



[TRANSLATION]

Citation: *MD v Canada Employment Insurance Commission*, 2022 SST 890

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

## Decision

**Appellant:** M. D.  
**Representative:** J. T.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (452273) dated February 1, 2022 (issued by Service Canada)

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**Tribunal member:** Manon Sauvé  
**Type of hearing:** Videoconference  
**Hearing date:** May 18, 2022  
**Hearing participants:** Appellant  
Representative  
**Decision date:** June 17, 2022  
**File number:** GE-22-785

## Decision

[1] The appeal is dismissed. The Commission has shown that the Claimant lost his job because of misconduct. This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup> So, he isn't entitled to benefits.

## Overview

[2] For more than 11 years, the Claimant worked as a heavy truck operator for the employer. After several warnings and suspensions, he was dismissed for being unwilling to follow COVID-19 health guidelines.

[3] On October 22, 2021, the Claimant applied for EI benefits.

[4] After investigating, the Commission found that the Claimant lost his job because of misconduct. On June 1, 2021, the employer suspended the Claimant for not following health guidelines. It asked him to come back to work on September 28, 2021. Employees had a meeting outdoors in the morning. After that, they had to take health and safety training indoors.

[5] The Claimant said he could not attend the training, since he would not be wearing a protective mask. He had an exemption from wearing a mask.

[6] The employer told the Commission that the Claimant had been issued several warnings for refusing to wear a protective mask. He was suspended a few times, and the employer tried to accommodate him. But he refused the proposed accommodations and was let go on November 23, 2021.

[7] The Claimant disagrees with the Commission's decision. He didn't commit misconduct, since he had an exemption from wearing a mask. Also, the employer's proposed accommodations weren't reasonable.

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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.

## **Matters I have to consider first**

[8] At the beginning of the appeal process, a union representative represented the Claimant. He was removed from the record at the Claimant's request. The Claimant's partner took over.

[9] I told the Claimant and his partner that the former representative could not attend the hearing without their knowledge. I also shared my screen to prove it. They said they were satisfied.

[10] Additionally, the Claimant says that the Commission denied him EI benefits because he doesn't have enough hours of insurable employment. The Commission hasn't actually made a decision on this issue.

[11] Furthermore, I don't have the authority to decide whether the Claimant has enough hours of insurable employment. That authority rests with the Canada Revenue Agency, and the Federal Court after that.

## **Issue**

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

## **Analysis**

[13] To decide whether the Claimant lost his job because of misconduct, I have to determine what his alleged acts are. Did he commit them? Do the alleged acts amount to misconduct under the law?

## **What are the Claimant's alleged acts?**

[14] The Claimant worked as a heavy truck operator for his employer for many years.

[15] Because of the COVID-19 pandemic, the employer implemented health measures in accordance with CNESST<sup>2</sup> guidelines. The Claimant was first spoken to on

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<sup>2</sup> Commission des normes, de l'équité, de la santé et de la sécurité du travail [Quebec's labour standards commission].

January 7, 2021, for not following guidelines, specifically wearing a medical mask in the workplace.

[16] On April 1, 2021, the Claimant left a health and safety awareness activity held by the employer. Because of this, he was issued a one-day suspension.

[17] On April 19, 2021, the Claimant was issued a written warning for not wearing a mask as required by the CNESST. He was told that he would not be allowed on site without a mask.

[18] On May 26, 2021, the Claimant provided his employer with medical evidence for a medical mask exemption. On June 1, 2021, he refused to attend a meeting, since he could not stay without a mask.

[19] The Claimant decided not to wear a mask in common areas. The employer asked to leave.

[20] On September 29, 2021, the Claimant was issued a four-day suspension for not following health guidelines.

[21] On October 4, 2021, the Claimant showed up without a mask again. He was suspended for 10 days.

[22] After that, the Claimant was suspended for 20 days without pay. He wasn't complying with health measures and was refusing the employer's proposed accommodations.

[23] The employer reminded the Claimant that it had asked him to provide the reasons for the mask exemption. He refused to provide further explanation, saying that it was confidential.

[24] The employer developed accommodations with the Claimant so that he could work and move about the workplace. However, some accommodations could not be applied, since they didn't meet standards. Alternatives were suggested to the Claimant.

[25] I note that the Claimant doesn't dispute the acts the employer says he committed. He admits that these are the acts alleged against him by the employer.

