



[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2022 SST 1410

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

Decision

Appellant: A. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462224) dated April 4, 2022 (issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: In person

Hearing date: October 18, 2022

Hearing participant: Appellant

Decision date: November 3, 2022

File number: GE-22-1468

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant has worked as a screening officer for an airport security company since 2014.

[4] The employer implemented a vaccination policy during the COVID-19 pandemic. Air transportation is under federal jurisdiction. The company has to follow airport rules.

[5] On November 14, 2021, the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy.

[6] On November 22, 2021, he applied for EI benefits with the Commission.

[7] The Commission denied him benefits because he was suspended from his job because of misconduct. He knew or should have known that he would be suspended for refusing to follow the employer's policy. So, he isn't entitled to EI benefits.

[8] The Claimant disagrees with the Commission. He asked for a religious exemption, but the employer refused to grant it. He is also of the view that the policy doesn't respect his rights (his right to refuse medical treatment) and that there is no vaccination requirement in his employment contract.

Issue

[9] Was the Claimant suspended because of misconduct?

¹ Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Analysis

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

Why was the Claimant suspended from his job?

[11] I note that there is no dispute that the Claimant was suspended from his job for refusing to follow the employer's vaccination policy.

[12] He acknowledges that the employer implemented a vaccination policy. He was given time to comply. He knew the consequences of refusing to comply.

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

[13] 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 his behaviour to be misconduct under the law.⁴

[14] There is misconduct if the Claimant 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 suspended because of that.⁵

[15] The Commission has to prove that the Claimant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities.

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 v Secours*, A-352-94.

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

This means that it has to show that it is more likely than not that the Claimant was suspended from his job because of misconduct.⁶

[16] The Commission says that the Claimant knew the employer would implement a vaccination policy. The employer operates in the civil aviation field, and it has to comply with federal government requirements.

[17] The Commission also says that the Claimant was told by his employer that he had to follow the vaccination policy, otherwise he would be suspended. He acted deliberately, and he knew what the consequence was, that is, losing his job.

[18] Concerning the financial problems caused by his suspension, the Commission argues that payments aren't related to a person's needs and obligations. They have to meet the requirements of the Act to be entitled to benefits.⁷

[19] The Claimant raises several arguments to justify his refusal to follow the employer's vaccination policy, including the following:

- He has the right to refuse medical treatment.
- The health measures were enough to ensure protection against the COVID-19 virus.
- He had personal beliefs about refusing to get vaccinated.
- He wasn't able to see his doctor to get a medical exemption.
- The employer didn't respect his rights and freedoms protected by the Charter.
- The vaccine is still in the experimental phase.

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

⁷ GD4-7 citing the decision in *Côté v Canada (Attorney General)*, 1986, A-178-86.

[20] I note that the Claimant has worked as a screening officer for an airport security company for several years.

[21] On October 6, 2021, the Government of Canada adopted the Policy on COVID-19 Vaccination for the Core Public Administration. Agencies like the one the Claimant works for also had to comply.

[22] The Claimant was given time to provide his employer with the attestation of his vaccination status or a medical or religious exemption. He had to provide the information before November 15, 2021. He didn't do this, and he was suspended.

[23] He presented a form exempting him from vaccination because of his personal beliefs. He also relied on the opinion of Reverend Martin Hoegger, who considers the vaccine experimental. The Claimant admits that he was desperate when he proposed this reverend's position.

[24] In my view, the exemption for personal beliefs doesn't apply. It was religious beliefs that would have exempted the Claimant from providing his vaccination status. He didn't show this proof before the Tribunal.

[25] The Claimant argues that he wasn't able to meet with his specialist before the vaccination policy came into effect. He had to wait several months. I don't accept this argument. The Claimant could have seen a family doctor or provided the exemption later. He clearly didn't make efforts to do this before or during his suspension.

[26] Concerning the lawfulness of the employer's policy, the refusal to disclose medical information to the employer, the refusal to receive a vaccine, the Claimant's rights under the *Canadian Charter of Rights and Freedoms*, and the absence of a vaccination requirement in his employment contract or collective agreement, the

Tribunal doesn't have the power to decide those issues. There are specialized forums for those matters.⁸

[27] 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 adopted a series of measures, including a vaccination policy.

[28] I also don't have to comment on the efficacy and safety of vaccines. I don't have to decide whether the health measures were adequate without vaccination.

[29] I have to decide whether the Commission has proven that the Claimant was suspended because of misconduct.

[30] In *Nelson*,¹⁰ the Federal Court of Appeal reiterated the need to apply an objective assessment as required by the Act: Indeed, "there 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."

[31] The Claimant's employer is under federal jurisdiction because it provides security services in airports. It decided that the vaccination policy also applied to the company. It was legitimate to protect employees as well as travellers.

[32] The Claimant was told that the employer had implemented a vaccination policy to deal with COVID-19 pandemic. The Claimant had time to comply. He chose not to

⁸ In a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination didn't violate section 7 of the *Canadian Charter of Rights [sic]* despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.

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

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

follow the policy. That is why he was suspended.¹¹ He knew or should have known that he would be suspended for this reason. He created his unemployment situation.¹²

[33] I find that misconduct can take different forms, including not complying with a vaccination policy that is an essential condition of the job.¹³ This is the case of the Claimant.

[34] So, I find that the Commission has proven that the Claimant was suspended because of misconduct.

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

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

Conclusion

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

[37] 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 Brisette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684—the Court listed a certain number of situations in this decision.