



Citation: *MN v Canada Employment Insurance Commission*, 2023 SST 1388

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

# Decision

**Appellant:** M. N.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (539015) dated October 3, 2022 (issued by Service Canada)

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**Tribunal member:** Barbara Hicks

**Type of hearing:** Teleconference

**Hearing date:** August 1, 2023

**Hearing participants:** Appellant  
Appellant's Support Person

**Decision date:** August 20, 2023

**File number:** GE-22-3927

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost her job as an environmental service representative at a health care facility. The Appellant's employer said that she was let go because she did not comply with the employer's mandatory COVID-19 vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, she says she didn't do anything wrong. She simply doesn't wish to be vaccinated. She didn't want to take an "experimental vaccine" that she didn't know much about and says that since she had COVID already, she has natural immunity and doesn't need a vaccine for protection. She also believes that the COVID-19 vaccine contains aborted fetal cells, which she objects to for religious reasons. She requested an exemption on religious grounds, which was denied.

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

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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.

## **Preliminary Matters**

### **Multiple Appeals**

[6] This appeal is related to another appeal involving the same parties, numbered GE-22-3928, which was heard on the same date. A separate decision will be issued for that appeal.

### **Support Person**

[7] The Social Security Tribunal Rules of Procedure permit a party to have a Support Person assist them during a hearing.<sup>2</sup> The Appellant requested that her friend, A. M., be allowed to assist her during the hearing by organizing her documents, taking notes and giving her emotional support. I granted the request.

### **Case Conference**

[8] A case conference was held on April 26, 2023 to discuss a number of matters, clarify the issues under appeal and the legal tests that will apply. The Appellant indicated that she had additional documents that she would like to file, and I gave her until May 17, 2023 to do so. The Appellant also changed her mind about the form of hearing that she would like to have. She indicated that she wanted to have a hearing by teleconference instead of in-person.

### **Issue**

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

### **Analysis**

[10] To answer the question of whether the Appellant lost her job because of misconduct, I must decide two things. First, I must determine why the Appellant lost her job. Then, I must determine whether the law considers that reason to be misconduct.

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<sup>2</sup> See Rule 15.

## **Why did the Appellant lose her job?**

[11] I find that the Appellant lost her job because she did not comply with the employer's COVID-19 Immunization Policy ("Policy").

[12] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer's Record of Employment indicates that the Appellant was dismissed for "Non compliance with Trillium's Covid Policy."<sup>3</sup> The Commission disqualified the Appellant pursuant to sections 29 and 30 of the Employment Insurance Act ("Act").

[13] The Appellant admits that this is the reason she lost her job.

[14] I see no reason not to accept this as fact.

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

[15] The reason for the Appellant's dismissal is misconduct under the law.

[16] To be misconduct under the law, the conduct must be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Appellant doesn't 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>6</sup>

[17] There is misconduct if the Appellant 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>7</sup>

[18] The Commission must prove that the Appellant lost her job because of misconduct. The Commission must prove this on a balance of probabilities. This means

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<sup>3</sup> See Box 18, GD3-19.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

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

that it must show that it is more likely than not that the Appellant lost her job because of misconduct.<sup>8</sup>

[19] The Commission says that there was misconduct because the Appellant wilfully refused to comply with the employer's mandatory vaccination policy and there was a clear connection between the refusal to get vaccinated and the dismissal or suspension. The Appellant had been made aware of the policy and what was required of her. She was aware that failure to comply with the policy could lead to her loss of employment.<sup>9</sup>

[20] The Policy was issued on July 9, 2021 pursuant to Directive #6 under Section 77.7 of the *Health Protection and Promotion Act (HPPA)*. The Policy applies to all employees, professional staff, learners and volunteers, including those working remotely.<sup>10</sup>

[21] The Policy became effective on September 7, 2021, with a 6-week implementation period that would end on October 20, 2021.<sup>11</sup>

[22] All individuals would be required to declare their vaccination status by October 20, 2021 by selecting one of two options: (1) I am fully vaccinated; or (2) I am unable to be vaccinated for medical exemption or other accommodation reasons and have been approved for an exemption or accommodation.

[23] The Policy clearly states at paragraph 6 that an individual's failure to comply with the COVID-19 policy will result in "progressive action up to and including termination of employment or placement and/or restriction, suspension, revocation or non-renewal of privileges."<sup>12</sup>

[24] The policy requires that all individuals receive the COVID-19 vaccine and provide proof of vaccination by October 20, 2021. Individuals who were not fully vaccinated in

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<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See GD4-3.

<sup>10</sup> See paragraph 1, GD3-43.

<sup>11</sup> See paragraph 6, GD3-46.

<sup>12</sup> See GD3-48.

the meantime would have to follow a testing regime and/or any additional health and safety measures that might be required and complete required training.<sup>13</sup>

[25] The Appellant says that there was no misconduct because she didn't do anything wrong. She just didn't want to be vaccinated. She wanted to be able to continue to work while undergoing regular testing and screening and abiding by the other health and safety protocols that were in place during the implementation period. The Policy did not allow for this.

[26] The Appellant requested a religious exemption. She provided her employer with an "Affidavit of Membership in the Confraternity of Our Lady of Fatima" issued by Bishop Athanasius Schneider in Steubenville, Ohio. The Affidavit states:

*"This is to certify that M. N. is a perpetual member of the Confraternity of Our Lady of Fatima in good standing and as such hold to the following deeply held religious belief that the crime of abortion is so monstrous that any kind of concatenation with this crime, even a very remote one, such as vaccines that use aborted fetal cells for the testing or production, is immoral and cannot be accepted under any circumstances by a Catholic."*<sup>14</sup>

[27] The Appellant testified that she has been Roman Catholic her whole life and she has attended a local church, the Norval Queen of Peace Church, since 1979. She asked her local Church for a religious exemption for the COVID-19 vaccine and they told her that they would not, or could not, give it to her. That's when she obtained the affidavit from the Bishop in Ohio.

[28] The Appellant told the Commission that her religious exemption request was denied, along with all the other employees who requested one. She does not know the reason why.

[26] I find that the Commission has proven that there was misconduct because it is clear that the Appellant did not comply with the employer's policy. She admits that she

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<sup>13</sup> See paragraph 6, GD3-47.

<sup>14</sup> See GD3-27.

knew what the policy said and that she deliberately did not comply with it. She did not wish to be vaccinated and took no steps to be vaccinated.

[27] She also knew that her request for a religious exemption had been denied.<sup>15</sup>

[28] The Appellant knew that one of the consequences of failing to comply could include termination.<sup>16</sup>

[29] At first, the Appellant was suspended and given an opportunity to comply with the policy. In a meeting with HR in December 2021, the Appellant disclosed that she was not vaccinated. She was put on an unpaid leave until early January so she could arrange to get vaccinated.<sup>17</sup>

[30] On January 4, 2022, the Appellant was placed on a further unpaid 2-week leave and told that if she did not get vaccinated, she could be terminated.<sup>18</sup>

[31] She made an appointment with her doctor, who put her on sick leave. The Appellant was still hoping to return to work without being vaccinated but her employer would not allow it. She was dismissed on February 18, 2022 when she still didn't comply with the policy.<sup>19</sup>

[32] The Appellant does not dispute any of the above. Her actions were deliberate and intentional.

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

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

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<sup>15</sup> See GD3-39.

<sup>16</sup> See GD3-38.

<sup>17</sup> See GD3-23.

<sup>18</sup> See GD3-23.

<sup>19</sup> See GD3-23.

## **Conclusion**

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

[35] This means that the appeal is dismissed.

Barbara Hicks

Member, General Division – Employment Insurance Section