



Citation: *AB v Canada Employment Insurance Commission*, 2022 SST 1402

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

Decision

Appellant: A. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (467398) dated May 16, 2022
(issued by Service Canada)

Tribunal member: Amanda Pezzutto

Decision date: October 7, 2022

File number: GE-22-1947

Decision

[1] A. B. is the Claimant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. The Claimant disagrees with this decision, so he is appealing to the Social Security Tribunal (Tribunal).

[2] I am summarily dismissing the Claimant's appeal. His appeal has no reasonable chance of success. There is no argument the Claimant could make that would let me allow his appeal.

Overview

[3] The Claimant worked for a provincial government. His employer introduced a policy requiring all employees to provide proof of vaccination against COVID-19. The employer asked the Claimant to provide proof of vaccination by November 22, 2021. The Claimant didn't attest to his vaccination status and didn't provide proof of vaccination by the employer's deadline. So, the employer suspended him.

[4] The Claimant says he didn't stop working because of misconduct. He says his employer violated the collective agreement and provincial labour code. He says that he wanted more information about the policy and the employer's liability, but they refused to give him this information. He says he was working from home and so his employer could have accommodated him.

[5] The Commission says the Claimant was suspended because of misconduct. The Commission says the Claimant knew that his employer required him to be vaccinated against COVID-19. The Commission says the Claimant knew, or should have known, that he couldn't continue working if didn't follow the employer's vaccination policy.

Matters I must consider first

[6] Before I summarily dismiss an appeal, I have to give the Claimant notice. I have to allow him a reasonable period to make arguments about whether I should summarily dismiss the appeal.¹

[7] Tribunal staff sent an email to the Claimant on September 16, 2022. In this letter, I explained why I was considering summarily dismissing his appeal. I asked him to respond to the letter by September 30, 2022.

[8] The Claimant responded to the letter with more submissions. I will consider these documents as I make my decision.

Issue

[9] I must decide whether I should summarily dismiss the Claimant's appeal. To make this decision, I have to decide if his appeal has a reasonable chance of success.

Analysis

[10] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.²

[11] This is what "no reasonable chance of success" means: is it plain and obvious, on the face of the record, that the Claimant's appeal is bound to fail? Are there any arguments or evidence that the Claimant could present at a hearing that would lead to a successful appeal?³

¹ Section 22 of the *Social Security Tribunal Regulations*

² Section 53(1) of the *Department of Employment and Social Development Act*.

³ In coming to this interpretation, I am relying on an Appeal Division decision, *J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1132, and a Federal Court of Appeal decision, *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147.

[12] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.⁴

[13] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.⁵

[14] To be misconduct under the law, your conduct has to be wilful. This means that your conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ You don't have to have wrongful intent (in other words, you don't have to mean to be doing something wrong) for your behaviour to be misconduct under the law.⁸

[15] There is misconduct if you knew or should have known that your conduct could get in the way of carrying out your duties towards your employer and that there was a real possibility of suspension or dismissal because of that.⁹

[16] The Commission has to prove that the employer suspended you because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not that you lost your job because of misconduct.¹⁰

⁴ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

⁵ Section 31 of the *Employment Insurance Act*.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[17] The Claimant argues that he didn't lose his job because of misconduct. He says that the employer violated the terms of his collective agreement and the provincial labour code. He says that he was working from home and so the employer could have accommodated him.

[18] The Claimant also says that he didn't refuse the COVID-19 vaccine. Instead, he says that he didn't attest to his vaccination status because he was waiting for more information from the employer about the vaccination policy.

[19] He also says that he didn't know that the employer was going to suspend him. He says the employer's policy only said that he "may" lose his job, so he didn't know he was going to lose his job.

[20] The Commission says the Claimant stopped working because of misconduct. The Commission says he knew about his employer's vaccination policy. The Commission says he knew that he was at risk of losing his job if he didn't comply with the vaccination policy by the deadline of November 22, 2021.

[21] I agree with the Commission. I find that this appeal has no reasonable chance of success. This is because I find that the Claimant lost his job because of misconduct. There is no argument or evidence that would lead me to a different conclusion.

[22] There are many basic facts that aren't in dispute. The Claimant told the Commission that he knew his employer had a vaccination policy. He agrees that he knew the policy required him to attest to his vaccination status and show proof of vaccination against COVID-19 by November 22, 2021. He agrees that the vaccination policy said that he was at risk of losing his job if he didn't comply with the policy. The Claimant agrees that he didn't comply with the policy, because he didn't attest to his vaccination status and he didn't provide proof of being fully vaccinated against COVID-19 by the employer's deadline.

[23] Many of the Claimant's arguments are about the employer's conduct. He says the employer violated his collective agreement and provincial labour codes. He says his employer should have answered his questions about the policy. He says the employer

could have accommodated him because he worked from home. He disagrees with the vaccination policy.

[24] But it is not up to the Tribunal to decide if the employer acted fairly by introducing a vaccination policy.¹¹ It is not up to the Tribunal to decide if the COVID-19 vaccine is safe or effective. I can't make decisions about whether the employer should have given him an exemption from the vaccination policy. And I can't make decisions about whether the employer violated the terms of the Claimant's collective agreement. The Claimant can pursue other measures through a human rights tribunal or his union if he wants to make these arguments.

[25] My only role is to decide if the Claimant's appeal is bound to fail, no matter what arguments or evidence he could present at a hearing. And I find that this appeal is bound to fail. This is because the Claimant lost his job because of misconduct, under the meaning of the *Employment Insurance Act*. This is because the Claimant and the Commission agree about the following:

- The Claimant stopped working because he didn't comply with the employer's vaccination policy. This was the only reason he stopped working.
- The Claimant knew his employer had a policy requiring all employees to attest to their vaccination status and provide proof of vaccination against COVID-19 by November 22, 2021. Even so, he deliberately failed to comply with the policy because he didn't attest and he didn't provide proof of his vaccination status by the deadline.
- The Claimant knew the employer had warned him that he was at risk of losing his job if he didn't follow the vaccination policy.

[26] If I accept all of these facts, then I have to find that the employer suspended the Claimant because of misconduct. The Claimant's failure to follow the vaccination policy

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

led directly to the loss of his employment. He acted deliberately. He knew, or should have known, that his actions were likely to lead to the loss of his employment.

[27] Based on these facts, there is no argument that the Claimant could make that would lead me to a different conclusion. He hasn't given me any evidence to contradict these facts. His appeal is bound to fail, no matter what arguments or evidence he could provide at a hearing.

Conclusion

[28] I find that the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss his appeal.

Amanda Pezzutto

Member, General Division – Employment Insurance Section