



[TRANSLATION]

Citation: *DR v Canada Employment Insurance Commission*, 2023 SST 809

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

Decision

Appellant: D. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (491784) dated August 1, 2022 (issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Teleconference

Hearing date: March 21, 2023

Hearing participant: Appellant

Decision date: April 5, 2023

File number: GE-22-2863

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his job because of misconduct. This means that the Appellant isn't entitled to Employment Insurance (EI) benefits.¹

[3] The Commission has also proven that the Appellant lost his job because of misconduct. This means that the Appellant is disqualified from receiving EI benefits.²

Overview

[4] The Appellant worked for the Government of Canada as a translator. On February 1, 2022, he was suspended from his job for not following the employer's vaccination policy.

[5] He applied to the Commission for EI benefits. The Commission denied him benefits because he was suspended for misconduct. He knew or should have known that he would be suspended for not following his employer's policy.

[6] Because he didn't follow the vaccination policy, his employer later didn't renew his employment contract.

[7] The Appellant disagrees with the Commission. He didn't commit misconduct by refusing to get vaccinated. He had the right to refuse because, among other things, the collective agreement doesn't include a vaccine mandate and the COVID-19 vaccines are experimental.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their employment because of misconduct aren't entitled to receive benefits.

² Section 30 of the Act says that claimants who are [*sic*] lose their job because of misconduct are disqualified from receiving benefits.

Issue

[8] Was the Appellant suspended and let go from his job because of misconduct?

Analysis

[9] When the Tribunal has to determine whether an appellant was suspended or lost their job because of misconduct, the criteria are the same, but the consequences aren't. An appellant who is suspended isn't entitled to benefits, while an appellant who is let go is disqualified from receiving benefits.

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

Why was the Appellant suspended and let go from his job?

[11] I note that the Appellant worked for the Government of Canada as a translator.

[12] During the COVID-19 pandemic, his employer, the Government of Canada, implemented a COVID-19 vaccination policy.

[13] The policy applied to all employees, including the Appellant. Employees were given time to learn about the vaccines. They were also given time to comply with the policy or to provide an attestation of exemption for medical or religious reasons.

[14] The Appellant didn't follow his employer's vaccination policy. He was suspended for this reason.

[15] Concerning the loss of his job, a month before his contract ended, his employer told him that he had to follow the vaccination policy; otherwise, his contract would not be renewed. It was a requirement for his continued employment.

[16] The Appellant didn't meet the requirement to have his contract renewed. The employer terminated his employment.

[17] I find that the Appellant was suspended and lost his job because he didn't follow his employer's vaccination policy.

Is the reason for the Appellant's suspension and dismissal misconduct under the law?

[18] 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 conduct that is so reckless that it is almost wilful.⁴ The Appellant doesn't have to have wrongful intent for his behaviour to be misconduct under the law.⁵

[19] There is misconduct if the Appellant 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 and let go because of that.⁶

[20] The Commission has to prove that the Appellant was suspended and lost 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 Appellant was suspended and let go because of misconduct.⁷

[21] The Commission says that the Appellant's refusal to follow the employer's policy amounts to misconduct. He knew or should have known that failing to comply with the vaccination policy would get him suspended.

[22] The Appellant, meanwhile, says that the employer could not subject him to a vaccination policy that wasn't included in the collective agreement or his employment contract.

[23] He had the right to refuse medical treatment under the *Canadian Charter of Rights and Freedoms* (Charter) and the *Civil Code of Québec*.

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

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.

[24] Before I begin my analysis, I will address certain issues related to the employer's policy.

[25] I don't have to decide the legality of the employer's policy, the refusal to give medical information to the employer, the refusal to get vaccinated, the respect of Charter rights, or the absence of a vaccine mandate in an employment contract or collective agreement. I also don't have to decide whether the vaccine is effective or what it contains. The Tribunal doesn't have the power to decide these issues. There are specialized forums for such matters.⁸

[26] In support of his arguments, the Appellant cites *AL*.⁹ But that decision isn't relevant, since the Federal Court confirmed in *Cecchetto* that the Tribunal's role wasn't to decide whether the vaccination policy was in accordance with the collective agreement or employment contract.

[27] In addition, in *Paradis*,¹⁰ the Federal Court of Appeal stated that it wasn't for the Tribunal to decide whether the employer's policy infringed employees' rights. That case involved a drug and alcohol policy that, according to the claimant, violated the *Alberta Human Rights Act*.

[28] I also 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.¹¹ But, it is true that I have to consider the context.¹²

[29] The Court did consider the context in *Nelson*.¹³ 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

⁸ *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

⁹ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

¹⁰ *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General)* [sic]

¹¹ *Canada (Attorney General) v Caul*, 2006 FCA 251.

¹² *Astolfi v Canada (Attorney General)*, 2020 FC 30.

¹³ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

First Nation had an interest in maintaining its credibility and in setting an example in the fight against substance abuse problems.

[30] The Federal Court of Appeal also [*sic*] 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.¹⁴

[31] 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. It is whether the claimant was guilty of misconduct and whether this misconduct resulted in their losing their job.¹⁵

[32] In *Nelson*,¹⁶ the Federal Court of Appeal noted that an objective assessment needs to be applied as required under the Act. It said, "[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."

[33] I note that the Appellant was told about his employer's vaccination policy and the consequences of refusing to follow it, namely suspension or dismissal.

[34] The fact is that he knew that he would be suspended for refusing to follow the vaccination policy. Afterwards, he knew that his contract would not be renewed if he didn't follow his employer's vaccination policy. He caused his unemployment.¹⁷

¹⁴ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at para 25.

¹⁵ *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

¹⁶ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.

¹⁷ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

[35] I find that misconduct can take different forms and includes violating a vaccination policy that is an essential condition of the employment. That is what the Appellant did.¹⁸

[36] In my view, the Appellant refused to follow the vaccination policy for personal reasons. In doing so, he knew that he would be suspended and let go. He caused his unemployment. He has the right to make personal choices, but he can't force all EI contributors to bear the burden of those choices.

[37] I find that the Commission has shown that the Appellant was suspended and let go because of misconduct.

So, was the Appellant suspended and let go because of misconduct?

[38] Based on my findings above, I find that the Appellant was suspended and let go because of misconduct.

Conclusion

[39] The Commission has proven that the Appellant was suspended and let go because of misconduct. As a result, the Appellant isn't entitled to benefits because of his suspension and is disqualified from receiving benefits because of his dismissal.

[40] This means that the appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

¹⁸ *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).