### **Did he commit the alleged acts?**

[26] The Claimant admits acting as the employer says he did. But he disagrees that he behaved inappropriately. In addition, the employer didn't honour the accommodation agreement.

### **Do the alleged acts amount to misconduct under the law?**

[27] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>5</sup>

[28] 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>6</sup>

[29] 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>7</sup>

[30] The Commission says that, because of the COVID-19 pandemic, the Government of Quebec adopted emergency health measures by Orders in Council. Persons aged 12 and over were required to wear masks to protect the public.

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[31] The employer had a duty to protect workers' health. It had to apply the CNESST's standards. Workers also had to take measures to protect themselves and other workers.

[32] They had to comply with a certain number of measures: social distancing, wearing a mask, excluding people who have the virus, hand hygiene in the workplace.

[33] On multiple occasions, the employer told the Claimant to comply with health measures. He had to wear a mask around workers. But he didn't have to wear one inside his truck.

[34] In June 2021, the Claimant submitted a medical certificate indicating that he was exempted from wearing a mask. The employer made accommodations to protect the health and safety of all workers.

[35] For example, he didn't have to wear a mask inside his truck. The CNESST allows this kind of exception. Regarding morning health and safety meetings, it was suggested that he attend from another room using a phone or the Zoom platform. The employer realized that social distancing made it difficult to honour the accommodations. It developed new measures with the Claimant's union. The Claimant refused the proposed accommodations.

[36] In the Commission's view, the evidence shows that the Claimant lost his job for refusing to comply with protective measures. He didn't commit to performing in a safe and consistent way to prevent transmitting the virus on the employer's premises.

[37] The employer imposed progressive discipline because the Claimant wasn't following health guidelines. In the end, he was let go for refusing accommodations. So, he was dismissed for insubordination.

[38] The Claimant raises several arguments to show that his behaviour isn't misconduct.

[39] To begin with, the Claimant argues that the Commission should have given him the benefit of the doubt given the evidence.<sup>8</sup> The employer hasn't proven on a balance of probabilities that he committed misconduct.

[40] In the Commission's view, the evidence shows, on a balance of probabilities,<sup>9</sup> that the Claimant lost his job because of misconduct. Even though there are conflicting versions of events, the Claimant was issued warnings and suspensions and was finally dismissed for not following health guidelines.

[41] The Claimant also argues that the employer made significant changes to his work duties. It didn't abide by the terms of his employment contract or the collective agreement.

[42] The Commission also says that the changes in duties weren't significant. The government adopted health measures that applied to everyone in Quebec. Wearing a mask was one of those measures, and everyone had to comply with it.

[43] In addition, the Claimant argues that his situation amounts to discrimination under the *Canadian Human Rights and Freedoms Act*<sup>10</sup> [sic]. The Commission argues that the evidence doesn't support a finding of discrimination. We don't know why the Claimant can't wear a mask.

[44] Lastly, the Commission doesn't have to determine whether the employer's measures and guidelines are reasonable or fair.<sup>11</sup> Because of this, it isn't relevant to say that the Claimant is a victim and that there is no law that requires wearing a mask.

[45] During his testimony, the Claimant explained that the employer had forced him to come back to work under the [collective] agreement. Whenever he came back to work, he would be suspended again because, in his employer's view, he was a health risk.

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<sup>8</sup> Section 49(2) of the *Employment Insurance Act*.

<sup>9</sup> It is more likely than not that the Claimant lost his job because of misconduct.

<sup>10</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, section 3(1).

<sup>11</sup> *Paradis v Canada (AG)*, 2016 FC 1282 at para 31.

[46] He says he tried to come to an agreement with his employer. But he wasn't able to. There were agreements, but the agreement was refused a few days later.

[47] He says that the agreement didn't comply with section 51 of the *Act respecting occupational health and safety*.<sup>12</sup> He was forced to leave his job for this reason.

[48] As far as the Claimant is concerned, is it misconduct if he has an exemption from wearing a mask?

[49] The Claimant also says that his employment contract and the [collective] agreement have to be applied to determine his working conditions, not health measures. Not to mention that, in February 2021, the CNESST website recommended wearing a mask.

[50] The Claimant says that, at first, he was allowed to wear a face shield. The employer changed its mind and asked him to wear a mask. He asked what he needed to do to avoid wearing a mask. He needed an exemption from his doctor. He got a certificate and submitted it to his employer on June 1, 2021.

