



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 756

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

Decision

Appellant: J. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (508644) dated September 21, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Videoconference

Hearing date: February 23, 2023

Hearing participant: Appellant

Decision date: February 28, 2023

File number: GE-22-3428

Decision

[1] J. B. is the Appellant. The Canada Employment Insurance Commission (Commission) decided that he couldn't get Employment Insurance (EI) benefits. This is because the Commission decided that his employer suspended him for misconduct. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that he stopped working because his employer suspended him for misconduct. This means he can't get EI benefits during his suspension.

Overview

[3] The Appellant's employer had a COVID-19 vaccination policy. They asked the Appellant to show proof of vaccination against COVID-19 by a deadline. The Appellant didn't show his employer proof of vaccination and he didn't ask the employer for an exemption from the policy. So, his employer put him on an unpaid leave of absence.

[4] The Commission says this means that his employer suspended him. And the Commission says the reason for his suspension is misconduct under the law. The Commission says the Appellant knew about his employer's policy and knew he couldn't continue working if he didn't follow the policy. The Commission says he acted deliberately when he decided not to follow the policy.

[5] The Appellant disagrees. He says he can make his own medical choices and his employer can't force him to take a vaccine. He says he disagrees with his employer's vaccination policy and thinks it is illegal. He says his employer should have accommodated him.

Issue

[6] Did the Appellant lose his job because of misconduct?

Analysis

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

Why did the Appellant stop working?

[8] I find that the Appellant stopped working because of a suspension. I find that his employer suspended him because he didn't follow their COVID-19 vaccination policy.

[9] The Commission says I should treat the Appellant's loss of employment as a suspension. The Commission says his employer suspended him because he didn't follow their COVID-19 policy.

[10] The Appellant agrees that he stopped working because he didn't give his employer proof of vaccination against COVID-19. He agrees that he didn't follow the COVID-19 vaccination policy. But he doesn't think he stopped working because of suspension. He says his employer put him on an unpaid leave of absence.

[11] I agree with the Commission. I will treat the Appellant's loss of employment as a suspension.

[12] At the hearing, the Appellant said he didn't ask his employer for a leave of absence. He didn't choose to leave his job and he didn't quit. He also agreed that there was still work available for him. He didn't stop working because his employer ran out of work for him. He said his employer chose to temporarily end his employment. He returned to work on June 20, 2022.

[13] So, I find that the Appellant didn't choose to leave his job. He didn't stop working because of a shortage of work. His employer temporarily ended his employment because he didn't follow their policy. So, I think the best way to look at his entitlement to EI benefits is to treat his loss of employment as a suspension.

[14] Both the Appellant and the Commission agree that the employer suspended him because of their COVID-19 vaccination policy. The employer expected the Appellant to show proof of vaccination or have an approved exemption from the policy by a deadline. The Appellant didn't ask for an exemption and he didn't show proof of vaccination by the deadline. This was the reason for his suspension.

[15] So, now I must decide if the reason for his suspension is misconduct under the law.

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

[16] I find that the reason for the Appellant's dismissal is misconduct under the meaning of the *Employment Insurance Act*.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹ Misconduct also includes conduct that is so reckless that it is almost wilful.² The Appellant 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.³

[18] There is misconduct if the Appellant 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.⁴

[19] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.⁵

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³ See *Attorney General of Canada v Secours*, A-352-94.

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

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The Commission says the Appellant's employer suspended him for misconduct. The Commission says he knew about his employer's COVID-19 vaccination policy. He knew the employer wouldn't let him keep working if he didn't follow the policy. And the Commission says he acted deliberately when he chose not to follow his employer's policy.

[21] The Appellant disagrees. He says he can make his own decisions about his health and vaccination isn't mandatory in Canada. He says he disagrees with his employer's policy. And he says the employer should have accommodated him and given him alternatives to vaccination.

[22] I agree with the Commission. I find that the reason for the Appellant's suspension is misconduct under the law.

[23] The Appellant and the Commission agree about most of the basic facts in this appeal.

[24] The Appellant's employer introduced a mandatory COVID-19 vaccination policy. The employer asked the Appellant to show proof of vaccination against COVID-19 by January 5, 2022. Alternatively, the employer said the Appellant could apply for an exemption from the policy. The employer said they would suspend the Appellant if he didn't follow the policy by the deadline. At the hearing, the Appellant agreed that he understood his employer's expectation. He knew that he couldn't keep working after the deadline if he didn't follow the employer's policy.

[25] The Appellant didn't ask the employer for an exemption from the policy because he couldn't get a doctor's note excusing him from vaccination. He didn't show his employer proof of vaccination by the deadline and so his employer suspended him. The Appellant made his own choice not to follow the employer's policy because he disagreed with the policy.

[26] There isn't any dispute about these facts, so I can accept them. But this means that the reason for the Appellant's suspension is misconduct under the meaning of the law. This is because:

- The Appellant knew about his employer's COVID-19 vaccination policy. He knew that his employer expected him to show proof of vaccination or have an approved exemption from the policy by the deadline.
- He knew the employer would suspend him if he didn't follow the policy.
- He acted deliberately when he decided not to follow the employer's COVID-19 policy. This is because he made his own decision about whether or not he would follow the policy. He was in control of his own actions.
- His employer suspended him because he didn't follow the COVID-19 vaccination policy. There was no other reason for his suspension.

[27] I understand that the Appellant has made arguments about the policy itself. He disagrees with the employer's COVID-19 vaccination policy and he thinks the policy is illegal. He thinks his employer should have given him alternatives to vaccination. But it is not my role to decide if the employer's policy was fair or justified. I can't make decisions about the safety or efficacy of COVID-19 vaccines. I can't make decisions about whether the employer should have given him alternatives or accommodated him. This is because case law says I can only look at the Appellant's own actions and decide if the reason he stopped working is misconduct under the meaning of the *Employment Insurance Act*.⁶

[28] And in this case, I find that the reason for the Appellant's suspension is misconduct under the meaning of the law. This means the Appellant isn't entitled to EI benefits during his suspension.

⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

Conclusion

[29] I am dismissing the Appellant's appeal. I find that he stopped working because his employer suspended him. And I find the reason for his suspension is misconduct under the meaning of the law. This means he isn't entitled to EI benefits during his suspension.

Amanda Pezzutto

Member, General Division – Employment Insurance Section