

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

## Decision

**Appellant:**

R. L.

**Respondent:**

Canada Employment Insurance Commission

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**Decision under appeal:**

Canada Employment Insurance Commission  
reconsideration decision (490862) dated July 13, 2022  
(issued by Service Canada)

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**Tribunal member:**

Catherine Shaw

**Type of hearing:**

Videoconference

**Hearing date:**

November 8, 2022

**Hearing participant:**

Appellant

**Decision date:**

December 9, 2022

**File number:**

GE-22-2650

## Decision

[1] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended). For this reason, he is disentitled to Employment Insurance (EI) benefits from April 10, 2022. So, the appeal on this issue is dismissed.

[2] The Claimant has shown that he was available for work starting June 1, 2022. He hasn't shown that he was available for work from April 10 to May 31, 2022. So, the appeal on this issue is allowed in part.

## Overview

[3] The Claimant was suspended from his job.<sup>1</sup> The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended because of misconduct.<sup>2</sup> It also decided that the Claimant was not available for work. For these reasons, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[6] The Claimant disagrees that he wasn't available for work. At first, he was waiting to be recalled to his job. But in June 2022, he started actively seeking other employment. He started a new job in October 2022.

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<sup>1</sup> The Claimant's employer put him on an unpaid leave of absence from work. Since the employer initiated the Claimant's separation from employment, this is considered a suspension.

<sup>2</sup> 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 the appeal**

[7] 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.

### **Issues**

[8] Was the Claimant suspended from his job because of misconduct?

[9] Was the Claimant available for work?

### **Analysis**

[10] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>3</sup>

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

### **Why was the Claimant suspended?**

[12] Both parties agree that the Claimant was suspended from his job because he went against the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

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<sup>3</sup> See sections 30 and 31 of the Act.

## Is the reason for his suspension misconduct under the law?

[13] The reason for the Claimant's suspension is misconduct under the law.

[14] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>6</sup>

[16] 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 being let go because of that.<sup>7</sup>

[17] The Commission has to prove that the Claimant 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 lost his job because of misconduct.<sup>8</sup>

[18] I only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

decide.<sup>9</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[19] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.<sup>10</sup> Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[20] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[21] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.<sup>11</sup> Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.<sup>12</sup>

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<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

<sup>12</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[22] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.<sup>13</sup> Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.<sup>14</sup>

[23] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

[24] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about getting vaccinated
- the employer communicated to the Claimant what it expected
- the Claimant knew or should have known what would happen if he didn't follow the policy

[25] The Claimant says that there was no misconduct because:

- the employer's vaccination policy went against the law and his human rights
- the CEO made statements that made him think he wouldn't be suspended if he didn't follow the policy

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<sup>13</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>14</sup> *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[26] The employer's vaccination policy said that employees had to be fully vaccinated against COVID-19. The deadline for vaccination was in November 2021, but was later extended to January 10, 2022.

[27] The Claimant said he was notified of the policy in September 2021. Shortly after the policy was announced, the CEO made a statement on the internal company network.<sup>15</sup> The statement said that they had "absolutely zero intent to make vaccines mandatory," that they "would never do that and couldn't even if [they] wanted to."

[28] The Claimant said this statement made him feel that his position was safe. He felt that it meant he wouldn't lose his job even if he didn't follow the vaccination policy.

[29] On December 23, 2021, the employer met with the Claimant. They told him that because he wasn't vaccinated, he was going to be placed on unpaid leave as of January 10, 2022. The Claimant said he was surprised. Before this meeting, he had felt that he wouldn't be suspended because of the policy.

[30] The Claimant went on medical leave at the end of December 2021. In March 2022, his doctor cleared him to return to work. He notified his employer that he was ready to return and the employer told him that he couldn't return to work unless he was vaccinated. They told the Claimant that if he wasn't vaccinated or had an accommodation, then he would be suspended.

[31] The employer suspended the Claimant on March 28, 2022, the date that he was cleared to return to work.

[32] The Claimant asked the employer for an accommodation from the vaccination policy on April 22, 2022, but the employer denied his request.

