Citation: *BC v Canada Employment Insurance Commission*, 2023 SST 840

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. C.
Representative:	E. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (495142) dated July 20, 2022 (issued by Service Canada)

Tribunal member:	Peter Mancini
Type of hearing:	Teleconference
Hearing date:	January 27, 2023
Hearing participants:	Appellant Appellant's Representative Respondent
Decision date:	April 6, 2023
File number:	GE-22-2665

Decision

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

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

Overview

[3] The Appellant lost her job. The Appellant's employer said that she was let go because she went against its vaccination policy, that is she refused to be vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says it was not misconduct. She says the employer violated the Appellant's collective agreement, and refused to recognize her religious exemption, and violated her human rights.

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

Matters I have to consider first

The matter of adjournments

[6] This hearing was scheduled for November 17th, 2022. The Appellant requested a new date within 2 days of receiving the notice of hearing. That request was granted. The Appellant suggested two possible dates for the hearing: January 14th or January 18th, 2023. The hearing was set for January 18th, 2023. The Appellant, her representative and a representative of the Appellant's union were all present. The Appellant and her representative were asked if they had read the documents submitted from the Respondent, most notably GD 3 and GD 4. They had not. They requested an

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

adjournment to review the documents as well as case law referenced in those documents. That adjournment was grated. The hearing was rescheduled to January 27th, 2023

Charter Challenges and Challenges under the Canadian Human Rights Act

[7] At the initial January 18th 2023, the issue of Charter challenges was raised by the Tribunal. The Appellant and her Representative were advised that some documents filed between November 17th and January 18th might be interpreted as Charter or Canadian Bill of Rights challenges to the EI legislation or to the Employers employment policy. I advised the Appellant that there was a possibility that her Appeal could be heard by a Tribunal Member who was trained in respect to the issue of the Charter arguments. The Appellant was advised that I was confined to the *Employment Insurance Act* (Act) but would adjourn the hearing so she could try to argue those issues before a Tribunal Member and review requirements in relation to Charter challenges. The Representative for the Appellant said she wanted to continue the hearing and not deal with Charter challenges or challenges under the Canadian Human Rights legislation. This issue was canvassed again at the beginning of the hearing on January 27th and the Appellant said she understood that the Charter and human rights legislation issues were considered beyond the scope of the hearing and reaffirmed her desire to continue with the hearing.

Filing of documents following the hearing.

[8] Following the conclusion of the hearing on January 27th, 2023, the Representative for the Appellant requested that she be permitted to submit additional documentation to the Tribunal. It became clear that the documentation would be written submissions based on final arguments as opposed to new information. The Representative was cautioned that this might delay the filing of a decision as the Respondent might be entitled to review the documents if new material was included. I agreed to permit the written submissions to the tribunal.

Issue

[9] Did the Appellant lose her job because of misconduct?

Analysis

[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 the Appellant 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] I find that the Appellant lost her job because she did not get vaccinated, as required by her employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

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

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

[13] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant'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.

[14] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule. The Federal Court

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

of Appeal has stated that “the breach must have been performed or the omission made willfully, that is to say consciously, deliberately or intentionally.”[3]

[15] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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.[5]

[16] 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.[6]

[17] The law doesn’t say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.[8]

[18] I have to focus on the EI Act only. I can’t make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren’t for me to decide.[9] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[19] The Commission has to prove that the Claimant 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 the Claimant lost her job because of misconduct.[10]

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*] at para 9
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The Commission says that there was misconduct because the Employer had a vaccination policy and the Appellant deliberately refused to comply with that policy. The Appellant was notified about the Employer's policy and about its expectations about getting vaccinated. The Appellant knew or should have known what would happen if she didn't follow the policy.

[21] The Appellant says that there was no misconduct because the employer had negotiated a contract with the Appellant's union and the collective agreement did not require the Appellant to get vaccinated for COVID purposes. In addition, the Appellant says that there was another option available to the Employer, such as testing for Covid on a regular basis. In her notice of appeal, she also said her religious rights and human rights had been violated when the employer denied her a request for a religious exemption and the employer lacked compassion when dealing with her.

[22] The employer operated a health care facility. The Appellant was employed in that facility. She was hired by the employer in 2011. Evidence submitted by the Appellant indicates she was a good employee, receiving a "better together" certificate of recognition Her last pay period was March 4th, 2022.

