



[TRANSLATION]

Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 1281

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

Decision

Appellant: N. S.
Representative: Jérémie Dhavernas

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (462325) dated April 19, 2022
(issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Videoconference
Hearing date: September 8, 2022
Hearing participants: Appellant
Representative

Decision date: October 12, 2022
File number: GE-22-1448

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant has worked for the Government of Canada for many years. On November 12, 2021, she was suspended for violating her employer's vaccination policy.

[4] On November 18, 2021, she applied for EI benefits. The Commission denied her EI benefits because she voluntarily took a leave of absence without just cause. She had other reasonable alternatives to taking leave without pay from her job. She could have agreed to her employer's requests.

[5] The Claimant disagrees with the Commission. She didn't take leave without pay, she was suspended for misconduct. She says that she didn't commit misconduct under the *Employment Insurance Act (Act)*. The employer's request wasn't reasonable.

[6] For the Commission, regardless of how it analyzes the file, it is the Claimant who chose to put herself in an unemployment situation.

Matter I have to consider first

[7] The parties had a period of time to file additional arguments. The Claimant had until September 26, 2022, to respond to the Commission's additional arguments filed on September 12, 2022.

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

[8] Before I analyze the issue, I have to decide whether it was misconduct or leave without just cause.²

[9] I agree with the Claimant that the situation should be analyzed in terms of misconduct. Contrary to the Commission's claims, she didn't voluntarily take a leave of absence without just cause.

[10] Regardless of the terms used, it is the facts that determine the nature of the acts. The Claimant refused to follow her employer's vaccination policy. The consequence of that refusal is "administrative leave" imposed by the employer. In other words, the Claimant was suspended for violating her employer's vaccination policy. This is indeed misconduct.

[11] So, I will analyze the Claimant's case in terms of misconduct and decide whether the Claimant's acts amount to misconduct. After the hearing, the Commission filed arguments to that effect.

Issue

[12] Did the Claimant lose her job because of misconduct?

Analysis

[13] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from her job?

[14] I understand that the Claimant works for the Government of Canada. In March 2020, the employer put measures in place for employees who work from home because of the COVID-19 pandemic.

² Section 32(1) of the *Employment Insurance Act* (Act).

[15] The Claimant, like her colleagues, carried out her duties through telework as part of a government lockdown. She always followed the health rules put in place by government authorities.

[16] In August 2021, the employer accepted the Claimant's request to telework from August 23, 2021, to December 31, 2022.

[17] On August 20, 2021, the Claimant's supervisor told employees that the government intended to require the entire public service to be vaccinated. The policy would apply to those who work on site, remotely, and in hybrid mode.

[18] On October 6, 2021, the Government of Canada implemented the *Policy on COVID-19 Vaccination for the Core Public Administration*.

[19] On November 2, 2021, the Claimant got an email saying that she hadn't given her information about her vaccination status. She also had to take training on the COVID-10 [sic] vaccine.

[20] On November 12, 2021, she was told that she would be placed on administrative leave for violating the policy. The government also told employees of some restrictions easing, like the option of working in the office.

[21] On June 20, 2022, the government suspended its vaccination policy.

[22] I understand from the Claimant's testimony that she recognizes that the reason she was suspended was for violating her employer's vaccination policy.

Is the reason she was suspended from her job misconduct under the law?

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes

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

conduct that is so reckless that it is almost wilful.⁴ The Claimant doesn't have to have wrongful intent for her behaviour to be misconduct under the law.⁵

[24] 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.⁶

[25] 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.⁷

[26] As I noted above, the Claimant recognizes that she violated her employer's Vaccination Policy by not disclosing her vaccination status.

[27] The Commission says that the Claimant's act amounts to misconduct.⁸ In this case, the Claimant recognizes that she didn't comply with her employer's request. She was suspended for that reason. She must have expected or should have expected to be suspended.

[28] The Claimant, meanwhile, says that it isn't misconduct under the Act. She has many reasons to support her appeal.

[29] The Claimant says that the vaccination policy isn't reasonable in her case. The Claimant has been teleworking since early March 2020. She got permission to telework until December 2022. This means that she doesn't come into contact with her colleagues, the administration, or the public. She is ready to submit to testing.

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

⁸ I am referring to GD-9 from the Commission.

[30] The Claimant also says the vaccination policy can be seen as reasonable in a general pandemic context but not in the Claimant's case. It is relevant to consider the fact that she worked from home.

[31] The employer can consider the fact that the Claimant violating its policy is reprehensible, but there isn't the element specific to misconduct.

[32] The Claimant feels the employer's behaviour that has to be examined, since—in this case—it is responsible for the Claimant's conduct. By imposing its vaccination policy, which wasn't necessary in the Claimant's situation, it turns out that she didn't commit misconduct. It is the employer who is responsible for her situation because it wasn't reasonable to impose its vaccination policy when she works from her home.

[33] To do so, the Claimant relies on *Astolfi*,⁹ which established the principle and decisions of the Tribunal. It is important to consider the behaviour of the employer, who didn't want to discuss possible accommodations. Violating a policy that isn't adapted to the Claimant's situation isn't misconduct under the Act.¹⁰ The Claimant violating the vaccination policy doesn't affect her work. She can perform her duties by teleworking.

[34] Also, the Claimant was ready to take tests or agree to other accommodations to keep working.

[35] The Commission, in turn, says that the Claimant initiated her suspension by refusing to comply with the Vaccination Policy. This was the direct cause of her suspension.

