

Scientific
Journal of
**Applied
Social and
Clinical
Science**

**DISMISSAL FOR JUST
CAUSE OF WORKERS
WHO, UNJUSTIFIEDLY,
REFUSE TO RECEIVE
THE VACCINE AGAINST
COVID-19 IN THE VIEW
OF THE REGIONAL
LABOR COURT OF THE
2ND REGION (TRT-2)**

Mery Elen da Silva Scalia Carvalho

Universidade Santa Cecília - Santos/SP

<http://lattes.cnpq.br/2061282929678064>

All content in this magazine is licensed under a Creative Commons Attribution License. Attribution-Non-Commercial-Non-Derivatives 4.0 International (CC BY-NC-ND 4.0).



Abstract: The present study aims to analyze how dismissals for just cause based on the worker's unjustified refusal to undergo vaccination against COVID-19 are being analyzed by the Regional Labor Court of the 2nd Region (TRT-2). First, a study was carried out on the collision of fundamental rights involved in the hypothesis, notably the individual right to freedom and the collective right to health. The contours of the disciplinary power of the employer and the possibility of evoking it for the imposition of indirect inductive measures to vaccination were also delimited. Afterwards, all localized judgments issued by the Labor Court of São Paulo on the subject were analyzed. It is concluded that dismissal for just cause has been admitted by TRT-2, mostly, as an act of insubordination and indiscipline, under the terms of article 482, paragraph h, of the Consolidation of Labor Laws (CONSOLIDATION OF THE LABOR LAWS). It was noted that most of the decisions did not address the employer's pedagogical responsibility, nor did they analyze the specificities of concrete cases.

Keywords: Vaccination. COVID-19. Collision of fundamental rights. Disciplinary power of the employer. Dismissal for just cause.

INTRODUCTION

The impacts that the COVID-19 pandemic has brought to humanity are immeasurable. Among the many measures adopted by the Government to contain the spread of the new coronavirus (SARS-CoV-2), vaccination stands out, the purpose of which is to make the population immune or resistant to the disease. Wide vaccination coverage in a short period of time has a strong impact on collective immunity, reducing the transmissibility of the virus, the development of severe conditions and the emergence of new viral variants.

Given the impossibility of forcing vaccination through physical coercion, it is

feasible to adopt indirect inductive measures for this purpose, the object of this study being the possibility of applying sanctioning measures by employers to workers who, for non-scientific reasons, refuse to adhere to the vaccine against COVID-19. The research will focus on the positioning of the Regional Labor Court of the 2nd Region, henceforth TRT-2, which covers the city of São Paulo and the regions of Guarulhos, Osasco, ABC Paulista and Baixada Santista.

Many fundamental rights are involved in the hypothesis, such as the right to freedom, right to work, collective right to health, right to information and the right to a balanced working environment. This way, it is of great importance to analyze how the Judiciary has been polishing the limits of the employer's directive power.

Regarding the methodology, this is an exploratory and descriptive research. Data collection will be carried out, primarily, through bibliographical, legislative and jurisprudential research. The analysis of these gathered data will be deductive and dialectical.

COMPULSORY VACCINATION AGAINST COVID-19 AND THE CONFLICT BETWEEN FUNDAMENTAL RIGHTS

In the Brazilian scenario, compulsory vaccination against COVID-19 is based, notably, on Article 3 of Ordinance Number: 597/2004 of the Ministry of Health and Article 3, III, d, of Law Number: 13,979/2020. This prophylactic strategy aims to preserve not only the health of each individual, but also to prevent the infectious agent from remaining in circulation, spreading the disease in the community (BARCELLOS et al, 2022, p. 29). According to the National Vaccination Operational Plan against COVID-19 (2022, p. 20), the recommended vaccination target in Brazil is 90% of the target population for the

complete primary scheme and reinforcements.

