



[TRANSLATION]

Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 1078

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

## Decision

**Appellant:** S. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (534569) dated October 24, 2022 (issued by Service Canada)

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**Tribunal member:** Manon Sauvé

**Type of hearing:** Teleconference

**Hearing date:** April 13, 2023

**Hearing participant:** Appellant

**Decision date:** May 4, 2023

**File number:** GE-22-3894

## Decision

[1] The appeal is dismissed.

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

## Overview

[3] For several years, the Appellant has worked for the Government of Canada. On February 1, 2022, she was placed on leave for not complying with her employer's COVID-19 vaccination policy.

[4] On February 7, 2022, the Appellant applied for EI benefits.

[5] After an investigation, the Commission denied the Appellant EI benefits, since she was suspended from her job because of misconduct. She hadn't complied with her employer's policy. She made a personal choice.

[6] The Appellant disagrees with the Commission. She asked for an exemption from the vaccine requirement for religious reasons. She is a believing and practicing Catholic. She has to act according to her conscience. She isn't bound by the Pope's position on vaccination.

[7] Also, the employer didn't act properly while assessing her request for an exemption.

## Matter I have to consider first

[8] At the hearing, the Appellant cited certain documents in support of her arguments. I gave her the right to produce the documents after the hearing. I informed

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

her that the Commission could make submissions about them and that she had the right to reply.

## **Issue**

[9] Was the Appellant suspended from her job because of misconduct?

## **Analysis**

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

### **Why was the Appellant suspended from her job?**

[11] Before deciding this question, I will consider whether the Appellant was placed on an administrative leave of absence or suspended from her job.

[12] In my view, the Appellant was suspended from her job. According to the *Employment Insurance Act* (Act), the Appellant, with the employer's approval, is the one who takes leave.<sup>2</sup>

[13] According to the evidence on file, the Appellant didn't request administrative leave that was authorized by her employer. Also, it isn't the words the employer uses that determine the nature of the time off work, but the facts.

[14] This means that the employer gave the Appellant until November 12, 2021, to comply with the vaccination policy. In other words, she had to attest to her vaccination status. She was suspended for two days because she didn't provide a vaccination attestation.

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<sup>2</sup> Section 32 of the Act.

[15] She was on vacation from November 15, 2021, to 2021. When she returned, she asked for an exemption for religious and spiritual reasons.

[16] The employer denied her request for an exemption on February 17, 2022. The Appellant was suspended from her job because she didn't comply with her employer's policy.

[17] In my view, the Appellant was suspended from her job for not complying with her employer's vaccination policy.

### **Is the reason for the Appellant's suspension 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.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Appellant doesn't have to have wrongful intent for her behaviour to be misconduct under the law.<sup>5</sup>

[19] There is misconduct if the Appellant 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.<sup>6</sup>

[20] The Commission has to prove that the Appellant 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 Appellant was suspended from her job because of misconduct.<sup>7</sup>

[21] I note that, in the context of the COVID-19 pandemic, her employer, the Government of Canada, implemented a COVID-19 vaccination policy.

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[22] 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.

[23] The Appellant is asking her employer to be exempted from this requirement for medical and religious reasons. She provided her employer with documents in support of her claim.

[24] After examining the Appellant's request, the employer refused to exempt her from its policy for a medical and non-religious religious reason [*sic*]. For the employer, this is a personal choice. The Appellant was suspended from her job for not complying with the vaccination policy.

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

[26] 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 rights under the *Canadian Charter of Rights and Freedoms*, 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.<sup>8</sup>

[27] Also, it isn't my role to determine whether the employer acted properly. There are remedies, like filing a grievance, if you disagree with the employer's way of doing things.

[28] The question is whether the Appellant's refusal to comply with her employer's policy amounts to misconduct under the Act.

[29] The Appellant says that she had the right to refuse to comply with her employer's vaccination policy because of her religious beliefs.

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<sup>8</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[30] I am of the view that this evidence shows that she is a practicing Catholic. But, in my view, the issue of whether her convictions and personal interpretation of God's message require an accommodation from her employer must be decided before the appropriate forum.<sup>9</sup>

[31] Also, I don't have to consider the legitimacy of the people who have decided the value or evidence of her convictions.

[32] I would like to point out that the main religious leaders, including the Pope, have said that they don't disagree with vaccination. The Appellant doesn't dispute this, but she says that she isn't bound by the Pope's position. She is entitled to do so, but that is her personal choice as part of her journey with God.

[33] Furthermore, the Appellant relied on the Commission's directives to show that she had the right to refuse to be vaccinated because of her religious beliefs, among other reasons.

