



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v CD*, 2025 SST 282

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Yanick Bélanger

Respondent: C. D.
Representative: Jesse Fafard Théorêt

Decision under appeal: General Division decision dated September 14, 2023
(GE-23-179)

Tribunal member: Pierre Lafontaine

Type of hearing: Videoconference

Hearing date: March 6, 2025

Hearing participants: Appellant's representative
Respondent
Respondent's representative

Decision date: March 25, 2025

File number: AD-23-920

Decision

[1] The appeal is allowed. The Respondent (Claimant) was suspended because of her misconduct.

Overview

[2] The Claimant was placed on leave without pay (suspended from her job) by her employer. She applied for Employment Insurance (EI) benefits. The Appellant (Commission) found that she had been suspended because of her misconduct, namely, for failing to comply with her employer's vaccination policy. As a result, the Commission disqualified her from receiving EI benefits.

[3] She asked the Commission to reconsider her application. It again denied her application for benefits. She appealed to the Tribunal's General Division.

[4] The General Division determined that the Claimant was placed on leave without pay or suspended from her job because she failed to comply with the employer's mandatory vaccination practice. However, it determined that the suspension wasn't the result of a wilful or deliberate act by the Claimant for the following reasons: medical reasons, religious beliefs, unilateral change in the terms of her employment contract, workplace context showing that she could have benefited from alternatives or accommodations without having to comply with the employer's mandatory vaccination practice. The General Division found that the Claimant wasn't suspended from her job because of her misconduct.

[5] The Appeal Division granted the Commission permission to appeal the General Division's decision. The Commission argues that the General Division exceeded its jurisdiction and made an error of law in interpreting the concept of misconduct.

[6] I have to decide whether the General Division exceeded its jurisdiction and made an error of law when it found that the Claimant wasn't suspended because of her misconduct.

[7] I allow the Commission's appeal.

Issue

[8] Did the General Division exceed its jurisdiction and make an error of law when it found that the Claimant wasn't suspended because of her misconduct?

Preliminary remarks

[9] On September 21, 2023, the parties attended a management conference. The Claimant asked for the case to be suspended until the higher courts addressed the issue of misconduct related to refusing to follow a vaccination policy that is unilaterally imposed by an employer. The Commission didn't object to the request. I granted the Claimant's request. On November 6, 2024, there was a second management conference. It was agreed that a hearing date would be scheduled. The hearing was held on March 6, 2025, by videoconference.

Analysis

[10] In light of the case law on misconduct related to refusing to follow a vaccination policy imposed by the employer, the parties agree to the following:

- (1) The General Division exceeded its jurisdiction by analyzing the employment contract.
- (2) The General Division made an error by finding that the Commission had to analyze the reasonableness of the employer's policy to determine whether misconduct was founded within the meaning of the *Employment Insurance Act* (EI Act).
- (3) The General Division made an error of law by not limiting itself to the objective analysis of misconduct, as consistently defined by the case law, but by broadening its analysis.
- (4) The General Division confused the concept of an express or implied term of employment with that of whether the policy was validly imposed on the Claimant.

[11] I note that the General Division's decision relies on the reasoning in *AL*.¹ But that decision had previously been overturned by the Appeal Division, even before the General Division gave its decision in this case. Furthermore, the General Division doesn't say anywhere in its decision why it deviated from the Appeal Division's decision in *AL*.² That decision has since been upheld by the Federal Court of Appeal.³

[12] Given the General Division's errors, I am justified in intervening.

Remedy

There are two ways to fix the General Division's errors

[13] When the General Division makes an error, the Appeal Division can fix it in one of two ways: (1) it can send the matter back to the General Division for a new hearing; or (2) it can give the decision that the General Division should have given.

[14] Considering that the parties had the opportunity to present their case to the General Division, I will give the decision that the General Division should have given.⁴

[15] I have to decide whether the Claimant was suspended because of her misconduct within the meaning of the EI Act.⁵

[16] My role isn't to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending the Claimant without justification, but rather to decide whether the Claimant was suspended from her job because of her misconduct.

[17] The concept of misconduct doesn't imply that the breach of conduct must be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, there will be misconduct where the claimant knew or should

¹ *Canada Employment Insurance Commission v AL*, 2023 SST 1423.

² *Canada Employment Insurance Commission v AL*, 2023 SST 1032.

³ *Lance v Canada (Attorney General)*, 2025 FCA 41.

⁴ As per section 59(1) of the *Department of Employment and Social Development Act*.

⁵ See sections 29 and 30 of the *Employment Insurance Act*.

have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.⁶

[18] I have to point out that there is now an abundance of unanimous case law from the Federal Court and the Federal Court of Appeal that confirms, in cases directly dealing with mandatory vaccination policies, the narrow role of the Social Security Tribunal (SST) in appeals dealing with misconduct.⁷

[19] The recent Federal Court decision in *Murphy* provides an in-depth review of the case law on mandatory vaccination and the notion of misconduct. The Court tells us that an employee's wilful and deliberate decision not to be vaccinated is a violation of the express duty set out in the vaccination policy and, as a result, is a form of misconduct.⁸

[20] The Court points out that case law refers to the performance of "obligations" toward the employer in a broad sense, not just the performance of the employee's limited "duties." In other words, the question is not whether the employee's non-compliance with an employer's policy affects the performance of the employee's duties. Instead, the question is whether the employee's non-compliance interferes with their obligations toward the employer.⁹

[21] The Court reminds us that the SST is not the place to challenge an employer's policies. The test for misconduct has to focus on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies.¹⁰

⁶ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See in particular: *Wong v Canada (Attorney General)*, 2024 FC 686; *Spears v Canada (Attorney General)*, 2024 FC 329; *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; and *Abdo v Canada (Attorney General)*, 2023 FC 1764.