There is legal support for such a public health policy. The Federal Supreme Court, in the judgment of ARE 1.267.879/SP (topic 1103 of General Repercussion), declared the constitutionality of mandatory vaccination, not characterizing a violation of freedom of conscience and philosophical conviction. And in the judgment of ADIs 6586 and 6587, the Supreme Court conferred an interpretation in accordance with the Constitution to article 3, III, d, of Law number: based on scientific evidence, is accompanied by extensive information on the efficacy, safety and contraindications of immunizers, among other conditions. On that occasion, it was highlighted that compulsory vaccination must not be confused with forced vaccination, as the user's consent is always required, in respect of the individual's right to physical integrity.

Faced with the impossibility of resorting to physical embarrassment to administer immunization, it is imperative that the State obtain consensus and adherence to vaccination. Therefore, the National Plan for the Operationalization of Vaccination against COVID-19 (2022, p. 70) provides for the need for constant communication campaigns that are easy to understand, aiming to guide the population about the importance of the vaccine and clarify false news.

In addition to this pedagogical strategy, the adoption of indirect inductive measures to encourage vaccination and discourage refusal is accepted. Among such measures, the possibility of requiring submission to the immunizing COVID-19 vaccine to maintain the employment relationship stands out.

In Brazil, in principle, this possibility was prohibited by article 1, §§ 1 and 2 of Ordinance Number: 620/2021 of the Ministry of Labor and Social Security (MTP), which considered dismissal based on the absence of a certificate of vaccination by the working person.

However, in the records of ADPF 898/DF, in November 2021, a preliminary injunction was granted suspending the effectiveness of the aforementioned article of Ordinance Number: 620/2021 of the MTP, concluding that only law in the formal sense could regulate the matter. Furthermore, the Minister Rapporteur Luis Roberto Barroso indicated that it is possible for the employer to demand a vaccination certificate from its employees in order to maintain the employment relationship in view of its duty to guarantee a safe and healthy work environment. However, dismissal for just cause, however possible, must be the ultima ratio, out of respect for the social value of work.

From this perspective, the instrumentalization of the directive power of companies to promote collective immunization and reduce the labor-environmental biological risk resulting from SARS-CoV-2 is legitimate. In fact, it is the employer's duty to ensure that the "exercise of work does not harm another fundamental human right: the right to health, an inseparable complement of the right to life" (OLIVEIRA, 2011, p. 142).

It appears that, in the hypothesis, the imposition of vaccination does not seek to depreciate the existential convictions of employees, but rather to guide conduct based on the recommendations of most of the scientific community. Analyzing the position of the STF, André Ramos Tavares highlights the emphasis that has been given to what he calls "(...) Brazilian scientific constitution, which advocates for a society guided by safe vectors, arising from serious and broad research" (2022, p. 1682, e-book). Thus, the recognition of just cause does not characterize discriminatory or intolerant behavior by the employer because "the study of the reason for a differentiation is fundamental to conclude whether or not it has a discriminatory nature" (LIMA, 2011, p. 99).

It must be noted that ADPF 898/DF was terminated without consideration of the merits in November 2022, due to the supervening loss of the object resulting from the cooling of the Covid-19 epidemic and the sufficiency of the effects of the precautionary measure already granted.

Despite this outcome, the fact is that there are still cases pending judgment, which justifies the deepening of the study of the collision of rights involved.

Refusal to receive the vaccine against COVID-19 is commonly based on the right to health self-determination, that is, the “ability to voluntarily accept, refuse or interrupt medical treatments” (RAMOS, 2021, p. 74, e-book). Such a right would be a corollary of freedom of conscience and the faculty of each individual to formulate judgments and opinions about the experimental nature, efficacy and side effects of the immunizer. The State could not, therefore, impose the adoption of conduct contrary to the philosophical, moral, existential or religious convictions of citizens.

However, there are no absolute rights, so that “it has become common ground that fundamental rights can be limited when they face other constitutional values, including other fundamental rights” (BRANCO; MENDES, 2022, p. 314, e-book). Furthermore, Alexandre de Moraes (2003, p. 48) teaches that “fundamental human rights cannot be used as a true protective shield against the practice of illicit activities”. Certainly, a certain behavior cannot be, at the same time, a right and an unlawful act.

