



Citation: *NH v Canada Employment Insurance Commission*, 2022 SST 241

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: N. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (439015) dated December 2, 2021 (issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: February 11, 2022

Hearing participant: Appellant

Decision date: February 17, 2022

File number: GE-21-2491

Decision

[1] The appeal is allowed in part.

[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.¹

[3] The Claimant has shown that she is available for work. This means she isn't disentitled from receiving EI benefits as of September 20, 2021.

Overview

[4] The Claimant lost her job because she refused to meet with management while on unapproved leave from the workplace.

[5] The Commission decided that the Claimant lost her job because of misconduct. Because of this, it decided that the Claimant is disqualified from receiving EI benefits. The Commission also decided that the Claimant is disentitled from receiving EI regular benefits as of September 20, 2021, because she wasn't available for work.

[6] The Claimant disagrees that it is misconduct. She was put off work by her doctor for medical reasons. She agrees that she was on unapproved leave, but says she wasn't medically fit to meet with management while she was off work. She stayed in touch with the employer to the best of her ability.

[7] The Claimant says that she has been actively looking for work since she was medically cleared to return to work on September 20, 2021.

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Matter I have to consider first

The employer is not a party to this appeal

[8] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

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

[10] Is the Claimant available for work?

Analysis

Did the Claimant lose her job because of misconduct?

[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.

- Why did the Claimant lose her job?

[12] I find that the Claimant lost her job because she refused to meet with the employer while on unapproved leave from work.

[13] The Claimant worked as a recreation coordinator at a senior care facility.

[14] In April 2021, she started a medical leave from work. The employer requested that the Claimant provide an Attending Physician Statement (APS), which the Claimant did on April 25, 2021. The APS was signed by her family doctor and said that the

Claimant was unable to work from April 16, 2021, to May 16, 2021. Her medical leave was approved.

[15] In May, the Claimant requested an extension to her medical leave. She provided a medical note from her doctor that said she was unable to work from May 13, 2021, to July 13, 2021. The Occupational Health Nurse (OHN) for the employer approved her medical leave until June 1, 2021. She did not approve her medical leave beyond June 1, 2021. She asked the Claimant to reach out to her supervisor to discuss a return-to-work schedule.

[16] About a week later, a Human Resources (HR) representative with the employer contacted the Claimant. She asked the Claimant to contact the OHN to discuss the Claimant's leave, but the Claimant said that she had nothing to discuss with the OHN until she returns to her doctor next month.

[17] The HR representative asked the Claimant to reach out so she can arrange a meeting in-person or by phone. The Claimant reiterated that she had no further information to give the employer until she returns to her doctor.

[18] The HR representative contacted the Claimant again a few days later. She said the Claimant is expected to return to work because her medical leave was not approved. She said the employer needs the Claimant to come in and meet with them as soon as possible to discuss a return-to-work and accommodation plan. She warned the Claimant that if she refuses to keep in contact with the OHN and set up a return-to-work plan, then her continued employment is at risk. She continued by saying that the employer has "a process that needs to be followed and if employees do not participate it can potentially end in termination."

[19] The Claimant responded that she saw no reason to meet with the employer. That her doctor has her on medical leave and she will follow her doctor's advice.

[20] On June 22, 2021, the Claimant's supervisor sent her registered letter stating that the Claimant is on unapproved leave, that she has failed to return to the workplace, and that she has not complied with the requests to schedule a meeting to discuss a

return-to-work plan and accommodations. The letter states that the Claimant must contact her supervisor by June 28, 2021, or they will consider that she has abandoned her job.

[21] The Claimant said that she called the supervisor on June 28, 2021. She also sent an email saying that her doctor has put her off work and that she has no more medical information to provide the employer. The next day, the Claimant provided another medical note saying that she is unable to return to work until August 28, 2021.

