



Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 552

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

Decision

Appellant: M. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (507548) dated August 12, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: February 7, 2023

Hearing participant: Appellant

Decision date: February 13, 2023

File number: GE-22-3005

Decision

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

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

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said that she was suspended because she didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, she says that her employer unfairly suspended her because she didn't set out to defy them, she just didn't feel comfortable getting the COVID-19 vaccine.

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

Matter I have to consider first

The Charter of Rights and Freedoms

[6] In her Notice of Appeal, the Appellant referred to the Charter of Rights and Freedoms.³

[7] I note that the Tribunal can't consider any arguments related to the Charter unless they specifically focus on how EI law (the *Employment Insurance Act* and

¹ In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.

² Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

³ GD2-12.

Employment Insurance Regulations) violates the Charter. At the hearing, I told the Appellant this and asked if she wanted to make a Charter argument that the Tribunal could consider. She said she didn't.

[8] I note that the Appellant went on to refer to the Charter (by saying her employer's mandatory COVID-19 vaccination policy violates her Charter rights) anyway, but she did this knowing that I can't consider this argument here for the reason I've just mentioned.

Issue

[9] Was the Appellant suspended from her 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.⁴

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

Why was the Appellant suspended from her job?

[12] I find that the Appellant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[13] The Appellant and the Commission agree on why the Appellant was suspended from her job. The Appellant says that her employer suspended her because she didn't follow their mandatory COVID-19 vaccination policy.⁵ Her employer also says this was why they suspended her.⁶

⁴ See sections 30 and 31 of the Act.

⁵ GD3-18.

⁶ GD3-26.

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

[14] The reason for the Appellant's suspension is misconduct under the law.

[15] 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 Appellant'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.

[16] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ The Appellant 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.⁹

[17] There is misconduct if the Appellant 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 because of that.¹⁰

[18] The Commission has to prove that the Appellant was suspended from 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 Appellant was suspended from her job because of misconduct.¹¹

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

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

[19] The law doesn't say I have to consider how the employer behaved.¹² Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.¹³

[20] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹⁴ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[21] The Commission says that there was misconduct because the Appellant knew about her employer's mandatory COVID-19 vaccination policy and knew that she could be suspended if she didn't follow the policy, but she chose not to follow it anyway.¹⁵

[22] The Appellant says that there was no misconduct because she didn't mean to do anything wrong and her employer unfairly suspended her for not getting vaccinated.¹⁶

[23] The Appellant told the Commission and testified that:

- She knew about her employer's mandatory COVID-19 vaccination policy.¹⁷
- Employees were informed in September 2021 at some point through a townhall meeting and on the employer's website.¹⁸
- The policy required that employees get their first vaccine dose by October 15, 2021.¹⁹
- She knew that she could be suspended if she didn't follow the policy.²⁰

¹² See section 31 of the Act.

¹³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁵ GD4-4.

¹⁶ GD2-12.

¹⁷ GD3-18.

¹⁸ GD3-18.

¹⁹ GD3-18.

²⁰ GD3-18.

- She didn't ask for an exemption because she wasn't able to get one. She has health issues and spoke to her doctor, but they told her she didn't qualify for an exemption.²¹
- She had concerns about getting the COVID-19 vaccine because she feels not enough is known about its potential side effects.²²
- She wanted to see more data about the vaccine before she decided to get it.
- She didn't mean to defy her employer. She just didn't want to get a vaccine that she didn't know enough about.
- Her employer didn't offer her any other accommodations besides following their policy or getting an exemption.

[24] The Appellant's employer told the Commission²³ that:

- The Appellant was hired on contract until May 2022.
- When her contract expired, she was still on unpaid leave for not following their mandatory COVID-19 vaccination policy.

[25] The Appellant's employer's mandatory COVID-19 vaccination policy, dated August 19, 2021 and September 2, 2021, says the following:

- All employees are expected to be fully vaccinated by October 15, 2021, aside from those who have an approved medical or human rights exemption.²⁴
- Those employees who aren't fully vaccinated by October 15, 2021 will be placed on unpaid leave.²⁵
- The policy applies to all employees regardless of where they work.²⁶

²¹ GD3-25.