[33] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Claimant about the requirements and the consequences of not following them.

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<sup>15</sup> See GD6-2.

[34] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.<sup>16</sup>

[35] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.<sup>17</sup>

[36] The Claimant said that the employer's policy violated the law and his human rights.

[37] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[38] These laws are enforced by different courts and tribunals.

[39] This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[40] But this Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

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<sup>16</sup> See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

<sup>17</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.



[41] The Claimant may have other recourse to pursue his claims that the employer's policy violated his rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

[42] I acknowledge that the Claimant was hopeful that the CEO's statement meant that he would not be suspended if he didn't follow the vaccination policy. However, the consequence of not following the employer's policy was clearly set out in the policy itself, and in the meeting he had with the employer in December 2021. This tells me that he could have normally foreseen that by going against the policy it would be likely to result in his suspension.

[43] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to provide proof of being fully vaccinated against COVID-19
- the employer clearly told the Claimant about what it expected of its employees in terms of being vaccinated
- the employer communicated to the Claimant what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

### **So, was the Claimant suspended because of misconduct?**

[44] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

[45] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that failing to get vaccinated was likely to cause him to be suspended.

## Was the Claimant available for work?

[46] 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, he has to meet the criteria of both sections to get benefits.

[47] 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>18</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>19</sup> I will look at those criteria below.

[48] 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>20</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>21</sup> I will look at those factors below.

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

[50] 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

[51] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts are reasonable and customary.<sup>22</sup> I have to look at whether his 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.

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<sup>18</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>19</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>20</sup> See section 18(1)(a) of the Act.

<sup>21</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>22</sup> See section 9.001 of the Regulations.

[52] 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>23</sup>

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

[53] The Commission says that the Claimant didn't do enough to try to find a job.

[54] The Commission spoke to the Claimant on May 5, 2022. The Commission officer's notes of the conversation state that the Claimant said he had not been looking for work since being suspended because he was still employed. He said that he had applied for a couple of odd jobs and was focusing on starting a business.

[55] The Claimant was employed as a customer service representative. His employer put in place a mandatory vaccination policy and he was suspended from his job as a result of that policy on March 28, 2022.

[56] The Claimant testified that he thought his suspension would be short. His employer indicated that the vaccination policy was based on provincial mandates and he had heard news about the mandates lifting. He had also applied for an exemption to the employer's policy, which may have resulted in him being reinstated to work.

[57] In April, he focused his efforts on starting a business with a partner. He had started exploring this business while he was still working as a side effort. So, while he was off work temporarily, he thought he would explore it further. However, in May the Claimant and his partner decided not to move forward with the business.

[58] The Claimant was looking for another job throughout this time, but he increased his efforts in June 2022. He applied for numerous jobs in June and July. He attended three interviews and was offered another job that started in October 2022.

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<sup>23</sup> See section 9.001 of the Regulations.

[59] The Claimant provided a detailed account of his job search efforts to the Tribunal. The majority of his efforts to find work took place after June 1, 2022, when he stopped waiting to be recalled to his job.

[60] I believe the Claimant that he was looking for work outside of starting his own business. His business was not intended to be his primary source of income. Rather, it was something he could operate in addition to his regular full-time job.

[61] The Commission spoke to the Claimant in May 2022, before he increased his job search efforts. The Claimant gave credible testimony that he was actively seeking work by applying for numerous jobs and attending three interviews. I put weight on his testimony.

[62] The Claimant's job search record shows that he was making sustained efforts to look for work. He had an updated resume, looked at job postings online, applied for around 30-50 jobs throughout the summer, and attended three interviews. He also accepted an offer of employment starting in October 2022.

[63] The Claimant has proven that he was making reasonable and customary efforts to find a suitable job. His efforts of assessing employment opportunities, applying for jobs, and attending interviews show that he was making reasonable and ongoing efforts to find suitable work.

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

[64] 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>24</sup>

- He wants to go back to work as soon as a suitable job was available.
- He has made efforts to find a suitable job.

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<sup>24</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.