[51] Moreover, he says that the employer never gave him a phone so that he could attend a Zoom meeting in another room. He could have attended the meeting with the other employees, since he always followed the two-metre rule. There were also sections between employees to prevent contact.

[52] The Claimant says he was suspended on June 1, 2021, not June 7, 2021, as the dismissal letter says. The employer misinterpreted several things.

[53] According to the CNESST's standards, wearing a mask was recommended, and he had to follow the two-metre rule. He would not have protested if the employer had allowed wearing a face shield from the start.

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<sup>12</sup> ACT RESPECTING OCCUPATIONAL HEALTH AND SAFETY, chapter S-2.1.



[54] Yet, public services respected him concerning his mask exemption. He would answer questions about his health and recent contacts. He would not have put others at risk.

[55] It is a shame that he wasn't able to explain himself to his employer. Every time he showed up at work, he had to leave. It isn't that he didn't want to wear a mask—he could not, for a medical reason. That reason remains confidential between him and his doctor.

[56] The Claimant argues that his rights were violated, that he was treated differently. He had to be in a different room than his co-workers. He could not eat with his co-workers even though there were panels for separating people in the cafeteria. Every situation was difficult for him. He felt marginalized.

[57] He takes the view that he was within his rights not to wear a mask at work. He didn't think he would lose his job, since he was relying on the standards of the CNESST, which recommended wearing a mask.

[58] After considering the evidence and hearing the Claimant and his representative, I find that the Claimant lost his job because of misconduct.

[59] Starting in January 2021, wearing a mask was a problem for the Claimant. The employer took different measures so that the Claimant would follow pandemic health guidelines.

[60] I want to point out that my role is to determine whether the Claimant's acts amount to misconduct, not to analyze the employer's conduct.<sup>13</sup> In other words, I won't accept the Claimant's arguments about the employer's management approach during the pandemic.

[61] The employer had a duty to provide its employees with a safe space. The Claimant also pointed this out.

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<sup>13</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107 at para 23 of the decision.

[62] So, it decided to apply measures to protect employees. The Claimant had to do as his employer instructed. With that in mind, I don't accept the Claimant's arguments that the employer had to follow the guidelines set out in the collective agreement or that significant changes were made to his working conditions.

[63] The employer took into account the guidelines of the CNESST, which was relying on those of the World Health Organization. The employer created the safest possible living space during the pandemic.

[64] As I mentioned, I have to consider the Claimant's behaviour, not the employer's behaviour.

[65] I consider that the Claimant was issued several warnings and suspensions before being let go. He had to have known that failing to do as instructed by his employer would get him dismissed.

[66] The employer put accommodations in place so that the Claimant could work while protecting his co-workers and being protected. The Claimant looked for many reasons not to accept those accommodations. It is true that changes were made, but the Claimant never tried the employer's proposed accommodations.

[67] I also consider that the Claimant was suspended a few times. Still, he continued to refuse to follow the accommodations.

[68] Before getting his mask exemption, the Claimant was issued warnings because he didn't want to follow guidelines. He says he didn't have a mask at his disposal. He wore two cloth masks, but the employer didn't want him to wear them.

[69] The Claimant says that his rights were violated and that his employer singled him out. I disagree. Just because he had a mask exemption doesn't mean he could act as though he had a mask. He had to adjust to his new reality, which was not wearing a mask in the workplace and accepting the guidelines.

[70] I don't accept the argument that the CNESST recommended wearing a mask and didn't require it in the workplace. Regardless of whether it was recommended, the

employer put health measures in place. The Claimant reported to his employer, not to the CNESST. The Claimant's unwillingness to comply with health measures and his refusing accommodations—or to at least try them—were acts of insubordination.

[71] I find that the Claimant could or should have known that he would be dismissed when he didn't accept the new accommodations. Starting in January 2021, he stubbornly refused to follow health guidelines. Despite several penalties being imposed on him, he tried to interpret the facts in such a way as to avoid wearing a mask and participate in common activities. That is why he was let go.

[72] Under the circumstances, I find that the Claimant lost his job because of misconduct. What amounts to misconduct isn't not wearing a mask because he had an exemption; it is refusing to follow the employer's guidelines and accommodations during the pandemic.

[73] For this reason, the Commission has shown that the Claimant lost his job because of misconduct.

## **Conclusion**

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

[75] The appeal is dismissed.

Manon Sauvé  
Member, General Division – Employment Insurance Section