



Citation: *SM v Canada Employment Insurance Commission*, 2022 SST 1438

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

# **Decision**

**Appellant:** S. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (458099) dated February 22, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Teleconference

**Hearing date:** October 13, 2022

**Hearing participant:** Appellant

**Decision date:** October 25, 2022

**File number:** GE-22-1062

## 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 disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] S.M. is the Claimant in this case. The Claimant worked as an Educator at a Child Care Centre. The employer dismissed her because she not follow the employer's direction to comply with the provincial vaccination mandate 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 lost her employment due to her own misconduct.<sup>4</sup>

[5] The Claimant disagrees with the employer's direction and provincial mandate to vaccinate for covid19 because of her religious beliefs.<sup>5</sup> She argues that the employer failed to accommodate and did not grant her exemption request. As well, there were no medical exemptions available.

## Matters I have to consider first

### The case was previously adjourned

[6] This case was first scheduled to be heard by teleconference on August 10, 2022.<sup>6</sup> However, it had to be adjourned because I was ill.<sup>7</sup> The case was rescheduled

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

<sup>2</sup> See record of employment at GD3-17 to GD3-18.

<sup>3</sup> See application for EI benefits at GD3-3 to GD3-16.

<sup>4</sup> See initial decision at GD3-25 to GD3-26 and reconsideration decision at GD3-36 to GD3-37.

<sup>5</sup> See notice of appeal at GD2-1 to GD2-11; GD2A-1 to GD2A-15 and GD2B-1 to GD2B-2.

<sup>6</sup> See notice of hearing at GD1-1 to GD1-3.

<sup>7</sup> See adjournment at GD6-1 to GD6-3.

and heard by teleconference on October 13, 2022.<sup>8</sup> Only the Claimant attended the hearing.

### **I asked the Commission for more information before the hearing**

[7] The Commission referred to the employer's "policy" in their submissions, but they did not include a copy of it in the file. So, I wrote to the Commission to ask them for a copy of the policy.<sup>9</sup> The Commission replied to my request and said that they did not obtain a copy of the policy from the employer.<sup>10</sup>

[8] I note that the Claimant was copied on the letter sent to the Commission. The Claimant replied to my request and provided the Tribunal with a copy of the provincial mandate: New Brunswick's *Regulation 2021-73* under the *Public Health Act* and *Regulation 2021-74* under the *Early Childhood Services Act* which was imposed by her employer (provincial mandate).<sup>11</sup>

### **Issue**

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

### **Analysis**

[10] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>12</sup>

[11] 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.

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<sup>8</sup> See notice of hearing at GD7-1 to GD7-3.

<sup>9</sup> See Commission's representations at GD4-1 to GD4-8; section 32 of the *Social Security Tribunal Regulations*.

<sup>10</sup> See Commission's response at GD10-1.

<sup>11</sup> See New Brunswick's *Regulation 2021-73* under the *Public Health Act* and *Regulation 2021-74* under the *Early Childhood Services Act* at GD9-1 to GD9-5.

<sup>12</sup> See sections 30 and 31 of the EI Act.

## Why did the Claimant lose her job?

[12] I find that the Claimant lost her job on November 19, 2021 because she went against her employer's direction to comply with the provincial mandate. This is consistent with the Claimant's testimony, the record of employment and termination letter in the file.<sup>13</sup>

[13] Specifically, the Claimant agrees that she did not comply with the requirement to be vaccinated for covid19 by November 19, 2021 and that was the reason she was dismissed.

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

[14] The *Employment Insurance Act* (EI Act) does not say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>14</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>15</sup>

[16] The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.<sup>16</sup>

[17] 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>17</sup>

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<sup>13</sup> See termination letter at GD3-29 and record of employment at GD3-17.

