



Citation: *DM v Canada Employment Insurance Commission*, 2022 SST 1697

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

Decision

Appellant: D. M.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (474369) dated May 13, 2022
(issued by Service Canada)

Tribunal member: Amanda Pezzutto
Type of hearing: Teleconference
Hearing date: September 21, 2022
Hearing participant: Appellant
Decision date: September 29, 2022
File number: GE-22-1811

Decision

[1] D. M. is the Claimant. The Canada Employment Insurance Commission (Commission) made several decisions about his entitlement to Employment Insurance (EI) benefits. The Claimant is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal on both issues. I find that he stopped working because his employer suspended him because of misconduct. He isn't entitled to EI benefits during his suspension.

[3] I also find that the Claimant hasn't proven that he was available for work.

Overview

[4] The Claimant's employer introduced a vaccination policy. The policy meant that all employees had to be vaccinated against COVID-19 by a deadline. The Claimant wasn't vaccinated by the deadline and he didn't ask the employer for an exemption from the policy. So, the employer put the Claimant on unpaid leave starting November 12, 2021. The Claimant applied for EI benefits but the Commission refused to pay benefits.

[5] The Commission says the employer suspended the Claimant because of misconduct. The Commission says the Claimant knew he couldn't continue working if he didn't comply with the vaccination policy.

[6] The Commission also says the Claimant hasn't shown that he was available for work. The Commission says the Claimant isn't trying to find a job because he is waiting to return to work.

[7] The Claimant disagrees with the Commission's decisions. He says that he can make his own decisions about accepting or refusing medical treatment and he chose not to get the COVID-19 vaccine. He says that he worked from home and so the employer could have accommodated him.

[8] He also says that it didn't make sense for him to look for work because he still had a job. He says he was willing to return to work as soon as his employer recalled him.

Issue

[9] I must make two decisions. First, I must decide if the Claimant's employer suspended him because of misconduct. To make this decision, I must decide if the Claimant stopped working because of a suspension. Then, I will decide why the Claimant stopped working and if his actions were misconduct under the law.

[10] Then, I must decide if the Claimant has proven that he was available for work.

Analysis - Misconduct

Did the employer suspend the Claimant?

[11] The Claimant says that the employer didn't suspend him. He says the employer put him on an unpaid administrative leave of absence.

[12] The Commission says the unpaid leave of absence amounts to a suspension.

[13] I agree with the Commission. I find that the Claimant's unpaid leave from work amounts to a suspension.

[14] The Claimant has always said that he didn't choose to leave his job. He didn't ask the employer for a leave of absence. So, it is clear that he didn't voluntarily take leave from his job.

[15] It is also clear that the employer didn't terminate the Claimant. He wasn't fired. In fact, at the hearing, he said he returned to work in June 2022. So, the Claimant didn't lose his job permanently.

[16] The employer put the Claimant on unpaid leave because he didn't follow their vaccination policy. In other words, the Claimant temporarily lost his employment

because he wasn't following the employer's policy. The Commission says this is equivalent to a suspension, and I agree.

[17] So, I find that the Claimant stopped working because of a suspension.

Why did the employer suspend the Claimant?

[18] The Claimant says he stopped working because of the vaccination policy. He says he wasn't vaccinated against COVID-19 by the employer's deadline.

[19] The Commission agrees. The Commission says the employer suspended him because he didn't follow the vaccination policy.

[20] Both the Claimant and the Commission agree about why the Claimant stopped working. He didn't follow the employer's vaccination policy and so the employer suspended him. There isn't anything in the appeal file that makes me think the Claimant stopped working for any other reason.

[21] Now, I must decide if the Claimant's actions – his failure to follow the employer's vaccination policy – amount to misconduct under the law.

Is the reason for the Claimant's suspension misconduct under the law?

[22] I find that the reason for the Claimant's suspension is misconduct under the law.

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹ Misconduct also includes conduct that is so reckless that it is almost wilful.² 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.³

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³ See *Attorney General of Canada v Secours*, A-352-94.

[24] 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 a suspension because of that.⁴

[25] 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 was suspended because of misconduct.⁵

[26] The Commission says that the Claimant stopped working because of misconduct. The Commission says he acted deliberately by refusing to follow the vaccination policy. The Commission also says he knew that the employer would suspend him if he didn't follow the vaccination policy.

[27] The Claimant disagrees. He says that his actions weren't misconduct. He says that he is on an administrative leave because he refused a medical procedure. He says he can make his own choices about the COVID-19 vaccine. He says he worked from home and so he wasn't a risk to anyone at his workplace.

[28] The Claimant and the Commission agree about many of the basic facts about the employer's vaccination policy. The Claimant agreed that his employer had a vaccination policy. He learned of the policy in August 2021. The employer expected the Claimant to provide proof of vaccination against COVID-19 by November 15, 2021. The Claimant didn't ask for an exemption from the policy and he wasn't vaccinated by the deadline. The employer's policy said that any employee who didn't comply with the policy would be put on an unpaid leave. The Claimant agreed that he knew about the consequences of failing to follow the vaccination policy.

