



Citation: *MC v Canada Employment Insurance Commission*, 2022 SST 1503

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

# **Decision**

**Appellant (Claimant):** M. C.

**Respondent (Commission):** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (460678) dated April 6, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy

**Type of hearing:** Teleconference

**Hearing date:** September 13, 2022

**Hearing participant:** Appellant

**Decision date:** September 23, 2022

**File number:** GE-22-1606

## Decision

### Issue #1

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from October 4, 2021, to October 29, 2021, and disqualified from receiving EI benefits as of November 1, 2021.<sup>1</sup>

### Issue #2

[3] The appeal is allowed.

[4] The Claimant has shown that she was available for work from October 4, 2021.

## Overview

### Issue #1

[5] The Claimant was initially placed on an unpaid leave (suspension) and then lost her job as a nurse on November 1, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave and then dismissed for failing to comply with their Covid-19 vaccination policy.

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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. Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their employment because of their misconduct are not entitled to receive benefits until (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves their employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

[6] The Commission accepted the employer's reason for the suspension and dismissal. It decided the Claimant was suspended and lost her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from October 4, 2021, to October 29, 2021, and disqualified from receiving EI benefits as of November 1, 2021.

[7] The Commission says the Claimant was made aware of the employer's Covid-19 policy, including the consequences of non-compliance, well in advance of the deadline.

[8] The Claimant says she disagreed with employer's vaccination policy and was wrongfully dismissed.

## **Issue #2**

[9] The Commission decided the Claimant was disentitled from receiving EI benefits as of October 4, 2021, because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[10] I must decide whether the Claimant has proven that she was available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[11] The Commission says the Claimant wasn't available, because she had been a nurse for 31-years and had no other skills or desire to seek alternate work. The Commission further says the Claimant remained unvaccinated and was only seeking nursing positions that didn't require the Covid-19 vaccine.

[12] The Claimant disagrees and says she applied to numerous employers in the health and education sectors.

## **Issues**

### **Issue #1**

[13] Was the Claimant suspended and dismissed because of misconduct?

### **Issue #2**

[14] Was the Claimant available for work?

## **Analysis**

### **Issue #1**

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

### **Why was the Claimant suspended and dismissed from his job?**

[16] I find the Claimant was suspended and lost her job because she failed to comply with the employer's vaccination policy.

[17] The Commission says the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant was suspended and dismissed owing to a violation of the Covid-19 vaccine requirement.

[18] The Claimant doesn't dispute she was suspended and dismissed for failing to comply with the employer's vaccination policy. However, the Claimant says she didn't agree with the employer's vaccination policy.

[19] I find the Claimant was suspended and dismissed for failing to comply with the employer's vaccination policy.

## **Was the reason for the Claimant's suspension and dismissal misconduct under the law?**

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

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> 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.<sup>4</sup>

[22] 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 suspended or let go because of that.<sup>5</sup>

[23] The Commission has to prove the Claimant was suspended and 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 was suspended and lost her job because of misconduct.<sup>6</sup>

[24] The Commission says there was misconduct because the Claimant was made aware of the employer's Covid-19 Policy, including the consequences of non-compliance, well in advance of the deadline.

[25] The Claimant says there was no misconduct because she didn't agree with the employer's vaccination policy and was wrongfully dismissed.

[26] I find the Commission has proven there was misconduct, because they showed the Claimant was fully aware of the employer's vaccination policy and the

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

consequences of failing to comply with the policy as early as August 2021 (GD3-55). I realize the Claimant testified she wasn't treated fairly by the employer and was wrongfully dismissed. However, the matter of determining whether the employer's vaccination policy was unfair wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.<sup>7</sup>

### **Additional Testimony from the Claimant**

[27] I realize the Claimant further testified that the employer rejected her request for a religious exemption from the vaccine (GD3-31). I also recognize the Claimant was frustrated and unhappy with the employer on this matter. Nevertheless, the only issue before me was whether the Claimant was suspended and dismissed because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even for compassionate reasons.<sup>8</sup>

### **So, was the Claimant suspended and dismissed from her job because of misconduct?**

[28] Based on my findings above, I find the Claimant was suspended and lost her job because of misconduct.

### **Issue #2**

#### **Analysis**

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

[30] 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.<sup>9</sup> The

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<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

<sup>8</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.

<sup>9</sup> See section 50(8) of the *Employment Insurance Act* (Act).

*Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>10</sup> I will look at those criteria below.

[31] 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.<sup>11</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>12</sup> I will look at those factors below.

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

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

### **Reasonable and customary efforts to find a job**

[34] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.<sup>13</sup> I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[35] 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:<sup>14</sup>

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs

[36] The Commission says the Claimant didn’t do enough to try to find a job. Specifically, the Commission says the Claimant had been a nurse for 31-years and had no other skills or desire to seek alternate work. The Commission further says the

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<sup>10</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>11</sup> See section 18(1)(a) of the Act.

<sup>12</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>13</sup> See section 9.001 of the Regulations.

<sup>14</sup> See section 9.001 of the Regulations.

Claimant remained unvaccinated and was only seeking nursing positions that didn't require the Covid-19 vaccine.

[37] The Claimant disagrees. The Claimant says she applied to work for numerous physicians, including: Dr. X, Dr. X, Dr. X, and Dr. X. The Claimant further says she applied for administrative and management jobs with "X Hospital," "X Hospital," and numerous schools including "X Secondary School," and "X Secondary School." The Claimant says her efforts were enough to prove that she was available for work.

[38] I find the Claimant has made reasonable and customary efforts to find work, because she provided specific names of employers where she applied for work. I realize the Commission argued the Claimant had no desire to seek work outside of nursing. However, the Claimant testified she applied to various jobs including positions in management and administration.

[39] In short, the Claimant has proven that her efforts to find a job were reasonable and customary.

### **Capable of and available for work**

[40] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:<sup>15</sup>

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

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<sup>15</sup> 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.



[41] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>16</sup>

– **Wanting to go back to work**

[42] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available. I make this finding, because the Claimant testified she wasn't ready to retire and provided specific names of employers she contacted about work.

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

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

[44] 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.<sup>17</sup>

[45] The Claimant's efforts to find a new job included assessing employment opportunities online and contacting numerous potential employers in health and education. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[46] Those efforts were enough to meet the requirements of this second factor, because the Claimant provided the specific names of employers she contacted about work.

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

[47] The Claimant hasn't set personal conditions that might unduly limit her chances of going back to work.

[48] The Claimant says she hasn't done this because she was looking for full-time work in nursing, administration, and management.

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<sup>16</sup> 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.

<sup>17</sup> 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.

[49] The Commission says the Claimant remained unvaccinated and was only seeking nursing positions that didn't require the Covid-19 vaccine.

[50] I find the Claimant hasn't unduly limited her chances of going back to work, because she was open to full-time work in various employment areas including management and administration. I recognize the Commission argued that the Claimant was only seeking nursing positions that didn't require the Covid-19 vaccine. However, the Claimant was looking at other work besides nursing positions. Furthermore, there were more employment opportunities now for unvaccinated workers.

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

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

## **Conclusion**

### **Issue #1**

[52] The Commission has proven the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant was disentitled and disqualified from receiving EI benefits.

[53] This means the appeal on this issue is dismissed.

## **Conclusion**

[54] The Claimant has shown that she was available for work within the meaning of the law.

[55] This means the appeal on this issue is allowed.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section