



Citation: *NF v Canada Employment Insurance Commission*, 2022 SST 743

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

## Decision

**Appellant:** N. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (455495) dated March 1, 2022 (issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference

**Hearing date:** June 2, 2022

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** June 3, 2022

**File number:** GE-22-1227

## Decision

[1] The appeal is dismissed.

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

## Overview

[3] The Claimant lost her job and applied for EI benefits. Her employer implemented a program that required employees to get vaccinated or have regular tests for COVID-19. The Claimant didn't get tested and didn't provide a proof of vaccination to the employer. So, the employer let her go.

[4] The Commission decided that the Claimant voluntarily left her job without just cause. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[5] The Claimant disagrees that she voluntarily left her job. The employer dismissed her after she asked questions about the changes to her job and the safety of the vaccine.

## Matters I have to consider first

### The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the

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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.

employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

### **The Claimant's demand for accommodation**

[7] Prior to the hearing and at the hearing itself, the Claimant and her representative made a demand for accommodations under several sections of domestic and international law.<sup>2</sup> The representative specified that section 27 of the Vienna Convention<sup>3</sup> and article 7 of the *International Covenant on Civil and Political Rights*<sup>4</sup> apply to the Tribunal's handling of the Claimant's appeal.

[8] The representative submitted that I had a duty to accommodate the Claimant to the point of undue hardship. The representative said this meant recognizing that the Claimant has been subjected to harm by the operation of the law and its regulations. It also meant providing immediate remedy in the form of full compensation for her EI claim backdated to October 2021.

[9] I recognize that the Claimant is facing hardship and financial difficulty as a result of losing her job and being denied EI benefits. She gave compelling testimony about her circumstances.

[10] However, as a tribunal member, I am bound to apply the law. I cannot exempt the Claimant from the requirements of the *Employment Insurance Act* or its regulations, no matter how compassionate her circumstances.<sup>5</sup>

[11] The Claimant is appealing the Commission's decision to disqualify her from receiving EI benefits under the *Employment Insurance Act*. So, my decision must address this question of law. If I did not make a decision on the Claimant's

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<sup>2</sup> See GD7.

<sup>3</sup> *Vienna Convention on the Law of Treaties*, United Nations (1969). Article 27 states "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

<sup>4</sup> *International Covenant on Civil and Political Rights*, United Nations (1966). Article 7 states "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

<sup>5</sup> See *Canada (Attorney General) v Knee*, 2011 FCA 301, at para 9.

disqualification, this would be a failure of procedural fairness because I would have refused to exercise my jurisdiction on the issue before me.

[12] I have no doubt that the Claimant has experienced financial difficulty as a result of losing her job and being denied EI benefits. But, I find there is no evidence that the Claimant has been subject to cruel, inhuman or degrading treatment or punishment as a result of being held to the requirements of the *Employment Insurance Act*. Employment insurance is an insurance program. And, like other insurance programs, you must meet certain requirements to qualify.

[13] At the end of the hearing, the representative made it clear that the Claimant needed to resolve her EI benefits because of her immediate financial need. The Claimant also stated that she needed this to be “done today.” So, I have made every effort to issue this decision in an expedited manner.

## **Issue**

[14] Did the Claimant voluntarily leave her job or did the employer dismiss her?

[15] Did the Claimant lose her job because of misconduct?

## **Analysis**

### **Why did the Claimant stop working?**

[16] A claimant who voluntarily leaves their job is disqualified from receiving EI benefits, unless they can prove that they had just cause for voluntarily leaving their job.<sup>6</sup>

[17] Similarly, claimants who have been dismissed from a job because of misconduct are also disqualified.<sup>7</sup>

[18] Sometimes it is not clear whether a claimant voluntarily left or the employer dismissed them. Both of these notions are linked in the *Employment Insurance Act*. They relate to whether someone caused their own unemployment, either by initiating

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<sup>6</sup> See section 30 of the Act.

<sup>7</sup> See section 30 of the Act.

their separation from employment without just cause, or by losing their job due to misconduct.

[19] Because the reasons for these disqualifications are linked, it is open to me to make a decision based on either of these grounds. In other words, where the reason for the Claimant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on a voluntarily leaving or dismissal due to misconduct.<sup>8</sup>

[20] In this case, it is not clear that the Claimant voluntarily left her job. She has consistently stated to the Commission and the Tribunal that she didn't quit. Rather, she says it was the employer who dismissed her from work.

