



Citation: *SJ v Canada Employment Insurance Commission*, 2022 SST 1772

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

Decision

Appellant: S. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (441868) dated January 20, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: July 21, 2022

Hearing participant: Appellant

Decision date: August 16, 2022

File number: GE-22-593

Decision

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

[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 this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

[3] Also, the Claimant has not shown that she was available for work. This means that she remains disentitled from EI receiving benefits.²

Overview

[4] The Claimant worked as a Registered Nurse at a hospital. The employer put the Claimant on a mandatory and unpaid administrative leave and then dismissed her because she did not comply with the covid19 vaccination policy at work.³ The Claimant then applied for EI regular benefits.⁴

[5] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended and lost her employment due to her own misconduct.⁵ As well, they decided that the Claimant had not proven that she was available for work.⁶

[6] The Claimant disagrees because she does not want to disclose her private medical information to the employer, specifically her covid19 vaccination status.⁷ Also, the Claimant says that she was available and looking for work.

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

² See sections 18(1)(a) and 50(8) of the EI Act.

³ See record of employment at GD3-22.

⁴ See application for EI benefits at GD3A-3 to GD3A-21.

⁵ See initial decision at GD3A-28 to GD3A-29.

⁶ See reconsideration decision at GD3A-74 to GD3A-75.

⁷ See appeal forms at GD2-1 to GD2-11.

Issues

[7] Was the Claimant suspended and did she lose her job because of misconduct?

[8] Was the Claimant available for work from September 13, 2021?⁸

Misconduct - Analysis

[9] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.⁹

[10] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹⁰

[11] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹¹

[12] 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.

Why did the Claimant stop working?

[13] I find that the Claimant was put on a mandatory and unpaid leave of absence/suspension on September 10, 2021 and then dismissed on October 14, 2021 because she did not comply with the employer's covid19 vaccination policy.

⁸ September 13, 2021 is the date the Commission decided the Claimant was not available for work; see GD4B-2.

⁹ See section 30 of the EI Act.

¹⁰ 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.

¹¹ 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

[14] In my view, the Claimant's unpaid leave of absence is similar to a suspension because the employer did not permit the Claimant to return or continue working. The policy also refers to a "disciplinary suspension" as a consequence.¹²

[15] This is consistent with the Claimant's testimony, the record of employment, as well as the discussions between the Claimant and employer referenced in the file.¹³

What was the employer's policy?

[16] The employer implemented a "*Covid19 Mandatory Vaccination Policy*" (policy) effective September 28, 2021 in response to their obligations under "Directive 6" as a hospital.¹⁴ A copy of the policy is included in the file.¹⁵

[17] The policy says that it has a duty to protect the health and safety of its staff and patients, so they expect all staff to receive the covid19 vaccine to reduce the risk of serious infection and transmission to staff and patients.

[18] The policy requires that, as a condition of employment, staff must be fully vaccinated and show proof of vaccine against covid19 by October 31, 2021.¹⁶

[19] The policy also provides accommodation for a valid medical contraindication or other reasonable considerations pursuant to the Ontario *Human Rights Code*.¹⁷

Was the policy communicated to the Claimant?

[20] The employer told the Commission that the policy was communicated to employees on several occasions between August 16, 2021 and October 22, 2021.¹⁸

¹² See GD3-72.

¹³ See record of employment at GD3A-22; GD3-24; GD3A-25; GD3-32.

¹⁴ See Ontario's Chief Medical Officer of Health issued Directive 6 on August 17, 2021. It affects hospitals and has legal force and effect

¹⁵ See policy at GD3A-69 to GD3A-72.

¹⁶ See GD3A-71.

¹⁷ See GD3A-71 and *Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁸ See GD3A-35 to GD3A-37; see emails starting from GD3A-41 to GD3A-68.

[21] The Claimant testified that the policy was communicated to her. Her manager told her about the policy and she confirmed receiving several emails at work. As well, a copy of the policy was sent to her.

