Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 632

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (494142) dated June 9, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Videoconference
Hearing date:	November 29, 2022
Hearing participants:	A. B. A. U. S. B.
Decision date:	January 15, 2023
File number:	GE-22-2340

Decision

1. The appeal is dismissed.

2. The Canada Employment Insurance Commission (Commission) has proven that the Appellant A. B. lost her job because of misconduct. This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

3. In September 2021 the Appellant was advised by her employer that they had implemented a COVID-19 Vaccination Policy. The Policy required all employees to disclose their vaccination status to their employer by a certain date. The Policy also required all employees to be fully vaccinated with a COVID-19 vaccine series by a certain date or obtain an exemption.

4. The Appellant did not comply with the Policy by the deadlines required by her employer. She was placed on unpaid leave on November 2, 2021 and was terminated from her employment on January 2, 2022.

5. The Appellant applied for Employment Insurance benefits on January 8, 2022.

6. The Canada Employment Insurance Commission (the "Commission") determined that A. B. was disqualified from receiving benefits because she lost her employment due to her own misconduct. The Commission submits that the Appellant knew about her obligations under the Policy and made the choice not to comply.

7. The Appellant disagrees with this decision. She says that she tried to comply with the Policy but was prevented in various ways from doing so. She also says that the Policy itself was unlawful and unreasonable. She argues that it was an unfair change to the terms of her employment contract and a violation of her collective agreement.

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

8. My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

Issue: Did the Appellant lose her job because of misconduct?

Analysis

9. 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.[2]

10. To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why A. B. lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

11. The documentary record submitted by the Appellant on this appeal was voluminous and detailed many communications, conversations and interactions between A. B. and her employer between September 2, 2021 when the employer's Vaccination Policy was first announced and January 3, 2022 when she received her notice of termination.

12. I will provide a chronology of some key events and communications.

- On September 2, 2021 the employer implemented a COVID-19 Vaccination Policy (the "Policy") and circulated it to all staff.[3]

- The Policy required the following:

    1. "Employees must disclose their vaccination status to [the employer] in accordance with the established process by no later than

[2] See sections 30 and 31 of the Act.
[3] GD8-15

September 20, 2021. [The employer] will maintain vaccination disclosure information in accordance with privacy legislation."

2. "All employees are required to be fully vaccinated with a COVID-19 vaccine series by October 30, 2021."

3. "Employees who are not able to obtain a COVID-19 vaccine for a reason related to a protected ground set out in the employer's Human Rights and Anti-Harassment/Discrimination Policy can request accommodation from Human Resources."

4. "Employees who do not comply with this policy may be subject to discipline, up to and including dismissal."

- Between September 10-14, 2021 A. B. sent emails to various supervisors and managers asking questions about the safety and efficacy of the vaccine and asking questions about the legal basis for the Policy.[4]

- The Appellant received many responses to her emails over the next number of weeks. Not all of her questions were answered.

- On September 30, 2021 the Appellant received a phone call from a manager. Because she had not disclosed her vaccination status by September 20, 2021 as required by the Policy, the manager called to confirm that the Appellant was aware of the Policy requirements.[5]

- On October 2, 2021 the Director of Human Resources wrote to the Appellant reminding the Appellant that the Policy "required that staff disclose their vaccination status by no later than September 20, 2021" and confirming that she had not yet done so. [6]

[4] For example GD13-3; GD2-30
[5] GD2-41
[6] GD2-41

- On October 15, 2021, A. B. received another email from Director of Human Resources that repeated terms of the Policy: “Under the policy, all staff were required to disclose their vaccination status and provide proof of vaccination by September 20, 2021, and all staff are required to receive both doses of a COVID-19 vaccine by October 30, 2021… Our records indicate that you have not provided proof of vaccination as is required under the policy. If our records are incorrect, please advise as soon as possible.”[7]

- This email confirmed that compliance with the Policy was a “condition of continued employment with [the employer].[8]

- On October 25, 2021, the Appellant received a letter from her employer dated October 22, 2021 that advised as follows: “Staff were required to disclose and provide proof of their vaccination status by September 20, 2021. You have failed to comply with this Policy.”[9]

- The letter advised that “in the event that [the Appellant] fail[ed] to provide [the employer] with proper substantiation for [her] non-compliance with this important Policy, [she] will be suspended without pay, beginning the next day until the earlier of” (1) compliance with the Policy or (2) December 12, 2021 at which time she would be terminated with cause.[10]

- The Appellant agrees that she had not disclosed her vaccination status by this date.

