



Citation: *BP v Canada Employment Insurance Commission*, 2022 SST 1608

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

Decision

Appellant:	B. P.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (468549) dated May 6, 2022 (issued by Service Canada)
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Tribunal member:	Audrey Mitchell
Type of hearing:	In person
Hearing date:	November 9, 2022
Hearing participant:	Appellant
Decision date:	November 22, 2022
File number:	GE-22-1913

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

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

Overview

[3] The Claimant was suspended from his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

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

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled, then disqualified from receiving EI benefits.

Issue

[6] Was the Claimant suspended from his 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 was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the

¹ Section 30 of the *Employment Insurance 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.

Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[9] I find that the Claimant was suspended from his job because he went against his employer's vaccination policy.

[10] The Claimant says his employer had a mandatory COVID-19 vaccination policy requiring all employees to be vaccinated. He says he didn't feel comfortable getting the vaccine because of his medical history. The Claimant says he was on paid leave up to January 14, 2022. This was followed by unpaid leave referred to in his employer's policy.

[11] The Commission says the Claimant didn't give his employer proof of taking the COVID-19 vaccine. It says the Claimant's employer allowed him to take paid leave until January 14, 2022, and then placed him on unpaid leave for going against the policy.

[12] In its initial decision, the Commission denied the Claimant's application for benefits because it decided that the Claimant voluntarily took leave from his job. But it changed the decision on reconsideration. It now says it considers the leave without pay to be a suspension because it was for non-compliance with a mandatory vaccination policy.

[13] I'm persuaded by the Commission's submission that the Claimant's employer placing him on an unpaid leave of absence is equivalent to a suspension. I find that the employer took action because the Claimant didn't do something it wanted him to do.

[14] The Claimant doesn't dispute the reason his employer placed him on unpaid leave. Even though he doesn't agree with what his employer did, I find that the Claimant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

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

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

[16] 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 suspension 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.

[17] 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 wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁵

[18] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.⁶

[19] 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

[20] 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 suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can

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

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

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.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] The Commission has to prove that the Claimant was suspended from his 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 from his job because of misconduct.¹⁰

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

- his employer wanted his private medical information, and this is protected by federal and provincial privacy laws,
- his employer could have accommodated him by allowing him to continue working from home,
- he didn't think he could lose his job because he thought his employer would honour human rights since the vaccination policy says human rights would be protected via accommodation, and
- violations of his rights through an illegal policy can't be construed as misconduct.

[23] The Commission says the Claimant knew that going against his employer's COVID-19 vaccination policy would lead to his suspension, but he still failed to comply.

[24] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could be suspended from his job if he went against his employer's COVID-19 vaccine policy. But he chose not to take the vaccine.

[25] The Claimant's employer told the Commission that the reason the Claimant wasn't working was an unpaid leave of absence due to non-compliance with its COVID-19 vaccination policy. The employer said all employees had to be vaccinated and that

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

the Claimant knew that if he didn't comply, it would place him on an unpaid leave of absence.

[26] The employer sent the Commission a copy of its COVID-19 vaccination policy. It says that it requires all staff to be vaccinated and confirm their vaccination status with the employer on or before November 1, 2021. The policy provides for accommodation on medical, religious, or other documented reason for not being vaccinated. It says that employees who don't follow the policy may be subject to disciplinary action up to and including termination of employment.

[27] The Claimant said he was aware of the employer's policy and the consequences of not complying. He testified that he asked for a medical exemption. He said the employer gave him until November 1, 2021 to get something from his doctor. But he couldn't get anything since the vaccine is still in trial until 2023.

[28] The Claimant testified that he expected his employer to give him some kind of accommodation that took into account his position. He explained that he worked after hours. The Claimant said he isn't against vaccines, but has concerns because of his medical history.

[29] The Claimant says his employer could have accommodated him by allowing him to work at home. Although this doesn't seem feasible given the Claimant's description of his duties, it is not my role to decide if the employer could have accommodated the Claimant in some way. And as noted above, the Claimant couldn't get anything from his doctor to support a medical accommodation.

[30] The Claimant expressed concern about his private medical information that are protected by provincial and federal laws. He also said the employer's policy is illegal. But these are issues that the Claimant would have to raise with a different tribunal or court. I can only decide whether the Claimant was suspended from his job due to misconduct.

[31] From the Claimant's testimony, I find that he knew from his employer's COVID-19 vaccination policy that he had to take the vaccine unless he had an approved

accommodation. The Claimant confirmed that he was aware that staff who don't comply with the policy may be subject to discipline, up to and including termination. But he highlighted that the policy does not say "shall"; it says "may".

[32] In spite of the Claimant highlighting the use of the word "may" in the employer's policy, I find that the Claimant should have known that there was a real possibility his employer would suspend him.

[33] The preamble of the employer's policy refers to evidence of the high level of protection provided by the COVID-19 vaccine. It also refers to the need to protect everyone in the workplace. The Claimant testified that he had been involved in pre-vaccine COVID-19 safety measures like masking and cleaning as a member of the health and safety committee. But, the employer's policy says it required the vaccine "as one of the critical protective measures against the hazard of COVID-19".

[34] The Claimant didn't have an approved accommodation exempting him from the requirement to take the vaccine. I find from this, and from the employer's stated reason for requiring the COVID-19 vaccine that he should have known that if he didn't take the vaccine, there was a real possibility he could face discipline the policy referred to.

[35] I understand that the Claimant is concerned about his health. He testified about not wanting to put anything in his body that would put it out of balance. He testified that he isn't against vaccines, but his concern relates to his medical history. But I find that by not taking the COVID-19 vaccine, the Claimant went against his employer's policy.

[36] I find that the Claimant's action was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

So, was the Claimant suspended from his job because of misconduct?

[37] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

[38] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

Conclusion

[39] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[40] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section