



Citation: *ED v Canada Employment Insurance Commission*, 2022 SST 1293

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

Decision

Appellant: E. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (460516) dated March 16, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: In person

Hearing date: September 28, 2022

Hearing participant: Appellant

Decision date: October 11, 2022

File number: GE-22-1321

Decision

Misconduct

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant on this issue.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost his job because of misconduct (in other words, because he did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Availability

[3] The appeal is allowed. The Tribunal agrees with the Claimant on this issue.

[4] The Claimant has shown that he was available for work from January 2, 2022.

Overview

[5] The Claimant worked as a subway operator for around 19 years. The employer put the Claimant on a leave of absence and dismissed him because he did not comply with the covid19 vaccination policy at work. The Claimant then applied for EI regular benefits.²

[6] The Commission decided that the Claimant was not entitled to receive EI benefits for two reasons. They say that he was suspended and lost his employment due to his own misconduct.³ ⁴As well, the Commission says that the Claimant was not available for work because he made a personal choice to not be vaccinated for covid19 and has only applied for two jobs.⁵

¹ See section 30 and 31 of the *Employment Insurance Act* (EI Act).

² See application for EI benefits at GD3B-3 to GD3B-13.

³ See Commission's submissions on misconduct at GD4B-1 to GD4B-8.

⁴ See initial decision at GD3B-50 and reconsideration decision at GD3B-67 to GD3B-68.

⁵ See Commission's submissions on availability for work at GD4A-1 to GD4A-6.

[7] The Claimant disagrees with the Commission's decisions because the covid19 vaccination policy was implemented arbitrarily by the employer.⁶ Also, vaccination for covid19 was not a condition of his employment or in the collective agreement. As well, he argues that he was available for work and actively seeking jobs.

Matters I have to consider first

A Pre-Hearing Conference (PHC) was held

[8] On June 6, 2022, a PHC was held by teleconference.⁷ The Claimant and the Commission attended. The Claimant asked for an in-person hearing and provided several reasons for making his request. However, the Commission identified that in-person hearings were not being scheduled at Service Canada centres because of the covid19 pandemic. I told the parties after considering their reasons and the availability of in-person hearings, I would issue an interlocutory decision on the method of hearing.

[9] An interlocutory decision with reasons was issued on June 10, 2022 and sent to the parties. I decided that the hearing would have to proceed by teleconference because in-person hearings were not available at the time. A teleconference hearing was scheduled for August 31, 2022.

[10] A few months later, the Tribunal received notification that in-person hearings were now available at Service Canada centres. I asked an agent of the Tribunal to contact the Claimant to confirm whether he wanted to exercise this option. He advised that he still preferred an in-person hearing. The matter was adjourned and rescheduled to September 28, 2022 to accommodate the Claimant's preferences.⁸ Only the Claimant attended the in-person hearing on the hearing date.

⁶ See notice of appeal at GD2-1 to GD2-12.

⁷ See pre-hearing conference at GD6-1 to GD6-2.

⁸ See adjournment and rescheduled hearing at GD7-1 to GD7-5.

The employer asked to be added to this appeal

[11] On May 4, 2021, the Tribunal sent the employer a letter advising that the Claimant had filed an appeal.⁹ The employer wrote back asking to be added to the appeal.¹⁰ On May 31, 2021, I denied the employer's request to be added because they had not provided any reasons to support that they had a direct interest in the decision.¹¹

There are two legal issues: misconduct and availability for work

[12] The Commission decided that the Claimant was not entitled to EI benefits for two reasons. They say that the Claimant was suspended and dismissed due to his misconduct. As well, they say that he was not available for work.

[13] I will start with misconduct followed by availability for work.

Misconduct

Issue

[14] Was the Claimant suspended and did he lose his job because of misconduct?

Analysis

[15] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.¹²

[16] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹³

⁹ See notice to potential added parties at GD5-1 to GD5-4.

¹⁰ See employer's / added party correspondence dated May 16, 2022.

¹¹ See potential added party denial letter dated May 31, 2021.

¹² See section 30 of the *EI Act*.

¹³ See section 31 of the *EI Act*; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

[17] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹⁴

[18] To answer the question of whether the Claimant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

The Claimant was suspended and dismissed from his job

[19] I find that the Claimant was put on a mandatory and unpaid leave of absence on November 21, 2021 because he did not comply with the employer's Covid19 vaccination policy. This was imposed by the employer and the Claimant was not permitted to return to work.

