Citation: *PK v Canada Employment Insurance Commission*, 2022 SST 2019

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	P. K.
Representative:	Anthony Lungu
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (591980) dated June 21, 2023 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	September 21, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	September 26, 2023
File number:	GE-23-2024

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.[1]

Overview

[3] The Appellant lost her job. The Appellant's employer said she was let go because the Appellant didn't return to work by the date they required.

[4] Even though the Appellant doesn't dispute that this happened, she says it isn't misconduct. The Appellant was out of Canada on vacation. While away, the Appellant's grandmother passed away. The Appellant says, due to her religious beliefs, she couldn't leave where she was until all funeral rites had been completed. The Appellant asked her employer for additional time away, but they didn't give her long enough. The Appellant says the employer failed to accommodate her to the point of undue hardship by not giving her all the time she needed to be away from work.

[5] The Commission originally found the Appellant had voluntarily left her job. This was partially based on the Record of Employment (ROE) that said the Appellant had quit. The Commission now says whether the Appellant voluntarily left, or was dismissed for misconduct, the result is the same. The Commission says the Appellant is disqualified from receiving EI benefits.

Issues

[6] Is the Appellant disqualified from receiving benefits?

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[1] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

[7] To answer this, I must first decide whether the Appellant voluntarily left her job or whether she was dismissed. If I decide that the Appellant voluntarily left, then I will look at whether she had just cause for leaving.

[8] If I decide that the Appellant was dismissed, then I will look at whether the reason for the dismissal is misconduct under the law.

Analysis

[9] There is one section of the *Employment Insurance Act* that sets out two reasons why someone can be disqualified from being paid EI benefits: (1) voluntarily leaving a job without just cause and (2) being dismissed because of misconduct.[2] Sometimes it is not clear whether a person quit or voluntarily left work. The law says that, in these situations, I am not bound by how the Commission decided it.[3] The disqualification can be based on either of the two reasons, as long as it is supported by the evidence.[4]

[10] In other words, while the Commission decided that the Appellant voluntarily left, I am able to look at evidence and decide whether it may in fact be a case of misconduct.

[11] While the issue (whether the Appellant is disqualified) is the same, the questions of who has to prove what are different, depending on whether it is a case of voluntarily leaving without just cause or misconduct. So, I will first decide which kind of case it is.

Did the Appellant voluntarily leave her job or was the Appellant dismissed?

[12] If the Appellant had a choice to stay or leave her job, then she voluntarily left.[5]

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[2] Section 30 of the *Employment Insurance Act*.
[3] *Canada (Attorney General)* v *Desson*, 2004 FCA 303.
[4] *Canada (Attorney General)* v *Desson*, 2004 FCA 303.
[5] *Canada (Attorney General)* v *Peace*, 2004 FCA 56.

The Appellant did not voluntarily leave her employment

[13] To decide if the Appellant voluntarily left her employment, I must first decide whether or not she had a choice to stay in or leave that employment.[6]

[14] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you did not have just cause.[7]

[15] The burden of proof is on the Commission to show that the leaving was voluntary.[8]

[16] The Appellant has always maintained that she didn't quit (voluntarily leave) her job.[9]

[17] The Commission decided it was the Appellant's personal choice not to return to work. Based on this, it decided this was a case of voluntary leaving.[10]

[18] In the Appellant's Notice of Appeal, she provided the letter of termination that she received from her employer.[11]

[19] The Commission notes, in its' representations, it is possible that this is a case of dismissal.[12]

[20] I find that, on its face, this is not a case a voluntarily leaving. The Appellant didn't have the choice to stay or go. I find it was the employer who initiated the separation of employment. The employer wrote the Appellant on March 13, 2023 and told her that her employment was terminated.[13]

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[6] *Canada (Attorney General)* v *Peace*, 2004 FCA 56.
[7] Section 30 of the *Employment Insurance Act* sets out this rule.
[8] See *Green* v *Canada (Attorney General),* 2012 FCA 313; *Canada (Attorney General)* v *White*, 2011 FCA 190; *Canada (Attorney General)* v *Patel*, 2010 FCA 95.
[9] See, for example, GD3-7; GD3-23; and GD2-11.
[10] See Gd3-30 and GD3-40.
[11] See GD2-49.
[12] See GD4-3.
[13] See GD2-49.

