



[TRANSLATION]

Citation: *NO v Canada Employment Insurance Commission*, 2022 SST 1589

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

Decision

Appellant: N. O.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (515798) dated July 5, 2022
(issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Videoconference
Hearing date: November 8, 2022
Hearing participant: Appellant
Decision date: November 10, 2022
File numbers: GE-22-2619 and GE-22-2639

Decision

[1] The appeal is allowed in part.

[2] I find that the Appellant didn't voluntarily take a leave of absence from November 15, 2021 (GE-22-2619).

[3] I also find that he hasn't shown that he was available for work between December 20, 2021, and June 24, 2022 (GE-22-2639). He can't receive benefits between December 20, 2021, and June 24, 2022.

Overview

[4] The Appellant works as a deckhand for the X ferry. He temporarily stopped working on November 12, 2021.

[5] On his Record of Employment (ROE), his employer said that he had quit. It later said that the employment relationship wasn't severed and that the separation could be considered unpaid leave.

[6] The Canada Employment Insurance Commission (Commission) accepted the employer's explanations. It decided that the Appellant voluntarily took a leave of absence from November 15, 2021, and it didn't pay him benefits. In its written arguments to the Tribunal, the Commission concedes the appeal because it considers that it decided incorrectly. But it asks the Tribunal to find that the Appellant stopped working because of misconduct.

[7] The Commission made a second decision. It told the Appellant that it was unable to pay him benefits from December 20, 2022, because he hadn't shown that he was available for work.

[8] The Appellant has to be available for work to get Employment Insurance (EI) regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[9] The Appellant disagrees with the Commission's decisions. He says that he stopped working because of a shortage of work.

[10] I have to decide whether the Appellant voluntarily took a leave of absence. I also have to decide whether he was available for work. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

Matter I have to consider first

[11] I joined the two files to make the process of participating in the hearing easier for the Appellant. I also joined them because the questions [*sic*] raise common questions of fact and no injustice is likely to be caused to any party.

Issues

Leave of absence

[12] Did the Appellant voluntarily take a leave of absence from November 15, 2022?

[13] If so, did the Appellant have no reasonable alternative to voluntarily taking a leave of absence?

Availability

[14] Was the Appellant available for work from December 20, 2022?

Analysis

LEAVE OF ABSENCE

Did the Appellant voluntarily take a leave of absence?

[15] An employee who voluntarily takes a period of leave from their employment without just cause isn't entitled to receive benefits if the employer authorized the period

of leave and if the employee and the employer agreed on the day the employee would go back to work.¹

[16] The facts of the case show that the employer sent the Commission a ROE dated November 15, 2021, saying that the Appellant had quit. The ROE indicates November 12, 2021, as the last day worked. The employer said that the expected date of return was unknown.

[17] Later, an official with the employer told the Commission that the Appellant stopped working on November 12, 2021, because he refused to comply with the employer's COVID-19 vaccination policy. The official said that if he hadn't refused to comply with the policy, the Appellant would have stopped working from January 1, 2022, to March 22, 2022, because of a shortage of work.²

[18] The official explained that employees were repeatedly told about the requirement to provide a COVID-19 vaccination attestation by November 15, 2022, and the consequences of not complying with the policy. There was a meeting on October 27, 2022, to give an update on the employer's vaccination policy.³

[19] The official also told the Commission that the Appellant had provided a falsified medical certificate to justify his refusal to get vaccinated. She said that he filed a complaint with his union because the employer had refused to pay out compensatory time during that period. She said that the employment relationship wasn't severed and that the separation could be considered unpaid leave rather than voluntary leaving.

[20] The Appellant told the Commission that he stopped working because of a shortage of work. He explained that he filed a grievance because the employer had refused to let him use accumulated leave. He figured he would be able to stop working because of a shortage of work as expected in January 2022 if he used his accumulated leave and vacation time until the end of December 2021.

¹ Section 32 of the *Employment Insurance Act* (Act).

² GE-22-2619: GD3-33.

³ GE-22-1619 [*sic*]: GD3-36 and GD3-40 to GD3-78.

[21] At the hearing, the Appellant didn't want to give any more explanations. But he said that he didn't voluntarily take a leave of absence and that he didn't voluntarily leave his job on November 15, 2021.

