



Citation: *BW v Canada Employment Insurance Commission*, 2022 SST 1445

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: B. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (466633) dated May 13, 2022 (issued by Service Canada)

Tribunal member: Marc-André St-Jules

Type of hearing: Teleconference

Hearing date: October 18, 2022

Hearing participant: Appellant

Decision date: October 26, 2022

File number: GE-22-2039

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 lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she refused to disclose her vaccination status. The employer had to therefore assume she was unvaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[5] 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.

Issue

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

Analysis

[7] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.²

[8] 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

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

² See sections 30 and 31 of the Act.

lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[9] I find that the Claimant lost her job because she went against her employer's vaccination policy.

[10] The Claimant says she was dismissed as she did not comply with the vaccination policy.

[11] The Commission says the Claimant was dismissed as she failed to comply with the employer's vaccination policy. The Claimant refused to disclose her vaccination status.

[12] I find that the Claimant was dismissed as she did not comply with the vaccine policy implemented by her employer. The Claimant and the employer have been consistent in their positions on this.

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] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Claimant doesn't have to have

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁵

[16] 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.⁶

[17] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[18] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[19] 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 lost her job because of misconduct.¹⁰

[20] The Commission says that there was misconduct because:

- The employer had a vaccination policy.¹¹

⁵ See *Attorney General of Canada v Secours*, A-352-94.

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

⁷ See Section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

¹¹ See GD3 pages 27-29. The policy required everyone to be fully vaccinated by November 15, 2021, to attend the workplace.

- The employer notified the Claimant about its expectations about getting vaccinated.¹²
- The employer communicated the policy to the Claimant.¹²
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[21] The Claimant says that there was no misconduct because:

- She was not terminated for any professional misconduct. She was competent, reliable, hard-working and terminated through no fault of her own.
- Her employer offered no alternative such as weekly testing.
- Her medical information is private. Nowhere in her employment contract does it state that she must disclose any information pertaining to her medical status.
- She has a right to choose what medical procedure she receives without fear of discrimination.

[22] The Claimant testified she understands the unprecedented situation of COVID-19 meant employers needed to make this type of decision. This includes dismissing individuals. However, she also argues that the term misconduct should not apply to this type of case. A new code should have been created to allow for employment insurance to be paid. There was no misconduct such as theft or wrongdoing on her part.

[23] The policy says that by November 15, 2021, all employees must be fully vaccinated to attend the workplace. The Claimant testified she was aware that non-compliance could result in the end of the employment relationship. The Claimant

¹² See GD3 page 19

testified she was notified on October 6, 2021, although she knew of the policy beforehand via verbal discussions.

[24] At the hearing, the Claimant was questioned regarding the November 4, 2021, letter from the employer to the Claimant.¹³ The letter mentions the Claimant's last day was going to be November 11, 2021. As this was a different date from the policy, the Claimant was questioned. She testified that November 11, 2021, was likely coinciding with her last day scheduled.

[25] The Claimant did not ask for any exemptions to the vaccination policy. This is because she refuses to disclose her vaccination status. She may be vaccinated or not but it is her sincere belief that either scenario is her private information. This would make an exemption request irrelevant.

[26] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said unvaccinated individuals could face the cessation of the employment relationship.
- The policy was communicated to all employees including the Claimant.
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy

[27] The Claimant testified that the threshold for misconduct has not been met. She followed her beliefs and was a reliable employee. No evidence before me suggests otherwise. I believe the Claimant when she says she was a dedicated employee. However, the courts have ruled over the years that a person does not have to have wrongful intent to be misconduct under the law.¹⁴

¹³ See GD3 page 30.

¹⁴ See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

[28] I find that once the employer imposed a vaccination policy, this became a fundamental condition of employment. I agree that the Claimant can decline to disclose her vaccination status. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[29] The Claimant references other laws and argues that her rights were violated under those laws. My role is to make decisions based on the EI Act, Regulations and related case law. The Claimant may have recourse under other forums but my jurisdiction is limited as stated above.

[30] By refusing to disclose her vaccination status and after failing to persuade her employer to accommodate her with alternatives such as testing, she made a personal decision that led to the foreseeable consequences for her employment.

[31] I understand that the Claimant feels that because she paid into the employment insurance fund, she should be entitled to financial support. This belief goes against the fundamental principle of employment insurance. This is that an employee must not voluntarily place herself in a position of unemployment. This is what the Claimant did in this case. This conscious and deliberate breach of the duty owed to the employer is misconduct under the Act.

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

[32] Based on my findings above, I find that the Claimant lost her job because of misconduct.

[33] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to disclose her vaccination status was likely to cause her to lose her job.

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.

Marc-André St-Jules
Member, General Division – Employment Insurance Section