



Citation: *ZB v Canada Employment Insurance Commission*, 2023 SST 363

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

Decision

Appellant: Z. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (504029) dated August 10, 2022 (issued by Service Canada)

Tribunal member: Marc-André St-Jules

Type of hearing: Videoconference

Hearing date: December 6, 2022

Hearing participant: Appellant

Decision date: January 10, 2023

File number: GE-22-2841

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant(who is the Appellant).

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost 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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Commission says the Claimant was suspended without pay because he went against its vaccination policy: he didn't get vaccinated.²

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He tried to comply but his exemption request was denied.

[5] The Commission decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Matters I have to consider first

I have two appeals before me. They were kept separate.

[6] I have two separate appeals before me with the same Claimant. I kept the appeals separate. This current decision deals with a disentitlement due to misconduct. The other decision will be issued separately. To minimize the Claimant's time and avoid delays, I scheduled one hearing for both issues.

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 After several attempts, a statement was not obtained from the employer. The Commission is relying on the Claimant's statements and documentation supplied by the Claimant.

[7] I find the Claimant is not prejudiced by having two separate decisions. Each issue has its own decision thereby making each of them individually clearer and more concise.

I will accept documents submitted after the hearing

[8] During the hearing, I agreed to accept documents to be submitted after the hearing as they supported part of his testimony. The documents were submitted as agreed. The documents were shared with the Commission. No reply from the Commission was received as of the date of this decision.

Issue

[9] Did the Claimant lose his job because of misconduct?

Analysis

[10] 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.³

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

Why did the Claimant lose his job?

[12] I find that the Claimant lost his job because he went against his employer's vaccination policy.

[13] The Claimant testified he was first suspended as he did not comply with the vaccination policy. He further testified the suspension was changed to a termination effective June 20, 2022.

³ See sections 30 and 31 of the Act.

[14] The Commission says the Claimant was suspended as he failed to comply with the employer's vaccination policy. The Claimant refused to be vaccinated.

[15] I find that the Claimant was suspended followed by a termination as he did not comply with the vaccine policy implemented by his employer. Nothing in the file or in testimony suggest any other reason for the job loss.

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.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[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 let go because of that.⁷

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[20] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁹

[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.¹⁰ 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 lost 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 lost his job because of misconduct.¹¹

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

- The employer had a vaccination policy.¹²
- The employer notified the Claimant about its expectations about getting vaccinated.
- The employer communicated the policy to the Claimant to advise employees including the claimant what it expected.
- The Claimant knew or should have known what would happen if he didn't follow the policy.

⁸ See section 30 of the Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹² See GD3 pages 36 to 41.

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

- His did not commit misconduct under the law.
- The vaccine is a high risk medical intervention.
- The employer's policy ignored his body's natural immunity following a previous COVID infection.
- He tried his best to comply with the vaccine mandate by submitting an exemption request.
- The Claimant had an exemplary career with stellar reviews during his 25 years with the employer. The bar for misconduct has not been met.
- A person's vaccination status does not present a functional limitation on an employee's ability to work.
- There are many other reasonable less intrusive accommodations available to create a safe and inclusive workplace.
- The new policy was not part of his employment contract.
- The Claimant paid into the employment insurance fund for over 25 years and has never been unemployed.

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

- The employer had a vaccination policy requiring proof of vaccination by November 22, 2021, or be placed on unpaid leave.¹³

¹³ The vaccination policy does allow for employees to continue working past November 22, 2021, while being unvaccinated or not fully vaccinated if the employee is granted an exemption. The same applies while an exemption request is being reviewed.

- The Claimant was made aware of the policy and the consequences of non-compliance.
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy

[26] First, I accept the undisputed fact that the policy was communicated to the Claimant. The Claimant testified that he received it and understood the policy. Although he acknowledged the receipt of the policy, he strongly disagrees with it.

[27] Second, I find that the Claimant wilfully and consciously chose not to comply with the policy for his own personal reasons. He testified he read the policy. He disagreed with it. He had natural immunity and submitted an exemption request.¹⁴ He strongly believes in his natural immunity and chose not to comply. The Claimant willingly chose not to comply and rely on his body's natural immunity.

[28] Third, the Claimant knew the consequences for non-compliance with the policy. This is supported by his testimony and his exemption request to the employer on November 22, 2021. The claimant wrote in the exemption request that he was submitting the request "under duress and threat of losing my job".¹⁵

[29] This is further reinforced by the November 22, 2021, email from the employer.¹⁶ This letter confirms the receipt of the request and provides information concerning the "temporary work arrangement" to work from home while it is being reviewed. This email was in response to the Claimant's request for exemption under the *Human Rights Code*.

[30] For this reason, the Claimant worked 100% from home after this date. What this email shows is that that employer is taking this matter seriously. The Claimant ought to have known that the employer had the full intention of implementing the policy as communicated.

¹⁴ See GD3 page 26.

¹⁵ See GD2 page 31.

¹⁶ GD3 page 42.

[31] After the exemption request was denied, he was placed on unpaid leave effective January 19, 2022.¹⁷ The leave letter to the Claimant provides additional time to for the Claimant to comply. This shows the employer continued to implement the policy and would not waiver. He maintained his position on vaccination and chose to remain unvaccinated which means he was non-compliant with the policy.

[32] The Claimant testified he was then terminated effective June 20, 2022.

[33] Some of the Claimant's arguments challenge the employer's conduct, including the reasonableness of the policy and the consequences for non-compliance.

[34] As noted above, I do not have the authority to determine whether the policy was reasonable, or if the Claimant should have been accommodated by the employer. This is supported by the courts.¹⁸ The fact that the employer denied his request for exemption falls into this category. I have no authority to make a determination if the employer wrongfully denied his request for exemption.

[35] In another case, the Federal Court decided that it was a matter for another forum when a Claimant argued that the employer's policy violated his human rights.¹⁹ This means that the Claimant's human rights arguments and the alleged discriminatory application of the employer's policy cannot be decided here.

[36] The Claimant argues the vaccination policy violates his rights under the *Canadian Charter of Rights and Freedoms* (Charter) as well as the *BC Human Rights Code*. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms. These laws are enforced by different courts and tribunals. The Social Security Tribunal's has no jurisdiction (authority) to consider whether an action taken by an employer violates the Charter or human rights legislation.

¹⁷ See GD3 pages 44,45.

¹⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185; *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107

¹⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[37] I can only decide whether what the Claimant did or failed to do is misconduct under the *Employment Insurance Act*. I have already decided that the Claimant's conduct does amount to misconduct.

[38] I find the Claimant is very credible. His statements were consistent and nothing from the Commission suggests any credibility issues. I have no doubt that the Claimant was a valuable employee.

[39] The Claimant says that the threshold for misconduct has not been met. I agree the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent.²⁰

[40] I find that once the employer imposed a vaccination policy, this became a fundamental condition of employment. I agree that the Claimant can decline vaccination. That is his 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.

[41] By choosing not to be vaccinated after failing to persuade his employer to accommodate his request, he made a personal decision that lead to the foreseeable consequences for his employment.

[42] I understand that the Claimant feels that because he paid into the employment insurance fund, he should be entitled to benefits. This belief goes against the fundamental principle of the employment insurance. This is that an employee must not voluntarily place himself 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.

²⁰ See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

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

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

[44] 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 his to lose his job.

Conclusion

[45] I find that the Claimant is disentitled from receiving benefits for the period of suspension from January 19, 2022 until June 19 2022.

[46] I find the Claimant is disqualified from receiving benefits from June 20, 2022. This is his termination date from employment on June 20, 2022.

[47] This means that the appeal is dismissed with modification.

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