[22] The Commission's file shows that the employer gave the Appellant a letter on November 11, 2022, telling him that he was being laid off because he hadn't provided a COVID-19 vaccination attestation. Under the employer's COVID-19 vaccination policy, employees who hadn't provided a COVID-19 vaccination attestation as of November 15, 2022, would no longer be able to work or come in. The letter said that the employment relationship would continue but that it would not be possible to indicate "Shortage of work" on the ROE.⁴

[23] The Commission's file also shows that the Appellant wanted his accumulated leave to be paid out from November 15, 2022, and that the employer refused. So, the Appellant filed a grievance under his collective agreement. He disagreed with being laid off without pay.⁵

[24] But the Appellant didn't intend to provide the employer with a COVID-19 vaccination attestation.

[25] On November 15, 2022, the Appellant still hadn't provided proof of vaccination, and the employer put him on unpaid leave.

[26] The Commission decided that the Appellant had taken a leave of absence under section 32 of the *Employment Insurance Act (Act)*. In its written arguments to the Tribunal, it indicates that the Appellant was actually suspended from his job under section 31 of the Act. It says that he committed misconduct by not providing the employer with a COVID-19 vaccination attestation in accordance with the employer's policy. It argues that the Appellant could have continued working after November 15, 2021, if he had followed the employer's vaccination policy.

⁴ GE-22-2619: GD3-23, GD3-25, GD3-35, and GD3-36.

⁵ GE-22-2619: GD3-27.

[27] I agree with the Commission in part. However, under section 113 of the Act, I have jurisdiction to hear an appeal of a reconsideration decision. The Commission's July 5, 2022, reconsideration decision says that the April 14, 2022, decision was being upheld. It says: [translation] "[W]e are unable to pay you benefits from December 20, 2021, because you stopped working by voluntarily taking leave from your job with X on November 15, 2021, without just cause."

[28] In submitting arguments that the Appellant was suspended, the Commission admits that he didn't take a leave of absence. It concedes the appeal on this issue and argues that the employer suspended him.

[29] However, I have to deal with the Commission's decision, and I can't consider another section of the Act to decide the issue on the merits. The Federal Court has also confirmed a number of times that the jurisdiction of a tribunal—like the Social Security Tribunal of Canada—is limited to the decision that the Commission made. But, in *Easson*, the Court says that, when a section of the Act deals with two distinct notions (which is the case for section 30 with voluntary leaving and misconduct), there is no fault in making a finding based on the overall intent of the provision.⁶

[30] In the Appellant's case, leaves of absence and suspensions are determined by two different sections of the Act. Still, in accordance with the spirit of the existing case law, suspensions are treated like dismissals for misconduct (section 30 of the Act).

[31] In the arguments it submitted to the Tribunal on June 13, 2022, the Commission indicates that it would have been preferable to deal with the Appellant's case from the perspective of a suspension for misconduct rather than from the perspective of a leave of absence, since the Appellant stopped working at the employer's initiative.

[32] I agree, and I grant it to the Commission that the Appellant stopped working because he refused to comply with the employer's vaccination policy, not because he voluntarily took a leave of absence. Under the employer's policy, he had to provide the

⁶ *Easson*, A-1598-92.

employer with proof of COVID-19 vaccination by November 15, 2022, and he refused to do so.

[33] But the Appellant wanted to keep working. He didn't ask the employer for a leave of absence, and the employer put him on unpaid leave without specifying a return date. The employer laid him off because he didn't provide a COVID-19 vaccination attestation as required by its vaccination policy.

[34] In this case, the Commission made a decision finding that the Appellant had voluntarily taken a leave of absence. And, as explained earlier, I have jurisdiction to deal with the Commission's reconsideration decision. I can't decide whether the Appellant stopped working because of misconduct, especially since he disagrees that he committed misconduct.⁷

[35] The question I have to answer in this case is this: Did the employee have a choice whether to take a leave of absence?⁸

[36] The answer is no. The Appellant didn't have a choice whether to take a leave of absence. He was [translation] "put on unpaid leave" because his behaviour wasn't in compliance with the employer's vaccination policy.

[37] The facts of the case are clear, and the Commission also agrees that the Appellant stopped working at the employer's initiative. He didn't ask for or voluntarily take a leave of absence.

[38] Since the Appellant didn't take a leave of absence voluntarily, he doesn't have to show that he had just cause for taking it or that he had no reasonable alternative to taking it in this case.

⁷ Section 18 of the *Social Security Tribunal Regulations*.

⁸ *Peace*, 2004 FCA 56.

AVAILABILITY

Was the Appellant available for work from December 20, 2022?

