



[TRANSLATION]

Citation: *DB v Canada Employment Insurance Commission*, 2022 SST 1477

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

Decision

Appellant: D. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (481946) dated June 9, 2022 (issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Videoconference

Hearing date : October 20, 2022

Hearing participant: Appellant

Decision date: November 4, 2022

File number: GE-22-2158

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. Because of this, the Claimant isn't entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] For several years, the Claimant has worked for a telecommunications company as a liaison officer.

[4] The employer implemented a vaccination policy because of the COVID-19 pandemic. The Claimant didn't comply with the employer's policy, and he was suspended.

[5] On January 17, 2022, he applied for EI benefits. The Commission denied him benefits, since he was suspended because of misconduct. This means that he isn't entitled to benefits.

[6] The Claimant disagrees with the Commission's decision. It isn't misconduct; he has always shown exemplary behaviour. He has the right to refuse medical treatment. He works outside; he doesn't need to be vaccinated. He follows health measures that prevent the spread of COVID-19. Also, the employer can't force him to follow the vaccination policy.

Matter I have to consider first

[7] The Claimant provided observations about the Commission's submissions. He sent an email so that the document could be corrected due to a technical problem.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

[8] During the hearing, the Claimant shared his screen so that I could read his comments correctly. Also, the recording gives me access to the corrections.

Issue

[9] Was the Claimant suspended from his job because of misconduct?

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 find that there is no dispute that the Claimant was suspended from his job because of his refusal to follow the employer's Vaccination Policy.

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

[12] 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

[13] 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

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.

[14] 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. This means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct.⁶

[15] The Commission says that the Claimant was suspended because of misconduct. His employer implemented a vaccination policy that applies to every employee. The Claimant was told about the policy. He had to give his employer his vaccination status. If he didn't, he would be suspended.

[16] This means the Claimant knew that by not complying with his employer's Policy, he would be suspended. He chose to refuse to comply, despite his employer's warnings.

[17] The Claimant, on the other hand, says that he didn't need to follow the employer's policy. He always works outside and over 90% of people are vaccinated. That policy isn't part of the collective agreement. He could undergo regular testing, even at his own expense. The Government of Quebec didn't apply the same vaccination policy.

[18] Also, in response to the Commission's submissions, the Claimant says that there was never a form to be exempt from the vaccination policy. There were discussions with the union, but the employer didn't provide any answers on that issue.

[19] I will address the Claimant's arguments before continuing with my analysis.

[20] I don't agree with the Claimant about the exemptions. The policy says that people can be exempt for medical reasons and the employer told the Commission that there could be exceptions.

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

[21] The debate about telework for tax purposes isn't relevant to this case. The Claimant works on the road and has to go to the office at his employer's request.

[22] Also, I understand that the Claimant doesn't agree with the Commission's use of the word [translation] "admit," but that doesn't affect the outcome of this case.

[23] The Claimant refers to information available on the Employment Insurance website about Records of Employment.⁷ The Commission says that it could contact the employer to find out whether the policy was applied to the employee reasonably and whether there are exceptions.

[24] Generally, I am not bound by the information the Commission provides. I have to consider the Act, court decisions, and the facts of this case.

[25] After studying the record, hearing the Claimant, and considering the parties' submissions, I find that the Claimant was suspended because of misconduct.

[26] My role isn't to decide the lawfulness of the employer's policy, or the right to refuse to disclose medical information to an employer, or the right to refuse to be vaccinated, or whether the rights and freedoms under the *Canadian Charter of Rights and Freedoms* were violated, and the absence of a vaccine mandate in his employment contract or the collective agreement. The Tribunal doesn't have the power to decide those issues. There are specialized forums for such matters.⁸

[27] I don't have to decide whether the employer's policy is justified or reasonable. But, I am of the view that context needs to be considered.⁹ To deal with the COVID-19 pandemic, the Government of Canada introduced a series of measures, including a

⁷ GD7-3.

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.

vaccination policy. The employer, who is under federal legislation, implemented the vaccination policy.

[28] I understand that the Claimant was told on September 15 that the employer was implementing a vaccination policy. The vaccination policy would be applied to all employees. He had until January 10, 2022, to follow the policy.

[29] The employer reminded the Claimant several times that he needed to comply with the policy's obligations.¹⁰ On January 10, 2022, the employer placed the Claimant on leave without pay.

[30] In *Nelson*,¹¹ 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."

[31] So, the Claimant was told that the employer implemented a vaccination policy in response to the COVID-19 pandemic. He was given time to comply with the policy, and he chose not to. That is why he was suspended.¹² He knew or should have known that he would be suspended because of that. He caused his unemployment.¹³

[32] I find that misconduct can take different forms and includes violating a vaccination policy that is an essential condition of the employment.¹⁴ That is what the Claimant did.

[33] So, I am of the view that the Commission has proven that the Claimant was suspended because of misconduct.

¹⁰ GD3-25.

¹¹ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.

¹² *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

¹³ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

¹⁴ *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.

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

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

Conclusion

[35] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant isn't entitled to receive EI benefits. This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section