



Citation: *NN v Canada Employment Insurance Commission*, 2022 SST 689

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

## **Decision**

**Appellant:** N. N.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (445733) dated January 28, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference

**Hearing date:** May 18, 2022

**Hearing participant:** Appellant

**Decision date:** May 24, 2022

**File number:** GE-22-711

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant worked as a delivery associate for a coffee company. The employer dismissed him because he did not comply with their vaccination policy.<sup>2</sup> The Claimant then applied for EI regular benefits.<sup>3</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his own misconduct.<sup>4</sup>

[5] The Claimant disagrees with the Commission's decision.<sup>5</sup> He did not quit and was not dismissed from his employment. The Claimant says that he is being discriminated against, that the policy was unconstitutional and it is medical coercion to force him to vaccinate.

## Issue

[6] Did the Claimant lose his job because of misconduct?

## Analysis

[7] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant is

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

<sup>2</sup> See record of employment at GD3-17.

<sup>3</sup> See application for benefits at GD3-3 to GD3-14.

<sup>4</sup> See Commission's representations at GD4-1 to GD4-7.

<sup>5</sup> See notice of appeal at GD2-1 to GD2-16.

no longer working for his employer. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant lose his job?**

[8] The parties dispute whether the Claimant quit his employment, or if he was dismissed or a shortage of work.

[9] The employer told the Commission that the Claimant was new employee and had not complied with their vaccination policy.<sup>6</sup> Instead of putting him on a leave of absence, they dismissed him. The dismissal is also shown the amended record of employment they issued.<sup>7</sup>

[10] The Commission relied on the employer's statement and record of employment to support their decision that the Claimant lost his employment due to his own misconduct.<sup>8</sup>

[11] The Claimant argues that his original record of employment should have shown there was a "shortage of work" because there was no work for him, specifically because he was unvaccinated.<sup>9</sup> He said that the original record of employment identified that he "quit" his job, so he called human resources and it was changed to "dismissal".

[12] I find that the Claimant was dismissed from his job on October 20, 2022. I preferred the employer's statement and record of employment that show he was dismissed.

[13] I was not persuaded by the Claimant's argument that there was a shortage of work. The evidence supports that the employer still had work available for employees, but that he needed to comply with the vaccination policy in order to continue working. As well, the Claimant said that his supervisor told him "if you aren't vaccinated, you cannot be employed with this company".

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<sup>6</sup> See supplementary record of claim at GD3-33 to GD3-34.

<sup>7</sup> See GD3-17.

<sup>8</sup> See initial decision at GD3-26 and reconsideration decision at GD3-50.

<sup>9</sup> See GD2-5.

[14] Lastly, the Claimant agrees that he did not have a choice to stay employed, so he did not quit.

### **What was the employer's policy?**

[15] The employer implemented a "*Covid19 Vaccination Policy*" (policy). A copy of that policy is included in the file.<sup>10</sup>

[16] The policy requires that employees are fully vaccinated from covid19 by November 20, 2021 and provide proof of vaccination to the employer.

### **Was the policy communicated to the Claimant?**

[17] The Claimant agrees that the policy was communicated to him by his employer around October 19, 2021. There was a zoom meeting with all employees on the call. They were told that vaccinations were mandatory. The Claimant then had a call with his supervisor on October 20, 2021 and he was told that he needed to be vaccinated.

### **What were the consequences of not complying with the policy?**

[18] The policy says that "covered individuals who fail to comply with the vaccination requirement may be subject to administrative or disciplinary measures, up to and including termination of employment or contract".<sup>11</sup>

[19] The Claimant agreed that his supervisor told him that there would be no work for him if he chooses to remain unvaccinated.

### **Is there a reason the Claimant could not comply with the policy?**

[20] The policy provides for exemptions for "covered individuals who choose not to be vaccinated based on human rights legislation (for example, disability or religion) may be eligible to apply for an accommodation request".<sup>12</sup>

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<sup>10</sup> See policy at GD3-45 to GD3-46.

<sup>11</sup> See GD3-46.

<sup>12</sup> See GD3-46.

[21] The Claimant said that he did not make a request for an exemption because he is not religious and does not meet the medical criteria.

### **Is the reason for the Claimant's dismissal misconduct under the law?**

[22] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>13</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>14</sup>

[23] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>15</sup>

[24] There is misconduct if the Claimant 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 let go because of that.<sup>16</sup>

[25] The Commission has to prove that the Claimant 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 Claimant lost his job because of misconduct.<sup>17</sup>

[26] I find that the Commission has proven that there was misconduct for the following reasons.

[27] First, I find that the Claimant willfully and consciously chose to not comply with the employer's policy and knew the consequences of not complying would result in his dismissal. The policy was communicated to the Claimant on October 19, 2021 and again on October 20, 2021. He was told that there would be no work for him if he remains unvaccinated.

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<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>14</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>15</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>17</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[28] The court has stated that Tribunals have to focus on the conduct of the Claimant, not the employer. The question is not 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 losing their employment.<sup>18</sup>

[29] In this case, the Claimant made a deliberate choice not to comply with the employer's policy. This conduct was a breach of the employer's policy and he knew it would result in losing his employment.

[30] Part of the Claimant's argument is that he did not commit true misconduct, such as theft, violence or harassment. However, the court has already decided that misconduct does not need to have wrongful intent for his behaviour to be misconduct under the law.<sup>19</sup>

[31] Second, the *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*<sup>20</sup> as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.<sup>21</sup>

[32] In this case, the Claimant admitted that he did not request an exemption from the employer's policy because he did not meet the medical or religious criteria.

[33] Third, I acknowledge that the Claimant has a right to decide whether he wants to be vaccinated. I also acknowledge that the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose policies at the workplace to ensure the health and safety of employees.

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

<sup>19</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>20</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>21</sup> See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at [https://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates).

[34] In this case, the Claimant has chosen to not get vaccinated for personal reasons, even though he knew it could get in the way of carrying out his duties toward his employer. The employer told him that the policy was implemented because customers wanted drivers to be vaccinated. This has led to undesirable outcomes, such as job loss and loss of income.

[35] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.<sup>22</sup> This is not an automatic right, even if a Claimant has paid EI premiums.

[36] In my view, the Claimant was not terminated involuntarily because it was his non-compliance with the employer's policy that led his dismissal. Based on my findings above, I find that the Claimant lost his job because of misconduct.

### **What about the Claimant's other arguments?**

[37] The Claimant disagrees with the employer's policy and penalty for a variety of reasons. He explained that he was discriminated against, the policy was a breach of his Charter rights, it is an experimental vaccine and his employer failed to accommodate him, etc.

[38] The court has stated that the role of Tribunals is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.<sup>23</sup>

[39] I do not have the authority to decide whether the employer breached any of his rights as employee when they dismissed him, or whether they could or should have accommodated him in some other way.

[40] The Claimant's recourse against his employer is to pursue his claims in court, or any other Tribunal that may deal with these particular matters.

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<sup>22</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>23</sup> See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[41] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>24</sup> Based on the facts of this case, I have already decided that the Claimant's conduct does amount to willful misconduct.

## **Conclusion**

[42] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[43] This means that the appeal is dismissed.

Solange Losier  
Member, General Division – Employment Insurance Section

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<sup>24</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.