



Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 1293

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Claimant: A. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (499634) dated July 20, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: December 20, 2022

Hearing participant: Claimant

Decision date: January 6, 2023

File number: GE-22-2627

Decision

[1] The appeal is dismissed. I disagree with the Claimant.

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

Overview

[3] The Claimant was suspended from her job. The Claimant's employer said that she was suspended because she didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says that her employer's policy was unfair and she didn't think she would actually be suspended.

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

Issue

[6] Was the Claimant suspended from her job because of misconduct?

Analysis

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

¹ In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.

² Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Why was the Claimant suspended from her job?

[8] I find that the Claimant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission agree on why the Claimant was suspended from her job. The Claimant says that she was suspended because she didn't follow her employer's COVID-19 vaccination policy (by not attesting to her vaccination status).³ Her employer also says that she was suspended for this reason.⁴

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

[10] The reason for the Claimant's suspension is misconduct under the law.

[11] 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 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.

[12] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[13] 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 suspended because of that.⁸

³ GD3-33.

⁴ GD3-32.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[14] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.⁹

[15] The law doesn't say I have to consider how the employer behaved.¹⁰ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹¹

[16] I have to focus on the 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.¹² I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] The Commission says that there was misconduct because the Claimant's employer had a mandatory COVID-19 vaccination policy, the Claimant knew about the policy, and she knew that she could be suspended if she didn't follow it, but chose not to follow it anyway.¹³

[18] The Claimant says that there was no misconduct because her employer's policy was unfair and she didn't think she would be suspended for not following it.¹⁴

[19] The Claimant told the Commission and testified that she knew about her employer's policy but chose not to follow it because she didn't want to give them her vaccination status in order to protect her privacy.¹⁵

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See section 31 of the Act.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ GD4-4.

¹⁴ GD3-33.

¹⁵ GD3-33.

[20] The Claimant also told the Commission and testified that she found out about her employer's policy in September 2021 and got more notices about it between then and when they suspended her on January 10, 2022.¹⁶

[21] The Claimant provided the following timeline of events surrounding her employer's policy¹⁷:

- September 15, 2021: her employer introduced new COVID-19 vaccination policy
- October 13, 2021: her employer updated their policy
- October 15, 2021: her employer's policy was posted in lunch room
- October 27, 2021: she received letter about policy from her manager
- November 1, 2021: she received hand-delivered notice about policy
- November 23, 2021: she received another hand-delivered notice about policy
- December 6, 2021: her employer updated their policy again
- December 10, 2021: she received another hand-delivered notice about policy
- January 4, 2022: her employer's policy was posted in lunch room again
- January 10, 2022: she went to work and police were called because she was trespassing

[22] The Claimant also told the Commission and testified that she feels her employer's policy was unfair because it violated her privacy rights and her original terms of employment and also shouldn't have applied to her because she mostly works alone.¹⁸

¹⁶ GD3-22.

¹⁷ GD2-10.

¹⁸ GD3-24, GD3-33.

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

[24] I find the Claimant committed the actions that led to her suspension, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[25] I further find the Claimant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[26] There is clear evidence that the Claimant knew about her employer's policy. She told the Commission and testified that she was aware of it, as mentioned above.

[27] There is also clear evidence that the Claimant chose not to follow her employer's policy. She told the Commission and testified that she refused to share her vaccination status with her employer, as mentioned above.

[28] I acknowledge that the Claimant feels that her employer's policy is unfair because it violated her original work contract and privacy rights and shouldn't have applied to her because she mostly works alone.

[29] Unfortunately, I find that this argument isn't relevant here. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I need to focus on the Claimant's actions leading to her suspension and whether she knew her actions could lead to her being suspended. If the Claimant wants to pursue this argument, she needs to do that through another forum.

[30] So, while I acknowledge the Claimant's concerns about her employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that she made a conscious decision not to follow the policy. She didn't declare her vaccination status as the policy required her to do, which shows that her actions were intentional.