- On November 1, 2021 the Appellant received correspondence from the employer that she would be suspended without pay effective November 2, 2021. “Staff were required to disclose and provide proof of their

[7] GD13-6
[8] GD13-6
[9] GD3-171
[10] GD3-171

vaccination status by September 20, 2021. You have failed to comply with this Policy. You are hereby suspended without pay."[11]

- The Appellant agrees that she had not disclosed her vaccination status by this date.
- On November 30, 2021, the Appellant was advised while on leave that her employer had extended the deadline for providing proof of vaccination from December 13, 2021 to January 2, 2022.
- The letter confirmed that A. B. would be dismissed if she did not achieve full compliance with the Policy by no later than 11:59 p.m. on January 1, 2022.[12]
- On December 21, 2021 the Appellant sent her employer a Spiritual Declaration and a Statement of Religious Belief and Conscience Affidavit, requesting an accommodation that she be exempt from the Policy based on her religious beliefs.[13]
- The request for accommodation was sent registered mail, and Canada Post documentation confirms that it was delivered to her employer by December 23, 2021.[14]
- The Appellant re-sent the Spiritual Declaration and Statement of Religious Belief and Conscience Affidavits to various directors and managers on December 30, 2021 by email.
- She received no response or determination regarding her accommodation request from her employer.

[11] GD8-12
[12] GD9-2
[13] GD3-75-77
[14] GD3-164

- On January 3, 2022 the Appellant received a letter dated January 2, 2022 that advised: “As of January 2, 2022, you were still not in compliance with [you employer’s] COVID-19 Vaccination Policy and, as such, you have not remedied your insubordination and willful disobedience. Therefore, in accordance with the letter dated November 30, 2021, this is to confirm your termination for just cause effective immediately, January 2, 2022.” [15]

- On January 3 and 4, 2022, the Appellant sent follow up emails to her employer asking for the outcome of her accommodation request.[16] She did not receive any determination on the request.

13. Based on the above documentation (which was all provided by the Appellant) I find that the Policy clearly required compliance in two stages.

14. At the first stage, all employees were required to disclose their vaccination status by September 20, 2021.

15. After September 20, 2021 all employees were required to either:

- Provide proof of vaccination by October 30, 2021; **or**
- Obtain an exemption from the requirement to receive the COVID vaccine.

16. At various points in her written submissions to the Commission and again to this Tribunal, the Appellant denies having breached the Policy. She argues that she requested an exemption as detailed in the Policy and never received a response to her request.

17. The Appellant agrees, however, that she did not disclose her vaccination status to her employer. “My employer supposed that I was unvaccinated because I did not disclose my vaccination status and because of that assumption they terminated me.”[17]

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[15] GD9-3
[16] GD3-212-GD3-213
[17] GD2-21

18. It is not necessary that the Appellant have breached every part of the Policy for that to be the cause of her dismissal. It is not disputed that the Appellant violated one part of the Policy: the requirement that she disclose her vaccination status.

19. I do not need to decide if she violated the rest of the Policy to determine whether this was the cause of her dismissal. I find that the Appellant was dismissed from her job for failing to comply with terms in the mandatory COVID-19 Vaccination Policy.

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

20. The Appellant's decision not to comply with her employer's vaccination policy amounts to misconduct.

21. Having determined why the Appellant lost her job (because she breached one or more conditions of her employer's vaccination Policy) I now need to consider whether these actions amount to misconduct.

22. Although the *Employment Insurance Act* doesn't provide an exact definition of the word misconduct, case law (decisions from courts and tribunals) shows us how to determine whether an Appellant's actions and behaviours amount to misconduct under the Act.

23. The Commission bears the burden of proving that the Appellant 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 A. B. lost her job because of misconduct.[18]

[18] See *Minister of Employment and Immigration v Bartone*, A-369-88.

A. B.'s decision not to comply with the Policy was wilful.

24. Case law says that, to be misconduct, the conduct has to be wilful. This means that the Commission needs to prove that the conduct was conscious, deliberate, or intentional.[19] They do not need to prove that there was deceit or a desire to cause the employer harm, just that the behaviour was done knowingly.

25. The Appellant argues that her non-compliance with the Policy was not her choice: by failing to answer her questions about the safety of the vaccine and the legality of the Policy, her employer prevented her from consenting to its terms.

26. She also argues that her employer's failure to respond to her request for exemption prevented her from complying with the Policy.

27. The Commission disagrees. They submit that the Appellant made a personal and active choice not to comply with the Policy.

28. As noted above, A. B. violated **both** elements of her employer's Policy:

    - The requirement to disclose her vaccination status; **and**
    - The requirement to receive COVID vaccinations unless exempted.

29. While the parties disagree about whether her violation of the second element was wilful, they do not disagree about the first. A. B. agrees that she knowingly refused to disclose her vaccination status to her employer.

30. I find that this is sufficient to establish that the Appellant wilfully breached her employer's Policy.

[19] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

The Policy constituted a necessary and important part of the Appellant's job.

31. The case law also says that misconduct, in the context of the Act, means behaviour that could get in the way of an employee carrying out their duties toward their employer.

32. This means that the Commission also bears the burden of proving that the Appellant's behaviour breached an important and necessary part of their job responsibilities. The case law does not require that the Commission demonstrate that the behaviour be dangerous, criminal, deceptive or unethical in order to amount to misconduct.