[29] There isn't anything in the appeal file that makes me doubt these facts, and so I accept the Claimant and the Commission's evidence about the vaccination policy, the deadline, and the consequences.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[30] And if I accept these facts, I must find that the Claimant stopped working because of misconduct. He deliberately chose to refuse the COVID-19 vaccine. He knew that his actions meant he wasn't following the employer's policy on vaccination. He knew the employer would suspend him if he didn't follow the COVID-19 vaccination policy.

[31] The Claimant has made arguments on issues that are outside of my decision-making power. I can't make decisions about whether the employer's policy was reasonable. I am not making decisions about whether the COVID-19 vaccination is safe or effective. I can't make decisions about whether the employer should have accommodated the Claimant.⁶

[32] The Claimant can take a complaint to a human rights commission or his union if he thinks the employer violated his rights or the collective agreement. But my only role is to make decisions about the Claimant's entitlement to EI benefits.

[33] I find that the Claimant stopped working because of misconduct. So, he isn't entitled to EI benefits during his suspension.⁷

Analysis - Availability

[34] There are two different sections of the law that say you have to prove that you are available for work.

[35] First, the *Employment Insurance Act* (EI Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.⁸ The *Employment Insurance Regulations* (EI Regulations) give examples that help explain what "reasonable and customary efforts" means.⁹

⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

⁷ Section 31 of the *Employment Insurance Act*.

⁸ See section 50(8) of the *Employment Insurance Act*

⁹ See section 9.001 of the *Employment Insurance Regulations*

[36] Second, the Act says that you have to prove that you are “capable of and available for work” but aren’t able to find a suitable job.¹⁰ Case law gives three things you have to prove to show that you are “available” in this sense.¹¹

[37] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[38] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven his availability for work.

Reasonable and customary efforts to find a job

[39] The Commission says it used this section to assess the Claimant’s entitlement to EI benefits.

[40] But the Appeal Division says I should be careful when looking at this part of the law. It says that I should be certain that the Commission actually assessed the Claimant’s job search efforts and warned him if it thought he wasn’t doing enough to find a job.¹²

[41] The Commission’s decision letter doesn’t refer to the Claimant’s job search efforts. I acknowledge that the Commission asked the Claimant about his job search efforts during the reconsideration process, but the records of conversation don’t show me that the Commission ever told the Claimant it was using this part of the law to assess his entitlement to EI benefits.

[42] So, I won’t use this part of the law as I make my decision. I don’t think the Commission has given me enough evidence showing that it really used this part of the law to assess the Claimant’s entitlement to EI benefits.

¹⁰ See section 18(1)(a) of the *Employment Insurance Act*.

¹¹ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹² *LD v Canada Employment Insurance Commission*, 2020 SST 688.

[43] This doesn't mean that I am allowing the Claimant's appeal on the issue of availability. I still must look at the second part of the law that talks about being available for work.

Capable of and available for work

[44] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[45] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
2. You must show that you made reasonable efforts to find a suitable job;
3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.¹³

– Wanting to go back to work

[46] The Claimant said he wanted to work. He wanted to return to work with his usual employer. At the hearing, he said he returned to work in June 2022.

¹³ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

[47] The Commission hasn't made many arguments about this point, and I have no reason to doubt the Claimant's statements. So, I believe him. I believe that he wanted to work.

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

[48] The Claimant told the Commission that he wasn't looking for work. He said he already had a job and was simply waiting to return to work.

[49] At the hearing, he said the same thing. He said he wasn't trying to find a job. He said he wanted to return to work with his usual employer.

[50] The Claimant said he spoke to some recruiters, but he didn't contact them. Instead, they contacted him. At the hearing, when I asked him to describe the active things he did to try to find a job, he said he didn't make any job search efforts.

[51] You have to be looking for work to prove your availability and entitlement to EI benefits.¹⁴ If the Claimant wasn't looking for work, then he hasn't shown that he meets the requirements of this factor.

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

[52] The Claimant told the Commission that he wasn't looking for work because he was waiting to return to work with his usual employer. The Claimant said that he didn't plan to look for work with other employers because he wanted to return to his usual job.

[53] So, I find that the Claimant set a personal condition on his job search. He wasn't looking for work with other employers, only his regular employer. But the Claimant couldn't work for his usual employer because of the vaccination policy. So, I find that the Claimant's personal condition limited his chances of returning to work. This is because he couldn't return to his usual employer until they lifted the vaccination policy in June 2022.

¹⁴ *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.

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

[54] I agree that the Claimant wanted to return to the labour market. But he wasn't making reasonable efforts to find a job. I also find that he set personal conditions that unduly limited his chances of returning to the labour market. This is because he only wanted to work with his regular employer. He wasn't trying to find work with any other employers.

[55] So, I find that the Claimant hasn't proven that he was available for work.

Conclusion

[56] I am dismissing the Claimant's appeal on both issues. He stopped working because his employer suspended him. And I find that the reasons the employer suspended the Claimant are misconduct under the law. I also find that the Claimant hasn't proven that he was available for work. This means that the Claimant isn't entitled to EI benefits starting November 15, 2021.

Amanda Pezzutto

Member, General Division – Employment Insurance Section