



Citation: *SB v Canada Employment Insurance Commission*, 2023 SST 1976

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (608585) dated August 25, 2023
(issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: November 16, 2023

Hearing participant: Appellant

Decision date: November 17, 2023

File number: GE-23-2546

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 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 disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated or didn't say whether she had been vaccinated.

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

[5] The Appellant says that the employer reissued the Record of Employment (ROE), and it no longer says that she was dismissed. She says that she was suspended and should be entitled to benefits. She says that she doesn't know why she was suspended.

Issue

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

¹ Section 31 of the *Employment Insurance Act* (Act) says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits, until certain conditions are met.

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 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?

[9] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[10] The Appellant says that the employer reissued the ROE. She says that she wasn't dismissed by the employer. She says that the reissued ROE shows that she was suspended. She says that she doesn't know why she was suspended.

[11] The Commission says the Appellant lost her job because she went against her employer's vaccination policy.

[12] The employer issued ROEs as follows:³

- the ROE dated November 23, 2021, says the Appellant is dismissed
- the ROE dated January 24, 2022, says the Appellant is dismissed or suspended
- the ROE dated December 22, 2022, says the Appellant is on a leave of absence and is suspended without pay

² See sections 30 and 31 of the Act.

³ See GD3-21 to 26.

[13] The employer told the Commission that the Appellant was dismissed because she went against the vaccination policy, on January 7, 2022.⁴

[14] The Appellant testified that she doesn't know why she was suspended. She says that it has nothing to do with the vaccination policy.

[15] In her notice of appeal, the Appellant says that, as her employer amended the ROE to show that she is suspended without pay, her personal choice around the vaccine has no bearing on her eligibility for benefits.⁵

[16] The Appellant says, in her request for reconsideration, that the employer changed the vaccination policy and reissued the ROE to show that she is suspended without pay.⁶

[17] The Appellant says, in her application for benefits, that she was dismissed for not disclosing her vaccination status.⁷

[18] I find that the Appellant was suspended from her job because she went against her employer's vaccination policy. I rely on the employer's most recent ROE to show that the Appellant was suspended, but not dismissed from her job. I rely on the Appellant's application for benefits, along with the conversation between the Commission and the employer, to show that the reason she was let go is because she went against her employer's vaccination policy.

[19] This means that, although the Appellant isn't disqualified from receiving benefits, she could be disentitled to receiving benefits.⁸

⁴ See GD3-27 and 28.

⁵ See GD2-6.

⁶ See GD3-39 and 40.

⁷ See GD3-8 and 9.

⁸ See section 30 and 31 of the Act. Section 31 of the Act says that an appellant who is suspended from their job due to misconduct is disentitled to receiving benefits until the period of suspension expires, she loses or voluntarily leaves the job, or she accumulates the required number of insurance hours at another job.

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

[20] The reason for the Appellant's suspension 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 reason for 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.

[22] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁰ The Appellant 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.¹¹

[23] There is misconduct if the Appellant 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.¹²

[24] The law doesn't say I have to consider how the employer behaved.¹³ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.¹⁴

[25] 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

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹¹ See *Attorney General of Canada v Secours*, A-352-94.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See section 30 of the Act.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

accommodations for the Appellant aren't for me to decide.¹⁵ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[26] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.¹⁶

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated and telling it whether she had been vaccinated
- the Appellant knew of the policy and deadlines
- the Appellant knew or should have known what would happen if she didn't follow the policy

[28] The Appellant says that there was no misconduct because the employer reissued the ROE to show that she was suspended, but not dismissed.

[29] The employer's COVID-19 vaccination policy says that:¹⁷

- staff must disclose and provide proof of vaccination
- staff who haven't provided proof of vaccination will be suspended for 6-weeks without pay, as of November 1, 2021
- staff who haven't provided proof of vaccination will be dismissed, as of December 13, 2021

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ See GD3-32 to 34.

[30] The employer says that emails were sent to staff announcing the policy and how it will be enforced, on August 19, 2021 and October 6, 2021.¹⁸

[31] The employer told the Commission that the deadline to follow the policy was delayed to January 2, 2022.¹⁹

[32] The employer told the Commission that the Appellant was let go because she didn't follow the vaccination policy.²⁰

[33] The Appellant told the Commission that she was dismissed because she didn't disclose her vaccination status to the employer.²¹

[34] The Appellant later told the Commission that she returned to work on January 3, 2023, as the employer lifted its vaccination policy.²²

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

- the employer had a vaccination policy that said staff must disclose and provide proof of vaccination
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated and telling it whether they have been vaccinated
- the employer sent emails to the Appellant several times to communicate what it expected
- at the time she was let go, the Appellant knew or should have known the consequence of not following the employer's vaccination policy

¹⁸ See GD3-29 to 34.

¹⁹ See GD3-29.

²⁰ See GD3-27.

²¹ See GD3-35.

²² See GD3-41 and 42.

- that the employer later changed its policy, allowing the Appellant to return to work, doesn't mean there was no misconduct

[36] The Federal Court recently said that by making a personal and deliberate choice not to follow the employer's vaccination policy, the employee breached duties owed to his employer and lost his job because of misconduct under the EI Act. The Court said that there are other ways the employee's claim can be brought forward in the legal system.²³

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

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

[38] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated and say whether she had been vaccinated was likely to cause her to lose her job.

Conclusion

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

[40] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

²³ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.