33. The Appellant says that compliance with the Policy was not a necessary or important part of her job. She argues that the nature of her job (which involved minimal contact with both co-workers and clients) meant that vaccination was not necessary for her to safely perform her job. She also argues that her employer did not need to know about her private health information in order for her to perform her job.

34. The Commission says because the Policy was instituted in compliance with provincial directives, in the context of a pandemic, to further public safety, it was a necessary part of the Appellant's job.

35. The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this vaccination policy as a requirement for all of its employees, this policy became a condition of the Claimant's continued employment.

36. The Claimant breached the policy when she chose not to comply with it. I find that this interfered with her ability to carry out her duty to the employer.

The Appellant knew that failing to comply with the policy would result in her dismissal.

37. Finally, the case law also establishes that for behaviour to be misconduct in the context of the Employment Insurance Act, the employee needs to have known that their actions might result in them being fired.

38. The Appellant acknowledges that she read the Policy when it was first released and was aware that it stated that "employees who do not comply with this policy may be subject to discipline, up to and including dismissal."

39. She argues in her submissions that this language was ambiguous and that she was not told that she *would* be dismissed if she did not comply.

40. That is not the test at law. I find that it was sufficiently clear to the Appellant that non-compliance with the policy could reasonably lead to her dismissal.

41. In any event, any ambiguity in the Policy itself was clarified in correspondence from her employer on October 15, October 22, November 1 and November 30, 2021 that all confirmed that the Appellant *would* be dismissed if she failed to comply with the Policy.

42. She continued to choose not to comply right up until her termination date of January 2, 2022.

43. I find that the Commission has proven, on a balance of probabilities, that A. B. lost her job because of misconduct: She was aware of her employer's policy requiring her to have both

    - disclosed her vaccination status and
    - obtained either vaccinations or an exemption

    by certain dates.

44. She knew that she could be fired for refusing to follow the employer's policy. And she decided not to follow the policy anyway.

Other issues raised on the Appeal

45. The Appellant raised other issues in her submissions.

46. A. B. argues that a vaccination mandate was contrary to both her Collective Agreement and original employment contract.

47. She submits that her dismissal was not justified because her presence in the workplace did not present a health and safety risk to co-workers or customers.

48. She also argues that the Policy was contrary to various laws, including the *Criminal Code*, the *Bill of Rights*, the *Occupational Health and Safety Act*, *the Personal Health Information Protection Act* and the *Charter of Rights and Freedoms*.

49. The Federal Court has already decided that the Tribunal cannot decide whether the employer's policy was fair or whether the Appellant's dismissal or penalty was justified.[20] The Appellant's recourse for these arguments is to pursue an action in court or any other Tribunal that may deal with her particular arguments about the fairness of the Policy.

50. Rather, the Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act. The Tribunal must focus on the Appellant's behaviour and actions, not the employer's conduct.[21]

51. In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.[22] He lost his job because of his employer's drug testing policy. He argued that he should not have

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[20] See *Canada (Attorney General) v Marion,* 2002 FCA 185 at paragraph 3

[21] See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31

[22] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

been let go, since the drug test wasn't justified in the circumstances and was contrary to his collective agreement.

52. He also said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. He relied on the applicable workplace health and safety legislation of the time.

53. In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[23]

54. The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them, including litigation, grievances and petitions to other tribunals. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[24]

55. In a more recent case called *Paradis*, the claimant was let go after failing a drug test.[25] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. The FCA relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[26]

56. In summary, my role isn't to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, my jurisdiction is limited to looking at what A. B. did or failed to do and whether that behaviour amounts to misconduct under the Act.

57. I have already decided that the Appellant's conduct does amount to misconduct based on the EI Act.

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[23] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[24] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[25] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[26] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

58. The Appellant also submitted that she had been paying into EI for her entire working life and that it was unfair for her to now be denied benefits right when she needs them the most.

59. The Employment Insurance Act is an insurance plan. Like other insurance policies, claimants looking to collect benefits under the plan need to meet the specified conditions of the plan.[27] The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. The Tribunal is not authorized to make decisions based on compassion or fairness. It must follow the law and apply the Act.[28]

60. The Appellant may have other recourse to pursue her claims that the employer's policy breached her personal rights and or that she ought to have been accommodated. But these matters must be addressed by the correct court or Tribunal.

So, did the Appellant lose her job because of misconduct?

61. Based on my findings above, I find that the Appellant lost her job because of misconduct. The Appellant's actions caused her dismissal. She acted deliberately. She knew that refusing to disclose her vaccination status was likely to cause her to lose her job.

Conclusion

62. The Commission has proven that the Appellant lost her job because of misconduct.

63. This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section

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[27] See *Pannu v. Canada (Attorney General)* 2004 FCA 90
[28] See *Canada (Attorney General) v Knee* 2011 FCA 301