- He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[65] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>25</sup>

[66] I will start by considering what is suitable employment for the Claimant

**- Suitable employment**

[67] To decide what is suitable employment, I must look at whether the Claimant's health and physical capabilities allow him to commute to the place of work and to perform the work.<sup>26</sup>

[68] The Claimant said that he has a partial disability that prevents him from standing for an extended time. I have no reason to doubt what the Claimant says about what he is capable of doing, so I accept that he is unable to stand for extended periods.

[69] I find that suitable employment for the Claimant is any job that doesn't require him to stand for an extended period.

**- Wanting to go back to work**

[70] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[71] The Claimant thought he would be recalled to work shortly after being suspended on March 28, 2022. In April and May, he focused on starting a new business and applied for a few jobs. After the employer denied his accommodation request and the vaccination mandate was still not lifted, he increased his efforts to find another job.

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<sup>25</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>26</sup> The full criteria to be considered when determining whether an employment is suitable are listed in section 9.002(1)(a) of the Regulations.

[72] He applied for numerous jobs in June and July. He attended three interviews and was offered another job that started in October 2022.

[73] I believe the Claimant wanted to return to work. He was actively looking for work. His conduct of assessing job postings, applying for jobs, and attending interviews supports that he wanted to work.

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

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

[75] 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>27</sup>

[76] The Claimant's efforts to find a new job included looking at job postings online, applying for jobs, and attending interviews. He testified that he applied for around 30-50 jobs and attended three interviews before he obtained his new job.

[77] The Claimant has shown that he was making reasonable and sustained efforts to find a job that was suitable for him. His numerous job applications and broad search efforts support that he wanted to find a suitable job as soon as possible.

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

[78] The Claimant did set personal conditions that might have unduly limited his chances of going back to work from April 10, 2022, to May 31, 2022.

[79] The Commission said the Claimant was overly limiting his chances of going back to work because he was waiting to return to his job and he was primarily focused on starting a business instead of finding suitable work.

[80] The Claimant agreed that he was focused on starting his business after being suspended but it was never planned to be his primary source of income. It was intended

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<sup>27</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.

to be a side business that he could do while working full-time. He thought he would be returning to his work shortly, either because the vaccination mandate was lifted or because the employer granted him an accommodation to the policy. So, he made some efforts to find another job in April and May, but didn't think he need to find another full-time job.

[81] In May, the Claimant decided not to pursue the business, and also realized that he may not return to work that quickly. The mandate was still in place and the employer had refused to grant him an accommodation from its policy. So, he increased his efforts to find another job starting in June.

[82] I don't believe the Claimant's focus on starting a business was a real limitation to his chances of returning to work because the business was intended to be operated **in addition to** his full time job. The business was not meant to replace his job as his primary source of income. The Claimant agreed that he had focused on starting the business for a time after he was suspended, but that was because he believed he was returning to work soon and didn't need to find another job.

[83] I find the Claimant set personal conditions that might have unduly limited his chances of returning to work by making limited efforts to find another job in April and May 2022, because he thought he would be returning to work. I understand that the Claimant thought his leave from work would be short-lived, however, he admitted that he made only small efforts to find work throughout this time. This restricted his ability to find another job.

[84] I believe the Claimant lifted this restriction on his availability by June 1, 2022. He testified at length about his job search efforts starting in June 2022. I accept that the Claimant wasn't limiting his efforts to find work from that time.

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

[85] Based on my findings on the three factors, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job from June 1, 2022.

[86] He hasn't shown that he was capable of and available for work but unable to find a suitable job from April 10, 2022, to May 31, 2022, because he set personal conditions that might have unduly limited his chances of returning to work during that time.

## **Conclusion**

[87] The Commission has proven that the Claimant was suspended because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits. The appeal on this issue is dismissed.

[88] The Claimant has shown that he was available for work within the meaning of the law from June 1, 2022. He hasn't shown that he was available for work from April 10, 2022, to May 31, 2022.

[89] The appeal on the issue of his availability is allowed in part. However, since he is disentitled from benefits for another reason, he will still not be able to receive EI benefits.

Catherine Shaw  
Member, General Division – Employment Insurance Section