In this path, the employer’s duty to safeguard the balance of the work environment and the quality of life of workers is outlined in the legislation. Notably, Article 2 of Law Number: 8080/90 recognizes the duty of companies to act with a view to reducing disease risks. Article 157 of the CONSOLIDATION OF

LABOR LAWS, on the other hand, establishes the employer’s duty to comply with and enforce compliance with occupational health and safety standards. It must be noted that Environmental Labor Law is governed by principles such as the minimum regressive risk (Article 7, XXII, of the Brazilian Federal Constitution/1988), retention of risk at source and the unavailability of the worker’s health. Sebastião Geraldo de Oliveira (2011, p. 148) asserts that:

the employer has a duty to reduce the risks inherent to the work as far as possible, at each time, so that the damages suffered by the worker due to risks that could be eliminated or controlled give rise to the characterization of the employer’s culpable conduct, due to non-compliance with the minimal regressive risk.

Thus, although each individual has the right to self-determination in terms of health, such freedom may be limited in view of the employer’s duty to ensure a healthy work environment. The CONSOLIDATION OF LABOR LAWS itself, in its article 8, provides that no class or private interest must prevail over the public interest.

There are several legal techniques for solving collisions (real or apparent) between fundamental rights. In the face of hard cases, the postulate of proportionality is commonly used to identify the values that deserve to be prioritized. Alexandre de Moraes (2003, p. 48) highlights the need for the interpreter to coordinate the conflicting legal assets “carrying out a proportional reduction in the scope of each one (contradiction of principles), always in search of the true meaning of the norm and the harmony of the constitutional text with its main purpose”.

Thus, the recognition of the legitimacy of sanctions imposed by the employer on employees who refuse vaccination against COVID-19 depends on the valuation given to the existential convictions of each individual,

the right to health of other employees and society, as well as other fundamental rights identified in the hypothesis.

EMPLOYER'S DISCIPLINARY POWER AS AN INSTRUMENT FOR INDIRECT INDUCTION TO VACCINATION AGAINST COVID-19

The directive power guarantees prerogatives to the employer that resemble the State, among which the power to impose sanctions on its employees (MAGANO, 1992, p. 207). The foundation of this disciplinary power, according to part of the doctrine, is democratic pluralism, which enables the existence of several autonomous power centers, inferior to the State, but capable of exerting influence on certain groups (MAGANO, 1992, p. 74).

According to the seriousness of the irregularity, there are three main applicable disciplinary sanctions: warning, suspension and reasoned dismissal. The gradation must take into account the pedagogical and didactic nature of disciplinary power, notably because "the central objective of such power would not be to sanction, punish, but mainly to create conditions for the resocialization of workers in the business universe" (DELGADO, 2019, p. 833).

The warning, although not provided for by law, stems from the theory of implicit powers, since "if the employer can do more (dismiss for just cause or serious misconduct), he can also do less (apply minor sanctions)" (LEITE, 2022, p.788). The suspension penalty is provided for in passing in article 474 of the CONSOLIDATION OF LABOR LAWS, which provides for "the suspension of the employee for more than 30 (thirty) consecutive days means the unfair termination of the employment contract". Finally, dismissal for just cause is the possibility for the employer to terminate the employment contract in view of the

employee's unlawful conduct that falls within the legal classification provided for, notably in article 158, sole paragraph, and in article 482 of the CONSOLIDATION OF THE LAWS OF LABOR. There is a certain imprecision in the concepts, so that the definition of what would be, for example, bad behavior (article 482, b, of the CONSOLIDATION OF LABOR LAWS) or an act of indiscipline or insubordination (article 482, h, of the CONSOLIDATION DAS LABOR LAWS) was left to doctrine and jurisprudence.

