



[TRANSLATION]

Citation: *MB v Canada Employment Insurance Commission*, 2022 SST 1032

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: M. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (461837) dated April 11, 2022
(issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Teleconference

Hearing date: September 14, 2022

Hearing participant: Appellant

Decision date: October 19, 2022

File number: GE-22-1708

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct. This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] On November 10, 2021, after working for the Government of Canada for almost 20 years, the Claimant was suspended from her job for violating her employer's Policy on COVID-19 Vaccination.

[4] On November 14, 2012 [*sic*], the Claimant applied for EI benefits. The Commission denied her benefits, since she was suspended from her job because of misconduct.

[5] She knew or should have known that violating the vaccination policy would get her suspended.

[6] The Claimant disagrees with the Commission's decision. In her view, she didn't commit misconduct under the *Employment Insurance Act* (Act). She exercised her rights. There wasn't a vaccination policy when she signed her employment contract during the pandemic, or in the collective agreement.

[7] Also, the penalty her employer imposed is disproportionate and unjustified.

Matter I have to consider first

[8] The Claimant submitted a post-hearing document on September 19, 2022. The Commission was given time to submit comments. It submitted supplementary

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

representations on October 4, 2022. The Claimant didn't respond to the Commission's arguments.

[9] I am making my decision later than expected because of this.

Issue

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

Analysis

[11] 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.

Why was the Claimant suspended from her job?

[12] The Claimant started working for the Government of Canada in 2003.

[13] During the COVID-19 pandemic, her employer, the Government of Canada, put in place a Policy on COVID-19 Vaccination.

[14] The policy applied to all employees, including the Claimant. Employees were given time to learn about the vaccines. They were also given time to comply with the policy or provide an attestation of exemption for medical or religious reasons.

[15] On November 12, 2021, the Claimant was suspended from her job for violating the vaccination policy.

[16] I note that the Claimant doesn't dispute that she was suspended because of that.

[17] But, the Claimant says that there was no misconduct. She isn't responsible for the situation. The employer didn't have the right to make vaccination mandatory.

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

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant doesn't have to have wrongful intent for her behaviour to be misconduct under the law.⁴

[19] 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.⁵

[20] 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 lost her job because of misconduct.⁶

[21] The Commission says that the Claimant's refusal to follow her employer's vaccination policy amounts to misconduct. She knew or should have known that failing to comply with the policy would get her suspended.

[22] The Claimant disagrees with the Commission's decision. There was no misconduct. She raises several arguments to show that there was no misconduct:

- The employer's policy is unlawful and violates the *Canadian Charter of Rights and Freedoms*.
- The *Digest of Benefit Entitlement Principles* says that a claimant can be entitled if the employer puts them on leave.

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

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

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Claimant's behaviour over the past 18 years was always exemplary.
- There was no progressive discipline.
- There wasn't a vaccine or medical mandate [when] she signed her employment contract in October 2020, which was during the pandemic.

[23] Also, the Claimant submitted a Tribunal decision⁷ after the hearing, on September 19, 2022. She says that the case is similar to hers. In that case, the Tribunal allowed the claimant's appeal, since the Commission hadn't shown that the claimant lost his job because of misconduct under a vaccination policy.

[24] On October 4, 2022, the Commission submitted supplementary representations concerning that decision. The Claimant didn't respond.

[25] I will begin by dealing with that decision. I agree with the Commission that the facts in that decision aren't similar to those in this case.

[26] In that case, the claimant had only two days to comply with his employer's vaccination policy. He didn't receive any written information either before or following his employer's verbal direction. He refused to quit his job, despite his employer's warning.

[27] The Tribunal found that the claimant hadn't committed misconduct, since he had only two days to comply with a verbal direction. The employer told him that he could quit if he didn't want to comply, and he didn't receive written documentation of the policy. He didn't have time to find out about the consequences of non-compliance. He didn't intentionally or deliberately breach his employer's policy.

[28] That isn't the case for the Claimant here. The employer told her that a vaccination policy would be put in place. She was given time to comply with the vaccination policy, and she knew she would be suspended if she didn't comply.

⁷ *TC v Canada Employment Insurance Commission*, 2022 SST 891.

[29] Now, I will deal with some of the Claimant's arguments before deciding whether her refusal to follow her employer's vaccination policy amounts to misconduct.

[30] Concerning the lawfulness of the employer's policy, the use of progressive discipline,⁸ the refusal to disclose medical information to the employer, the Claimant's rights under the *Canadian Charter of Rights and Freedoms*, and the absence of a vaccine mandate in her employment contract or the collective agreement, the Tribunal doesn't have the power to decide those issues. There are specialized forums for such matters.

[31] I don't have to decide whether the employer's policy is justified or reasonable. But, in my view, the context needs to be considered.⁹ To deal with the COVID-19 pandemic, the Government of Canada introduced a series of measures, including a vaccination policy as an employer. It applied to all federal public servants, whatever status or type of job they had. It wasn't a measure intended specifically for the Claimant; quite the contrary.

[32] The question now is whether the Claimant's non-compliance amounts to misconduct. In *Nelson*,¹⁰ the Federal Court of Appeal reiterated that an objective assessment needs to be applied as required under the Act: "[T]here will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

[33] After reviewing the record, hearing the Claimant, and considering the parties' submissions, I find that the Claimant lost her job because of misconduct. The Commission has shown that she lost her job because of misconduct.

⁸ The question is whether the conduct amounts to misconduct. See *Canada (Attorney General) v Jolin*, 2009 FCA 303.

⁹ *Astolfi v Canada (Attorney General)*, 2020 FC 30.

¹⁰ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.

[34] The Claimant was told about the employer's vaccination policy in response to the COVID-19 pandemic. She was given time to comply with the policy, and she chose not to. That is why she was suspended.¹¹ She knew or should have known that she would be suspended because of that. She caused her unemployment.¹²

[35] I find that misconduct can take different forms and includes violating a vaccination policy that is an essential condition of the employment.¹³ Which is what the Claimant did.

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

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

Conclusion

[37] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[38] This means that the appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

¹¹ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

¹² *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

¹³ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21; *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684—the Court listed a certain number of situations in this decision.