[21] The Claimant was employed as a receptionist. In September 2021, the employer put in place a program that required employees to be vaccinated against COVID-19 or to submit to regular testing for COVID-19.<sup>9</sup>

[22] The Claimant was on leave from work when this program was implemented. She testified that the Office Manager sent her several text messages informing her that she would be required to provide proof of her vaccination or to be tested for COVID-19 before she returned to work.

[23] The Claimant returned to work on September 21, 2021. The Office Manager sent an email to all the staff asking them to provide proof of their vaccination or a negative COVID-19 test result.<sup>10</sup> Two hours later, the Office Manager sent the Claimant an email asking her to provide a copy of her negative COVID-19 test result.<sup>11</sup>

[24] The next day, the Office Manager emailed the Claimant again. The email stated that the employer required all employees to be "fully vaccinated or show a negative COVID 19 test administered in the last 72 hours." The Office Manager said that she had

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<sup>8</sup> The Federal Court of Appeal explains these principles in *Canada (Attorney General) v. Desson*, 2003 FCA 303 and *Canada (Attorney General) v. Easson*, A-1598-92.

<sup>9</sup> See GD3-28.

<sup>10</sup> See GD3-44 to GD3-45

<sup>11</sup> See GD3-43 to GD3-44.

requested information from the Claimant numerous times “with no response.” She asked the Claimant to respond.<sup>12</sup>

[25] The Claimant responded saying that she felt stressed about these changes. She needed time to speak to her doctor and process the new requirements for COVID-19 vaccination or testing. She says she can provide a doctor’s note if needed.<sup>13</sup> The Office Manager responded that the vaccination or negative COVID-19 test result is required and that they will need a doctor’s note.<sup>14</sup>

[26] The Claimant said that she continued to work until September 27, 2021. She typically works from home and attends the office as needed. On September 27<sup>th</sup>, she was in the office for a meeting. She testified that she contacted the CEO to inform him of a scheduling change and the CEO asked if she had been vaccinated or provided her negative test result. She told the CEO that she had not. The CEO told her to get out of the office.

[27] The Office Manager called the Claimant after she left the office and told the Claimant that she was being put on leave until the requirement for vaccination or testing was over.

[28] The Claimant said that she sent the Office Manager and CEO an email asking questions about the safety and efficacy of the vaccine. She stated that she would be willing to get the vaccination if the employer would confirm that she would not be harmed from the vaccination and have a doctor take legal and financial responsibility for any injuries to herself or interactions by personnel regarding these procedures.<sup>15</sup>

[29] The Office Manager emailed the Claimant on October 4, 2021. The email reiterated that the employer’s program required all employees to be vaccinated against COVID-19 or to provide negative COVID-19 test results twice per week. It states that the employer has “tried to work together with [the Claimant] to obtain the information

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<sup>12</sup> See GD3-43

<sup>13</sup> See GD3-42.

<sup>14</sup> See GD3-41.

<sup>15</sup> See GD3-30.

requested.” The email then states that the employer has a policy about abandonment of position. Any employee absent from work for three consecutive days without notifying the Office Manager of their reasons for absence will be considered to have resigned. The Office Manager says that if the Claimant doesn’t “have a response” by the end of the day, that they will consider that she has abandoned her position.<sup>16</sup>

[30] The Claimant responded to this email on October 5, 2021. She stated that she has been busy and continues to work from home.<sup>17</sup> The Office Manager quickly emailed back stating that the Claimant’s role requires her to be in the office and that she has not been approved to work solely from home. She stated that they have not received the requested proof of vaccine or a negative COVID-19 test result from the Claimant. They now consider that she has abandoned her position.<sup>18</sup>

[31] The employer sent the Claimant a letter dated October 5, 2021. The letter states that the Claimant is “non-compliant with company health and safety standards and protocols.” The employer will issue the Claimant’s final pay and a Record of Employment (ROE). They ask the Claimant to return her work equipment including her computer and office key.<sup>19</sup>

[32] The employer issued an ROE with the comment “employee is non-compliant with company health and safety protocols.”<sup>20</sup>

[33] I find the evidence on file supports that the employer initiated the Claimant’s separation from employment. I put weight on the Claimant’s consistent statements that the employer placed on her leave and then dismissed her from her job.<sup>21</sup> This is supported by the letter of termination and the ROE issued by the employer.