[31] I also find the Claimant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being suspended from her job.

[32] I note that the Claimant's employer told the Commission that they introduced a mandatory COVID-19 vaccination policy in September 2021, which required all staff to provide their vaccination status by mid-December 2021 and be fully vaccinated by January 10, 2022 or they would be placed on unpaid leave.¹⁹

[33] I also note that the Claimant's employer told the Commission that employees received multiple letters and reminders about the policy and what would happen if they didn't follow it.²⁰ The Claimant confirmed that she received multiple letters and reminders about the policy, as mentioned above.

[34] Additionally, I note that the letters and reminders from the Claimant's employer clearly state that the Claimant could be suspended if she didn't follow her employer's policy. This included:

- A letter, dated October 27, 2021, which says that she hadn't completed her vaccine attestation even though the deadline was October 15, 2021 and she needed to do it immediately or could be placed on unpaid leave.²¹
- A letter, dated December 6, 2021, which says that after January 10, 2022, any employee who isn't vaccinated would be placed on unpaid leave for not following their policy.²²
- A letter, dated December 10, 2021, which says that she needed to be fully vaccinated by December 31, 2021 or would be placed on unpaid leave as of January 10, 2022.²³
- An employee information bulletin, dated January 4, 2022, which says that employees who have attested that they are not fully vaccinated will be placed on unpaid leave on January 10, 2022 and should not report to work that day.²⁴

¹⁹ GD3-32.

²⁰ GD3-32.

²¹ GD2-6.

²² GD3-29.

²³ GD2-3.

²⁴ GD3-30.

[35] The Claimant also told the Commission and testified that she knew she could be suspended if she didn't follow her employer's policy as she had read their letters and reminders.²⁵

[36] But the Claimant also testified that she didn't think she would actually be suspended for not following her employer's policy. This was because:

- Her employer kept changing the attestation deadline and one of her managers made it even more confusing because they kept harassing her to attest and always made it seem like the deadline was the next day.
- She went into one of her other manager's office on January 5, 2022 after seeing the January 4, 2022 notice (which is mentioned above) to ask what it meant by leave of absence. He said he wasn't sure aside from the fact that it could be up to 12-18 months and she should come back the next day after he looked into it more.
- She returned the next day (January 6, 2022) to that manager's office and he said he still wasn't sure what leave of absence meant exactly and that he would just see her on Monday (which was January 10, 2022). She figured that meant she should just come into work like usual and that would be that.

[37] While I acknowledge that the Claimant's employer may have changed the deadlines for employees to follow their mandatory COVID-19 vaccination policy, I find that there is no evidence that this meant they didn't intend to actually go forward with their policy at some point. Instead, I find that there is clear evidence that the Claimant's employer continued to send reminders about their policy even as they adjusted the deadlines, as mentioned above. So, I don't give this argument much weight.

[38] I also believe the Claimant when she says she thought she would be able to keep her job because her manager gave her that impression. Unfortunately though, I find this doesn't mean she also couldn't have still known that she could be suspended. In my view, what the Claimant's manager did or didn't say doesn't cancel out the

²⁵ GD3-33.

various reminders and letters she received from her employer about their policy and what would happen if she didn't follow it, including as recently as the day before she met with her manager.

[39] In other words, I find it was entirely possible for the Claimant to believe both of these things (that she would be able to keep her job but could also be suspended) at the same time, especially as she confirmed that she knew about her employer's mandatory COVID-19 vaccination policy and the consequences of not following it, as mentioned above.

[40] So, while I understand that the Claimant didn't think she would be suspended, I find that the evidence clearly shows that she should have known that she could be suspended, unfortunately.

[41] I therefore find that the Claimant's conduct is misconduct under the law since she committed the conduct that led to her suspension (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being suspended.

So, was the Claimant suspended from her job because of misconduct?

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

Conclusion

[43] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[44] This means that the appeal is dismissed.

Bret Edwards
Member, General Division – Employment Insurance Section