



Citation: *MB v Canada Employment Insurance Commission*, 2022 SST 1678

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

Decision

Appellant: M. B.
Representative: M. B.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (498955) dated July 25, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Videoconference
Hearing date: November 9, 2022
Hearing participant: Appellant
Appellant's representative and Witness
Decision date: November 23, 2022
File number: GE-22-2766

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and then lost her job because of misconduct (in other words, because she did something that caused her to be suspended and lose her job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from December 12, 2021, to June 18, 2022, and disqualified from receiving EI benefits from June 19, 2022.¹

Overview

[3] The Claimant worked as a Health Nurse and was placed on an unpaid leave of absence on December 10, 2021. The Claimant was then dismissed from her job on June 22, 2022. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence and then let go because she didn't comply with their mandatory vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and then letting her go. The Commission decided the Claimant was suspended and then lost her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from December 12, 2021, to June 18, 2022, and disqualified from receiving EI benefits from June 19, 2022.

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

Section 31 of the *Employment Insurance Act* (EI act) says a claimant who is suspended from her employment because of her misconduct is not entitled to receive employment insurance benefits until the claimant meets one of the provisions in Section 31 of the Act, which are: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 of the EI Act to qualify to receive benefits

[5] The Commission says the Claimant was aware of the employer's vaccination policy and understood that failing to comply would lead to her suspension and possible dismissal.

[6] The Claimant says she wouldn't take the Covid-19 vaccine for health reasons. She further says there was no misconduct on her part.

Matters I have to consider first

The Claimant's representative

[7] The Claimant's representative (the Claimant's spouse) wished to provide oral testimony during the hearing. Under the circumstances, I allowed the Claimant's representative to be sworn-in and provide oral testimony.

Issue

[8] Was the Claimant suspended and dismissed because of misconduct?

Analysis

[9] To answer the question of whether the Claimant was suspended and lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended and lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended and dismissed from her job?

[10] I find the Claimant was suspended and lost her job because she didn't comply with the employer's vaccination policy.

[11] The Commission says the reason the employer gave is the reason the Claimant was placed on an unpaid leave of absence and then dismissed. The employer told the Commission the Claimant was placed on an unpaid leave of absence and dismissed, because she didn't comply with their mandatory vaccination policy.

[12] The Claimant doesn't dispute that she was placed on an unpaid leave of absence and then dismissed for not complying with the employer's vaccination policy. However, the Claimant says she didn't want to take the vaccine for health reasons.

[13] I find the Claimant was suspended and then dismissed for failing to comply with the employer's vaccination policy.

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

[14] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[15] 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 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

[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 suspended and let go because of that.⁵

[17] The Commission has to prove that the Claimant was suspended and 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 suspended and lost her job because of misconduct.⁶

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

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.

[18] The Commission says there was misconduct because Claimant was aware of the employer's vaccination policy and understood that failing to comply would lead to her suspension and possible dismissal.

[19] The Claimant says there was no misconduct because she was forced by the employer to take the vaccine or risk losing her job.

[20] I find the Commission has proven there was misconduct, because they showed the Claimant was aware she would be placed on an unpaid leave of absence and dismissed for failing to complying with the employer's vaccination policy (GD3-18 and GD3-41). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that failing to comply with their policy would involve discipline "up to and including termination of employment" (GD3-36). I realize the Claimant testified she refused the vaccine for health reasons. Nevertheless, the Claimant didn't file a request for a medical exemption.

Additional Testimony and Submissions from the Claimant

[21] I realize the Claimant argued that the she was forced to take the vaccine or lose her job. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁷

[22] I also recognize the Claimant testified that she previously had a negative reaction to a flu shot and was concerned about having the Covid-19 vaccine. The Claimant further explained that previous medical records indicating her negative reaction to a flu shot had been lost. I realize these were unfortunate circumstances for the Claimant. However, as mentioned the Claimant didn't file a request for a medical exemption to the employer.

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

[23] Finally, the Claimant argued there was no misconduct on her part and she was forced on an unpaid leave of absence. Nevertheless, I must apply the legal test for misconduct to the evidence. In other words, I cannot ignore the law even in the most sympathetic cases.⁸

So, was the Claimant suspended and dismissed because of misconduct?

[24] Based on my findings above, I find the Claimant was suspended and lost her job because of misconduct.

Conclusion

[25] The Commission has proven the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is disentitled and disqualified from receiving EI benefits.

[26] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301