



Citation: *BM v Canada Employment Insurance Commission*, 2022 SST 1706

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

Decision

Claimant: B. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (514772) dated August 24, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: November 3, 2022

Hearing participant: Claimant

Decision date: November 21, 2022

File number: GE-22-2813

Decision

[1] The appeal is dismissed. I disagree with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended because of misconduct (in other words, because he did something that caused him to be suspended). 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 said he was suspended because he refused to comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant agrees that he was suspended for this reason, but says his employer had other motivations too. He also says that his employer's policy was unlawful and they kept changing compliance dates, so he never thought he'd actually be suspended.

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

Matter I have to consider first

The Claimant briefly brought up the Canadian Charter of Rights and Freedoms during the hearing

[6] The Claimant briefly brought up the Canadian Charter of Rights and Freedoms when arguing that his employer's mandatory COVID-19 vaccination policy was unlawful. I asked him if he wanted to make a formal Charter challenge in his appeal, and he said no, he just wanted to mention it quickly, that was all.

¹ Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

[7] So, the hearing proceeded without the Claimant discussing the Charter any further and I don't need to consider it here.

Issue

[8] Was the Claimant suspended from his job because of misconduct?

Analysis

[9] 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 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?

[10] I find that the Claimant was suspended from his job because he refused to comply with his employer's mandatory COVID-19 vaccination policy.

[11] The Claimant and the Commission don't entirely agree on why the Claimant was suspended from his job.

[12] The Claimant's employer told the Commission that the Claimant was suspended because he refused to comply with their mandatory COVID-19 vaccination policy.²

[13] The Claimant testified that he agrees this was the official reason he was suspended, but thinks that his employer actually suspended him when they did because they wanted to keep him until the Christmas peak season was over.

[14] I accept that the Claimant thinks that he was suspended only once the Christmas peak season was over, but he didn't provide any other evidence, such as a witness, to support his testimony. He also doesn't actually dispute his employer's reason for the suspension, as mentioned above.

² GD3-27.

[15] So, without more evidence, I can't conclude that the Claimant was suspended for any reason other than not complying with his employer's mandatory COVID-19 vaccination policy.

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

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

[17] 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.

[18] 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

[19] 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 suspended because of that.⁶

[20] 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

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 31 of the Act.

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

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

[22] 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

[23] The Commission says that there was misconduct because the Claimant knew about his employer's mandatory COVID-19 vaccination policy and knew that he could be suspended if he didn't comply with it, but decided not to comply anyway.¹¹

[24] The Claimant agrees that he didn't comply with his employer's mandatory COVID-19 vaccination policy, but says there is no misconduct because his employer's policy was unlawful and his employer kept changing the compliance dates, so he didn't think he would actually be suspended.¹²

[25] I find that the Commission has proven that there was misconduct for the following reasons.

[26] I find the Claimant committed the actions that led to his suspension, as he agrees that he refused to comply with his employer's mandatory COVID-19 vaccination policy.

[27] I further find the Claimant's actions were intentional as he made a conscious decision not to comply with his employer's mandatory COVID-19 vaccination policy.

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

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

¹¹ GD4-5.

¹² GD2-7.

[28] The Claimant told the Commission and testified that he didn't ask for an exemption from his employer's mandatory COVID-19 vaccination policy.¹³ He testified that he chose not to do this because he didn't have a reason that fell under an acceptable ground.

[29] The Claimant also testified that he chose not to submit an exemption request because he heard that his employer was verbally refusing all of them.

[30] But the Claimant hasn't provided any evidence that this actually happened, other than to say that he heard about it from co-workers. So, without more evidence, I can't conclude that his employer was verbally refusing other exemption requests.

[31] The Claimant also told the Commission and testified that he feels his employer's mandatory COVID-19 vaccination policy was unlawful because vaccine mandates are illegal and weren't part of his collective agreement.¹⁴

[32] I understand the Claimant's position, but he hasn't provided any evidence to actually show that his employer's mandatory COVID-19 vaccination policy was unlawful other than to raise arguments (about the employer-employee relationship) that aren't relevant for deciding whether he committed misconduct. Beyond that, it must also be understood that the employer has the right to impose policies that are designed to protect the company's employees and clients.

[33] So, based on the evidence before me, I can't conclude that the Claimant's employer's mandatory COVID-19 vaccination policy was unlawful. If the Claimant wishes to pursue this argument further, he needs to do so through another avenue.

[34] Additionally, the Claimant testified that he knows other coworkers in his situation who qualified for EI, so he should too.

[35] I'm not bound by the Commission's decisions on other EI applications and can't make assumptions about the specific information the Commission relied on to make

¹³ GD3-20.

¹⁴ GD3-20, GD3-23, GD2-7.

these decisions. I can only look at the Claimant's actions in relation to what the law says about misconduct. It is clear in this case that the Claimant made a conscious decision to not comply with his employer's mandatory COVID-19 vaccination policy by refusing to get vaccinated.

[36] I also find the Claimant knew or should have known that refusing to comply with his employer's mandatory COVID-19 vaccination policy could lead to him being suspended from his job.