<sup>14</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>15</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>16</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>17</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[18] The law does not say I have to consider how the employer behaved.<sup>18</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>19</sup>

[19] I have to focus on the EI Act only. I cannot make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.<sup>20</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[20] 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>21</sup>

[21] The employer told the Commission that the provincial government imposed a vaccination mandate for all daycare staff and that the deadline to be vaccinated covid19 was November 19, 2021.<sup>22</sup> The employer told the Commission that employees were notified of the provincial vaccine mandate in August 2021 verbally and via email.<sup>23</sup>

[22] I note that the employer did not have a separate policy at work, but instead was following the provincial mandate. This was legally binding on the employer, who operated as a child care centre.

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<sup>18</sup> See section 30 of the EI Act.

<sup>19</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>20</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>21</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>22</sup> See supplementary record of claim (SROC) at GD3-35.

<sup>23</sup> See SROC at GD3-19 and GD3-35.

[23] As noted above, the Claimant provided the Tribunal a copy of the provincial mandate (New Brunswick's Regulation 2021-73 under the *Public Health Act and Regulation 2021-74 under the Early Childhood Services Act*).<sup>24</sup>

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

[25] First, the Claimant testified and agreed that the employer communicated the provincial regulations verbally and by group messenger. The Claimant also had enough time to comply.

[26] Second, the Claimant knew that if she did not follow the employer's direction to comply with the provincial mandate and was not vaccinated for covid19 by November 19, 2021, that she would be dismissed. While, she did ask the employer for a leave of absence, her request was denied.

[27] I acknowledge that the Claimant only received a copy of the provincial mandate on her last day of work. However, she was already aware of the employer's expectations, namely that she had to be vaccinated for covid19 by November 19, 2021.<sup>25</sup>

[28] Third, the Claimant wilfully and consciously decided to not comply with the provincial mandate for her own personal reasons. She knew the risk and that it would lead to her dismissal on November 19, 2021.<sup>26</sup>

[29] The Claimant was not exempt from the provincial mandate. I acknowledge that she asked for a religious exemption<sup>27</sup> but it was denied by *Department of Education and Early Childhood Development* on October 18, 2021, so she knew that she had to comply and still had enough time to do so.<sup>28</sup> As well, even though she had some

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<sup>24</sup> See GD9-1 to GD9-2

<sup>25</sup> See termination letter on GD20A-8.

<sup>26</sup> See termination letter on GD20A-8.

<sup>27</sup> See GD3-24; GD3-30 to GD3-33; GD2A-1 to GD2A-5.

<sup>28</sup> See GD3-23.

medical concerns, she was unable to obtain a medical exemption because they were not available.

[30] The Claimant made deliberate choice to not comply with the provincial mandate. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy (the employer's direction in this case) is considered misconduct based on the EI Act.<sup>29</sup> Even though the Claimant did not have wrongful intent, it was still misconduct.

[31] I was not persuaded by the Claimant's argument that being vaccinated for covid19 was not a requirement of her job. Even so, the Federal Court of Appeal has said that misconduct can include a breach of an express or implied duty in an employment contract.<sup>30</sup> The employer was bound by provincial mandate imposed by the covid19 pandemic, so it became a condition of her continued employment.

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

[32] Based on my findings above, I find that the Claimant lost her job because of misconduct. This is because the Claimant's actions led to her dismissal. She knew the risk and that it would lead to her dismissal.

[33] I acknowledge the Claimant's additional arguments, specifically that the employer had a duty to accommodate, she was not offered alternatives, such as working from home or rapid testing and that the denial of her religious exemption was against her human rights.<sup>31</sup>

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<sup>29</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>30</sup> See *Canada (Attorney General) v Brissette* 1993 FCA 3020 and *Canada (Attorney General) v Lemire*, 2010 FCA 314.

<sup>31</sup> See GD2B-1 to GD2B-2 and GD2A-11 to GD2A-15.

[34] However, the Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments in order to get the remedy she is seeking.<sup>32</sup>

## **Conclusion**

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

[36] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>32</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.