



Citation: *NL v Canada Employment Insurance Commission*, 2022 SST 1629

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

## Decision

**Appellant:** N. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (471442) dated June 2, 2022 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Teleconference

**Hearing date:** December 13, 2022

**Hearing participant:** Appellant

**Decision date:** December 20, 2022

**File number:** GE-22-2230

## Decision

[1] N. L. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that he couldn't get Employment Insurance (EI) benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that he lost his job because of misconduct. This is because his employer required him to get vaccinated against COVID-19, but he chose not to get vaccinated. This means he can't get EI benefits.

## Overview

[3] The Claimant worked as a school bus driver. His employer introduced a COVID-19 vaccination requirement. This meant that his employer wanted all employees to be vaccinated against COVID-19 by November 19, 2022. The Claimant didn't get vaccinated by the employer's deadline. So, his employer put him on an unpaid leave of absence.

[4] The Commission says this means that the Claimant's employer suspended him. And the Commission says the employer suspended him for misconduct. The Commission says this is because he knew his employer required him to be vaccinated against COVID-19. But he didn't get vaccinated by the employer's deadline.

[5] The Claimant disagrees. He says his employer didn't have a real policy about COVID-19 because there wasn't a written, formal policy. He says his employer can't force him to get a vaccine.

## Issue

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

## Analysis

[7] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.<sup>1</sup>

[8] 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 lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

### Why did the Claimant lose his job?

[9] The Commission says the Claimant stopped working because his employer had a COVID-19 vaccination policy and he didn't follow this policy.

[10] The Claimant says that his employer's vaccination requirement wasn't a real policy. But he agrees that his employer put him on an unpaid leave of absence because he wasn't vaccinated against COVID-19.

[11] The Claimant and the Commission both agree that the Claimant's employer put him on an unpaid leave of absence. He didn't ask his employer for a leave of absence.

[12] It is clear to me that the Claimant didn't choose to go on leave. So, I will treat this as a suspension when I am deciding whether he can get EI while he was off work.

[13] I also understand that the Claimant disagrees that his employer's vaccination requirement was a real policy. But his employer told him that the vaccination requirement was a policy and that they had explained the policy in their memos. In this decision, I will refer to the employer's vaccination requirement as a policy. This is because the employer treated it like a policy. They expected the Claimant to follow this policy. So, for this decision, it doesn't matter whether there was a formal, written policy explaining the vaccination requirement. It had the same effect on the Claimant.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

[14] Both the Claimant and the Commission agree that the Claimant stopped working because of the COVID-19 vaccination policy. He wasn't vaccinated against COVID-19 by the employer's deadline and this caused his suspension. Nothing in the appeal file makes me think the Claimant stopped working for any other reason.

[15] Now I have to decide if the reason the Claimant lost his job is misconduct under the meaning of the *Employment Insurance Act* (EI Act).

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

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</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>4</sup>

[17] 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>5</sup>

[18] 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>6</sup>

[19] The Commission says the Claimant lost his job because of misconduct. The Commission says the Claimant knew his employer expected him to be vaccinated against COVID-19 by November 19, 2021. The Commission says that he knew he was likely to lose his job but he deliberately chose not to follow his employer's policy.

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The Claimant disagrees. He says his employer can't force him to get a vaccine. He says he didn't think the employer would really put him on a leave of absence because he thinks the policy is illegal.

[21] I agree with the Commission. I find that the reason the Claimant stopped working is misconduct under the law.

[22] The Claimant and the Commission agree about many of the facts in this appeal. But they disagree about how the law applies to the facts.

[23] The Claimant and the Commission agree that the Claimant's employer expected him to be vaccinated against COVID-19 by November 19, 2021. They agree that the employer said that they would put the Claimant on an unpaid leave of absence if he wasn't vaccinated by the deadline.

[24] At the hearing, the Claimant said he learned about the employer's policy in early September 2021. In early October 2021, he says the employer notified him of the deadline for vaccination.

[25] Even though the Claimant agrees that the policy said he would be put on an unpaid leave of absence if he wasn't vaccinated, he says that he didn't think he would lose his job. He says that he felt like the policy was illegal, so the employer wouldn't follow through.

[26] But if the employer's policy said the Claimant would be put on a leave of absence if he wasn't vaccinated, I find that he should have known that there was a real possibility that he could lose his job. At the hearing, the Claimant agreed that no one told him that he was exempt from the policy.

[27] I find that the reasons the Claimant lost his job are misconduct under the law. This is because:

- He knew about his employer's COVID-19 vaccination policy. He knew the employer expected him to be vaccinated by November 19, 2021.

- He knew the policy said that the employer would put him on an unpaid leave of absence if he wasn't vaccinated by the deadline.
- He acted deliberately and wilfully when he chose not to get vaccinated against COVID-19 by the deadline.
- His actions – failing to get vaccinated by the employer's deadline – led directly to his suspension. He lost his job because of his actions.

[28] So, for these reasons, I find that the Claimant stopped working because of misconduct.

## **Conclusion**

[29] I am dismissing the Claimant's appeal. I find that the Commission has proven that he lost his job because of misconduct under the meaning of the EI Act. This means he isn't entitled to EI benefits while he was off work.

Amanda Pezzutto  
Member, General Division – Employment Insurance Section