[23] On August 17th, 2021, the Chief Medical Health Officer of Ontario issued a directive regarding Covid 19. The directive stated that organizations that fell under the legislation had to establish a policy that implemented a vaccine requirement for employees, staff, contractors and volunteers and students. The policy had to be implemented by September 7, 2021. The Appellant's employer was an organization that fell under the directive. The employer prepared a Covid 19 immunization policy that was approved by the Senior Leadership Committee on September 1st, 2021.

[24] The policy was communicated to the Appellant on September 2, 2021(GD3 42). The policy stated that employees who were not fully vaccinated were required to produce negative Covid 19 test results twice weekly by self administering a rapid antigen test. This requirement would be in place until October 20th 2021 at which time all employees had to be fully vaccinated against Covid 19. Employees could apply for an exemption. One of the grounds for an exemption was religious. The Applicant

applied for such an exemption. This application was acknowledged by the employer by way of a communication dated October 18th, 2021. The Employer acknowledged that the review of the request would take some time and encouraged the Appellant to continue the two-week rapid Covid 19 testing.

[25] On December 6th, 2021, the Employer advised the Appellant her request for an exemption was denied. The letter set out the time frame for the Appellant to comply with the Covid 19 immunization policy, which required her to be vaccinated. The Appellant did not get a vaccination.

[26] On December 20th, 2021, a letter of written warning was sent to the Appellant from her Employer. She was advised that she was required to have her first dose of vaccine within 14 days and if she failed to do so by January 3, 2022, she would be placed on unpaid suspension up to and including January 27th. She was advised noncompliance with the policy would lead to termination of her employment. The Appellant agrees she was aware of this information and did not comply with the requirement that she be vaccinated.

[27] On February 10th, 2022, the Appellant was invited to a meeting with her Employer to discuss her noncompliance with the policy. The meeting was set for February 17th. The Appellant was terminated from her employment of March 4th, 2022. The employer stated she was dismissed with cause for failing to comply with the company policy.

[28] The Appellant confirmed with the Commission that the policy was communicated to her on September 2nd ,2021 by email and a hard copy was delivered to her by hand on September 29th, 2021. The Appellant sent letters to the employer on September 12th,2021 and on September 28th, 2021. The letters indicated she believed the policy violated the Human Rights Act. The Appellant was clearly aware of the policy.

[29] None of this sequence of events have been disputed by the Appellant and I find the events above are represent a factual series of events.

[30] The Representative for the Appellant argues that the Employer failed to adequately address the questions put to the employer. She says the employee must be given sufficient time to ask questions and to consider the employers reply. To support this argument she references the case of GE 22 829. She provided a copy of that case in her documentation. In that case Appellant had been dismissed for failure to follow the employer's vaccination policy. The Tribunal found that there was no misconduct for several reasons. The Appellant quotes paragraph 34 of the decision where in it is held that an employee must be given adequate time to review a policy and understand the policy. The Appellant argues that this case applies to her.

[31] There is a distinct factual difference between that case and this one. In the case referenced by the Appellant, the employer gave the Appellant verbal notice of the policy on July 7th, 2021, and the Appellant was to comply with the policy by July 9th 2021. He was given 2 days to be vaccinated for Covid 19. There did not appear to be any written documentation for the Appellant to read. This case is clearly distinguishable given the written communication between the Appellant and her employer and the timelines given by the employer to comply with the policy. The policy was communicated to the Appellant in September 2021. She was dismissed in March of 2022. Between those two dates there was significant communication between the Appellant and her Employer about the policy and the consequences of not following the policy.

[32] The Appellant wrote to the Employer for more information about the policy and those letters were answered by the Employer and websites were referenced by them. There was communication back and forth between the Appellant and the Employer about the policy and consequences of not following the policy, and I find the six months between the communication of the policy to the Appellant and the meeting with the Appellant in February of 2022 provided sufficient time for the Appellant to be aware of the policy and to comply with it if she chose to do so. She chose not to follow the policy.

[33] The Appellant argues that the Commission did not properly investigate the claim of the Appellant when discussing her initial claim for benefits over the phone. The appellant references the website of Employment Canada and the information the

Commission would seek under the Covid 19 headings on that website. She says the Commission did not ask if the requests by the employer were reasonable in the workplace situation or if the employer denied an exemption for a valid reason.