[20] I also find that the Claimant was dismissed from his job on December 31, 2021 for the same reason above.

[21] This is consistent with the Claimant's testimony, records of employment, previous discussions between the Claimant and Commission, as well as the employer and Commission.¹⁵

The employer's "Covid19 Mandatory Vaccination Policy"

[22] The employer implemented a "*Covid19 Mandatory Vaccination Policy*" (policy) effective September 7, 2021. A copy of the policy is included in the file.¹⁶

[23] The policy states that its purpose is to take every precaution reasonable in the circumstances for the protection of health and safety of workers, in accordance with the

¹⁴ See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

¹⁵ See record of employment at GD3B-14 to GD3B-17; supplementary record of claim (SROC) at GD3B-19; SROC at GD3B-49; SROC at GD3B-18 and SROC at GD3B-20.

¹⁶ See policy at GD3B-23 to GD3B-26.

employer's obligations under the *Occupational Health and Safety Act*¹⁷ from the hazard of covid19.

[24] The policy requires employees to upload proof of vaccination for covid19 and confirm vaccination status by September 20, 2021.¹⁸ This was later extended to October 6, 2021.¹⁹

[25] The policy also requires that employees obtain their first Covid19 dose by September 30, 2021 and second dose by October 30, 2021. This was later extended to October 30, 2021 to obtain the first covid19 dose and extended until December 30, 2021 to comply with the policy to be fully vaccinated.²⁰

[26] The policy says that full vaccination is a precondition to employment.

[27] The policy also provided accommodation under Ontario's *Human Rights Code*.²¹ Employees must make a request and provide written documentation and additional information as requested to support their accommodation request.

[28] The Claimant testified that he was aware of the initial deadlines outlined in the policy. He explained that the union took the employer to court/arbitration, so the deadline dates to comply ended up being pushed forward and extended by the employer.

[29] I note that is consistent with the employer's statement to the Commission. The employer said that the deadline to comply was extended to November 20, 2021 and December 31, 2021.²²

¹⁷ See *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

¹⁸ See GD3B-24.

¹⁹ See GD3B-31 to GD3B-32; GD3B-37.

²⁰ See GD3B-39 to GD3B-40.

²¹ See GD3B-25; *Human Rights Code*, RSO 1990, c H.19.

²² See GD3B-20; GD3B-41 to GD3B-42.

The policy was communicated to the Claimant

[30] The employer told the Commission that the policy was communicated to employees on September 1, 2021.²³ A copy of the memo was included in the file.²⁴

[31] The Claimant testified that the policy was communicated to him in a few different ways, starting in September 2021. He received notification by employer memo, some of them were posted at work. Other memos were informally shared via a social media group communication chat for each division (referred to as “whatsapp”).

[32] I find that the policy was first communicated to the Claimant in early September 2021. I also accept that the Claimant was aware of the extensions to the deadline dates to comply.

Non-compliance led to an unpaid leave of absence and dismissal

[33] As noted above, the policy says that employees are expected to comply as a precondition of his employment.²⁵

[34] The employer wrote in a memo that a failure to comply meant employees put themselves at risk of being “unavailable for work”.²⁶ On October 15, 2021, the employer wrote in a memo that a failure to comply by November 20, 2021 will result in an unpaid leave of absence effective November 21, 2021 and further non-compliance will result in termination with cause on December 31, 2021.²⁷ This is also stated in other subsequent memos to employees.²⁸

[35] The Claimant testified that he was put on a mandatory and unpaid leave of absence effective November 21, 2021 for not complying with the policy. The deadline to obtain his first covid19 vaccination was November 20, 2021.

²³ See SROC at GD3B-20 and SROC at GD3B-58.

²⁴ See GD3B-22; GD3B-27 to GD3B-28; GD3B-29 to GD3B-30.

²⁵ See GD3B-26.

²⁶ See GD3B-33.

²⁷ See GD3B-39 to GD3B-40.

²⁸ See GD3B-42 to GD3B-44; GD3B-45 to GD3B-49.

[36] The Claimant said that he was then dismissed on December 31, 2021 because he had not complied with the policy. The deadline to be fully vaccinated was December 30, 2021.

[37] The Claimant explained that he did not expect to be put on an unpaid leave of absence and dismissed from his job. He felt that the employer would allow unvaccinated employees to do rapid testing or possibly change the deadline dates.