[22] On June 29, 2021, the supervisor sent the Claimant another registered letter. It says that despite the employer's requests for the Claimant to contact them to set up a meeting, the Claimant continues to respond only by email and refuses to have any further discussions or provide any more information. It says that the employer needs to speak to the Claimant by telephone or in-person to resolve this situation. The Claimant is asked to call the supervisor by July 5, 2021. If she doesn't call the supervisor by that date, her employment will be terminated.

[23] The Claimant says that she called the supervisor on July 5, 2021. She followed up with an email stating that she is out of work on the direction of her doctor and is not abandoning her job. She said that she doesn't feel that there is any need for contact and that she will not be returning to work until her doctor says she can. She will discuss a return-to-work plan at that time. She said that the employer's attempts to contact her are not helping her medical issues and she feels as if the employer is harassing her.

[24] On July 8, 2021, the supervisor sent the Claimant a termination letter. It states that the employer has made multiple attempts to meet with the Claimant to discuss a return-to-work plan and accommodations. The Claimant has continued to refuse to meet with management and has made it clear that she won't be returning to the workplace and will not have a conversation about a return-to-work plan. So, the employer has decided to terminate her employment.

[25] I find the Claimant was dismissed because she refused to have a meeting with the employer while she was on unapproved leave from work. This is supported by:

- The timing of the Claimant's dismissal. She was told that she would be terminated if she refused to contact the employer to arrange a meeting by July 5, 2021. The Claimant sent an email confirming that she would not meet with management or return-to-work until her doctor cleared her to do so. The employer sent the termination letter the following day.
- The employer's warnings. The employer warned the Claimant several times that refusing to meet with the employer could affect her employment status.
- The termination letter. The employer states that the Claimant is terminated because of "job abandonment" because she refused to meet with management and will not discuss returning to work.

[26] The preponderance of evidence supports that the employer asked the Claimant to have a meeting to discuss a return-to-work plan while the Claimant was on unapproved leave from work. The Claimant refused to have a meeting as requested and was dismissed as a result.

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

[27] The reason for the Claimant's dismissal is misconduct under the law. This is because I find that she understood her actions and she knew the employer might dismiss her if she refused to have a meeting with them.

[28] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant doesn't have to have

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

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.⁴

[29] 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.⁵

[30] 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.⁶

[31] The Commission says that there was misconduct because the Claimant made the deliberate decision to not meet with her employer or provide additional medical information. The employer warned her that she could lose her employment if she refused to meet with them.

[32] The Claimant says that there was no misconduct because her doctor had advised her to stay away from work for medical reasons. She was experiencing high anxiety and felt she couldn't have a phone or in-person meeting with the employer for that reason.

[33] The Claimant gave conflicting information about whether she thought she could be dismissed from her job because of her conduct. At the hearing, she said that she didn't think the employer could let her go while she was on medical leave. However, she also said that she called the employer on July 5, 2021, because she didn't want to lose her job. The employer had warned her that she would be terminated if she didn't phone her supervisor by that date.

[34] The Claimant understood that the employer did not approve her medical leave from work since June 1, 2021. She understood that the employer wanted to meet with

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

her to discuss returning to work, since she was no longer on approved leave. Based on her action of calling the employer on July 5, 2021, I think it's most likely that she understood that she might lose her job if she didn't meet with the employer, as they requested.

[35] I recognize that the Claimant wanted to stay away from her workplace for medical reasons. Her doctor said that being in contact with the employer didn't help the Claimant's ongoing medical concerns.

[36] The Claimant has several notes from her family doctor which state that she is unable to work because of her medical condition. These notes don't say that the Claimant is unable to speak to her employer. The employer asked to meet with the Claimant by phone or in-person. If the Claimant could not attend the workplace because of her mental health concerns, she could have had the meeting by telephone.

[37] I find that the Claimant's actions were wilful or conscious. There is no evidence to show that the Claimant wasn't in control of her actions when she repeatedly refused to meet with the employer. The employer warned her several times that refusing to arrange a meeting could result in the Claimant's termination. The employer dismissed her because of her repeated refusal to meet with them. So, the reason for the Claimant's dismissal is misconduct under the law.

