



Citation: *JJ v Canada Employment Insurance Commission*, 2022 SST 1663

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

## Decision

**Appellant (Claimant):** J. J.  
**Respondent (Commission):** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (474347) dated June 13, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy  
**Type of hearing:** Videoconference  
**Hearing date:** November 30, 2022  
**Hearing participant:** Appellant  
**Decision date:** December 14, 2022  
**File number:** GE-22-2487

## Decision

### Issue 1

[1] The appeal is dismissed on the first issue.

[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 be suspended and to lose her job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from October 17, 2021, and disqualified from receiving EI benefits from January 23, 2022.<sup>1</sup>

### Issue 2

[3] The appeal is allowed on the second issue.

[4] The Claimant has shown that she was available for work from October 18, 2021.

## Overview

### Issue 1

[5] The Claimant worked as a pharmacy technician and was placed on an unpaid leave of absence effective October 15, 2021. The Claimant then lost her job on January 25, 2022. The Claimant's employer ("X") said the Claimant was suspended and then let go because she didn't comply with their vaccination policy.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until the claimant meets one of the following provisions: (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 of the EI Act qualify to receive benefits.

Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

[6] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and then letting her go. It decided that 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 17, 2021, and disqualified from receiving EI benefits from January 23, 2022.

[7] The Commission says the Claimant was aware that failing to comply with the employer's Covid-19 vaccination policy would lead to her loss of employment.

[8] The Claimant says she didn't request a leave of absence from the employer. She further says she disagreed with the definition of misconduct.

## **Issue 2**

[9] The Commission decided that the Claimant was disentitled from receiving EI regular benefits as of October 18, 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 for work, because she imposed voluntary restrictions on her job search that severely limited her chances of securing suitable employment.

[12] The Claimant disagrees. The Claimant says she applied to numerous employers and secured a job in June 2022.

## **Issues**

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

[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 her 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 accepted the employer's reason for placing the Claimant on an unpaid leave of absence and letting her go. The employer told the Commission that the Claimant was placed on an unpaid leave of absence and then dismissed because she failed to comply with their vaccination policy.

[18] The Claimant doesn't dispute that she was placed on unpaid leave of absence and dismissed for failing to comply with the employer's vaccination. However, the Claimant says the employer's vaccination policy wasn't part of her employment contract.

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

### **Is 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 and let go because of that.<sup>5</sup>

[23] The Commission has to prove that 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 aware that failing to comply with the employer's Covid-19 vaccination policy would lead to her loss of employment.

[25] The Claimant says there was no misconduct because she didn't do anything wrong.

[26] I find the Commission has proven there was misconduct, because they showed the Claimant was aware that she was in violation of the employer's vaccination policy (GD3-155). Furthermore, the Commission provided a copy of the employer's vaccination which stated that employees who failed to be vaccinated by January 17, 2022, would be terminated for cause (GD3-108). I realize the Claimant argued that she disagreed with the definition of misconduct. However, I must apply the legal test for

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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.

misconduct as established in the case law. In other words, I cannot ignore the law even in the most sympathetic cases.<sup>7</sup>

### **Additional Testimony and Submissions from the Claimant**

[27] I recognize the Claimant testified that she didn't want to be placed on an unpaid leave of absence. The Claimant further argued that the employer's vaccination policy wasn't part of her employment contract. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.<sup>8</sup>

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

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

## **Conclusion**

### **Issue 1**

[29] The Commission has proven the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from October 17, 2021, and disqualified from receiving EI benefits from January 23, 2022.

[30] This means the appeal on the first issue is dismissed.

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<sup>7</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.

<sup>8</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

## Analysis

### Issue 2

[31] 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, she has to meet the criteria of both sections to get benefits.

[32] First, the *Employment Insurance Act* (EI 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 *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.

[33] Second, the EI 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.

[34] 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.

[35] 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

[36] 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

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

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

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

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.

[37] 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

[38] The Commission says the Claimant didn't enough to try to find a job. Specifically, the Commission says the jobs the Claimant looked at required her to be vaccinated in order to be eligible. The Commission further says the Claimant was unwilling to look for any other type of employment.

[39] The Claimant disagrees. The Claimant says she assessed various employment opportunities online, applied for numerous jobs, and secured a job in early June 2022. The Claimant says her efforts were enough to prove that she was available for work.

[40] I find the Claimant made reasonable and customary efforts to find work, because she applied to numerous employers and secured a temporary job in early June 2002 ("X") and a full-time job as a pharmacy technician in June 2022. I realize the Commission argued the Claimant was unwilling to look for other types of work. However, the Claimant did secure a temporary job for "X" in June 2022 which was outside her profession.

[41] The Claimant has proven that her efforts to find a job were reasonable and customary.

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



## Capable of and available for work

[42] 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 made efforts to find a suitable job.
- c) She didn't set personal conditions that might have unduly (in other words, overly limited) her chances of going back to work.

[43] 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

[44] 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 secured a temporary job with "X" in early June 2022 and then started working full-time again as a pharmacist in June 2002.

## Making efforts to find a suitable job

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

[46] 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>

[47] The Claimant's efforts to find a new job included assessing employment opportunities online and applying to various employers including: "X," "X," "X, and "X." I

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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.

<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.

explained these reasons above when looking at whether the Claimant made reasonable and customary efforts to find a job.

[48] Those efforts were enough to meet the requirements of this second factor, because the Claimant listed the specific names of employer where she applied for work. The Claimant also secured a job as a pharmacist in June 2022.

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

[49] The Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[50] The Claimant says she hasn't done this because she looked for work outside of her profession as a pharmacy technician.

[51] The Commission says the Claimant imposed voluntary restrictions on her search that severely limited her chances of securing suitable employment.

[52] I find the Claimant didn't set personal conditions that might have unduly limited her chances of going back to work. I make this finding because the Claimant applied for work outside her profession and secured a temporary job with "X" in June 2022. I realize the Commission submitted that the Claimant imposed voluntary restrictions that severely limited her chances of going back to work. Nevertheless, the Claimant did secure a temporary job outside her profession in June 2022.

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

[53] 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 2**

[54] The Claimant has shown that she was available for work from October 18, 2021, within the meaning of the law.

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

*Gerry McCarthy*

Member, General Division – Employment Insurance Section