



Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 1798

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

## Decision

**Appellant:** N. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (488062) dated May 26, 2022 (issued by Service Canada)

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**Tribunal member:** Kristen Thompson

**Type of hearing:** Teleconference

**Hearing date:** September 29, 2022

**Hearing participants:** Appellant  
Appellant's witness

**Decision date:** October 7, 2022

**File number:** GE-22-2018

## 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 his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant lost his job. The Claimant's employer dismissed him on December 20, 2021 because he didn't follow the employer's COVID-19 vaccination policy.

[4] The Claimant doesn't dispute that this happened.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[6] The Commission says the employer required the Claimant to either be fully vaccinated, or to provide a negative rapid antigen test result to his employer at the beginning of his shift each Monday. The Claimant was required to pay for the test. The Commission says that the Claimant wilfully didn't follow the policy.

[7] The Claimant says that he would've provided a negative test result, if the employer paid for it. He says his actions aren't misconduct. He says that his employer didn't follow the vaccination policy because it didn't provide him with the required educational information. He says his employer changed the terms of his employment contract. He says his employer made false statements to the Commission.

[8] The Claimant also says that his employer contravened a number of provincial, federal and international laws. This includes that he has the right to protect his biological

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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.

property, the right to work, and right to forego medical procedures against his health and safety. This also includes freedom from discrimination, and cruel and unusual punishment.

## **Issue**

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

## **Analysis**

[10] 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?**

[11] I find that the Claimant lost his job because he didn't follow his employer's vaccination policy.

[12] The employer's vaccination policy is dated September 17, 2021 and updated October 28, 2021. The policy states all employees must provide proof of vaccination by October 15, 2021.<sup>2</sup>

[13] The employer's vaccination policy says employees who don't provide proof of vaccination are required to get a Rapid Covid-19 Antigen Screening test. It says the test should occur within 24 hours of the employee's shift start time. The test is to be done once a week. The results are to be shared with the employer. The employee is to pay for the test.<sup>3</sup>

[14] The employer suspended the Claimant for one day, on November 17, 2021, for not following the policy. The Claimant received a letter from the employer on November 16, 2021 stating that he didn't provide test results. The letter says the Claimant is

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<sup>2</sup> See GD7-4 to GD7-5.

<sup>3</sup> See GD7-5.

required to provide test results before returning to work on November 18, 2021. He is required to provide test results every Monday going forward. The letter says he will be subject to further disciplinary action, including dismissal, if he doesn't follow the vaccination policy.<sup>4</sup>

[15] The employer put the Claimant on a 3-week unpaid leave. The Claimant received a letter from the employer on November 23, 2021 stating that he didn't provide test results. The letter says COVID-19 has killed many Canadians and the best protection is vaccination. The letter says the Claimant should speak to his doctor to better understand why it's important to follow the vaccination policy. The letter says that, if the Claimant doesn't follow the policy, he will be dismissed.<sup>5</sup>

[16] The employer dismissed the Claimant because he didn't follow his employer's vaccination policy. The Claimant received a termination letter from the employer on December 20, 2021. The letter says that he declined to undergo testing, as required by the policy.<sup>6</sup>

[17] The Claimant says the policy was handed out to him by his employer. The Claimant is uncertain on what date he received the policy. The Claimant gave a copy of the policy to the Tribunal. The Claimant gave a copy of the suspension, unpaid leave, and termination letters to the Tribunal.

[18] The Claimant says that he didn't provide his employer with test results or with proof of vaccination.

[19] Based on this information, I find that it's undisputed that the Claimant was dismissed from his job because he didn't follow his employer's vaccination policy.

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

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

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<sup>4</sup> See GD7-2.

<sup>5</sup> See GD7-3.

<sup>6</sup> See GD7-11 to GD7-12.

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>8</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>9</sup>

[22] 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>10</sup>

[23] 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>11</sup>

[24] The Commission says that there was misconduct because the Claimant wilfully didn't follow the employer's vaccination policy. The employer required the Claimant to either be fully vaccinated, or to provide test results to his employer at the beginning of his shift each Monday. The Claimant didn't provide proof of vaccination. The Claimant didn't provide test results.

[25] The Claimant says that there was no misconduct because he would've provided test results, if the employer paid for it. He says that he couldn't afford the test. He says that each test cost \$20 to \$50. He says that he would basically be paying to go to work. He says that he gave the employer information on how to get free tests.

[26] The employer's representative told the Commission that tests have to be done at a retailer or pharmacy. The employer wouldn't accept the results of a test done at home. The employer's representative says that tests done at home aren't as accurate. The

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<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>9</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

employer's representative says that there is a verification process, including showing identification, when tests are done at a retailer or pharmacy.

[27] The union's representative told the Commission that tests have to be done at a pharmacy, to ensure accuracy. The union representative says that the union negotiated with the employer to allow for rapid antigen testing, instead of PCR testing. The union representative says rapid antigen tests are less expensive.