The law does not provide for a specific procedure for assessing unlawful conduct and applying penalties to the worker, but it is certain that "the employer's directive power comes up against several restrictions and limits, since it must be focused exclusively on the purposes of the company" (OLIVEIRA, 2011, p. 228).

Thus, it is convenient to identify the objective, subjective and circumstantial requirements for the validity of setting penalties in the employment context (DELGADO, 2019, p. 828).

The objective requirement concerns the typicality and seriousness of the worker's conduct. With regard to the subsumption of refusal of vaccination against COVID-19 by the employee to the assumptions of dismissal for just cause, the authors of ADPF 898 maintained that article 482, item "h", of the CONSOLIDATION OF LABORS (indiscipline and insubordination) would be applicable to the hypothesis, corollary of the legal subordination of the employee. Indiscipline is characterized as "non-compliance with rules, guidelines or general orders of the employer or its agents and managers, impersonally addressed to members of the establishment or company" (DELGADO, 2019, p. 1436). In another turn, insubordination "relates to non-compliance with legal, personal and direct orders made by the employer" (LEITE,

2022, p.1673, e-book). The behavior could also be classified as bad procedure, that is, “an employee’s irregular attitude, an incorrect procedure, incompatible with the rules to be observed by the common man before society” (MARTINS, 2012, p. 388). Finally, subsumption to the hypothesis of article 158, sole paragraph, of the CONSOLIDATION OF LABOR LAWS is also acceptable, in the face of non-compliance with the necessary precautions to prevent the spread of the disease in the work environment.

With regard to the subjective requirement, the application of sanctions to the worker depends on proving the intentionality of the irregular conduct or, at least, of his negligent, reckless or impertinent act.

Finally, regarding the circumstantial criteria of the employer’s disciplinary action, the appropriateness and gradation of the penalty must be analyzed. The exercise of disciplinary power is not properly delimited by legislation (DELGADO, 2019, p. 828), which makes it imperative to observe principles such as proportionality, reasonableness, non bis in idem and the presumption of innocence (LEITE, 2022, p. 790-794, e-book). It cannot be forgotten that dismissal for just cause results in the loss of the right to prior notice, proportional vacations and thirteenth bonus, compensation on the FGTS balance, unemployment insurance, as well as the right to maintain the condition of beneficiary of the corporate health plan (Article 30 of Law Number: 9.656/98).

In the monocratic decision by which the injunction was granted in ADPF 898/DF, it was highlighted that the recognition of the unconstitutionality of §§ 1 and 2 of article 1 of Ordinance Number: 620/2021 of the MTPS only reestablished the employer’s right to terminate the contract of work in the face of the unjustified refusal of the vaccine against COVID-19, not meaning that he must

necessarily do so. Thus, in view of the social value of work, it is important to consider the circumstances of the case, as employers are expected to adopt responsible business practices, including encouraging their employees to be vaccinated.

ANALYSIS OF DECISIONS DELIVERED BY THE REGIONAL LABOR COURT OF THE 2ND REGION (TRT-2)

One of the fundamental rights of the working person is the protection against arbitrary or unfair dismissal (Article 7, I, of the Federal Constitution of 1988). In this path, this article will analyze the decisions handed down in the 2nd instance by the Regional Labor Court of the 2nd Region, henceforth TRT-2, regarding contractual breaches for just cause based on the mandatory proof of submission of the worker to the vaccine against COVID-19. In view of the Jurisprudence system of this court, the following search terms were used, separately and jointly: “vaccination”; “vaccine”; “Covid-19”; “resignation”; “just cause” and “dismissal for just cause”. The search covered judgments handed down in actions distributed between 01/17/2021 and 12/25/2022.