[34] I am not bound by the Commission's directives. I am bound by the law that applies to the facts of this case.

[35] Regarding the Supreme Court of Canada's decision<sup>10</sup> on the freedom of religion cited by the Appellant, I don't have the authority to make a decision about the constitutionality of her employer's vaccination policy.<sup>11</sup>

[36] Regarding the Social Security Tribunal decisions,<sup>12</sup> I am not bound by the *DL* decision, since it is a General Division decision. In any event, the facts in this case aren't the same. This is because the employer had decided to refuse the request before receiving the exemption letters for religious reasons. That isn't the case with the Appellant.

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<sup>9</sup> *Paradis v Canada*, 2016 FC 1282.

<sup>10</sup> *Syndicat northcrest v Amselem*, (2004) 2 SCR.

<sup>11</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282.

<sup>12</sup> *DL v Canada Employment Insurance Commission*, 2022 SST 281; and *NE v Canada Employment Insurance Commission*, 2022 SST 732.

[37] Concerning the Appeal Division decision in *NE*, the Appeal Division referred the matter back to the General Division, because it was summarily dismissed. The Appeal Division found that there was an arguable case by raising that the employer's policy was unlawful.

[38] But, this Appeal Division decision is no longer relevant. The Federal Court<sup>13</sup> has ruled that it isn't for the Social Security Tribunal to determine the legality or reasonableness of an employer's vaccination policy.

[39] I don't have to decide whether the employer's policy is justified or reasonable. I have to consider the Appellant's actions, not the employer's behaviour.<sup>14</sup>

[40] According to the Commission, the employer adopted a mandatory COVID-19 vaccination policy that came into force on October 6, 2021. This policy requires all employees to be fully vaccinated unless accommodation is made for a certified medical contraindication, religion, or another prohibited ground of discrimination under the *Canadian Human Rights Act*. The Appellant has to comply or there is misconduct. By choosing not to comply with her employer's policy, the Appellant was insubordinate. This shows there was misconduct.

[41] The Commission also says that the Appellant made a personal choice not to get vaccinated. She hasn't shown that her religion prohibits vaccination. She made her own path in refusing to follow her employer's policy. She knew or should have known that she would be suspended for this reason.

[42] I will now consider whether the Appellant's refusal to comply with the employer's vaccination policy amounts to misconduct. To do this, I have to consider the context.<sup>15</sup>

[43] The Court did consider context in *Nelson*.<sup>16</sup> In this case, the claimant was a receptionist for a First Nation. She also lived on the reserve. The employer implemented

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<sup>13</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>14</sup> *Canada (Attorney General) v Caul*, 2006 FCA 251.

<sup>15</sup> *Astolfi v Canada (Attorney General)*, 2020 FC 30.

<sup>16</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

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.

[44] The Federal Court of Appeal has also decided 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>17</sup>

[45] Also, 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.<sup>18</sup>

[46] In *Nelson*, 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."<sup>19</sup>

[47] As a result, the Government of Canada introduced a series of measures to manage the COVID-19 pandemic, including a vaccination policy that applied to the Appellant.

[48] I note that the Appellant was informed of her employer's vaccination policy and the consequences of refusing to comply, namely suspension or dismissal. She knew that she would be suspended for refusing to comply with the vaccination policy.

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<sup>17</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at para 25.

<sup>18</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Fleming v Canada (Attorney General)*, 2006 FCA 16.

<sup>19</sup> *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paras 20 and 21.



[49] She tried to get a medical exemption, but it didn't work. Fear of getting vaccinated isn't a medical reason. She then tried getting a religious exemption, but her request was denied. In my view, she caused her unemployment.<sup>20</sup>

[50] I find that misconduct can take different forms, including violating a vaccination policy that is an essential condition of the employment.<sup>21</sup> That is what the Appellant did.

[51] I disagree with the Appellant when she says that she didn't know she would be suspended after asking for the exemption for a religious reason. She knew this because she applied for an exemption. She could not assume she would get a favourable response from her employer, since she knew the Pope's position on vaccination.

[52] I find that the Appellant refused to comply with the vaccination policy for personal reasons. In doing so, she knew that she would be suspended. She caused her unemployment. She has the right to make personal choices, but she can't force all EI contributors to bear the burden of those choices.

[53] So, I am of the view that the Commission has shown that the Appellant was suspended because of misconduct.

### **So, was the Appellant suspended from her job because of misconduct?**

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

### **Conclusion**

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

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<sup>20</sup> *Canada (Canada Employment Insurance and Immigration Commission) v Gagnon*, 1988 2 SCR 29.

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

[56] This means that the appeal is dismissed.

Manon Sauvé  
Member, General Division – Employment Insurance Section