



Citation: *HM v Canada Employment Insurance Commission*, 2022 SST 1510

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

Decision

Appellant: H. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (485905) dated May 11, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: September 21, 2022

Hearing participant: Appellant
Appellant's representative

Decision date: October 31, 2022

File number: GE-22-1980, GE-22-1981

Decision

[1] H. M. is the Claimant. The Canada Employment Insurance Commission (Commission) made several decisions about her entitlement to Employment Insurance (EI) benefits. The Claimant is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal on both issues. I find that the Claimant's employer suspended her because of misconduct. I also find that the Claimant hasn't proven that she is available for work. Both of these decisions mean that the Claimant can't get EI benefits.

Overview

[3] The Claimant worked as a personal support worker in a nursing home. Following a provincial health order, her employer introduced a vaccination policy. The policy required all workers to be fully vaccinated against COVID-19. The Claimant wasn't vaccinated, and so her employer put her on an unpaid leave of absence.

[4] The Commission says the Claimant's employer suspended her because of misconduct. The Commission says she acted deliberately and she knew that she could lose her job because of her actions.

[5] The Commission also says that the Claimant hasn't shown that she is available for work. The Commission says she isn't making reasonable efforts to find a job and that she has personal conditions that would make it too hard to find a job.

[6] The Claimant disagrees with both of the Commission's decisions. The Claimant says that her employer and the government can't force her to get a vaccine. She says the employer's vaccination policy isn't a law and her actions weren't misconduct.

[7] The Claimant also says that she was trying to find a job. She says that she looked for different kinds of work and she wants to return to work.

Issue

[8] I have to make two decisions. First, I have to decide if the Claimant lost her job because of misconduct.

[9] Then, I have to decide if the Claimant has proven that she was available for work.

Analysis - Misconduct

[10] 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?

[11] I find that the Claimant stopped working because she didn't follow her employer's vaccination policy. I will look at her loss of employment using the parts of the *Employment Insurance Act* (EI Act) that deal with suspension.

[12] The Commission says that I can treat the Claimant's loss of employment as a suspension or a voluntary leave of absence. The Commission has chosen to treat the Claimant's loss of employment as a suspension. The Commission says that the Claimant lost her job because she didn't follow the employer's vaccination policy.

[13] The Claimant has never said that she chose to leave her job. She says that she wanted to keep working.

[14] Nothing in the appeal file makes me think the Claimant chose to leave her job. The employer's vaccination policy and a letter from the Claimant's employer both say that the employer will put unvaccinated employees on an unpaid leave of absence. Nothing makes me think the Claimant had a choice to stay or leave her job. Instead, the evidence shows me that the employer made the choice to put the Claimant on an unpaid leave of absence.

[15] So, I find that the parts of the EI Act that talk about suspension for misconduct are the best way to approach the Claimant's loss of employment. I will treat this as a suspension and decide if the reason for the suspension is misconduct under the law.

[16] The Claimant and the Commission agree that the reason for the Claimant's suspension is the employer's vaccination policy. Both the Claimant and the Commission agree that the Claimant wasn't vaccinated by the employer's deadline. They agree that this is the reason the Claimant's employer suspended her.

[17] There isn't any evidence in the appeal file that makes me think the Claimant stopped working for any other reason. There isn't evidence showing that the Claimant took any other actions that caused the loss of her job.

[18] So, I find that the Claimant lost her job because she didn't follow the employer's vaccination policy. Now I must decide if her actions amount to misconduct under the law.

Is the reason for the Claimant's suspension misconduct under the law?

[19] I find that the reason for the Claimant's suspension is misconduct under the law.

[20] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹ Misconduct also includes conduct that is so reckless that it is almost wilful.² The Claimant 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.³

[21] 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.⁴

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³ See *Attorney General of Canada v Secours*, A-352-94.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[22] 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.⁵

[23] The Commission says the Claimant stopped working because of misconduct. The Commission says she knew about the employer's vaccination policy, but deliberately didn't follow the policy. The Commission says she knew that she would lose her job if she didn't follow the vaccination policy.

[24] The Claimant says she didn't lose her job because of misconduct. She says that she has the right to make her own medical decisions. She says the employer's vaccination policy isn't a law. She says neither the employer nor the government can force her to take medical treatment.

[25] I don't find the Claimant's arguments convincing. I agree with the Commission. I find that the Claimant lost her job because of misconduct.