The Claimant was not exempt from the policy

[38] As noted above, the policy provided for accommodation under Ontario's *Human Rights Code*.²⁹

[39] The Claimant testified that he had medical concerns and did not want to risk taking the covid19 vaccine. He spoke to his doctor about his concerns.

[40] The Claimant did not ask his employer for a medical accommodation because he heard that few people were accepted.

[41] After the Claimant was put on an unpaid leave of absence, he asked his employer for religious accommodation on November 26, 2021.³⁰ He included additional supporting documents.³¹ However, the employer denied his request for religious accommodation and sent him a letter communicating the denial.

Is it misconduct based on the law – the *Employment Insurance Act*?

[42] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³² Misconduct also includes conduct that is so reckless that it is almost wilful.³³

²⁹ See GD3B-25; *Human Rights Code*, RSO 1990, c H.19.

³⁰ See GD3B-61 to GD3B-64.

³¹ See GD3B-63.

³² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[43] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.³⁴

[44] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of suspended or let go because of that.³⁵

[45] The Commission has to prove that the Claimant was suspended and lost his 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 his job because of misconduct.³⁶

[46] I find that the Commission has proven that there was misconduct for the following reasons.

[47] First, I find that the policy was communicated to the Claimant in early September 2021 and he was aware of the initial deadline dates and the extensions to the deadlines in the policy.

[48] I also find that the Claimant had enough time to comply with the policy, particularly since there were extensions. As well, once the Claimant's religious exemption was denied by the employer, he knew that he had to comply with the policy by December 30, 2021.

[49] Second, I find that the Claimant willfully and consciously chose to not to comply with the policy for his own personal reasons. He did not agree with the employer's implementation of the policy, so he chose not to comply with it.

³⁴ See *Attorney General of Canada v Secours*, A-352-94.

³⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[50] This was a deliberate choice he made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.³⁷

[51] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence and dismissal. It is clear that the employer was actively communicating with employees and letting them know that they would be put on a leave of absence effective November 21, 2021 and dismissed on December 31, 2021. The consequences were communicated to the Claimant on more than one occasion, including at a meeting when he was put on an unpaid leave of absence.

[52] Fourth, I find that the Claimant has not proven he was exempt from the policy. The Claimant's request for religious accommodation was denied by the employer. As noted above, he did not ask the employer for medical accommodation.

[53] Lastly, I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic. As stated in the policy, this was a precondition to employment. The Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duties at work.

What about the Claimant's other arguments?

[54] The Claimant raised other arguments to support his position. Some of them included the following:

- a) There was a breach of human rights
- b) The employer used threats and coercion
- c) The termination was without cause and resulted in undue financial hardship

³⁷ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

- d) He was not accommodated by the employer
- e) He has an underlying health condition
- f) Vaccination was a not a condition of his employment or in the collective agreement
- g) He had concerns about the safety of the vaccine
- h) The employer was a victim of cyber attacks, so he did not feel his information was safe with the employer
- i) Vaccines take years to complete clinical trials

[55] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.³⁸ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[56] I acknowledge the Claimant's additional arguments, but his recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments.³⁹ The Claimant testified that he works in a unionized environment and has already filed a grievance to deal with these arguments.

Availability

Issue

[57] Was the Claimant available for work from January 2, 2022?

Analysis

[58] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled to EI benefits

³⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

³⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

under both of these sections. So, he has to meet the criteria of both sections to get EI benefits.

[59] First, the *Employment Insurance Act* says that a Claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.⁴⁰ The *Employment Insurance Regulations* give criteria that help explain what “reasonable and customary efforts” mean.⁴¹ I will look at those criteria below.

[60] Second, a Claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.⁴² Case law gives three things a Claimant has to prove to show that they are “available” in this sense.⁴³ I will look at those factors below.

[61] The Commission decided that the Claimant was disentitled from receiving EI benefits because he was not available for work based on these two sections of the law.

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

Reasonable and customary efforts to find a job

[63] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.⁴⁴ I have to look at whether his 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.

[64] 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:⁴⁵

- assessing employment opportunities

⁴⁰ See cition 50(8) of the *Employment Insurance Act* (Act).

⁴¹ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁴² See section 18(1)(a) of the Act.

⁴³ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁴⁴ See section 9.001 of the Regulations.

