



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1336

**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 (476162) dated May 30, 2022 (issued by Service Canada)

Tribunal member: Jillian Evans

Type of hearing: Videoconference

Hearing date: October 19, 2022

Hearing participant: Appellant

Decision date: January 31, 2023

File number: GE-22-2272

Decision

1. The appeal is dismissed.
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 J. B. is a nurse. She is a former employee of X's Interior Health Authority. Prior to being dismissed she had worked for this employer since completing her degree in nursing in 2016.
4. Her employer says that she was suspended and then ultimately terminated from her job because she failed to comply with one of its policies: the Appellant didn't provide confirmation that she had received approved COVID vaccinations by the deadline set out in the employer's COVID-19 Immunization Requirement Policy (the "Policy").
5. The Appellant agrees that she chose not to receive COVID-19 vaccines by the employer's required deadline. She also agrees that her employer dismissed her for this reason.
6. The Commission decided that because J. B. was terminated for breaching one of her employer's policies she lost her job due to misconduct. The Commission denied her application for EI benefits on this basis.
7. The Appellant says that she had always been a dedicated and model employee. She describes herself as a compassionate and empathetic nurse who worked extremely hard taking care of her patients during the pandemic. She says that she

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

has never engaged in dangerous, unprofessional or negligent behaviour as a nurse. She does not believe that her decision not to get a COVID vaccination meets the definition of misconduct.

8. My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

Issue: Did the Appellant lose her job because of misconduct?

Analysis

9. 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 J. B. lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

10. The Commission and the Appellant do not disagree about why the Appellant lost her job.
11. The Commission says that the Appellant was dismissed from her job for failing to comply with her employer's COVID-19 vaccination policy.
12. The Appellant agrees with this. In her Notice of Appeal to the Tribunal, the Appellant notes that she was terminated on January 26, 2022 "due to her beliefs to not be vaccinated."²
13. Her testimony at the hearing echoed this. She described being told on January 26, 2022 that she was being dismissed from her job because she had not provided her employer with confirmation that she had received the COVID vaccinations required by their Policy.

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14. The Appellant understood that she had been terminated from her job because she chose not to comply with her employer's COVID-19 vaccination Policy. I see no evidence to contradict this, and so I find that the Appellant lost her job for this reason.

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

15. The Appellant's decision not to comply with her employer's vaccination Policy amounts to misconduct.

16. Although the *Employment Insurance Act* doesn't provide an exact definition of the word misconduct, case law (decisions from courts and tribunals) shows us how to determine whether an Appellant's actions and behaviours amount to misconduct under the *Act*.

17. The Commission bears the burden of proving that J. B.'s refusal to comply with her employer's vaccination policy fits this legal meaning of the word.

18. In reviewing the decisions by the courts, we find a difference between the common use of the word "misconduct" and the legal meaning of that word in the Employment Insurance context. The term "misconduct" in the EI context refers to the employee's violation of an employment rule. The Appellant doesn't have to have wrongful or harmful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.

19. The Appellant shared the following chronology of events at the hearing, which provide some context for her position on this appeal:

- On September 24, 2021, the hospital employer sent a mass email to all staff announcing that it anticipated a province-wide Public Health Order would be issued by the X Public Health Officer requiring that all healthcare workers would need to be fully vaccinated as a condition of employment.

- The Appellant began a medical leave on September 28, 2021 that continued until December 22, 2021. During this leave, she was not expected to open or respond to any email communications from her employer, nor did she.
- On October 14, 2021 the X Public Health Officer issued an order³ that all community healthcare workers needed to be vaccinated by October 26, 2021 as a condition of employment (the “P. H. Order”).
- On December 5, 2021 her paid sick benefits ran out. She continued her leave – unpaid - until December 22, 2021.
- On December 23, 2021, with her medical leave concluded, the Appellant contacted her manager to advise her that she was ready to return to work and to ask to be put back on the schedule as of December 28, 2021.
- During that telephone call the Appellant was advised that the P. H. Order required that she be vaccinated in order to return to work. If she was not, she would be placed on unpaid leave.
- No reference was made during this call to the employer having its own Policy. The manager only made reference to the P. H. Order as a basis for these requirements.
- On January 3, 2022 the Appellant wrote to Dr. Bonnie Henry, the X Public Health Officer, to request a religious exemption to the P. H. Order.
- On January 4, 2022 she was advised that her request for an exemption was denied.

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- On January 11, 2022 the Appellant, a representative from her union and her employer met. The employer advised J. B. that because she could not confirm that she had received the necessary COVID vaccinations:
 1. She was not able to return to work
 2. She would be placed on unpaid leave for two weeks; and
 3. If she did confirm that she was vaccinated she would likely be terminated.
- No reference was made during this meeting to the employer's Policy. The manager only made reference to the P. H. Order as a basis for these requirements.
- On January 26, 2022 she was terminated and received a termination letter of that date.

20. The Commission received differing information from the Appellant's employer regarding the timing of J. B. dismissal:

- The employer advised the Commission that their records indicated that the Appellant had been dismissed effective December 5, 2021 for failing to comply with the P.H. Order.
- It notes that the ROE indicates December 5, 2021 as the last day for which J. B. was paid.

21. In light of my findings below, I do not need to determine when, in fact, the Appellant's last day of work was. Whether she was dismissed effective December 5, 2021 for failing to comply with the vaccination requirements in the P. H. Order or whether she was dismissed on January 26, 2022 for failing to comply with the vaccination requirements in the P. H. Order is not relevant to the issue before me.

