



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1326

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 (506238) dated August 29, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: In person

Hearing date: March 31, 2023

Hearing participant: Appellant

Decision date: April 4, 2023

File number: GE-22-3120

Decision

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

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

Overview

[3] The Appellant lost his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

[6] The Appellant says that his request for accommodation should have been granted. He says that he was able to work from home. He says that the policy is against several laws and legal principles.

Issue

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

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Analysis

[8] 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

[9] 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 lose his job?

[10] I find that the Appellant lost his job because he went against his employer's vaccination policy.

[11] The Appellant doesn't dispute this happened.

[12] The Commission says that the Appellant lost his job because he went against his employer's vaccination policy.

[13] I find that it is undisputed that the Appellant lost his job because he went against his employer's vaccination policy.

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

[14] The reason for the Appellant's suspension is misconduct under the law.

[15] 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 Appellant'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.

² See sections 30 and 31 of the Act.

[16] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[17] 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.⁶

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

[19] 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.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] 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.¹⁰

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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.

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

- the employer had a vaccination policy
- the Appellant was aware of the policy and what it required
- the Appellant was aware that if he didn't follow the policy, he would be suspended

[22] The Appellant says that there was no misconduct because:

- his request for religious accommodation should have been granted by the employer and, as such, he didn't expect to lose his job, relying on a decision of this Tribunal¹¹
- he was able to work from home
- the policy is against several laws and legal principles, including the *Canadian Charter of Rights and Freedoms* and discrimination
- vaccination isn't part of his employment contract, and the employer didn't consult his union about the policy, relying on another decision of this Tribunal¹²

[23] The employer's vaccination policy started November 8, 2021. It says that employees must be fully vaccinated against COVID-19, unless accommodated based on a certified medical contraindication, religion, or another prohibited ground under the *Canadian Human Rights Act*.¹³

[24] The Appellant testified that he was made aware of the policy and what it required on November 8, 2021.

¹¹ See *DL v Canada Employment Insurance Commission*, 2022 SST 281.

¹² See *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

¹³ See GD3-31 to 42.

[25] The Appellant says that he requested religious accommodation from his employer on November 17, 2021.¹⁴ He included a letter of support from his religious leader.¹⁵ His employer asked him to complete a questionnaire about his request. He returned the questionnaire on November 24, 2021.¹⁶

[26] The employer denied the Appellant's request for religious accommodation in a letter dated December 17, 2021. The letter says that he is required to get vaccinated. It says that if he doesn't follow the policy by January 14, 2022, he will be suspended.¹⁷

[27] The Appellant says that he met with his employer to discuss his request for religious accommodation on two occasions. He says that his employer admitted that he had a sincere religious belief in the second meeting. But the employer didn't give him an accommodation to the policy.

[28] The employer wrote to the Appellant on January 5, 2022. The letter says that he will be suspended effective January 19, 2022, if he doesn't follow the policy.¹⁸

[29] The Appellant says that he was suspended effective January 19, 2022. His suspension was lifted June 20, 2022.

[30] The Appellant says that he filed a grievance against his employer. The grievance process is still ongoing.

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

- the employer had a vaccination policy that required employees to be vaccinated, unless they were given accommodation to the policy
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated

¹⁴ See GD2-23 to 28.

¹⁵ See GD2-29.

¹⁶ See GD2-30 to 38.

¹⁷ See GD2-40 to 41.

¹⁸ See GD2-48.

- the employer sent letters and spoke to the Appellant several times to communicate what it expected
- the employer sent a letter and spoke to the Appellant to tell him that his request for accommodation is denied
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

[32] The Appellant relies on a decision of this Tribunal, which said that there was no misconduct because the employee couldn't have known she would be fired when her employer had predetermined to reject all religious exemptions.¹⁹ The Appellant says that this case is like his situation – he didn't expect his request for accommodation to be denied by his employer, as his religious beliefs are sincere. I am not persuaded to follow this decision, as the Appellant didn't provide evidence to show that his employer had already decided to reject all religious requests for accommodation. As well, the Appellant's employer told him several times that his request for religious accommodation was denied and he had to follow the policy, so he knew or should have known that he could be suspended.

[33] The Appellant relies on another decision of this Tribunal, which said that an employee's failure to follow an employer's mandatory vaccine policy didn't amount to misconduct.²⁰ However, the Federal Court recently said that this case doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.²¹ I'm not bound by other Tribunal decisions and will not follow it. This is because the question of whether an employer can unilaterally change the Appellant's employment agreement isn't for me to decide. Instead, the Appellant can file a grievance, which the Appellant says he has already done.

¹⁹ See *DL v Canada Employment Insurance Commission*, 2022 SST 281.

²⁰ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

²¹ See *Cecchetto v Attorney General of Canada*, 2023 FC 102 at paragraph 43.

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

[34] Based on my findings above, I find that the Appellant lost his job because of misconduct.

[35] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew or should have known that refusing to get vaccinated was likely to cause him to lose his job.

Conclusion

[36] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[37] This means that the appeal is dismissed.

Kristen Thompson

Member, General Division – Employment Insurance Section