⁸ *Murphy c Canada (Procureur général)*, 2024 CF 1356 [In French only] at para 63.

⁹ *Murphy c Canada (Procureur général)*, 2024 CF 1356 [In French only] at para 78.

¹⁰ *Murphy c Canada (Procureur général)*, 2024 CF 1356 [In French only] at para 68.

[22] Similarly, the Court tells us that the SST does not need to analyze the employment context because the test for misconduct focuses on a claimant's objective knowledge of the consequences that their actions will have.¹¹

[23] Finally, the Court reiterates that the SST is a forum for determining entitlement to social security and EI benefits, not for deciding allegations of wrongful suspension/termination. There are remedies available to penalize an employer's behaviour other than through EI benefits.¹²

[24] The Commission submits that the evidence supports a finding of misconduct within the meaning of the EI Act because the Claimant was aware of her employer's policy and its consequences, and she wilfully didn't comply with it.

[25] The Claimant argues that the General Division accepted her testimony as reliable and credible, and that it was best placed to conclude that her sincerely held religious beliefs meant that, in her specific, individual case, she couldn't have acted deliberately or recklessly.

[26] The Claimant submits that the facts relating to her religious beliefs, combined with her particular health condition and the unusual circumstances surrounding COVID, led the General Division to unequivocally conclude that when she failed to comply with the employer's policy, she didn't possess the mental element needed to form an objective or subjective *mens rea* (wilfulness or reckless conduct) as required by recent developments in interpreting misconduct.

[27] I am of the view that the evidence supports a finding of misconduct. With the greatest respect, I can't accept the Claimant's arguments.

[28] In *Zago*, the claimant also argued that he had not committed misconduct within the meaning of the law because his sincerely held religious belief rendered his conduct

¹¹ *Murphy c Canada (Procureur général)*, 2024 CF 1356 [In French only] at para 79.

¹² *Murphy c Canada (Procureur général)*, 2024 CF 1356 [In French only] at para 69; and *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at para 5.

involuntary.¹³ The Federal Court of Appeal reminds us that according to the objective definition of misconduct, it is sufficient if the conduct in question is undertaken with the knowledge that dismissal (or suspension) might result.

[29] In the similar cases *Francis* and *Abdo*, it was determined that according to the objective definition of misconduct, an employee's refusal to be vaccinated in violation of their employer's policy amounted to misconduct, even in light of their argument that, given their religious beliefs, there was [translation] "no real choice" involved in their decision.¹⁴

[30] In this case, the employer's policy required all employees to provide an attestation of their vaccination status by November 12, 2021. It provided a process for requesting accommodations for medical or religious reasons. The Claimant didn't get a medical or religious exemption. The policy also said that employees who refused to provide an attestation of their vaccination status would be considered as refusing to be fully vaccinated and would be placed on unpaid leave after November 26, 2021. The employer suspended the Claimant on November 27, 2021.

[31] The evidence shows, on a balance of probabilities, that the Claimant's continued refusal to be vaccinated against COVID-19 amounted to misconduct because she was aware of the employer's vaccination policy, knew that she wouldn't be allowed to work if she didn't follow it, meaning she wouldn't be able to fulfill her duties, and knew that there was a real possibility that she would be suspended as a result.

[32] The Claimant's unsuccessful attempts to get a medical exemption show that she knew the policy and the consequences of not following it. She also told the Commission that she was [translation] "reluctant to comply with the requirement **despite the disadvantages**."¹⁵ (Emphasis added)

¹³ *Zagol v Canada (Attorney General)*, 2025 FCA 40.

¹⁴ *Francis v Canada (Attorney General)*, 2023 FCA 217; and *Abdo v Canada (Attorney General)*, 2023 FC 1764.

¹⁵ See GD3-31.

[33] I can't accept the Claimant's argument that she didn't make a conscious choice because her religion is deeply ingrained in her. I understand and appreciate her religious beliefs, but I find that she understood her choices and chose not to be vaccinated because of her religious beliefs. I find that it was her own choice.¹⁶

[34] I don't have jurisdiction to decide whether it was reasonable for the employer to apply the vaccination policy to the Claimant given her health status and religious beliefs. I don't have the authority to evaluate the reasons that the employer gave for refusing her exemption request.

[35] While I sympathize with the Claimant, I have to decide the issue of misconduct only within the parameters set by the higher courts, which have defined misconduct under the EI Act. The evidence supports finding that the Claimant was suspended because of her misconduct.

[36] I understand that the Claimant's employer allowed her to return to work on December 29, 2021, unvaccinated, while it reviewed her request for religious exemption. This doesn't change the nature of the misconduct that initially caused her suspension.

Conclusion

[37] The appeal is allowed. The Claimant was suspended because of her misconduct.

Pierre Lafontaine
Member, Appeal Division

¹⁶ See *Zagol v Canada (Attorney General)*, 2025 FCA 40 at para 49.