

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250310

Docket: A-216-23

Citation: 2025 FCA 57

**CORAM: WEBB J.A.
BIRINGER J.A.
DAWSON D.J.C.A.**

BETWEEN:

CORINA COSTEA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 6, 2025.

Judgment delivered at Ottawa, Ontario, on March 10, 2025.

REASONS FOR JUDGMENT BY:

BIRINGER J.A.

CONCURRED IN BY:

**WEBB J.A.
DAWSON D.J.C.A.**

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] The applicant seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal [AD-23-226] determining that she was disentitled to benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (EI Act). The Appeal Division reversed a decision of the General Division [GE-22-3321], finding that the General Division erred in applying the test for misconduct for the purposes of section 31 of the EI Act.

[2] The General Division found that the applicant was suspended for failure to comply with her employer's COVID-19 vaccination policy and that she knew her non-compliance would result in suspension. However, it determined that there was no misconduct because the employer chose to suspend, not dismiss, the applicant. The Appeal Division found that it was an error of law to focus on the employer's conduct and rendered its own decision pursuant to subsection 59(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34.

[3] The Appeal Division's decision meets the required standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 16; *Francis v. Canada (Attorney General)*, 2023 FCA 217 at para. 4 [*Francis*]. It is supported by the evidentiary record. It is also consistent with the jurisprudence of this Court applying the test for misconduct to a knowing failure to comply with an employer's COVID-19 vaccination policy: see, for example, *Cecchetto v. Canada (Attorney General)*, 2024 FCA 102; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 [*Sullivan*]; *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240; and *Francis*.

[4] The Appeal Division reasonably held that the employer's decision to only suspend and not dismiss the applicant, was irrelevant to the misconduct analysis: *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at para. 23; *Sullivan* at para. 4. What mattered was whether the applicant knew or ought to have known the consequences of non-compliance with the employer's policy and chose not to comply: *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at para. 14 [*Mishibinijima*].

[5] The applicant has not demonstrated any errors in the Appeal Division’s decision. I do not accept the applicant’s submission that the Appeal Division failed to consider her request to be exempt from the employer’s vaccination policy for religious reasons (which was refused), or that her non-compliance with the policy was based on her religious beliefs. The Appeal Division acknowledged this but was required, under the test for misconduct, to focus on the applicant’s failure to comply and awareness of the consequences. An employee’s reasons for non-compliance are not relevant to the analysis: *Nelson v. Canada (Attorney General)*, 2019 FCA 222 at para. 21; *Mishibinijima* at para. 14.

[6] For the foregoing reasons, I would dismiss the application for judicial review, without costs.

[7] The style of cause is amended such that the Attorney General of Canada is named as the respondent (changed from the Canada Employment Insurance Commission).

“Monica Biringer”

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
Eleanor R. Dawson D.J.C.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-216-23

STYLE OF CAUSE: CORINA COSTEA v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: MARCH 6, 2025

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: WEBB J.A.
DAWSON D.J.C.A.

DATED: MARCH 10, 2025

APPEARANCES:

Corina Costea FOR THE APPLICANT
ON THEIR OWN BEHALF

Érélégna Bernard FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef FOR THE RESPONDENT
Deputy Attorney General of Canada