[34] I find that the Commission gathered significant information concerning the employment situation of the Appellant. Reviewing the documents in GD 3 I find that the Commission gathered extensive information regarding the Employer's policy and the communication between the Employer and the Appellant. Much of that information contains the employer's reasons for requiring the employee to be vaccinated in the workplace. The Commission also was aware that there was an exemption requested by the Appellant and that the exemption was denied. In their written submissions contained in GD 4 the Commission references the reasons why the religious exemption was denied by the Employer. I find that, although the Commission may not have requested the information cited by the Appellant in a direct fashion, they made inquiries that provided them with the information needed to assess the Appellant's application.

[35] The Appellant submitted arguments in relation to the Collective agreement that existed between the Appellant's Union and the Employer. The Appellant argued that the Employer's Covid 19 policy violated the Collective Agreement. The agreement had expired September 27,2021; 20 days after the Covid 19 policy was introduced. The Appellant says there was no misconduct on her part, and that her refusal to be vaccinated was permitted under the Collective Agreement.

[36] The representative for the Appellant submitted numerous cases as part of her presentation. I have reviewed all of those cases and considered them. I will address one of the cases referenced by the Representative for the Appellant, as it appeared to be of some significance to the Appellant. The Representative referred me to **AL v CANADA EMPLOYMENT INSURANCE COMMISSION [11].** The Appellant felt this case had a particular relevance given the similarities with her case, namely the Appellant in that case worked for a hospital and had a collective agreement that the Appellant felt was

[11] This decision of the Tribunal's General Division, Employment I\insurance division was released on December 14,2022. It does not have a neutral citation as it is not yet published.

violated by the employer's covid policy. The Tribunal member who decided that case found AL did not lose her job because of misconduct.

[37] I am not bound by other decisions of Tribunal members. But I can rely on them to guide me where I find them persuasive and helpful.[12]

[38] I do not find the AL decision to be persuasive. I will not follow it. This is because the AL decision goes against binding case law from the Federal court about misconduct.

[39] The Tribunal does not have jurisdiction to interpret or apply a collective agreement or employment contract[13]. Nor does the Tribunal have legal authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act.[14]

[40] Said differently, it is not the Tribunal's authority to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal

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[12] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I must follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. But I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[13] See Fakhari v. Canada (Attorney General), 197 N.R. 300 (FCA) and Paradis v. Canada (Attorney General), 2016 FC 1282. See also Canada (Attorney General) v. McNamara, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting or applying a collective agreement. This was recently confirmed by the Tribunal's Appeal Division in SC v Canada Employment Insurance Commission, 2022 SST 121.

The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. Where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement. This means that if the claimant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

[14] See Paradis v Canada (Attorney General), 2016 FC 1282; Canada (Attorney General) v McNamara, 2007 FCA 107; and Mishibinijima v Canada (Attorney General), 2007 FCA 36. The Tribunal can decide cases based on the Canadian Charter of Rights and Freedoms, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the Department of Employment and Social Development Act or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't

decide whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed on was too severe. The Tribunal must focus on the reason the Claimant was separated from her employment and decide if the conduct that caused her to be suspended and dismissed constitutes misconduct under the EI Act.

[41] The Claimant submits her conduct was not misconduct because there was no provision for mandatory vaccination in the collective agreement that governed her employment from the time she was hired. This is not a persuasive argument, as there was no COVID-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as changing circumstances may require.

[42] I agree her collective agreement has a clause where she can refuse any vaccination. This has not been taken away. Under the COVID vaccination policy, the Claimant can refuse vaccination as well.

[43] As stated above, I have no authority to decide whether the employer breached the Claimant's collective agreement or whether she was wrongfully dismissed. The Claimant's recourse for her complaints against the employer is to pursue her claims in court or before another tribunal that deals with such matters.

[44] I therefore make no findings with respect to the validity of the policy or any violations of the Claimant's rights under the collective agreement or otherwise. She is free to make these arguments before the appropriate adjudicative bodies and seek relief there.

[45] However, none of the Claimant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that she was suspended and subsequently terminated because of conduct that is considered misconduct under the EI Act.

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

[46] I find that the Appellant lost her job because of misconduct. The Employer had a vaccination policy that said employees had to be vaccinated against Covid 19. That

policy was clearly communicated to the Appellant, and she knew what was expected of her in terms of getting vaccinated. The Claimant was not approved for an exemption from the vaccine policy and this was communicated to her. The Appellant knew or should have known the consequence of not following the employer's vaccination policy.

[47] Based on my findings above, I find that the Appellant lost her job because of misconduct. The Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

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

[49] This means that the appeal is allowed.

Peter Mancini

Member, General Division – Employment Insurance Section