[21] The Commission noted it wasn't able to speak to the Appellant's employer.[14] After the Commission conducted its original investigation, the employer issued a second amended ROE. The second ROE coded the reason for separation as "K" other,[15] instead of "E" quit which was on the first ROE.[16]

[22] These factors, along with the Appellant's testimony, lead me to the finding that this was not a question of the Appellant voluntarily leaving her employment. This means the Commission hasn't met its burden of proving the Appellant voluntarily left her employment.

No need to determine just cause

[23] Having determined that the Appellant did not voluntarily leave her employment, it is not necessary for me to consider the question of just cause.

What was the reason for dismissal?

[24] As I have found the Appellant was dismissed from her job, I will now consider whether she lost her job because of misconduct.

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

Why did the Appellant lose her job?

[26] I find that the Appellant lost her job because she didn't return for work on March 13, 2023 as required by her employer. The parties agree to this. I don't see anything in the file to suggest otherwise. So, I accept this is the reason for the Appellant's dismissal.

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[14] See GD4-3.
[15] See GD3-41.
[16] See GD3-21.

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

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

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

[29] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[17] Misconduct also includes conduct that is so reckless that it is almost wilful.[18] 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.[19]

[30] An employee might be disqualified from receiving EI benefits because of misconduct, but that doesn't necessarily mean they did something "wrong" or "bad".[20]

[31] 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.[21]

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[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[19] See *Attorney General of Canada v Secours*, A-352-94.
[20] See *Karelia* v *Canada (Human Resources and Skills Development)*, 2012 FCA 140 at paragraphs 18 and 20. The Federal Court of Appeal said it was besides the point what the root cause of the employee's dismissal was. In this case the employee had wanted to be with his family, what his counsel deemed as blameless conduct. The Court said whether or not the employee was blameless doesn't have a bearing in this context. "The relevant conduct is the conduct related to one's employment". Here the Court found it isn't the "function of the employment insurance system to make determinations about whether an employee has been dismissed for just cause".
[21] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[32] The law doesn't say I have to consider how the employer behaved.[22] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[23]

[33] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.[24]

[34] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.[25] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[35] It isn't the Tribunal's role to rule on whether or not the employer's policy was fair or legal. The Tribunal's role is to determine whether or not what the employee did, met the criteria for misconduct under the Act.[26]

[36] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[27] He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

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[22] See section 30 of the Act.
[23] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[24] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[25] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[26] See *Canada (Attorney General)* v *Lemire*, 2010 FCA 314.
[27] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[37] In response, the FCA noted it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[28]

[38] The FCA also said, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[29]

[39] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[30] He argued he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[31]

[40] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[32] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.[33]

[41] These cases show that my role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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[28] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[29] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[30] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[31] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[32] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[33] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[42] Recently, the Federal Court decided *Cecchetto*.[34] The Tribunal (both the General and Appeal division) had denied benefits to the appellant because he did not follow his employer's vaccination policy. The Court found that the Tribunal has a “narrow and specific role to play in the legal system”.[35] In that case it was to decide why the appellant had been dismissed and if it was “misconduct” under the EI Act.

[43] This means that if the Appellant has other concerns they are best addressed in other forums.

What the Commission and the Appellant say

[44] The Commission and the Appellant agree on the key facts of the case. The key facts are the facts that the Commission must prove to show the Appellant’s conduct is misconduct within the meaning of the Act.

[45] There is no dispute between the parties about the chronology of events. I accept the entire chronology as fact.

[46] The Appellant requested time off to go to India. Her employer granted her the time off. The Appellant left Canada on February 13, 2023 and she was to return back on February 26, 2023.[36]

[47] While in India, the Appellant’s grandmother had a stroke and was in intensive care at the hospital.[37]

[48] The Appellant wrote to her employer to ask for additional time off for this reason.[38] The Appellant requested to return to work on March 17, 2023.

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[34] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[35] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 paragraphs 46 and 47.
[36] See GD2-20 and GD2-21.
[37] See GD2-23.
[38] See GD2-25.

[49] The employer responded to the Appellant and didn't authorize until March 17, 2023. Instead, the employer granted her until March 7, 2023.[39] The employer asked her to sign a letter that outlined terms and conditions.[40] This letter includes the following:

- an acknowledgement that the Appellant's vacation was originally only granted to February 28, 2023
- that the employer was granting the Appellant an additional five days of vacation
- that the Appellant is expected to return to work on March 7, 2023
- that the Appellant, prior to her return to work, must provide documentation to show the flight the Appellant had originally booked (i.e., the original departure date and must include date of purchase)
- the clause "if you do not return to work on the expected return date mentioned above, we will assume that you have resigned from your position, and your employment will be terminated".