11 judgments that dealt specifically with the subject returned. In 10 of them, dismissal for just cause was upheld. There is, however, divergence regarding the legal grounds, as shown in the table below:

Process number	Employer activity	Legal basis of just cause
1000376-59.2022.5.02.0052 (9ª Class)	Supermarket network	Indiscipline (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1000395-97.2021.5.02.0473 (9ª Class)	Healthcare service provider company	Insubordination (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1000486-58.2021.5.02.0613 (17ª Class)	Private non-profit association providing health services	Indiscipline (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1001383-24.2021.5.02.0084 (18ª Class)	private surveillance company	Insubordination (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1000508-87.2022.5.02.0482 (6ª Class)	Supermarket network	Indiscipline (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1000285-84.2021.5.02.0025 (13ª Class)	Nursing home for seniors	Bad procedure (article 482, b, of the CONSOLIDATION OF LABOR LAWS)
1000286-17.2022.5.02.0710 (11ª Class)	Supermarket network	Indiscipline (article 482, h, of the CONSOLIDATION OF LABOR LAWS)
1000161-04.2022.5.02.0046 (15ª Class)	Sales promotion of technological products	Negligence (article 482, e, of the CONSOLIDATION OF LABOR LAWS)
1001215-11.2021.5.02.0702 (6ª Class)	Languages course	Misconduct and insubordination (article 482, b and h, of the CONSOLIDATION OF LABOR LAWS)
1001221-43.2021.5.02.0241 (6ª Class)	Materials industry for medicine and dentistry	Insubordination (article 482, h, of the CONSOLIDATION OF LABOR LAWS)

Table 1. Labor claims in which the TRT-2 upheld the dismissal for just cause

It appears that, for the most part, the TRT-2 has been adopting the understanding that the right to life and health of the community must

prevail over the individual right to freedom, admitting the dismissal for just cause of the worker who, unjustifiably, decides not to immunize against COVID-19.

It must be noted that in the 10 judgments in which just cause was recognized, the application of paragraph h of article 482 of the CONSOLIDATION OF LABOR LAWS (indiscipline and insubordination) to justify the dismissals, highlighting the employer's obligation to provide a safe work environment for its employees, who cannot be forced to live with a possible transmitter of SARS-CoV-2.

A different basis was applied in case Number: 1000285-84.2021.5.02.0025, in which the Panel decided that the fact that the worker unjustifiably refuses vaccination does not constitute an act of insubordination because "the employer cannot dispose of the worker's body in any society that pretends to be founded on the principle of freedom of work". However, considering that the exercise of the individual right to the intangibility of the body cannot jeopardize the right to health and life of the other members of the community, he classified reluctance as a bad procedure (article 482, b, of the CONSOLIDATION OF LABOR LAWS).

It must be noted that only the decisions handed down in cases 1001221-43.2021.5.02.0241, 1000286-17.2022.5.02.0710 and 1000395-97.2021.5.02.0473 highlighted the gradation of the penalty, mentioning the prior application of a warning and/or suspension to resignation. In most judgments, due emphasis was not given to the employer's duty to provide guidance and clarification to the employee about the importance of vaccination and the consequences of its refusal, as provided for in article 2 of Ordinance Number: 620/2021 and highlighted in the precautionary judgment of ADPF 898/DF by the STF. And, as a rule, the particularities of employers (economic

size, corporate purpose, etc.) and employees were also not detailed in the analyzed group decisions.

As an exception, it is worth highlighting the decision issued in case n.º 1001221-43.2021.5.02.0241, which deepened all these discussions. In this case, the worker would have stopped submitting to immunization due to religious belief. The penalty was graded, as the dismissal was preceded by a warning and suspension, with the granting of a deadline for presenting proof of vaccination. The Judge Rapporteur did not corroborate the worker's thesis, because "nobody is forcing the appellant to go against dogmas of her religion, even because no religion prohibits vaccination". The judge also addressed the safety of vaccines, upholding the dismissal for just cause because the "panorama that must be analyzed from the perspective of public health and the employer's responsibility for maintaining a healthy work environment, as well as for compliance with safety standards and occupational medicine (article 157, I, of the CONSOLIDATION OF LABOR LAWS)."

