



Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 444

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

Decision

Appellant (Claimant): A. B.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (518651) dated August 23, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: January 19, 2023
Hearing participant: Appellant
Decision date: January 20, 2023
File number: GE-22-3127

Decision

[1] The appeal is dismissed.

[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 be suspended from his job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from February 27, 2022.¹

Overview

[3] The Claimant worked as a X and was placed on an unpaid leave of absence by his employer on November 26, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence because he didn't comply with their vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from February 27, 2022.

[5] The Commission says the Claimant was aware of the employer's vaccination policy and chose not to comply with the policy knowing the consequences.

[6] The Claimant says misconduct wasn't defined in the EI Act. He further says the employer breached the collective agreement when they imposed the vaccination policy.

¹ Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended from his employment because of his misconduct is not entitled to receive EI benefits until the claimant meets one of the following provisions: (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 to qualify to receive benefits.

Issue

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

Analysis

[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 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 the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason for the Claimant's suspension. The employer told the Commission that the Claimant was placed on an unpaid leave of absence for failing to comply with their vaccination policy.

[11] The Claimant doesn't dispute that he was placed on an unpaid leave of absence for not complying with the employer's vaccination policy. However, the Claimant says he never made any request to be placed on an unpaid leave of absence.

[12] I find the Claimant was suspended from his job for failing to comply with the employer's vaccination policy. I realize the Claimant testified he never requested to be placed on an unpaid leave of absence. However, the Claimant initiated the separation from his employment when he failed to comply with the employer's vaccination policy. As a result, I agree with the Commission that the Claimant's separation from his employment on November 26, 2021, was a suspension.

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

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

[14] 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁴

[15] 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 or let go because of that.⁵

[16] 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.⁶

[17] The Commission says there was misconduct because the Claimant was aware of the employer's vaccination policy and chose not to comply with the policy knowing the consequences.

[18] The Claimant says there was no misconduct because misconduct wasn't defined in the EI Act.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware he could be placed on an unpaid leave of absence if he didn't comply with the employer's vaccination policy (GD3-104). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who didn't attest to their vaccination status would be considered unwilling to be fully vaccinated and placed on leave without pay after November 26, 2021 (GD3-23). I realize the Claimant argued that misconduct wasn't defined in the EI Act. However,

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.

misconduct is referred to in the EI Act and **defined in the case law (listed above)**. On this matter, I must the apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

Additional Testimony from the Claimant

[20] I realize the Claimant argued that the employer breached the collective agreement when they imposed their vaccination policy. 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.⁸

[21] Finally, I realize the Claimant was re-instated in his job on September 6, 2022. Nevertheless, the only issue before me was whether the Claimant was suspended from his job on November 26, 2021, because of misconduct. On this matter, I must apply the law and cannot ignore the law even for sympathetic reasons.⁹

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

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

⁷ *Knee v Canada (Attorney General)*, 2011 FCA 301.

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁹ *Knee v Canada (Attorney General)*, 2011 FCA 301.

Conclusion

[23] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from February 27, 2022.

[24] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section