[22] I find that the policy was first communicated to the Claimant on August 16, 2021 by email. There were other also dates of communication. This is not disputed between the parties.

What were the consequences of not complying with the policy?

[23] The policy says that “staff who continue to be non-compliant with the reporting requirements (including those who have failed to provide proof of vaccination) will be temporarily placed on a disciplinary suspension and/or have their privileges suspended, pending compliance. Thereafter, further failure to comply with the reporting requirements without reasonable explanation may lead to termination of employment for cause and/or loss of privileges”.¹⁹

[24] The policy also says that a “continued failure to comply with this policy may ultimately result in cessation of employment or permanent suspension of privileges, as applicable”.²⁰

[25] The employer told the Commission that they sent two letters to the Claimant and met with her telling her that she would be put on an administrative leave for not disclosing her vaccination status and that it may result in suspension and/or termination.²¹

[26] The Claimant testified that she did not think she would be dismissed from her job. She thought that the hospital would respect applicable laws.

¹⁹ See GD3A-72.

²⁰ See GD3A-39.

²¹ See GD3-24 and GD3-25.

Is there a reason the Claimant could not comply with the policy?

[27] As noted above, the policy provided for accommodation for valid medical contraindications or other reasonable considerations based on the Ontario *Human Rights Code*.²²

[28] The employer told the Commission that the Claimant did not ask for a medical or human rights exemption.²³

[29] The Claimant testified that she knew that the policy provided for exemptions, but said that none of them were applicable.

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

[30] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁵

[31] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²⁶

[32] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out her duties toward his employer and that there was a real possibility of suspended or let go because of that.²⁷

²² See GD3A-71 and *Human Rights Code*, R.S.O. 1990, c. H.19.

²³ See GD3-35 to GD3-36.

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁶ See *Attorney General of Canada v Secours*, A-352-94.

²⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[33] The Commission has to prove that the Claimant was suspended or 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 or lost his job because of misconduct.²⁸

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

[35] First, I find that the policy was communicated to the Claimant and she was aware of the deadline dates to comply. The Claimant also had enough time to comply with the policy.

[36] Specifically, the employer sent several emails to employees between August 16, 2021 and October 22, 2021. The Claimant also met with her employer to discuss the policy.

[37] Second, I find that the Claimant willfully and consciously chose to not to comply for her own personal reasons because she disagreed with the policy. I accept that the Claimant did not have wrongful intent when she chose not disclose her vaccination status to her employer. However, it is still misconduct because the policy required disclosure of her covid19 vaccination status a condition of her continued employment.

[38] This was a deliberate choice she made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.²⁹

[39] 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/suspension and dismissal. The consequences were communicated to the Claimant verbally and in writing. She also received a copy of the policy which outlined the consequences.

²⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[40] I was not persuaded by the Claimant's testimony that she did not expect to be terminated. I note that the employer wrote her a second letter saying that a refusal to comply within 15 days will result in termination.³⁰ She ought to have known that the employer was going to dismiss her.

[41] Fourth, I find that the Claimant has not proven she was exempt from the policy. The Claimant confirmed that she did not ask her employer for an exemption because none of the circumstances were applicable.

[42] 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. So, the disclosure of her vaccination status for covid19 became a condition of her employment when they introduced the policy. The Claimant wilfully breached the policy when she chose not to comply with it and that interfered with her ability to carry out her duty to the employer.

[43] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.³¹ In this case, it was not involuntary because it was the Claimant's actions that led to her dismissal.

[44] Even if the Claimant paid EI premiums, this does not grant her an automatic right to EI benefits. At the hearing, the Claimant explained that she was unsatisfied with the customer service she received from EI agents, however this is not something I can resolve. The Claimant should raise her customer service concerns directly with Service Canada.

³⁰ See GD3-25.

³¹ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

What about the Claimant's other arguments?

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

- a) She was wrongfully dismissed by the employer
- b) The policy was illegal and unjust
- c) The employer breached her privacy rights
- d) She was not putting anyone at risk for not disclosing her vaccination status
- e) She was discriminated against under Ontario's Human Rights code
- f) The employer failed to accommodate her because she was willing to do rapid testing
- g) There was no vaccine mandate, etc.