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<sup>16</sup> See GD3-49 to GD3-50.

<sup>17</sup> See GD3-49.

<sup>18</sup> See GD3-48.

<sup>19</sup> See GD3-52.

<sup>20</sup> See GD3-21 to GD3-22.

<sup>21</sup> See the Claimant’s initial application for benefits on GD3-10.

[34] As the Claimant was dismissed from her job, I must decide whether she lost her job because of misconduct.

[35] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

[36] I find that the Claimant lost her job because she did not comply with the employer's policy. The policy required her to be vaccinated against COVID-19 or to provide negative COVID-19 test results every 72 hours.

[37] The Claimant and the Commission don't agree on why the Claimant lost her job. The employer told the Commission that the Claimant was let go because health guidelines required all employees to be fully vaccinated or have negative rapid tests twice per week. She said the Claimant refused to do either for personal reasons.<sup>22</sup>

[38] The Claimant disagrees. The Claimant says that the real reason she lost her job is that she asked the employer questions.

[39] The Claimant said that her job changed in September 2021. She had previously been required to comply with masking and physical distancing while at work. She also had to screen visitors for COVID-19 by asking questions and taking their temperatures. But, these procedures changed in September.

[40] On September 16, 2021, the employer's Board of Directors adopted the provincial Restriction Exemption program. This program required all employees and visitors to be fully vaccinated or show a negative COVID-19 test administered in the last 72 hours. The screening process for visitors now required proof of vaccination, proof of a test result, or a medical exemption letter.<sup>23</sup>

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<sup>22</sup> See GD3-23.

<sup>23</sup> See GD3-43.



[41] The Claimant testified that she asked the employer if her employment contract had changed as a result of these changes, but received no response to that question.

[42] The Office Manager sent several emails to the Claimant asking her to respond to the requirements and provide a negative COVID-19 test result.<sup>24</sup> The Claimant responded that she needed time to process the changes and would be speaking to her doctor.<sup>25</sup>

[43] The Claimant testified that, on September 27, 2021, the CEO ordered her to go home when she told him that she was not vaccinated and did not have a negative COVID-19 test result.

[44] The Claimant said the Office Manager called her later that day and told her that she was being placed on leave. The Office Manager asked her to return her office key.

[45] The Claimant then sent the employer an email with questions about the safety and efficacy of the vaccine. This letter contained specific questions about the contents of the vaccine, its testing procedures, and adverse reactions associated with the vaccine. As outlined in para 28 above, the Claimant's letter said she would agree to take the vaccine if the employer met certain conditions. The Claimant said she didn't receive a response to these questions.

[46] The Office Manager told the Commission that she responded to the Claimant by saying that she is not a medical doctor and could not answer those questions. She told the Claimant that the policy doesn't require the Claimant to get the vaccine.

[47] On October 4, 2021, the Office Manager emailed the Claimant again asking her to respond to the requirements of the employer's Restriction Exemption program by providing proof of vaccination or a negative COVID-19 test result. She stated that if the Claimant didn't respond by the end of the day, she would be considered to have abandoned her position.

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<sup>24</sup> See Office Manager's emails dated September 16, 21, 2021.

<sup>25</sup> See the Claimant's email dated September 22, 2021.

[48] The Claimant did not provide a response to the Office Manager's request. Instead, she asserted that she was still working from home. The Office Manager responded by stating that the Claimant's position required her to work from the office and, to do that, she had to meet the requirements of the Restriction Exemption program. Since she had not complied with the requirements of that program, she was dismissed from her employment.<sup>26</sup>

[49] I do not agree with the Claimant's position that she was dismissed for asking questions about the new COVID-19 protocols at work. The evidence before me supports that the employer dismissed the Claimant due to her choice not to provide the employer with proof of vaccination or a negative COVID-19 test result and this is the conduct that led to her dismissal. As a result, I find it is more likely that the Claimant's failure to comply with the requirements of the Restriction Exemption policy was the real reason for her dismissal.

[50] The Claimant asked questions about the changes to her employment duties after she returned from her vacation on September 21, 2021. And, she submitted a list of questions about the safety and efficacy of the vaccine after she was put on leave on September 27, 2021. However, the Claimant had received multiple warnings before these dates about the requirement to provide proof of vaccination or a negative COVID-19 test result as a condition of her employment. She was also suspended from work on September 27, 2021, for not meeting these conditions.