[26] In conversation with the Commission and at the hearing, the Claimant has always given the same explanation of why she stopped working. The Claimant and the Commission agree on the following points:

- The Claimant's employer introduced a vaccination policy. According to the policy, all employees had to be vaccinated against COVID-19 by a deadline.
- The Claimant knew about the policy. She knew that the employer wouldn't let her keep working if she wasn't vaccinated against COVID-19 by the employer's deadline.
- The Claimant made her own choice not to get vaccinated against COVID-19.

[27] Because the Claimant and the Commission agree on the above facts, I accept them all as true. And if I accept the above facts, then I must find that the Claimant

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

stopped working because of misconduct. This is because the reasons she stopped working meet all the parts of the legal test for misconduct. She knew about the employer's policy. She acted deliberately when she decided not to follow the employer's vaccination policy. She knew that she could lose her job if she didn't follow the vaccination policy.

[28] It is not my role to decide if the employer acted fairly by introducing a vaccine policy.⁶ I am not making a decision about whether the COVID-19 vaccine is safe or effective. I can't make decisions about whether the employer should have granted her an exemption to the policy.

[29] My only role is to decide if the Claimant is entitled to EI benefits. To make this decision, I have to decide if the Claimant stopped working because of misconduct. And I find that the Claimant's employer suspended the Claimant because of misconduct, under the meaning of the EI Act.

[30] So, I find the Claimant isn't entitled to EI benefits during her suspension.⁷

Analysis - Availability

[31] There are two different sections of the law that say you have to prove that you are available for work.

[32] First, the EI Act says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.⁸ The *Employment Insurance Regulations* (EI Regulations) give examples that help explain what "reasonable and customary efforts" means.⁹

⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

⁷ Section 31 of the *Employment Insurance Act*

⁸ See section 50(8) of the *Employment Insurance Act*

⁹ See section 9.001 of the *Employment Insurance Regulations*

[33] Second, the EI Act says that you have to prove that you are “capable of and available for work” but aren’t able to find a suitable job.¹⁰ Case law gives three things you have to prove to show that you are “available” in this sense.¹¹

[34] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[35] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven her availability for work.

Reasonable and customary efforts to find a job¹²

[36] The law explains how I must look at the Claimant’s job search efforts and decide if she has proven that her efforts were “reasonable and customary.” I have to look at whether she made sustained efforts. This means she has to show that she kept trying to find a suitable job.

[37] The law gives examples of which kinds of job search activities are reasonable and customary. For instance, I can look at whether the Claimant was doing the following kinds of job search activities:

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- applying for jobs

¹⁰ See section 18(1)(a) of the *Employment Insurance Act*.

¹¹ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹² I have decided to include an analysis of this part of the law because the Commission made arguments specifically about the Claimant’s job search efforts.

- attending interviews¹³

[38] The Commission says the Claimant wasn't making reasonable and customary efforts to find a job.

[39] The Claimant disagrees. She says she was trying to find a job.

[40] There is conflicting information about the Claimant's job search efforts in the appeal file. On March 3, 2022, the Claimant spoke to a Commission agent. According to the Commission's record of conversation, she said she hadn't applied for any jobs since her last day of work on October 31, 2021.

[41] But at the hearing, the Claimant said she started looking for work right after her last day of work. She provided a job search record after the hearing. According to this job search record, she inquired about jobs with some employers beginning in November 2021.

[42] But even at the hearing, the Claimant gave conflicting information about her job search efforts. She said that she couldn't work at restaurants because they required vaccination. So, she said she didn't apply for any jobs at restaurants from November 2021 until they lifted the vaccination requirement.

[43] The Commission's March 2022 record of conversation doesn't include any information suggesting that the Claimant was confused or didn't understand the Commission's questions. So, I think the record of conversation is probably reliable. I give it some weight, especially since the Claimant made these statements spontaneously and closer in time to when she stopped working. I don't think this record of conversation shows that the Claimant was making reasonable and customary efforts to find a job.

[44] I also note that the Claimant spoke to the Commission again in May 2022. During this conversation, she didn't give the Commission very much information about her job

¹³ See section 9.001 of the *Employment Insurance Regulations*.

search efforts. She didn't give the Commission a job search record and she didn't talk about her different kinds of job search activities. So, I also give this record of conversation some weight. I don't think this record of conversation shows that the Claimant was making reasonable and customary efforts to find a job.

[45] I give less weight to the Claimant's statements at the hearing. I also give less weight to her job search record. This is because she provided this information about her job search efforts starting in November 2021 nearly a full year later. I don't think a job search record is as reliable so long after the fact.