[46] 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.³² I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[47] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments.

[48] The Claimant confirmed that she did file a grievance and the union helped in the beginning. However, they are unable to help her because she does not want to attest to her vaccination status.

³² See *Canada (Attorney General) v Marion*, 2002 FCA 185.

Availability – Analysis

[49] 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.

[50] First, the *EI Act* says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.³³ The *EI Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.³⁴ I will look at those criteria below.

[51] 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.³⁵ Case law gives three things a claimant has to prove to show that they are “available” in this sense.³⁶ I will look at those factors below.

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

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

Reasonable and customary efforts to find a job

[54] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.³⁷ I have to look at whether her 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.

³³ See section 50(8) of the EI Act.

³⁴ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

³⁵ See section 18(1)(a) of the EI Act.

³⁶ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

³⁷ See section 9.001 of the Regulations.

[55] 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:³⁸

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

[56] I find that the Claimant has not proven that her efforts to find a job were reasonable and customary for the following reasons. So, she remains not entitled to EI benefits under this section.

[57] At the hearing, I asked the Claimant about her efforts to find work. She explained that she had applied for one or two jobs online and updated her resume. She was also receiving job related ads sent by indeed and LinkedIn.

[58] The Claimant said that she eventually secured an "on-call" nursing job with an agency around April or May 2022. At one point, she was also offered a healthcare aide job, but she declined it because the 45 minute commute was not feasible.

[59] I do not find that the Claimant's efforts were sustained from September 13, 2021. The file shows that she spoke to the Commission on January 20, 2022, and told them she had not applied anywhere, but had jobs lined up with employers who were seeking her out.³⁹ She spoke again to the Commission and when asked to provide the names of employers, she did not provide that information.⁴⁰

³⁸ See section 9.001 of the Regulations.

³⁹ See GD3B-56

⁴⁰ See GD3B-57.

[60] At the hearing, I asked the Claimant about her efforts. However, she was unable to provide any specific details about the places she applied to, or when she applied to them. She did not provide any other supporting evidence to prove that she was actively applying for jobs online.

[61] I acknowledge that she made other typical job seeking efforts, such as updating her resume and receiving job alerts, but this is not enough given the period time being considered (from September 13, 2021). In my view, her best chance at finding work was to apply for suitable jobs when she lost her employment. She has not shown that her efforts were sustained.

Capable of and available for work

[62] 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:⁴¹

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

When I consider each of these factors, I have to look at the Claimant's attitude and conduct.⁴²

⁴¹ 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.

⁴² 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.

- **Wanting to go back to work**

[63] I find that the Claimant has shown that she wanted to go back to work as soon as a suitable job was available. In particular, she testified that she loved her job as a nurse and wanted to go back to work as soon as possible.

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

[64] 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.⁴³

[65] The Claimant's efforts to find a new job included applying for 1 or 2 jobs online, updating her resume and receiving job alerts. She did secure employment around April or May 2022 with an agency for casual work as a nurse.

[66] I find that those efforts were not enough to meet the requirements of this second factor because applying for only a few jobs from September 13, 2021 is not enough.

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

[67] I find that the Claimant has set personal conditions that might have unduly limited her chances of going back to work. Specifically, the Claimant has limited herself to finding jobs in healthcare that do not require her to disclose her vaccination status.

[68] The Claimant is a Registered Nurse and said that most places required prospective employees to disclose their covid19 vaccination status. She said that it was hard to find suitable job opportunities while she was looking. However, her recent casual role with the agency does not require her to disclose her vaccination status.

[69] The Claimant did consider applying for administrative jobs, but she noted that she does not have any work experience in that field, so I accept that it was likely not suitable work for her.

⁴³ 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.

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

[70] Based on my findings on the three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[71] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[72] The Claimant has not shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant is disentitled from receiving EI benefits.

[73] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section