[51] The employer did not immediately dismiss the Claimant for asking questions. Rather, the employer gave the Claimant further opportunities to provide the information required by the policy. The Office Manager indicated in the email dated October 4, 2021, that if the Claimant didn't provide the requested information, then she would lose her job. The Claimant did not provide proof of vaccination against COVID-19 or a negative COVID-19 test result. The October 4, 2021 email, and the Claimant's

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<sup>26</sup> See the employer's termination letter dated October 5, 2021.

subsequent dismissal, support that she was dismissed for not complying with the employer's policy.

[52] I find the essential conduct that led to the Claimant's loss of employment was that she chose not to comply with the employer's policy that required her to provide a proof of vaccination or negative COVID-19 test result.

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

[53] The reason for the Claimant's dismissal is misconduct under the law.

[54] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>27</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>28</sup> The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>29</sup>

[55] There is misconduct if the Claimant 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 let go because of that.<sup>30</sup>

[56] The Commission has to prove that the Claimant lost 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 Claimant lost her job because of misconduct.<sup>31</sup>

[57] The Commission provided its submissions on the issue of whether the Claimant had just cause to voluntarily take leave from her employment. However, its submissions include the factors to be considered when deciding if the Claimant was dismissed due to misconduct. Specifically the Commission says the Claimant was aware that she was required to comply with the employer's policy to continue working in her job. It noted the

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<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>29</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>30</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>31</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

Claimant chose not to take the vaccine or to be tested for COVID-19. In doing so, the Commission submits she willfully made the choice not to comply with the employer's policy.

[58] The Claimant says that there was no misconduct because the employer's policy was unfair and breached her rights. Choosing to take the vaccine or be tested against COVID-19 is a personal medical decision and she should not be forced to undergo a medical procedure like that.

[59] The representative points out that the Claimant never refused to get vaccinated or be tested for COVID-19.

[60] I acknowledge that the Claimant asked for an exemption to the policy based on her spiritual beliefs.<sup>32</sup> But, she said the employer did not grant this exemption request. The Claimant was aware that the employer had not exempted her from the policy. Regardless, she chose not to comply with the policy.

[61] The representative said that the Claimant never refused to comply with the policy. However, the Claimant had to provide proof of vaccination or a negative COVID-19 test result to comply with the policy. Her actions of not providing the proof of vaccination or negative COVID-19 test result put her in non-compliance with the policy. If the Claimant intended to comply with the policy, she could have communicated that to her employer and asked for an extension of time to do so.

[62] The Claimant wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in losing her job.

[63] The Claimant was notified about the employer's policy in September 2021. She chose not to provide proof of vaccination or a negative COVID-19 test result, as

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<sup>32</sup> The Commission provided notes of a conversation it had with the Claimant on GD3-24, which stated that the Claimant had a medical exemption from the vaccine. At the hearing, the Claimant clarified that these notes are incorrect, she did not have a medical exemption. Rather, she had asked for a religious exemption because of her indigenous spiritual beliefs.

required by the policy. She was sent home from work and put on leave on September 27, 2021. She was asked to return the office key at that time. A week later, the employer warned her that she could lose her job if she didn't provide the necessary information under the policy. This evidence tells me that she knew that not complying with the policy would result in losing her job. Accordingly, I find the Commission has proven that the Claimant was terminated from her employment due to her own misconduct within the meaning the law and case law described above.

[64] The Claimant said that the policy was not part of her employment contract when she was hired.

[65] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[66] I understand the Claimant's concerns that the employer's policy was not fair and that it did not give her any option other than to get vaccinated or tested for COVID-19. I acknowledge that she disagrees with the employer's policy and feels that it breached her human rights. But, I do not have the authority to decide whether the employer breached her rights by dismissing her from her job when they could have accommodated her in some other way.

[67] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.<sup>33</sup>

[68] The Claimant may have other recourse to pursue her claims that the employer's policy breached her human rights and she was unfairly dismissed. But these matters must be addressed by the correct court or Tribunal.

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<sup>33</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

**So, did the Claimant lose her job because of misconduct?**

[69] Based on my findings above, I find that the Claimant lost her job because of misconduct.

**Conclusion**

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

[71] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section