She was not granted a religious exemption. She did not request a medical exemption.

[28] The Claimant says that her employer's policy said that employees who were not vaccinated and didn't have an exemption would be dismissed. She feels that this was unreasonable and that she should have been allowed to take Covid-19 rapid tests instead. She noted that this was allowed by other employers.

[29] The Claimant says it wasn't fair or reasonable that her company enforced a Covid-19 vaccine mandate when the Government of Canada did not have a vaccine mandate. She said she did not see why she had to be vaccinated, because she had no contact with customers or co-workers and she wore a mask when outside of her office. She said she felt this went against the Charter of Rights.

[30] I make no findings about the fairness or reasonableness of the employer's policy or any violations of the Claimant's rights. The conduct of the employer is not a relevant consideration under section 30 of the EI Act. Rather, the analysis is focused on the Claimant's act or omission and whether that amounts to misconduct within the meaning of section 30 of the EI Act. The question of whether the Claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant is a matter for another forum. I am not making decisions about whether the Claimant has any course of action under other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act.⁷

[31] The Claimant is free to make these arguments before the appropriate court or tribunal and seek relief there. These arguments don't change the fact that the

⁷ *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at para. 22: "there is constant jurisprudence from this Court that the role of the Board and the Umpire is not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act."

Commission has proven on a balance of probabilities that she was dismissed because of misconduct under the EI Act.

[32] I find that the Commission has proven that there was misconduct, because it has proven that:

- The employer had a mandatory vaccination policy that was communicated to the Claimant;
- The Claimant was aware of the requirements of the employer's vaccination policy;
- The Claimant didn't get vaccinated, which she knew meant that she couldn't do her job;
- her conduct was wilful;
- she knew she would be dismissed from her job if she didn't get the vaccination; and
- her failure to be vaccinated caused her to lose her job.

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

[33] While I am sympathetic to the Claimant's circumstances and her genuine concerns about the vaccine, I cannot change the law. Based on my findings above, I find that the Claimant lost her job because of misconduct.

Conclusion

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

[35] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section