[46] Even if I choose to give some weight to the Claimant's job search record, I don't think it is enough to prove that the Claimant's job search efforts were reasonable and customary. The Claimant's job search record doesn't give me a clear picture of the Claimant's job search efforts. According to this job search record, she contacted several of the same prospective employers over and over again, even after they told her that they didn't have a job for her. Many of the job contacts don't have the date that the Claimant contacted the employer. And the job search record doesn't include information about other kinds of job search efforts. It doesn't say whether the Claimant used online job banks, networked, worked with an employment counsellor, or worked on a resume and cover letter.

[47] So, I don't think it is likely that the Claimant was making reasonable and customary efforts to find a suitable job. I give more weight to her statements that she wasn't looking for work. I don't think her job search record gives me enough information about her job search efforts to overcome the statements she made to the Commission.

Capable of and available for work

[48] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[49] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
2. You must show that you made reasonable efforts to find a suitable job;
3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.¹⁴

– **Wanting to go back to work**

[50] The Claimant has always said that she wanted to work. She said it wasn't her choice to stop working in the first place.

[51] I believe her. I find that the Claimant has shown that she wanted to return to work as soon as she found a job.

– **Making efforts to find a suitable job**

[52] I have already decided that the Claimant hasn't shown that she was making reasonable and customary efforts to find a suitable job. This factor falls under a different part of the law, so I have to look at her job search efforts again.

[53] But I have already explained why I give more weight to the Claimant's first statements to the Commission. She told the Commission that she wasn't looking for a job. Even after she asked for a reconsideration, she didn't give the Commission information about her job search efforts. She didn't describe contacting employers, applying for jobs, or using online job banks.

¹⁴ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

[54] At the hearing, she said she was trying to find a job and she submitted a job search record after the hearing. But I don't give a lot of weight to her later statements. She made these statements nearly a year after she first started working.

[55] And her job search record isn't convincing enough to overcome the statements she made to the Commission. The job search record shows that she contacted some of the same employers over and over again. It suggests that she only contacted one or two employers in several months. And she didn't even list dates for several of her employer contacts. I don't think the job search record shows that the Claimant was making reasonable efforts to find a job. I don't give it more weight than her statements to the Commission

[56] So, I find that the Claimant hasn't proven that she was making reasonable efforts to find a suitable job.

– **Unduly limiting chances of going back to work**

[57] The Commission says the Claimant set personal conditions that unduly limited her chances of returning to the labour market.

[58] The Claimant disagrees. She says that she was trying to find a job, but she lives in a small community without many job opportunities.

[59] I agree with the Commission. I find that the Claimant had personal conditions on her job search. When I look at all these personal conditions together, I find that they unduly limited the Claimant's chances of returning to the labour market.

[60] According to a record of conversation with the Commission in May 2022, the Claimant told the Commission that she was only looking for part-time work.

[61] The Claimant says that she didn't limit herself to part-time work. She says she was working full-time before and wanted to work full-time.

[62] There isn't any other evidence in the appeal file that suggests the Claimant was only looking for part-time work. So I agree that the Claimant probably didn't set this limit on her job search.

[63] But at the hearing, the Claimant agreed that she had some personal conditions on her job search.

[64] First of all, the Claimant said she wasn't vaccinated against COVID-19. At the hearing and on her job search record, the Claimant said that this meant she couldn't work in a care home. Her job search record includes notes saying that this also prevented her from working as a private care aide. And at the hearing, the Claimant said she couldn't apply for work at any restaurant because they had vaccination requirements.

[65] At the hearing, the Claimant also said that she lives in a small community without many employers. She said she doesn't drive and the town doesn't have public transit. So, she said that she could only apply for jobs within walking distance.

[66] When I look at these two personal conditions together, I find that the Claimant set restrictions on her job search that unduly limited her chances of returning to the labour market. Her personal conditions made it too difficult for her to expand her job search in a way that would make it easier to find a job. For instance, she couldn't expand her job search to a larger area because she couldn't travel beyond walking distance. And she couldn't work in her usual profession, nor any other job that required vaccination, because she wasn't vaccinated against COVID-19. Both of these personal conditions together made it very difficult for the Claimant to find a job.

[67] So, I find that the Claimant set personal conditions that unduly limited her chances of returning to the labour market.

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

[68] I agree that the Claimant wanted to work. But I think she hasn't proven that she was making reasonable efforts to find a job. And I find that she set personal conditions that unduly limited her chances of returning to the labour market.

[69] So, I find that the Claimant hasn't shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[70] I am dismissing the Claimant's appeal on both issues. I find that her employer suspended her for misconduct. I also find that she hasn't proven that she was available for work.

[71] Both of these decisions mean that the Claimant isn't entitled to EI benefits starting November 7, 2021.

Amanda Pezzutto
Member, General Division – Employment Insurance Section