Finally, only in labor claim n.º 1000759-73.2021.5.02.0601 was the dismissal for just cause converted into unjustified dismissal, stating in the judgment that "in order for there to be dismissal for just cause, there must be legal framework, not verifying the refusal to the vaccine in any of the hypotheses of the exhaustive list of article 482 of the CONSOLIDATION OF LABOR LAWS, which does not admit extensive interpretation". It must be noted that the ruling issued in case Number: 1000161-04.2022.5.02.0046, by non-unanimous vote, upheld the dismissal for just cause based on article 482, h, of the CONSOLIDATION OF LABOR LAWS. But in the losing vote, the Judge stated that the decision regarding vaccination referred to the sphere of the person's intimacy and privacy, and the CONSOLIDATION OF LABOR

LAWS does not contain "any provision that if the employee refuses to take the vaccine, this constitutes just cause. If the employee refuses to take the vaccine against covid and the company's customers make this demand, the solution for the company is to fire the worker, without just cause".

This demonstrates the controversy of the theme and the multiple approaches that can be adopted.

CONCLUSION

In the context of labor relations, there is a collision between fundamental rights when proof of vaccination against COVID-19 is required to maintain the employment relationship. The employer's directive power is used, in the hypothesis, as an indirect inductive measure to collective immunization.

Based on the information gathered and the arguments set out above, it is clear that, so far, the TRT-2 prevails that the unjustified refusal of the worker to receive the vaccine against COVID-19 can be classified as an act of indiscipline and/or or insubordination (article 482, h of the CONSOLIDATION OF LABOR LAWS) to substantiate his dismissal for just cause.

However, the Judging Panels of the Labor Court of São Paulo have been refraining from addressing in greater depth the employer's pedagogical duty to make employees aware of the importance of broad vaccination coverage against COVID-19. Emphasis has also not been given to the peculiarities of each case and the need for a gradation of the penalty.

REFERENCES

BARCELLOS, Christovam et al. **Boletim Observatório COVID-19: balanço de dois anos da pandemia COVID-19 - Janeiro de 2020 a Janeiro de 2022**. Fiocruz, 09 fev 2022. Disponível em: https://portal.fiocruz.br/sites/portal.fiocruz.br/files/documentos_2/boletim_covid_2022-balanco_2_anos_pandemia-redb.pdf. Acesso em 25 dez 2022.

BRASIL. Ministério da Saúde. **Plano Nacional de Operacionalização da Vacinação contra a Covid-19**. 2. ed. Brasília: Ministério da Saúde, 2022. Disponível em: : http://bvsms.saude.gov.br/bvs/publicacoes/plano_nacional_operacionalizacao_vacinacao_covid19.pdf. Acesso em 25 dez 2022.

DELGADO, Maurício Godinho. **Curso do Direito do Trabalho**. 18. ed. São Paulo: LTr, 2019.

LEITE, Carlos Henrique Bezerra. **Curso de Direito do Trabalho**. 14. ed. São Paulo: Saraiva, 2022. *E-book*.

LIMA, Firmino Alves. **Teoria da Discriminação nas Relações de Trabalho**. Rio de Janeiro: Elsevier, 2011.

MAGANO, Octávio Buenumber: **Manual de Direito de Trabalho: direito individual do trabalho**. 3 ed. São Paulo: LTr, 1992.

MARTINS, Sérgio Pinto. **Direito do Trabalho**. 28. ed. São Paulo: Atlas, 2012.

MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. **Curso de Direito Constitucional**. 17. ed. São Paulo: Saraiva, 2022. *E-book*.

MORAES, Alexandre de. **Direito Constitucional**. 13. ed. São Paulo: Atlas, 2003.

OLIVEIRA, Sebastião Geraldo de. **Proteção Jurídica à Saúde do Trabalhador**. 6 ed. São Paulo: LTr, 2011.

RAMOS, André de Carvalho. **Direitos Humanos na Pandemia: Desafios e Proteção Efetiva**. São Paulo: Saraiva, 2021. *E-book*.

TAVARES, André Ramos. **Curso de Direito Constitucional**. 20. ed. São Paulo: Saraiva, 2022. *E-book*.