[37] The Claimant's employer told the Commission that they implemented a mandatory COVID-19 vaccination policy on September 15, 2021 and made employees aware of it in several ways, including letters, postings by the swipe/punch clocks, and two virtual town halls with the employer's medical director.¹⁵

[38] I note that the Claimant's employer's mandatory COVID-19 vaccination policy states that employees were required to attest to their vaccination status by October 15, 2021 and be fully vaccinated by November 1, 2021. It also states that after December 31, 2022, anyone who wasn't fully vaccinated and without an approved exemption would be placed on unpaid leave.¹⁶

[39] I note that on December 7, 2022, the Claimant's employer updated their policy to say that after January 10, 2022, anyone who wasn't fully vaccinated and without an approved exemption would be placed on unpaid leave.¹⁷ They also submitted an information bulletin to employees on January 4, 2022 that reiterated this revised deadline.¹⁸

[40] The Claimant told the Commission and testified that he received a total of five verbal and written warnings from his employer about their mandatory COVID-19

¹⁵ GD3-28.

¹⁶ GD3-32 to GD3-33.

¹⁷ GD3-38 to GD3-39.

¹⁸ GD3-22.

vaccination policy. He received the first of these warnings in September 2021 and the last in late December 2021.¹⁹

[41] The Claimant testified that his first four warnings were verbal. He testified that managers gave him these warnings and said that employees had to be vaccinated by specific dates, but were vague about what would happen to those who didn't comply with the policy and never specifically said that they would be put on leave.

[42] The Claimant testified that his last warning was a letter in late December 2021 that said he could be suspended (put on unpaid leave) for not complying with his employer's mandatory COVID-19 vaccination policy. He testified that he never got any of the other letters his employer says they sent out about this, as mentioned above.

[43] Even if I accept that the Claimant didn't get a letter from his employer until late December 2021, I still find that there is sufficient evidence that he knew he could be suspended for not complying with his employer's mandatory COVID-19 vaccination policy.

[44] If the Claimant's own version of events is accurate, he would have had approximately two weeks after receiving the letter in late December 2021 to get vaccinated in order to comply with his employer's mandatory COVID-19 vaccination policy before he was placed on unpaid leave (on January 10, 2022).

[45] While I acknowledge that I might have questions about ample notice if an employer introduced a mandatory COVID-19 vaccination policy and gave employees only two weeks to get vaccinated in order to keep working, that wasn't the case here at all.

[46] There is clear evidence that the Claimant's employer introduced their policy in September 2021, as mentioned above, so well before the letter the Claimant says he received in late December 2021. There is also clear evidence that the Claimant knew about the policy in September 2021, as mentioned above.

¹⁹ GD3-19.

[47] Additionally, the Claimant provided clear evidence that he received four verbal warnings between September 2021 and December 2021 and they all included specific deadlines for getting vaccinated. I find that it's reasonable to believe that since the Claimant's warnings were similar each time (they told him when he needed to get vaccinated by), he should have realized that his work status could be jeopardized if he didn't comply.

[48] So, in light of all of this evidence, I find that the Claimant still had a reasonable amount of time when he received his employer's letter in late December 2021 to get vaccinated in order to avoid being placed on unpaid leave, as this requirement shouldn't have come as a surprise to him then.

[49] The Claimant also testified that he didn't think he would actually be suspended for not following his employer's mandatory COVID-19 vaccination policy because his employer kept changing the deadlines and he ultimately thought they were bluffing about leaves of absences for not getting vaccinated.

[50] I believe the Claimant when he says he didn't think he would actually be suspended because his employer kept changing the deadlines and he ultimately thought they were bluffing. There is also evidence that his employer did change their policy deadlines, as mentioned above.

[51] But this doesn't mean the Claimant also couldn't have still known that he could be suspended for not getting vaccinated. In other words, it was entirely possible for him to believe both of these things at the same time, especially as he confirmed that he received four verbal warnings and one written warning between September 2021 and December 2021 and was aware of the consequences of not complying with the policy in late December 2021, as mentioned above.

[52] While I understand that the Claimant didn't think he would be suspended even after choosing not to get vaccinated, I find the evidence shows that he should have known that he could be suspended.

[53] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his suspension (he refused to comply with his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being suspended.

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

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

[55] The Claimant testified that he is entitled to EI because he has been contributing to it for many years.²⁰

[56] I understand the Claimant's argument. However, Employment Insurance isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. The Commission has proven that the Claimant was suspended from his job because of misconduct. This means that he isn't entitled to receive EI benefits.

Additional Considerations

[57] The Commission proposes an amendment to its initial decision. It proposes that a disentitlement for suspension due to misconduct be imposed from January 9, 2022, rather than a disqualification for dismissal due to misconduct.²¹

[58] The Commission argues that the Claimant was suspended, not dismissed, from his job due to his own misconduct, so the amendment corrects the record.²²

[59] I agree with the Commission. There is clear evidence that the Claimant's employer placed him on a leave of absence as of January 10, 2022, as mentioned above.

²⁰ GD2-7.

²¹ GD4-6.

²² GD4-6.

[60] I therefore find that the Claimant was suspended from work beginning on January 10, 2022, as proposed by the Commission.

Conclusion

[61] 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.

[62] This means that the appeal is dismissed.

Bret Edwards
Member, General Division – Employment Insurance Section