



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 787

**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 (544206) dated October 20, 2022 (issued by Service Canada)

Tribunal member: Guillaume Brien

Type of hearing: Teleconference

Hearing date: March 2, 2023

Hearing participant: Appellant

Decision date: March 16, 2023

File number: GE-22-3706

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

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

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she didn't follow the employer's policy of getting vaccinated for COVID-19.

[4] Even though the Claimant doesn't dispute that this happened, she says that she was fired unfairly since she "was never given informed consent on a vaccine that has proven to not even be required anymore." She also says that she "was given no other options" but to quit.²

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

[6] Did the Claimant lose her job because of misconduct?

Analysis

[7] 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

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 See 7 – Reasons for your appeal of the reconsideration decision in GD2-5.

³ Section 30 and 31 of the Act.

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

Why did the Claimant lose her job?

[9] I find that the Claimant lost her job because she didn't follow the employer's policy of getting vaccinated for COVID-19.

[10] Both the Claimant and the Commission agree that she was dismissed for this reason, so I accept this as fact.

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

[11] The reason for the Claimant's dismissal is misconduct under the law.

[12] 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 dismissal 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.

[13] Case law says that to be misconduct under the law, 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.⁶

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.

[14] There is misconduct if the Claimant 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 let go because of that.⁷

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

[16] 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 dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹⁰ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[17] 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. He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[18] 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.

[19] 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. Those solutions

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

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.

penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.

[20] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹¹ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Federal Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.

[21] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.¹² He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate him.

[22] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[23] The Commission says that there **was misconduct** for the following reasons:

- The employer implemented a mandatory COVID-19 vaccination policy.
- The Claimant was aware of the policy and that she could be let go if she didn't follow it.
- The Claimant didn't get vaccinated by the mandatory deadline.
- She was let go because she didn't follow the employer's policy.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[24] The Claimant agrees with the above, but says that she didn't commit misconduct for the following reasons:

- She didn't do anything wrong; she was dismissed honourably.
- Her employment contract didn't say she needed to be vaccinated for COVID-19.
- Her employer never answered her questions about the vaccine so she could not give informed consent to vaccination.
- Her employer had unfairly refused her vaccination exemption requests.

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

- The employer had a mandatory vaccination policy.
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated.
- The Claimant knew or should have known the consequences of not following the employer's vaccination policy.
- The Claimant was dismissed as a direct result of not following the mandatory vaccination policy.

[26] The evidence is very clear that the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely going to cause her to lose her job.

[27] The Claimant argues that her behaviour wasn't misconduct because of four reasons.

– **Reason #1: The Claimant didn't do anything wrong: she was dismissed honourably**

[28] The Claimant says that, since she didn't do anything wrong, her refusal to be vaccinated should not constitute misconduct. She says that she was dismissed honourably. She says that she paid her EI premiums for 20 years. When she finally needed EI benefits, she didn't get them. She says that she didn't get the vaccine because she thought it was going to kill her. She finds it very unfair.

[29] While the Claimant feels that she did what was right for her, that doesn't mean that it isn't misconduct under the law. She wilfully chose to remain unvaccinated and knew she could lose her job by doing so.

[30] I find that the Claimant lost her job because of misconduct.

– **Reason #2: The Claimant's employment contract didn't say she needed to be vaccinated for COVID-19**

[31] The Claimant argues that she signed a 25-year employment contract, and that her contract didn't say she would need a COVID-19 vaccine to keep her job.

[32] The management rights of an employer include the right to develop and update employment policies as it sees fit. New and updated policies become part of the employment conditions.

[33] The Claimant was aware of the mandatory vaccination policy and that she could be let go if she didn't follow it. She wilfully chose to remain unvaccinated. So, she was let go.

[34] I find that the Claimant lost her job because of misconduct.

– **Reason #3: The Claimant says that her employer never answered her questions about the vaccine**

[35] As explained above, my role isn't to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go.

[36] The employer implemented the policy. The policy and the consequences for not following it were also clear.

[37] I find that the Claimant lost her job because of misconduct.

– **Reason #4: The employer unfairly refused the Claimant’s vaccination exemption requests**

[38] As already mentioned, the FCA said that the focus is on what the employee did or failed to do. It isn’t relevant that the employer didn’t accommodate the Claimant.

[39] I find that the Claimant lost her job because of misconduct.

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

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

Conclusion

[41] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[42] This means that the appeal is dismissed.

Guillaume Brien
Member, General Division – Employment Insurance Section