²² GD3-25.

²³ GD3-26.

²⁴ GD3-42.

²⁵ GD3-44.

²⁶ GD3-44.

[26] I sympathize with the Appellant, but find that the Commission has proven there was misconduct for the following reasons.

[27] I find that the Appellant committed the actions that led to her suspension, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[28] I further find that the Appellant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[29] There is clear evidence that the Appellant knew about her employer's policy. She said that she knew about it, as mentioned above.

[30] There is also clear evidence that the Appellant chose not to follow her employer's policy. She said that she didn't get vaccinated by the deadline her employer gave her or request an exemption from the policy, as mentioned above.

[31] I acknowledge that the Appellant has concerns about getting the COVID-19 vaccine and feels that her employer should have given her a special accommodation instead of asking her to follow their policy (by getting vaccinated or an approved exemption).

[32] Unfortunately, I find that this argument isn't relevant here. As mentioned above, I must focus my analysis of misconduct on the employee's conduct, not the employer's. This means I need to focus on the Appellant's actions leading to her suspension and whether she knew her actions could lead to her being suspended. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[33] I also acknowledge that the Appellant feels that she didn't intentionally defy her employer and just wanted more time to decide whether to get the COVID-19 vaccine.

[34] Unfortunately, I disagree. The Appellant does have the right to choose whether to get the COVID-19 vaccine, but this doesn't change the fact that I must focus my analysis of misconduct on the Appellant's conduct, not the employer's. This means that I need to look at the Appellant's actions leading up to her suspension. When I do, I find

that the evidence shows that her employer asked her to get the COVID-19 vaccine by a specific deadline and she didn't do that.

[35] In other words, while I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that she made a conscious decision not to follow it. She didn't get vaccinated as the policy required her to do, which shows that her actions were intentional.

[36] I also find that the Appellant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being suspended from her job.

[37] There is clear evidence that the Appellant knew she could be suspended if she didn't follow the policy. She said that she knew this, as mentioned above.

[38] There is also clear evidence that the Appellant's employer told her on multiple occasions that she could be suspended if she didn't follow their policy. The evidence is:

- An email to the Appellant, dated September 2, 2021. It says that their records show that her COVID-19 vaccination documentation is incomplete. It also says that employees must be fully vaccinated by October 15, 2021 or they will be placed on unpaid leave.²⁷
- An email to the Appellant, dated September 9, 2021. It says that their records show she hasn't begun her COVID-19 vaccination series. It also reiterates the policy deadline and consequences for those who don't follow it.²⁸
- An email to the Appellant, dated September 16, 2021. It says that she must get her first COVID-19 vaccine dose by September 17, 2021 or September 24, 2021 in order to avoid being placed on unpaid leave after October 15, 2021.²⁹

²⁷ GD3-48.

²⁸ GD3-50.

²⁹ GD3-54.

- An email to the Appellant, dated September 23, 2021. It says that if she doesn't receive her first vaccine dose by September 24, 2021, she'll be placed on unpaid leave, effective October 16, 2021.³⁰
- An email to the Appellant, dated September 30, 2021. It says that if she hasn't yet gotten her first dose, she'll be placed on unpaid leave, effective October 16, 2021.³¹
- An email to the Appellant, dated October 4, 2021. It says that their records show she hasn't followed the policy, so that doesn't change by October 15, 2021, she'll be placed on unpaid leave the next day.³²

[39] I therefore find that the Appellant's conduct is misconduct under the law since she committed the conduct that led to her suspension (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being suspended.

So, was the Appellant suspended from her job because of misconduct?

[40] Based on my findings above, I find that the Appellant was suspended from her job because of misconduct.

[41] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to follow her employer's mandatory COVID-19 directive was likely to cause her to be suspended from her job.

³⁰ GD3-56.

³¹ GD3-58.

³² GD3-60.

Conclusion

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

[43] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section