[28] The Claimant says that there was no misconduct because he didn't think not following the policy would get in the way of carrying out his work duties. He says that he worked during the entire pandemic following other safety procedures, including wearing personal protective equipment. He says that he didn't think he would be dismissed because he worked for the employer for 16 years. He says he has a clean employment record. The Claimant relies on a Tribunal decision to show that an employee must have a chance to review and know an employer's policy and be given time to follow with it.<sup>12</sup>

[29] The Claimant testified that he has safety concerns about testing. He says that there is a chemical on the swab that is inserted into the nose. His employer couldn't answer his questions about test safety. He contacted an officer through occupational health and safety, but they didn't have information. He says one time he went to ask a retailer who performs tests about its safety, but the line was too long.

[30] The Claimant says he has a family doctor. He has had his family doctor for about 8 years. He says he couldn't remember if he brought up his concerns about vaccine and testing safety with his doctor.

[31] The Claimant says that there was no misconduct because his employer didn't follow the whole vaccination policy. Specifically, his employer didn't provide him with the required educational information. The vaccine policy states: "Prior to being terminated with cause, each employee will be provided with educational information on the importance of testing and being vaccinated."<sup>13</sup>

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<sup>12</sup> See *TC v Canada Employment Insurance Commission*, 2022 SST 891.

<sup>13</sup> See GD7-5.

[32] The Claimant says that there was no misconduct because his employer made false statements to the Commission. Some of these statements include:

- a) The employer's pay roll manager told the Commission that the Claimant abandoned his job. The Claimant says he tried to go to work, but he was sent home.
- b) The employer's human resources manager told the Commission that the Claimant was put on a three-week suspension. The Claimant says it was a three-week unpaid leave, not a suspension.
- c) The manager told the Commission that the Claimant was the only employee who had concerns about the policy. The Claimant says there were other employees who also disagreed with the policy.

[33] The Claimant says that there was no misconduct because his employer changed the terms of his employment contract. He says his employer contravened a number of provincial, federal and international laws. This includes that he has the right to protect his biological property, the right to work, and right to forego medical procedures against his health and safety. This also includes freedom from discrimination, and cruel and unusual punishment. The Claimant gave an arbitration decision to support his argument.<sup>14</sup> Claimant says the Ontario Labour Relations Board recently decided that his union failed to represent him in accordance with its duty of fair representation.

[34] The employer's pay roll manager told the Commission that the Claimant was terminated for job abandonment. The employer's human resources manager later clarified with the Commission that the Claimant was terminated for not following the vaccination policy. The manager says that the Claimant refused to be fully vaccinated or to provide test results.

[35] The employer's human resources manager told the Commission that employees were notified bi-weekly, with each pay, that they must follow the policy by October 15,

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<sup>14</sup> See 2022 Canlii 7228.

2021. The policy itself states: “Failure to comply with this policy may lead to disciplinary action up to and including dismissal for cause.”<sup>15</sup>

[36] I find that the Commission has proven that there was misconduct, because the evidence shows that the Claimant knew about the policy, knew that he could be dismissed if he didn’t follow the policy, and he chose not to follow the policy. I find that his choice to not follow the policy was conscious, deliberate, and intentional. The Claimant provided the Tribunal with a copy of the policy, the suspension letter, and the unpaid leave letter. Each document says that the Claimant is to provide test results or risk dismissal. I find that the Claimant was given clear information about his obligations under the policy and risks for not following the policy.

[37] In regards to the Claimant’s other arguments:

- a) *Educational information.* I find that the employer’s clause in the policy to provide employees with educational information on the importance of being tested, is incidental to the real substance of the policy. In the alternative, I find that the employer fulfilled this term of its policy in the letter dated November 23, 2021. The letter told the Claimant that COVID-19 has killed many Canadians and the best protection is vaccination. The letter says the Claimant should speak to his doctor to better understand why it’s important to follow the vaccination policy. The Claimant testified that he couldn’t remember talking with his family doctor about his vaccine-related concerns.
- b) *False statements.* I recognise that there may be some incorrect statements given to the Commission by the employer’s representatives. So, I rely on the written correspondence of the employer, including the written policy, and letters of suspension, unpaid leave, and termination, in my decision.
- c) *Employer changed the terms of his employment contract and contravened a number of provincial, federal and international laws.* I note that there are other forums for the Claimant to bring up these arguments. The conduct of the

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<sup>15</sup> See GD7-5.



employer isn't a relevant consideration under section 30 of the EI Act. Rather, my analysis is focused on the Claimant's act or omission and whether that amounts to misconduct within the meaning of section 30 of the EI Act.<sup>16</sup> I am not making decisions about whether the Claimant has any course of action under other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act.

- d) *Other Social Security Tribunal decision.* I find that this decision can be set apart on its facts. As well, other Tribunal decisions aren't binding on my decision. In the other Tribunal's decision, the Claimant was provided with only two days to follow with the employer's vaccination policy. The Member held that the Claimant wasn't provided with enough time to follow the policy and couldn't have known he would be dismissed for his conduct. In this case, I find that the Claimant was provided with enough time to follow the policy. I find that the Claimant was provided with repeat warnings that he would be dismissed if he didn't follow with the policy.

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

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

### **Conclusion**

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

[40] This means that the appeal is dismissed.

Kristen Thompson  
Member, General Division – Employment Insurance Section

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<sup>16</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107.