[36] After reviewing the record, hearing the Claimant, and considering the parties' submissions, I find that the Claimant was suspended from her job because of misconduct.

⁹ *Astolfi v Canada (Attorney General)*, 2020 FC 30 ; *Canada Employment Insurance Commission v AK*, 2020 SST 155; *ZY v Canada Employment Insurance Commission*, 2020 SST 362; *DM v Canada Employment Insurance Commission*, 2020 SST 1051; and *DM v Canada Employment Insurance Commission*, 2020 SST 765.

¹⁰ CUB 77648 and CUB 51995A.

[37] I don't agree with the Claimant that the Federal Court established a principle with *Astolfi*. In that case, the Court takes issue with the Tribunal for not taking context into account. Let us recall briefly, the employer had been violent toward the claimant, who had refused to return to work when his employer required him to. The employer let the claimant go for misconduct. The Appellant takes issue with the Tribunal for not considering the harassment he had been a victim of.

[38] First, I make a distinction between that decision and this case. The vaccination policy was implemented for all federal public servants. The Claimant wasn't treated differently from other employees. The employer's measures applied to all employees.¹¹ I am being asked to indirectly do what I don't have to, when I have to decide whether the Claimant's alleged act amounts to misconduct.

[39] The Claimant says that the employer had other options. For example, it had the option to conduct testing to see whether she had contracted the virus.

[40] If I were to consider this option, I would be deciding whether the measure was reasonable or not. That is not my role. I would like to add that, at the hearing, the Claimant said that she would have given her test results to her employer, even though that is medical information.

[41] She says that she has the right to refuse to submit her vaccination status attestation because that is medical information. I find that the Claimant's consent to disclose medical information varies. In any case, it is not the Tribunal's role to determine whether the Claimant could refuse to disclose medical information to her employer; there are forums to decide this issue.

[42] Secondly, *Astolfi* didn't establish a principle. It is a decision that was made based on the appellant's specific situation. The principle being that the Tribunal's role is not to determine whether a policy is reasonable, or whether a suspension or dismissal is

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

justified.¹² In fact, in this decision, the Court found that the harassment allegations had to be examined to decide whether or not the conduct was intentional.

[43] Also, the Federal Court of Appeal decided several times that the Tribunal's role isn't to decide whether the employer's behaviour is reasonable or justified.¹³

[44] With this in mind, Canada, like other countries, was going through the COVID-19 pandemic. The Government of Canada introduced measures to address the pandemic. It implemented a vaccination policy, which applied to all employees. It treated all its employees the same way.

[45] The Claimant decided to violate the vaccination policy. She knew that she would be suspended for not complying with the policy.

[46] She claimed she could perform her job duties despite her refusal to disclose her vaccination status to the employer. This doesn't convince me that it doesn't amount to misconduct. Neither does her claim that she didn't intend to cause harm to her employer, but she didn't want to follow a policy she sees as unreasonable either.

[47] It isn't an issue of wrongful intent, but of a wilful and deliberate act.¹⁴ Concerning the causal relationship, the act has to cause the loss of employment.¹⁵ That is the case with the Claimant—she was suspended for violating the employer's vaccination policy.

[48] Also, I find once again that I am being asked to indirectly do what I don't have to do directly—decide whether or not the policy is reasonable in the Claimant's case. It is

¹² *Canada (Attorney General) v McNamara*, 2007 FCA 107 para 22.

¹³ *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Canada (Attorney General) v Caul*, 2006 FCA 251; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *Canada (Attorney General) v Marion*, 2002 FCA 185, *Fakhari v Canada (Attorney General)*, 197 N.R. 300 (FCA), [1996] FCA n 653 (AC) (QL); *Canada (Attorney General) v Langlois*, [1996] FCA n°241 (AC) (QL) [*Langlois*]; *Canada (Attorney General) v Secours* (1995), 179 N.R. 132 (FCA), [1995] FCA n°210 (AC) (QL) [*Secours*]; *Canada (Attorney General) v Namaro* (1983), 46 N.R. 541 (FCA), [1983] FCA n°21 (AC) (QL) [*Namaro*].

¹⁴ *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684.

¹⁵ *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684.

true that I have to examine the cause of the failure to comply with the conditions of the employment.¹⁶

[49] In the Claimant's case, it is because she disagreed with the vaccination policy. She has the right to disagree, but she knew that she would be suspended if she violated it. My role isn't to decide whether it was unreasonable for the employer to implement a vaccination policy that applies to all federal employees. My role also isn't to decide whether the employer had to select some employees, or if it had to allow accommodations. There are remedies and forums to address these issues.

[50] When it comes to the EI Act, which aims to pay benefits to insured people who haven't wilfully lost their job or haven't been suspended because of misconduct. Has the Commission proven, on a balance of probabilities, that she was suspended from her job because of misconduct?

[51] I found that the Commission did show, on a balance of probabilities, that the Claimant was suspended because of misconduct. She was aware of the employer's policy; she knew she would be suspended for committing this act. She wasn't suspended because of her beliefs, convictions, or opinions, but because she violated the employer's policy which, in the circumstances, is a causal relationship.

[52] In *Nelson*,¹⁷ the Federal Court of Appeal reiterated that an objective assessment needs to be applied as required under the Act. In other words, "there will be misconduct where the claimant knew or should have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility." And, I find that misconduct can take different forms and includes violating a vaccination policy that is an essential condition of the employment.¹⁸

¹⁶ *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684.

¹⁷ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.

¹⁸ *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684—the Court listed a certain number of situations in this decision.

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

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

Conclusion

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

[55] This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section