Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1202

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 (510634) dated August 19, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Videoconference
Hearing date:	January 11, 2023
Hearing participant:	Appellant
Decision date:	January 26, 2023
File number:	GE-22-3050

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant. The modification is that the disentitlement ends February 25, 2022. This coincides with her unpaid leave of absence. Starting February 27, 2022, the Claimant is disqualified from receiving benefits following her termination from employment.[1]

[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.

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy.

[4] The Claimant disagrees. She says that it is a mutual agreement between her and her employer to part ways.

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[1] Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. It doesn't matter whether the Record of Employment says suspension or leave of absence. Where an employer prevents an employee from working and unilaterally places them on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment if the reason for the unpaid leave is due to misconduct. In the present case, the Commission determined that the reason for the Claimant's unpaid leave of absence (namely, her failure to comply with the employer's mandatory vaccination policy) was misconduct and, therefore, considered her separation from employment from December 20, 2021, to February 25, 2022, to be a suspension. This is why the Commission says the Claimant is disentitled to EI benefits during the suspension.

Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. It has been determined that the reason the Claimant was terminated from her employment on February 28, 2022 was due to her own misconduct, she has been disqualified from EI benefits as of that date.

The combined effect of these decisions is that the Claimant cannot be paid any EI benefits on her claim starting from December 20, 2022 (the first working day after she was suspended).

[5] The Commission accepted the employer's reason for the suspension and termination. 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.[2]

[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 went against her employer's vaccination policy.

[10] The Commission says the employer implemented a policy which required vaccination by December 20, 2021.[3] This policy mentions that if no approved accommodation has been granted, employees may be subject to disciplinary actions up to and including unpaid leave and/or termination of employment.

[11] The Claimant says it was a mutually agreed upon decision between her and her employer. It is a private matter and will not elaborate. She also argues that the original record of employment (ROE) was incorrect.[4] The employer has since issued an

[2] See sections 30 and 31 of the Act.
[3] See GD3 pages 22&23. Employer policy dated October 20, 2021.
[4] See GD3 page 16.

amended ROE.[5] It now shows the reason of separation as “other,” with the comment added, “Dismissal without cause.”

[12] The Claimant was asked to elaborate on her January 11, 2022, application for benefits. The Claimant wrote there that this was an “Employer leave of absence.”[6] The Claimant testified this was between her and her employer and would not explain why she had answered “Employer leave of absence”. When questioned why she did not attend work on December 20, 2021, the Claimant answered, “My employer did not want me to.”

[13] I agree that three records of employment were issued by the employer. The first dated January 8, 2022, bearing serial number W87xxxxxx has Leave of absence as the reason with no comments in the comment box.[7]

[14] This record of employment was amended and replaced on March 9, 2022. The new ROE bears serial number W88xxxxxx. It has Other as the reason for issuing the ROE with “Vaccination Policy” in the comment box.[8]

[15] This amended ROE was amended another time on May 24, 2022. This new ROE has serial number W90xxxxxx. It kept Other as the reason for issuing the ROE but now the comments show “Dismissal without cause.”[9]

[16] In response to the Commission’s inquiry, the employer provided the policy and termination letter dated February 28, 2022.[10]

[17] To counter this, the Claimant testified it is not true and she had an agreement with her employer. She will not elaborate on the agreement she had with her employer.

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[5] See GD3 page 20.
[6] See GD3 page 7.
[7] See GD3 page 16.
[8] See GD3 page 18.
[9] See GD3 page 20.
[10] See GD3 page 22 for the initial contact with the employer.

This is similar to what the Commission documented following a conversation with the Claimant on August 11, 2022.[11]

[18] I am not persuaded by the Claimant's arguments. She testified she should be allowed to receive benefits as the employer agreed there was no misconduct. She testified that following discussions with the employer, they agreed to change the record of employment. She also testified that most of those discussions occurred after she had been placed on leave.