⁴⁵ See section 9.001 of the Regulations.

- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- attending job-search workshops or job fairs
- networking
- contacting employers who may be hiring
- applying for jobs
- attending interviews
- doing competency tests

[65] I find that the Claimant has proven that his efforts to find a job were reasonable and customary for the following reasons. This means that he is not disentitled to EI benefits under this section in law.⁴⁶

[66] The Claimant testified that after he was dismissed from his job, he started making some efforts to find work. He has some experience in construction, seasonal and yard work, so he started asking around about jobs. He made many inquiries about jobs in-person, but admits that some employers were not simply hiring due to the pandemic lockdown.

[67] Specifically, in December 2021, January and February 2022, he explained that he was looking for jobs and talking to friends about potential work. He also took a course in February 2022 to upgrade his skills and obtained a certificate as a “cannabis sommelier”. When the provincial lockdown was lifted in March 2022, he hand delivered around 20 resumes to various local places in his neighborhood, etc. He had an interview with home depot in February 2022, as well as two job offers. One of the job offers was for seasonal work as a mover and the other job offer arranged by his friend was at cannabis store.⁴⁷ The Claimant considered the cannabis store job, but saw that it would be around 2.5 hours commute. This was not feasible by public transit, so he could not accept it.

⁴⁶ See section 50(8) of the *EI Act* and 9.001 of the *EI Regulations*.

⁴⁷ See GD3A-25.

[68] On March 31, 2022, the Claimant secured new employment and started his job. This job pays him around \$16.00 per hour, so he is making significantly less income than his previous employment.

[69] I am satisfied that the Claimant's efforts to find were sustained. He has shown that he made a variety of efforts to find work since becoming unemployed. He previously worked as a subway operator, but immediately expanded his job seeking efforts to other industries. For this reason, I have decided that his efforts to find a job were reasonable and customary.

Capable of and available for work

[70] 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:⁴⁸

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has made efforts to find a suitable job.
- c) He did not set personal conditions that might have unduly (in other words, overly limited his chances of going back to work.

[71] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁴⁹

Wanting to go back to work

[72] I find that the Claimant has shown that he wanted to go back to work as soon as a suitable job was available. The Claimant testified that he a desire to work and a

⁴⁸ 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.

⁴⁹ 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.

financial need to obtain a job. This is consistent with his previous statement to the Commission.⁵⁰

Making efforts to find a suitable job

[73] 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.⁵¹

[74] The Claimant's efforts to find a new job included looking and applying for jobs, networking with friends, dropping off resumes, interviewing and upgrading his skill set, including obtaining a certificate as a cannabis sommelier.

[75] I find that the Claimant has made enough effort to find a suitable job. Those efforts were enough to meet the requirements of this second factor because he has shown that he undertook a variety of efforts over the relevant period to try to find work that he was able to do. He had success because he secured a job on March 31, 2021.

Unduly limiting chances of going back to work

[76] I find that the Claimant did not set any personal conditions that might have unduly limited his chances of going back to work. Specifically, the Commission says that his chances of going back to work were limited because he was unvaccinated and does not have a car so he should focus on local opportunities.⁵²

[77] I was persuaded by the Claimant's testimony on this issue. He explained that while it was challenging to find work for "unvaccinated" people, there were some industries that did not require their employees to be vaccinated for covid19. He said that the cannabis industry is deemed a "necessary service" and did not require employees to be vaccinated for covid19. He noted that prospective employers only required employees to-do regular rapid testing for covid19, which he was willing to comply with.

⁵⁰ See SROC at GD3A-19.

⁵¹ 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.

⁵² See GD4A-1 to GD4A-6.

[78] The Claimant explained that he focused his job seeking efforts by trying to obtain a suitable job that did not require vaccination for covid19 and that was within commuting distance. Around March 2022, he admits that he saw more job postings because the provincial mandate for covid19 vaccination had been removed. This led him to securing suitable employment at a cannabis store on March 31, 2021.

[79] Therefore, I do not find that the Claimant's decision to not vaccinate for covid19 was a personal condition that unduly limited his chances of going back to work.

Conclusion

[80] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence and dismissal. The Commission has proven that the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits. This means that the appeal is dismissed on the issue of misconduct.

[81] The Claimant has shown that he was available for work within the meaning of the law. This means that the appeal is allowed on the issue of availability.

Solange Losier
Member, General Division – Employment Insurance Section