[50] The Appellant testified that she understood this letter. The Appellant testified she signed this letter and returned a copy to her employer.

[51] Sadly, on March 2, 2023, the Appellant's grandmother passed away.[41]

[52] The Appellant wrote to her employer to ask for additional time off. She said that she could be back by March 15, 2023.[42]

[53] The employer responded to the Appellant and said they will only give her an additional four days away. The employer says the additional time given is under the same conditions outlined in the previously signed letter. The employer specifically notes the Appellant is expected to return to work on Monday, March 13, 2023.[43]

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[39] See GD2-28.
[40] See GD2-30.
[41] See GD2-36.
[42] See GD2-38.
[43] See GD2-38.

[54] The Appellant wrote back to her employer and tried to explain her religious customs. She explained that it isn't possible for her to leave as it is believed that the soul of the departed might go with the person leaving.[44]

[55] The employer wrote back and said, "any further requests for additional time off will not be granted. As previously stated, you are expected to return to work on March 13, 2023 under the same terms and conditions of the letter you signed back".[45]

[56] The Appellant wrote back to the employer again asking for an extension of time away.[46] Once again, the employer repeated that, "we are expecting you back to work on March 13, 2023 under the same terms and conditions of the letter you signed".[47]

[57] The Appellant then wrote the employer again. This time to her direct supervisor. She asked again for additional time off.[48] Her supervisor responded, "we are expecting you back to work on March 13, 2023 under the same terms and conditions of the letter you signed".[49]

[58] The Appellant didn't return to work on March 13, 2023. The employer sent the Appellant a letter terminating her employment.[50]

[59] The Appellant, upon her return to Canada, made efforts to try and get her job back that were unsuccessful. She brought a wrongful dismissal claim that was settled.[51] There was no admission of wrongdoing by the employer but they did pay her some separation funds. They also amended the ROE to say "K" other instead of quit.

[60] The Commission says there is evidence that the Appellant requested time off, which was denied. The Appellant made a wilful decision not to return to work. The Commission says that EI is designed to provide assistance to those who have lost their

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[44] See GD2-42.
[45] See GD2-42.
[46] See GD2-43.
[47] See GD2-43.
[48] See GD2-47.
[49] See GD2-46.
[50] See GD2-49.
[51] See Minutes of Settlement at GD2-79.

employment through no fault of their own. The employer imposed a date that the Appellant was to return to work and she didn't. The Commission says this severed the employment relationship. The Commission concluded the Appellant's failure to return to work constitutes misconduct within the meaning of the Act. The Commission says the Appellant knew her employment would be severed and chose not to return on the date the employer asked her to.[52]

[61] The Appellant says there is no misconduct because she didn't intend to do anything bad. She feels her employer had a duty to accommodate her under the *Ontario Human Rights Code*. The Appellant says her employer didn't discuss any emergency leaves that she could access under the *Employment Standards Act*.[53] The Appellant says she clearly told her employer that she required a religious accommodation and the employer failed to give her one.

[62] The Appellant told the Commission she was aware of what the consequences would be if she didn't return to work.[54] The Appellant also told the Commission she was aware she was on an unauthorized leave when she continued to stay away from work longer than her employer permitted. The Appellant again told the Commission she was aware of the consequence.[55]

[63] At the hearing, the testimony from the Appellant was less clear. The Appellant testified she only received one letter from the employer. This was the February 23, 2023 letter that the Appellant signed and returned to her employer.[56] This means there were no other letters that the Appellant signed. The Appellant testified she knew the letter she signed expressly stated that if she didn't return to work by March 7, 2023, her employment would be terminated.[57]

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[52] See GD4-3 and GD4-4.
[53] See *Employment Standards Act*, 2000, S.O. 2000, c. 41. It is not my role to determine whether the employer had any responsibility to tell the Appellant about any other leaves she might have been entitled to.
[54] See GD3-28.
[55] See GD3-38.
[56] See GD2-30.
[57] See GD2-30.

[64] When the employer gave the Appellant an extension to her leave from March 7, 2023 to March 13, 2023, the employer kept noting the extension was “under the same terms and conditions of the letter you signed”.

[65] The Appellant testified she thought the terms and conditions were only referring to the employer’s request to provide her original flight information. She testified she thought the employer would send another letter for her to sign. So, she says she didn’t think the terms and conditions the employer was referring to, included the possibility that she could be terminated for not returning to work. The Appellant testified she believed she thought this could be worked out and that she would still be able to work.

