



[TRANSLATION]

Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 424

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

Decision

Appellant: M. J.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (515904) dated August 30, 2022 (issued by Service Canada)

Tribunal member: Manon Sauvé
Type of hearing: Teleconference
Hearing date: January 17, 2023
Hearing participant: Appellant
Decision date: January 25, 2023
File number: GE-22-3177

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.¹

Overview

[3] The Claimant had been working as a courier for a shipping company for over 30 years.

[4] From November 24, 2021, the Claimant was absent from work due to illness. During this time, his employer told him that he had to follow the vaccination policy if he wanted to go back to work after his medical leave.

[5] The Claimant refused to follow his employer's policy. On March 19, 2022, he was suspended without pay. On April 4, 2022, he went on leave due to illness again.

[6] He applied to the Commission for regular benefits. The Commission denied him EI regular benefits because he was suspended for misconduct. He knew or should have known that he would be suspended if he refused to follow his employer's vaccination policy.

[7] The Claimant disagrees with the Commission. He refused to get vaccinated because of his health problems. He has a right to refuse; the employer can't make him get vaccinated. Also, the vaccination policy was changed on June 20, 2022.

Issue

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

¹ 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.

Analysis

[9] 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?

[10] I note that the Claimant was working for a shipping company. From November 25, 2022, to March 18, 2022, he was off work due to illness or injury.

[11] While he was off work, the employer implemented a vaccination policy because of the COVID-19 pandemic. The Claimant was told that he had to get vaccinated before January 2022 and what the consequences would be if he refused.

[12] The Claimant refused to get vaccinated before going back to work. On March 19, 2022, he was suspended from his job.

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

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

[14] 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

[15] 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.

[16] 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.⁶

[17] 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.

[18] The Claimant says that he refused to get vaccinated because of his health problems.

[19] 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*.
- He has good judgment, and some vaccines cause problems, including a risk of thrombosis.
- His employer made false statements when it put him on leave and accused him of misconduct.

[20] 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.

[21] Concerning the lawfulness of the employer's policy, 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.⁷

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

⁷ 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.

[22] In addition, the Claimant says that his employer's policy was changed on June 20, 2022.

[23] I have to look at the facts at the time of the suspension, namely the fact that vaccination was mandatory.

[24] 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.⁸ But, it is true that I have to consider the context.⁹

[25] The Court did consider the context in *Nelson*.¹⁰ 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.

[26] 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.¹¹

[27] 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 unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in their losing their job.¹²

⁸ *Canada (Attorney General) v Caul*, 2006 FCA 251.

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

¹⁰ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

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

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

[28] Again in *Nelson*,¹³ 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.”

[29] In this case, to deal with the COVID-19 pandemic, the Government of Canada introduced a series of measures, including a vaccination policy that applied to the Claimant.

[30] The Claimant chose not to get vaccinated. 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.

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

[32] The Claimant made a personal choice not to get vaccinated. He knew the consequences: suspension without pay. He deliberately caused his unemployment.

[33] 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?

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

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

¹⁴ *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.

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 EI regular benefits from March 19, 2022.

[36] This means that the appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section