



Citation: *MP v Canada Employment Insurance Commission*, 2022 SST 490

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

## **Decision**

**Appellant:** M. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (446556) dated January 18, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** May 18, 2022

**Hearing participant:** Appellant

**Decision date:** May 31, 2022

**File number:** GE-22-693

## 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 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 not entitled to receive Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant worked as a Registered Practical Nurse (RPN). The employer suspended and then dismissed her because she did not comply with the covid19 vaccination policy at work.<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 she was suspended and lost her employment due to her own misconduct.<sup>4</sup>

[5] The Claimant disagrees because she submitted a request for accommodation based on creed, but it was denied by the employer in bad faith.<sup>5</sup> She also has other arguments to support her position.

## Matters I have to consider first

### There is a related Tribunal file

[6] This matter was heard with a related Tribunal file because it involved the same Claimant.<sup>6</sup> Separate decisions were issued because the legal issues were different in each file.

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

<sup>2</sup> See record of employment at GD3-20.

<sup>3</sup> See application for benefits at GD3-3 to GD3-19.

<sup>4</sup> See initial decision at GD3-51 and reconsideration decision at GD3-81.

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

<sup>6</sup> See Tribunal file GE-22-809.

## **The Claimant asked for an adjournment**

[7] A few days prior to the hearing, the Claimant wrote to the Tribunal and asked to adjourn her case to a future date.<sup>7</sup> She asked for more time to prepare for both cases.

[8] I denied the Claimant's request for an adjournment for a few reasons.<sup>8</sup> First, the Claimant had enough time to prepare for both cases because the notice of hearing was sent to her on March 24, 2022, which was approximately two month's before the scheduled hearing date.<sup>9</sup> Second, the Claimant's request could have been made at an earlier date because the Tribunal had already booked time to hear both cases.

[9] Lastly, I note that the Claimant submitted a written statement prior to the hearing outlining her arguments in advance of the hearing.<sup>10</sup>

## **Documents submitted after the hearing**

[10] The Claimant submitted additional arguments after the hearing about her misconduct case.<sup>11</sup> These submissions were unsolicited.

[11] I accepted them because they were relevant and appear to repeat similar arguments made at the hearing. The Claimant's additional submissions were shared with the Commission. The Commission has not provided any comments in response as of the date of this decision.

## **Issue**

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

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<sup>7</sup> See Claimant's adjournment request at GD8-1.

<sup>8</sup> See Adjournment denial at GD9-1 to GD9-3.

<sup>9</sup> See notice of hearing at GD1-1 to GD1-3.

<sup>10</sup> See GD10-1 to GD10-19.

<sup>11</sup> See post hearing submissions at GD11-1 to GD11-14.

## Analysis

[13] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits until their period of suspension expires, if they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.<sup>12</sup>

[14] Also, Claimants who lose their job because of misconduct are disqualified from receiving EI benefits.<sup>13</sup>

[15] 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.

[16] I note that the Claimant also presented some arguments about voluntarily leave in her written arguments.<sup>14</sup> However, the section in law she raised is not applicable because she did not voluntarily leave her employment.<sup>15</sup> She did not have a choice to stay employed. Further, the Commission's reconsideration decision was based on misconduct only.<sup>16</sup>

### Why did the Claimant lose her job?

[17] I find that the Claimant was first suspended from her job as a RPN on November 3, 2021. She was put on an unpaid leave of absence for not complying with the employer's vaccination policy. The Claimant was then dismissed on January 3, 2022 for the same reason. This is consistent with the record of employment, the termination letter in the file and is not disputed by the parties.<sup>17</sup>

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<sup>12</sup> See section 31 of the Act.

<sup>13</sup> See section 30 of the Act.

<sup>14</sup> See GD11-4 to GD11-5.

<sup>15</sup> See section 29(c) of the Act.

<sup>16</sup> See reconsideration decision at GD3-81 and section 113 of the Act.

<sup>17</sup> See termination letter at GD2-10; record of employment at GD3-20.

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

[18] The employer implemented a "*Covid19 Vaccination Policy*" (policy). A copy of that policy became effective on September 7, 2021 and is included in the file.<sup>18</sup>

[19] The policy requires that employees provide their vaccination status by September 13, 2021 to the employer.<sup>19</sup>

[20] The first dose of the covid19 vaccination was required by September 30, 2021 and the 2<sup>nd</sup> dose by October 30, 2021.<sup>20</sup>

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

[21] Yes, the Claimant agrees that the policy was communicated to her. She first became aware of the policy in August 2021. She was abroad for a period of time visiting her mother around that time and returned to work on October 2, 2021. She acknowledged receiving a copy of the policy and knowing the deadlines contained within the policy.

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

[22] The policy states that "employees who do not comply with this policy may be subject to discipline, up to and including dismissal."<sup>21</sup>

[23] The employer also told the Commission that the Claimant knew a failure to comply would cause a loss of employment.<sup>22</sup>

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<sup>18</sup> See policy at GD3-25 to GD3-28.