[66] I find the Appellant knew, or should have known, that her employment was at risk. I make this finding because the employer expressly told her this in their letter dated February 23, 2023. The Appellant testified she understood from this letter that her employment was at risk if she didn’t return by March 7, 2023.

[67] When the Appellant received a further extension to be away to March 13, 2023, I understand the Appellant was hopeful it wouldn’t mean the end of her employment when she stayed away past that date. But it was.

[68] It is not disputed that the employer repeatedly told the Appellant they were only extending her authorized time away to March 13, 2023 on the “same terms and conditions” as the February 23, 2023 letter. I find that it would be reasonable to understand this included the very specific term that if the Appellant didn’t return by the date required, her employment would be terminated. Therefore, I find it was the Appellant’s hopeful thinking to believe that this explicit term (and condition) of the letter didn’t apply to the extension to March 13, 2023.

[69] The terms and conditions of the February 23, 2023 letter, only required two things. The first term and condition required the Appellant to provide a copy of her original flight itinerary prior to returning to work. The Appellant testified she complied with this term prior to asking for the additional time away from work from March 7 to March 15, 2023.

[70] The second term and condition in the letter says the Appellant must return back by March 7, 2023 and a failure to do so will result in termination of your employment. There are no other conditions in this letter. I do not find it to be a reasonable interpretation that when the Appellant was given an extension of time to March 13, 2023, that this term wasn't included.

[71] Again, the employer repeatedly alerted the Appellant to the fact that the extension of time was based on the same terms and conditions in the February 23, 2023 letter. When I asked the Appellant for clarification on this issue at the hearing because I was confused, she said she thought the employer would send her another letter.

[72] I find, on a balance of probabilities, the Appellant knew, or should have known, that the most important term and condition of the February 23, 2023 letter, was that she needed to return by the date specified or her employment would be at risk.

[73] The Appellant testified she understood this term when she originally received the letter. She testified she signed it. The employer granted a further extension of time away from work March 7, 2023 to March 13, 2023. The employer repeatedly wrote to the Appellant that the extension of time to March 13, 2023 was based on the same terms and conditions of the February 23, 2023 letter. I find this means that the February 23, 2023 letter was simply amended to allow the Appellant to be away to March 13, 2023 rather than March 7, 2023.

[74] It is unknown what other term or condition the employer would have been referring to. The Appellant testified, that by this time, she had already complied with the first term of the letter by sending her employer the original flight itinerary. So, on its face, the employer agreeing to change the specified return date didn't change their position that a failure to return would put the Appellant's employment at risk. This was the only other term and condition in the letter that the employer repeatedly referred to in their correspondence with the Appellant.

Charter and Human Rights

[75] The Appellant feels the employer's actions went against the *Ontario Human Rights Code*.[58] The Appellant feels her rights were infringed when her employer required her to return home when she had religious/cultural obligations to remain in India.

[76] In Canada, there are a number of laws that protect an individual's rights. The Charter is one of these laws. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[77] As explained to the Appellant during the hearing, these laws are enforced by different courts and tribunals. This Tribunal can consider whether a section of the *Employment Insurance Act* (or its regulations) infringes the rights that are guaranteed by the Charter. The Appellant's Representative stated at the hearing that he was not challenging any part of the *Employment Insurance Act*, rather he feels that the Appellant's employer infringed the Charter or human rights by their actions.

[78] It was explained to the Appellant, and the Appellant's Representative, that it is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter or human rights legislation. It was also explained to the Appellant that she would need to go to a different court or tribunal to address those types of issues. The Appellant's Representative said he understood and wished to proceed.

Astolfi v *Canada (Attorney General)*[59]

[79] I asked the Appellant's Representative whether he was claiming that it was the employer that caused the misconduct in this case.

[80] In *Astolfi*, the CEO of the employer pounded his fist on a table and shouted angrily at the employee. Following that meeting, the employee wrote the employer and said that he wouldn't be attending the office until the situation was investigated and

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[58] See *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.
[59] See *Astolfi* v *Canada (Attorney General)*, 2020 FC 30.

resolved. The employee was later directed to come in person to the office the following week. He did not. The employer decided the employee had abandoned his job.

[81] The Federal Court found that the actions of the CEO were what caused the employee to stay away, the misconduct. The Federal Court found that the Tribunal should have considered the employer's actions and how they impacted what the employee did.