22. I must only decide whether, in the above context, the Appellant's failure to comply with the vaccination requirements in the P. H. Order amounts to misconduct.

The Appellant's decision not to comply with the Policy was wilful, intentional and deliberate.

23. Case law says that to be misconduct, the conduct has to be wilful. This means that the Commission needs to prove that the conduct was conscious, deliberate, or intentional.⁴ They do not need to prove that there was deceit or a desire to cause the employer harm.

24. The Appellant raised many objections to the Commission's finding that she engaged in misconduct. She does not, however, dispute that she consciously and deliberately declined to receive the vaccinations and that she did so knowing that it was contrary to the P.H. Order with which her employer had to comply.

25. I find that her decision not to meet the employer's vaccine requirements was wilful.

The Appellant knew that compliance with the employer's vaccine requirements was an essential part of her employment.

26. The case law also says that misconduct, in the context of the Act, means behaviour that an employee knew could get in the way of them carrying out their duties toward their employer. This means that the Commission also bears the burden of proving that the Appellant's behaviour breached an important and necessary part of their job responsibilities. The case law does not require that the Commission demonstrate that the behaviour be dangerous, criminal, deceptive or unethical in order to amount to misconduct.

27. In this case, the employer was required by law to comply with an order of the Provincial Health Officer. They took steps to comply with this P. H. Order, including the introduction of a hospital-wide Policy consistent with that Order.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

28. The Appellant's evidence is that by December 23, 2021 at the latest she was made aware that she could not return to work unless she provided her employer with proof of vaccination. She was told that this requirement had been mandated by the province's Public Officer of Health Dr. Bonnie Henry.

29. I find that the Appellant knew that failure to comply with the P. H. Order was not an option for the employer, as it would have been contrary to the *Public Health Act*.

30. I find that compliance with the employer's policy became a necessary part of the Appellant's job. The Appellant knew that the vaccination requirement had been imposed on her employer by law.

The Appellant knew that her actions might result in her being fired.

31. Finally, the case law also establishes that for behaviour to be misconduct in the context of the *Employment Insurance Act*, the employee needs to have known that their actions might result in them being fired.

32. The Appellant submits that she was never provided with a copy of the employer's own Policy. In fact, her evidence is that the first time she ever saw a copy of the employer's Policy was when it was produced by the Commission as part of this appeal process.

33. Instead, during every meeting or discussion with her manager on the topic of vaccinations, she was advised that the requirement to confirm her vaccination status was pursuant to the P. H. Order.

34. The Appellant submits that nowhere in the P. H. Order does it state that unvaccinated employees would – or even could – be fired for failing to comply. She reviewed the P. H. Order online after being told by her manager of the vaccination requirement and it only references that unvaccinated employees were “not permitted to work.”

35. She also submits that the P. H. Order indicates that it was a temporary measure, and so she did not understand that a permanent dismissal was possible.

36. I accept that the Appellant never received the employer's actual COVID-19 Immunization Requirement Policy that expressly provided that "disciplinary action up to and including termination of employment" was a consequence of non-compliance.
37. I also accept that she understood that the only document that she was being required to comply with was the P. H. Order.
38. However, at the hearing J. B. was very candid in stating that by no later than January 11, 2022 she knew that "termination was on the table." Although she did not believe that her employer *would* go so far as to dismiss her, she confirmed that at that meeting, she understood the "reality" that she might well be terminated for non-compliance with the P. H. Order's vaccine requirements.
39. I find that the Commission has proven, on a balance of probabilities, that J. B. lost her job because of misconduct: By no later than December 23, 2021, she was aware that she was not permitted to work at the hospital unless she provided proof of vaccination. She understood that her employer required her to provide such proof.
40. And although it was not initially clear to her that termination was a possibility, she learned by no later than January 11, 2022 that she could be dismissed for refusing to provide her employer with this proof. And she decided not to receive the necessary vaccinations anyway.

Other arguments

41. The Appellant raised other issues in her submissions.
42. The Appellant says that the Policy violated her right to make her own decisions about her health and what was best for her body. She argues that the employer breached her right to informed consent.
43. I disagree. The Appellant was able to make a decision about whether or not to get vaccinated. She made an intentional decision not to.
44. The Appellant also says that her employer's Policy breached her collective agreement by engaging in unjust and discriminatory practices. She also raised the

argument that the employer's decision to terminate her infringed on her freedoms under the *Bill of Rights*.

45. The Federal Court has said that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's dismissal under that policy was justified or reasonable.⁵ Nor can the Tribunal interpret or apply a Collective Agreement. The Tribunal must focus on the Appellant's behaviour and actions, not the employer's conduct.⁶
46. The Federal Court has confirmed that the Tribunal's jurisdiction is limited "determining why the Applicant was dismissed from [their] employment, and whether that reason constituted "misconduct."⁷
47. The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For example, 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 agreement.
48. I can decide issues under the *Act* only. I can't make any decisions about whether the Appellant has other options under other laws. These matters must be addressed by the correct court or Tribunal.
49. The *Employment Insurance Act* is an insurance plan. Like other insurance policies, claimants looking to collect benefits under the plan need to meet the specified conditions of the plan.⁸ The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. It must follow the law and apply the Act.⁹

⁵ See *Canada (Attorney General) v Marion*, 2002 FCA 185 at paragraph 3

⁶ See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31

⁷ See *Cecchetto v Canada* 2023 FCA 102

⁸ See *Pannu v. Canada (Attorney General)* 2004 FCA 90

⁹ See *Canada (Attorney General) v Knee* 2011 FCA 301

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

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

Conclusion

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

52. This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section