– Reasonable and customary efforts to find a job

[39] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.⁹ I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[40] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job search activities I have to consider. Some examples of those activities are the following:¹⁰

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[41] The Commission argues that on April 13, 2022, five months after he stopped working, the Appellant said that he still hadn't made efforts to find a job. It says that, later, he intended to look for work but would limit his search to a job as a deckhand. It asks that his disentitlement end on June 24, 2022, since that is when he went back to work.

[42] On April 13, 2022, the Appellant told a Commission employee that he hadn't made any efforts to find a job since November 12, 2021, because he was waiting for

⁹ See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the Act.

¹⁰ See section 9.001 of the Regulations.

Transport Canada's Interim Order No. 7 to be lifted so he could go back to work. He said that even if he were to look for a job as a deckhand, no employer would want to hire him because he wasn't vaccinated. He also said that he had studied at the Institut maritime du Québec [Quebec marine institute] and that he didn't want to work in another field.¹¹

[43] At the hearing, the Appellant didn't mention making any other job search efforts between December 20, 2021, and June 24, 2022.

[44] To be able to get regular benefits, the Appellant has to show, on a balance of probabilities, that he made significant efforts to find a job each working day of his benefit period. Of course, I understand that he did remain available for his employer and that he went back to work as soon as the employer called him back.

[45] But the fact that the Appellant remained available for his employer until it called him back isn't enough to show his availability for work within the meaning of the Act.

[46] Even considering the Appellant's explanation, I can't find that he made reasonable and customary efforts to find a suitable job between December 20, 2021, and June 24, 2022. A claimant has to make consistent, sustained efforts to find a job each working day of their benefit period.

[47] I find that the Appellant hasn't shown that he was available for work within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations between December 20, 2021, and June 24, 2022.

¹¹ GE-22-2639: GD3-27.

– **Capable of and available for work**

[48] Case law sets out three factors for me to consider when deciding whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:¹²

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

[49] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.¹³

○ **Wanting to go back to work**

[50] The Appellant showed a desire to go back to work as soon as a suitable job was available. On this point, he explained that he remained available to go back to his job as a deckhand as soon as possible.

[51] The Appellant showed a desire to go back to work, but I have to consider whether he made suitable efforts or whether he had personal conditions that unduly limited his chances of going back to work from December 20, 2021.

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

[52] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.¹⁴

¹² 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.

¹³ Two decisions set out this requirement. Those decisions are *Attorney General of Canada v Whiffen*, A-1472-92; and *Carpentier v The Attorney General of Canada*, A-474-97.

¹⁴ This principle is explained in the following decisions: *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.

[53] The Appellant explained to a Commission employee that he had made no effort to find a job. He said that he wasn't interested in finding a job other than as a deckhand and that no employer would want to hire him because he wasn't vaccinated.

[54] I understand from the Appellant's explanations that he is saying he was available for work from December 20, 2021. I also find that he went back to work on June 24, 2022.

[55] A claimant's availability is essentially a question of fact, and the Appellant has to prove that he was available for work each working day of his benefit period to be entitled to benefits.¹⁵ As I explained at the hearing, a claimant's availability is mainly shown through their job search efforts.

[56] While I understand the Appellant's explanations, the facts in the record and his testimony show that he wasn't available for work each working day of his benefit period between December 20, 2021, and June 24, 2022.

[57] I find that the Appellant didn't express his desire to go back to work through significant efforts to find a suitable job each working day of his benefit period between December 20, 2021, and June 24, 2022.

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

[58] The Commission argues that looking for only one type of job limited the Appellant's chances of finding a job.

[59] It is true that the Appellant told the Commission that he didn't want to look for a job other than as a deckhand. But he didn't actually try to find a job.

[60] The fact that the Appellant would have limited his search to a job as a deckhand unduly limited his chances of going back to work.

¹⁵ This principle is explained in the following decision: *Landry, A-719-91*.

○ **So, was the Appellant capable of and available for work?**

[61] To be able to get benefits, a claimant has to make these efforts each working day of their benefit period and show that they are making serious efforts to go back to work.

[62] Based on my findings on the three factors, I find that the Appellant hasn't shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[63] I find that the Appellant didn't voluntarily take a leave of absence.

[64] I also find that the Appellant wasn't available for work between December 20, 2021, and June 24, 2022.

[65] The appeal is allowed in part.

Josée Langlois
Member, General Division – Employment Insurance Section