Is the Claimant available for work?

[38] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[39] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.⁷ The

⁷ See section 50(8) of the Act.

Employment Insurance Regulations (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁸ I will look at those criteria below.

[40] Second, the Act says that a claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.⁹ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁰ I will look at those factors below.

[41] The Commission decided that the Claimant was disentitled from receiving benefits because she isn’t available for work based on these two sections of the law.

[42] I will now consider these two sections myself to determine whether the Claimant is available for work.

Reasonable and customary efforts to find a job

[43] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts are reasonable and customary.¹¹ I have to look at whether her efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[44] I also have to consider the Claimant’s efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:¹²

- assessing employment opportunities
- applying for jobs
- attending job interviews

[45] The Commission says that the Claimant isn’t doing enough to try to find a job.

⁸ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁹ See section 18(1)(a) of the Act.

¹⁰ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹¹ See section 9.001 of the Regulations.

¹² See section 9.001 of the Regulations.

[46] The Claimant disagrees. As soon as she became cleared to return to work, she updated her resume and started looking for jobs. She signed up for job notifications on several job search websites. She checked for new job postings on a daily basis on Job Bank, Indeed, Kijiji, and Facebook. She contacted friends, relatives, and former coworkers to ask if they knew of any jobs available. Since September 20, 2021, she has applied for twelve jobs. She has attended one interview and had another interview scheduled at the time of the hearing.

[47] The Commission provided a list of 55 advertised jobs in the Claimant's area. It says this shows that there were numerous jobs available in the Claimant's area. So, by only applying for twelve jobs, she hasn't shown that she was making reasonable efforts to find work.

[48] At the hearing, the Claimant addressed the Commission's list of job postings. She pointed out that the majority of the job postings required qualifications that she didn't have, including an early childhood education diploma, first aid certificate, or personal support worker certification. She pointed out that she had already applied at all of the job postings on the list for which she was qualified.

[49] I accept the Claimant's testimony. I think it was reasonable for her to apply for jobs for which she was qualified. She also expressed that she was open to taking certification courses to improve her employability in the future.

[50] The Claimant has proven that she was making reasonable and customary efforts to find a suitable job. Her efforts of assessing employment opportunities, applying for jobs, networking, and attending job interviews show that she was making sustained efforts to find suitable work.

Capable of and available for work

[51] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:¹³

- a) She wants to go back to work as soon as a suitable job is available.
- b) She has made efforts to find a suitable job.
- c) She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[52] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁴

- Wanting to go back to work

[53] The Claimant has shown that she wants to go back to work as soon as a suitable job is available.

[54] The Claimant started looking for work as soon as she was cleared to return to work by her doctor. She wanted to go back to work and made efforts to do so.

[55] The Claimant's attitude shows that she has a desire to return to the labour market. Her conduct in applying for jobs, asking about job openings with her friends and family, and reviewing job postings on a daily basis show that she wants to go back to work.

- Making efforts to find a suitable job

[56] The Claimant has made enough effort to find a suitable job.

¹³ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

¹⁴ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[57] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹⁵

[58] The Claimant's efforts to find a new job included having an updated resume, reviewing job postings, applying for jobs, and attending a job interview. I explained these efforts above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[59] I believe the Claimant was looking for work. She made reasonable and ongoing efforts to find suitable employment. I find that she has met this factor.

- Unduly limiting chances of going back to work

[60] There is no evidence that the Claimant set personal conditions that might unduly limit her chances of going back to work. So, I accept that she hasn't done this.

So, is the Claimant capable of and available for work?

[61] Based on my findings on the three factors, I find that the Claimant has shown that she is capable of and available for work but unable to find a suitable job.

Conclusion

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

[63] The Claimant has shown that she is available for work within the meaning of the law. The appeal on this issue is allowed.

Catherine Shaw
Member, General Division – Employment Insurance Section

¹⁵ I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.