



[TRANSLATION]

Citation: *ER v Canada Employment Insurance Commission*, 2023 SST 319

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

**Decision**

**Appellant:** E. R.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (513562) dated August 22,  
2022 (issued by Service Canada)

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**Tribunal member:** Manon Sauvé  
**Type of hearing:** In person  
**Hearing date:** January 12, 2023  
**Hearing participant:** Appellant  
**Decision date:** January 25, 2023  
**File number:** GE-22-2916

## 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 isn't entitled to Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was working as a janitor in a private seniors' residence.

[4] Because of the COVID-19 pandemic, the Government of Quebec introduced measures, including an Order in Council concerning people who worked in health care settings. They had to get vaccinated or tested.

[5] On November 8, 2021, the Claimant was suspended from his job without pay for refusing to get vaccinated or to get tested three times a week.

[6] On November 9, 2020 [sic], the Claimant applied for EI benefits.

[7] After checking with the Claimant and the employer, the Commission denied the Claimant EI benefits because he was suspended for misconduct. He knew or should have known that he would be suspended if he didn't follow the vaccination policy.

[8] The Claimant disagrees with the Commission. The employer and the government can't force him to get vaccinated. That goes against his rights. This is a medical matter between him and a health care staff member. In addition, the employer changed his conditions of employment, which was unreasonable. This isn't misconduct under the *Employment Insurance Act* (Act).

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that a claimant who is suspended from their job because of their misconduct isn't entitled to receive benefits.

## 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 note that the Claimant was working as a janitor in a seniors' residence.

[12] In response to the COVID-19 pandemic, the Government of Quebec put in place a vaccination policy to protect the public, including vulnerable people.

[13] People who worked in health care settings had to get vaccinated or get tested three times a week to be able to continue working.

[14] The Claimant refused to follow the government's policy, which applied to his workplace. Because of this, his employer suspended him.

[15] I find that the Claimant was suspended for this reason.

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

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

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

[17] 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.<sup>5</sup>

[18] 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 from his job because of misconduct.<sup>6</sup>

[19] The Commission says that the Claimant's refusal to follow his employer's vaccination policy amounts to misconduct. He knew or should have known that he would be suspended if he didn't follow the policy.

[20] Given the global COVID-19 pandemic, the employer's policy was reasonable. It was meant to protect residents and employees.

[21] The Claimant says that the Commission hasn't shown that the employer's policy was reasonable. The employer changed his conditions of employment without his consent.

[22] The Claimant also 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 Civil Code protects his integrity and his consent.
- The nurse refused to vaccinate or test him after a confidential discussion. He didn't meet the criteria set out in the code of ethics.

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

[23] I will begin by dealing with some of the Claimant's arguments before deciding whether his refusal to follow his employer's vaccination policy amounts to misconduct.

[24] Concerning the lawfulness of the employer's policy, the confidentiality of medical information, the Claimant's rights under the *Canadian Charter of Rights and Freedoms*, and the absence of a vaccine mandate in his employment contract, the Tribunal doesn't have the power to decide those issues. There are specialized forums for such matters.<sup>7</sup>

[25] In addition, I don't have to decide whether the employer's policy is justified or reasonable. I have to consider the Claimant's actions, not the employer's behaviour.<sup>8</sup> But, it is true that I have to consider the context.<sup>9</sup>

[26] The Court did consider the context in *Nelson*.<sup>10</sup> The claimant was a receptionist for a First Nation. She also lived on the reserve. The employer implemented a policy prohibiting alcohol use on the job and on reserve to address the population's alcohol and drug use problem. The claimant consumed alcohol at home. She was let go. The First Nation had an interest in maintaining its credibility and in setting an example in the fight against substance abuse problems.

[27] The Federal Court of Appeal also noted that it is irrelevant that the policy isn't in any written employment contract. It may be express or implied and may relate to a concrete or more abstract requirement.<sup>11</sup>

[28] What is more, the Federal Court of Appeal has stated that tribunals have to focus on the claimant's conduct, not the employer's. The question isn't whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute

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<sup>7</sup> See, for example, this decision, where the union decided to challenge the vaccination policy before the Court: *United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.

<sup>8</sup> *Canada (Attorney General) v Caul*, 2006 FCA 251.

<sup>9</sup> *Astolfi v Canada (Attorney General)*, 2020 FC 30.

<sup>10</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

<sup>11</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at para 25.

unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in their losing their job.<sup>12</sup>

[29] Again in *Nelson*,<sup>13</sup> the Federal Court of Appeal noted 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.”

[30] In this case, the Government of Quebec put measures in place to protect the public as well as health care users and people who worked in health care settings. As someone who worked in the health care system, the Claimant was subject to the vaccination policy. He was told about the policy and about the consequences of not complying with it.

[31] He chose not to get vaccinated or tested for personal reasons. I note that he didn’t provide a medical or religious exemption. He knew or should have known that he would be suspended because of that.

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

[33] I don’t accept his arguments or the documents he submitted to the Tribunal. Some of his arguments fall outside my jurisdiction, as I noted. And other arguments and documents aren’t relevant in deciding whether the Claimant committed misconduct.

[34] So, the fact that the nurse refused to vaccinate or test him because of the answers he had given doesn’t change the outcome. The Claimant refused to get

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<sup>12</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

<sup>13</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.

<sup>14</sup> *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.

vaccinated. He could have been exempted from the vaccine mandate if he had provided a doctor's note, but he didn't. By his actions, he violated his employer's policy, and he knew the consequences.

[35] As a result, I find that the Commission has shown that the Claimant was suspended because of misconduct.

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

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

### **Conclusion**

[37] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant isn't entitled to EI benefits.

[38] This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section