<sup>19</sup> See GD3-26.

<sup>20</sup> See GD3-26.

<sup>21</sup> See GD3-28.

<sup>22</sup> See supplementary record of claim at GD3-23; see October 15, 2021 letter at GD3-45; see November 3, 2021 letter at GD3-48 to GD3-49.

[24] The Claimant agreed that she was aware of the consequences of not complying with the policy and that it would lead to her suspension and dismissal. However, she explained that she has good reasons for not complying with the policy.

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

[25] The policy provides for accommodations in accordance with the *Human Rights Code* related to a protected ground.<sup>23</sup> It requires written proof of the need for accommodation along with a request form provided by the employer.<sup>24</sup>

[26] The Claimant said that she submitted a request for accommodation based on creed and family status. A copy of the form was included in the file.<sup>25</sup> However, she argues that the employer denied her request in bad faith. A copy of the employer's denial letter is in the file.<sup>26</sup>

[27] The Claimant explained that she is Christian Orthodox and that the position of the church on vaccinations is that it should be done freely and not by coercion. She submitted a copy of various scriptures and a letter from the church to support her position.<sup>27</sup>

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

[28] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>28</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>29</sup> The Claimant does not 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>30</sup>

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<sup>23</sup> See *Human Rights Code*, R.S.O. 1990, c. H.19; and GD3-27.

<sup>25</sup> See GD3-41 to GD3-44.

<sup>26</sup> See October 26, 2021 letter at GD3-47.

<sup>27</sup> See GD3-62 to GD3-68.

<sup>28</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>29</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>30</sup> See *Attorney General of Canada v Secours*, A-352-94.

[29] 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>31</sup>

[30] 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>32</sup>

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

[32] 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>33</sup>

[33] I find that the Claimant willfully and consciously chose not to comply with the employer's policy once her request for accommodation was denied. The employer clearly communicated the policy to her and there was sufficient time to comply with it.

[34] The Claimant knew that it would result in her suspension and dismissal because it was communicated to her on more than one occasion. She made a deliberate choice not to comply with the policy and her conduct resulted in losing her employment. As noted above, the Claimant does not have to have wrongful intent for it to be misconduct.<sup>34</sup>

[35] I acknowledge that the Claimant requested an exemption from the policy and asked to be accommodated based on creed and family status. She testified and

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<sup>31</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>32</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>33</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

<sup>34</sup> See *Attorney General of Canada v Secours*, A-352-94.

submitted information about her request to the employer. However, the employer denied her request for accommodation, so she was not exempt from the employer's policy.

[36] 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>35</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>36</sup>

[37] I acknowledge that the employer has the authority to manage their day-to-day operations, which may include the development and imposition of policies at the workplace to ensure the health and safety of employees and others. In this case, they implemented a policy around vaccinations because they were "committed to taking every precaution reasonable in the circumstances of the protection of the health and safety of workers from the hazard of covid19".<sup>37</sup>

[38] I also acknowledge that the Claimant has the authority to decide whether she wants to be vaccinated and/or to disclose her vaccination status to her employer. However, I do not find that the employer was not forcing her to vaccinate because she still had a choice. It was her choice that led to undesirable outcomes, such as job loss and loss of income.

[39] The Claimant chose not to comply with the policy and knew that it could get in the way of carrying out her duties as an RPN at long-term care home. This became a condition of her employment and she was dismissed for not complying.

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<sup>35</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>36</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).

<sup>37</sup> See policy statement at GD3-25.



[40] 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>38</sup> This is not an automatic right, even if a Claimant has paid EI premiums.

[41] In my view, the Claimant was not terminated involuntarily because it was her non-compliance with the employer's policy that led her suspension and dismissal.

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

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

[43] I understand that the Claimant disagrees with the employer's policy and penalty imposed for a variety of reasons. She has provided information and arguments about free consent, informed consent, religious freedom, bad faith, privacy rights, immunization, human rights, etc.<sup>39</sup>

[44] The court has already said that the role of Tribunals is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.<sup>40</sup>

[45] This means that I do not have the authority to decide whether the employer breached any of her rights as employee when they suspended or dismissed her, or whether they could have accommodated him in some other way.

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

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<sup>38</sup> *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

<sup>39</sup> See GD11-1 to GD11-14; GD3-61 to GD3-78;

<sup>40</sup> See *Canada (Attorney General) v Caul*, 2006 FCA 251.

<sup>41</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[47] The Claimant's recourse against her employer is to pursue her claims in court, or any other Tribunal that may deal with these particular matters. I note that the Claimant has already filed a union grievance at work to deal with these matters.<sup>42</sup>

## **Conclusion**

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

[49] This means that the appeal is dismissed

Solange Losier  
Member, General Division – Employment Insurance Section

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<sup>42</sup> See union letter dated November 15, 2022 at GD3-55.