[19] I find that the Claimant was suspended then dismissed as she did not comply with the vaccination policy. The employer provided the vaccinating policy which stipulates that December 20, 2021, is the compliance deadline and employees not in compliance would face unpaid leave and/or up to termination. Any agreement between the employer and the Claimant made before or after the fact can not change the reason why the Claimant is no longer employed.

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

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

[21] 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.

[22] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[12] Misconduct also includes conduct that is so reckless that it is almost wilful.[13] The Claimant doesn't have to have

[11] See GD3 page 35.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.[14]

[23] 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.[15]

[24] 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.[16]

[25] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.[17] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[26] 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.[18] 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.

[27] 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]

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[14] See *Attorney General of Canada v Secours*, A-352-94.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[18] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[19] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

[28] 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 penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[20]

[29] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.[21] 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 FCA relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[22]

[30] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.[23] 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 them.[24]

[31] 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.

[32] The Commission says that there was misconduct because:

- The employer had a vaccination policy.

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[20] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[21] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[22] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[23] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[24] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- The employer clearly notified the Claimant about its expectations about getting vaccinated / telling it whether she had been vaccinated / getting tested regularly.
- The employer sent letters to the Claimant / spoke to the Claimant several times to communicate what it expected.
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[33] The Claimant says that there was no misconduct because:

- It is a personal matter between her employer and her.
- Her employer changed the record of employment comment to dismissal without cause.[25]
- There was no proven misconduct.
- The employer wrote a letter of reference[26]
- She paid into employment insurance all her adult life.

[34] The employer's vaccination policy says that non-compliant employees may be subject to disciplinary actions up to and including unpaid leave and/or termination of employment.

[35] I agree that the employer changed the ROE to "other" and "Dismissal without cause." This does not change the fact that based on a balance of probabilities, she was in fact suspended and terminated after she did not comply with the vaccination policy. An agreement after the fact between the employer and the Claimant does not change

[25] See GD7 Pages 6 & 7
[26] See GD7 Pages 4 & 5

that fact. In addition, the Claimant would not elaborate on this agreement, so I am not able to consider this agreement.

[36] The Claimant testified there was no misconduct proven. I do agree there was no wrongful intent. However, the conditions for misconduct do exist and are explained in paragraphs 21 to 31 above. Misconduct has been proven.

[37] It is not up to the employer or the Claimant to decide if there is misconduct. It is by analyzing the evidence provided by all parties and applying the EI Act and related case law.

[38] The letter of reference does not add or change any of the previous findings. It does not mention anything regarding the reason for separation. I agree it also suggests no wrongful intent on the part of the Claimant. However, wrongful intent was never suggested issue as reviewed above.

[39] I understand that the Claimant feels that because she paid into the employment insurance fund, she is entitled to financial support. This belief goes against the fundamental principle of employment insurance, that is, an employee must not voluntarily place herself in a position of unemployment. This is what the Claimant did in this case. This conscious and deliberate breach of the duty owed to the employer is misconduct under the Act.

[40] The Claimant knew what she had to do under the vaccination policy and what would happen if she didn’t follow it. The Claimant testified she did receive the October 20, 2021, vaccination policy. It was emailed to everyone, and she testified she did read it.

[41] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said all employees must be fully vaccinated by December 20, 2021. It mentions employees may be subject to disciplinary actions up to and including unpaid leave and/or termination.[27]

- 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 consequence of not following the employer's vaccination policy.

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

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

[43] This is because the Claimant's actions led to her dismissal. She acted intentionally. She knew or ought to have known that refusing to comply with the vaccination policy was likely to cause her to lose her job.

Conclusion

[44] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disentitled until February 25, 2022, while she was suspended. She is then disqualified starting February 27, 2022, to coincide with the date she was terminated.[28]

[45] This means that the appeal is dismissed.

Marc St-Jules

Member, General Division – Employment Insurance Section

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[27] See GD3 pages 23-24

[28] Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.