[82] The Federal Court in *Astolfi* said:

> The statement that the GD had to "focus on the conduct of the claimant, not the employer" is problematic for a number of reasons. First, it is a narrow application of the legal test for misconduct and led the GD to misinterpret the case law. It is true that once employee misconduct is established, there is no obligation for the GD to question whether the dismissal was justified (*Dubeau v Canada (Attorney General)*, 2019 FC 725 at para 19). However, there is an important distinction between an employer's conduct after alleged misconduct, and an employer's conduct which may have led to the "misconduct" in the first place.[60]

[83] The Appellant's Representative argued that the employer's conduct of setting the March 13, 2023 deadline must be considered. He argued that the employer's conduct of failing to be in accordance with the *Ontario Human Rights Code* is what led to the Appellant's failure to return to work. He argued that this case is similar to *Astolfi* because the employer's conduct led to the actions the Appellant took.

[84] Respectfully, I disagree. I find this case can be distinguished from *Astolfi*. It is possible the Appellant's employer may have contravened another Act or Code. But it wasn't the employer's actions that caused the Appellant to continue to stay in India and not return back by the employer's stated return to work date.

[85] The Appellant was clear in her testimony and in her statements to the Commission. She didn't have any intention of leaving India until the funeral rites were complete. This was her decision. I completely understand and empathize that the Appellant was put in a difficult position. The Appellant even wrote to her employer and

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[60] See *Astolfi* v *Canada (Attorney General)*, 2020 FC 30 at paragraph 31.

said that if they didn't provide her with the additional time off, she might be forced to resign.[61] But this doesn't mean that the actions of the employer caused the Appellant to make the choice that she did.

[86] There was no break in causation. Once the Appellant's grandmother passed away, the Appellant intended to stay in India until the funeral rites were complete. It is unfortunate that her employer didn't grant her additional time off. Yet, their failure to grant the time didn't change what the Appellant intended to do. The Appellant was clear to the Tribunal, the Commission and her employer. She intended to stay in India until the funeral rites were complete. This means it was always the Appellant's decision to remain in India. The employer's conduct did not create any kind of safety issue. The employer's conduct didn't change the choices the Appellant made. Specifically, the Appellant's choice to remain in India for the duration of the funeral rites. Therefore, I find that *Astolfi* is distinguishable from this case. That means I have to continue to focus on what the Appellant did or didn't do.

[87] In *Cecchetto*, the Federal Court also made it clear that a claimant may not be satisfied with the Employment Insurance scheme, but "there are ways in which his claims can properly be advanced under the legal system".[62]

[88] This means there are other avenues open to appellants if they do not feel that their employer was acting within their employment contract, or if some other law was infringed. For that reason, I don't have the authority to decide the merits, legitimacy or legality of her employer's policy/requirement that the Appellant return to work on the date they did. It is not the role of the Tribunal to determine if the employer failed in their duty to accommodate under the *Ontario Human Rights Code* or any other law. There are other ways for the Appellant to be made whole for that issue. That means I am not going to decide whether the employer breached any obligation under a different law.

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[61] See GD2-47.
[62] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 49.

[89] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[63] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

Elements of misconduct?

[90] I find that the Commission has proven that there was misconduct for the reasons that follow.

[91] There is no dispute that the employer communicated to the Appellant that she had to return to work by March 13, 2023. The Appellant knew this was the case. I find the Appellant made her own choice not to return to work by that date. I fully understand her religious reasons for not doing so. Yet, my role is not to look at the reasonableness of the Appellant's refusal to abide by her employer's requirement. This means that the Appellant's choice to not return back to her job on March 13, 2023 **was conscious, deliberate and intentional**.

[92] The employer required that the Appellant return to work by March 13, 2023. The Appellant didn't. This means that she was not in compliance with her employer's requirement. That means that she didn't go to work to **carry out her duties owed to her employer**. This is misconduct.

[93] As noted above, it is not for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.[64]

[94] The Appellant agreed she was aware that her employer required her to return back to work by March 13, 2023. I found above the Appellant knew, or should have known, that not returning back to work could lead to a loss of her employment. This means that the Appellant knew, or should have known, there **was a real possibility of dismissal**.

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[63] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[64] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[95] By not returning to work by the date imposed by her employer, the misconduct, led to the Appellant **losing her employment**.

[96] I find the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew she was required to return to work on March 13, 2023. She did not follow her employer's requirement. The Appellant knew she was not following her employer's requirement to return to work by the date the employer said. This means she didn't carry out her duties owed to her employer. The Appellant was also aware, or should have been aware, that there was a real possibility she could be let go for this reason.

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

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

Conclusion

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

[99] This means that the appeal is dismissed.

Elizabeth Usprich

Member, General Division – Employment Insurance Section