



Citation: *MM v Canada Employment Insurance Commission*, 2022 SST 1747

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

## **Decision**

**Appellant:** M. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (462393) dated April 12, 2022 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Teleconference

**Hearing date:** September 13, 2022

**Hearing participant:** Appellant

**Decision date:** October 19, 2022

**File number:** GE-22-1528

## Decision

[1] M. 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 allowing the Claimant's appeal on the issue of availability for work. I find that he has proven that he was available for work. But I am dismissing the Claimant's appeal on the issue of misconduct. I find that his employer suspended him for misconduct. This means that he isn't entitled to EI benefits during his suspension.

## Overview

[3] The Claimant's employer introduced a vaccination policy. The employer required all employees to be fully vaccinated against COVID-19. The Claimant asked the employer for an exemption from the policy for religious reasons. The employer refused the Claimant's exemption request and asked him to provide proof of vaccination by a deadline. The Claimant wasn't vaccinated by the deadline, and so the employer put him on an unpaid leave of absence.

[4] The Commission says the Claimant's employer suspended him. The Commission says he isn't entitled to EI benefits during his suspension because the employer suspended him for misconduct. The Commission says he knew about the employer's vaccination policy and he knew that he was likely to lose his job if he didn't follow the employer's policy.

[5] The Commission also says the Claimant wasn't available for work during his suspension. The Commission says that he set personal conditions that unduly limited his chances of returning to the labour market because he wasn't vaccinated against COVID-19. The Commission says it was unlikely that he would find a job because he wasn't vaccinated.

[6] The Claimant disagrees with both of the Commission's decisions. He says he was trying to find a job. He says he applied for jobs with some employers who didn't have a mandatory vaccination policy. He also says that he would have asked any prospective employers for an exemption from a vaccination policy.

[7] The Claimant also says he wasn't suspended for misconduct. He says his employer's vaccination policy was unreasonable. He says his employer should have granted him an exemption from the policy because of his religious beliefs. He says that the employer violated his human rights and the terms of his collective agreement.

## **Issues**

[8] I have to make two decisions.

[9] First, I must decide if the Claimant lost his job because of misconduct. To make this decision, I will decide if he stopped working because of a suspension. Then, I will decide if the reason his employer suspended him is misconduct under the law.

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

## **Analysis - Misconduct**

### **Did the employer suspend the Claimant?**

[11] The Claimant says his employer didn't suspend him. He says the employer put him on an unpaid leave of absence. He argues that the *Digest of Benefit Entitlement Principles* (Digest) says the Commission should treat his loss of employment as a lay-off.

[12] The Commission disagrees. The Commission says the Claimant stopped working because of a suspension.

[13] I agree with the Commission. I will treat the Claimant's loss of employment as a suspension.

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

[15] It is also clear that the Claimant didn't terminate the Claimant. He wasn't fired. At the hearing, he said he returned to work on June 20, 2022. So, I find that the Claimant didn't lose his job permanently.

[16] All the evidence in the appeal file shows me that 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 his employer's policy. The Commission says this is equivalent to a suspension, and I agree.

[17] I disagree that the Claimant's employer laid him off. There is no evidence in the appeal file that says there was a shortage of work or a workplace shutdown. I understand that the Claimant thinks that chapter 6.6.2 of the Digest describes his situation, but I disagree. This section of the Digest refers to voluntary leaving, and there is no evidence that the Claimant chose to leave his job. Furthermore, the section of the digest quoted by the Claimant has no reference to the legislation.

[18] The Digest is a useful tool, but it isn't the law. I have to rely on the *Employment Insurance Act* (EI Act), the *Employment Insurance Regulations* (EI Regulations), and case law because these all form EI law. The Digest alone isn't the law.

[19] In this case, the Claimant's loss of employment happened as a direct result of his actions. He stopped working because he wasn't following his employer's policy. So, I find that the parts of EI law that refer to suspension for misconduct are the most suitable frame to make decisions about the Claimant's loss of employment.

[20] Now, I must make a decision about the cause of the Claimant's loss of employment. Then, I will decide if the reasons he lost his job amount to misconduct under the law.

## **Why did the employer suspend the Claimant?**

[21] The Commission says the Claimant's employer suspended him because he didn't follow the employer's vaccination policy. The Commission says his employer required all employees to provide proof of full vaccination against COVID-19 by a deadline. The Claimant didn't provide proof of full vaccination by the employer's deadline. The employer suspended him. The Commission says there is a direct link between the Claimant's failure to follow the vaccination policy and his loss of employment.

[22] At the hearing, the Claimant said he agreed that he stopped working because he didn't follow the employer's vaccination policy. He has never said that he lost his employment for any other reason. He isn't trying to argue that the employer used the vaccination policy as an excuse to suspend him for another reason.

[23] There isn't any evidence in the appeal file that makes me think the employer suspended the Claimant for any other reason. It is clear to me that there is a direct, causal link between the Claimant's failure to follow the employer's vaccination policy and his loss of employment. In other words, his failure to follow the vaccination policy caused his suspension from employment.

[24] So now I must decide if the Claimant's actions are misconduct under the law.

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

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

[26] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>1</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>2</sup> The Claimant doesn't have to have

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<sup>1</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

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>3</sup>

[27] 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 losing his job because of that.<sup>4</sup>

[28] 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>5</sup>

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

[30] The Claimant disagrees. He says the employer's vaccination policy was unreasonable. He says the employer should have granted his exemption request. He says the employer violated his rights and didn't follow his collective agreement.

[31] I agree with the Commission. I find that the reasons the Claimant stopped working amount to misconduct under EI law.

[32] The Claimant and the Commission agree on the following basic facts:

- The Claimant knew that his employer introduced a mandatory vaccination policy. He knew that the policy meant that he had to show proof of vaccination or have his employer approve an exemption request.

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<sup>3</sup> See *Attorney General of Canada v Secours*, A-352-94.

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

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

- The Claimant knew the deadline for complying with the employer's vaccination policy.
- The Claimant's employer didn't grant his request for an exemption from the vaccination policy. The Claimant knew that his employer didn't grant his request for an exemption.
- The Claimant knew there were consequences for failing to follow the vaccination policy. He knew that he couldn't keep working as long as he didn't follow the vaccination policy.
- Even though the Claimant knew about the vaccination policy and the consequences, he deliberately chose not to follow the vaccination policy. He wasn't vaccinated against COVID-19 by the employer's deadline.

[33] If I accept all of the above facts, then I have to find that the Claimant stopped working because of misconduct. This is because he acted deliberately. He knew his actions were likely to lead to his suspension. And his actions were the direct cause of his suspension.

[34] I understand that the Claimant has made many arguments about why he doesn't think he lost his job because of misconduct. But I am not convinced by any of the Claimant's arguments.

[35] The Claimant says that the EI Act says I must consider different circumstances. He says I have to consider whether the employer's actions violated the law, whether the employer discriminated against him, whether the employer made significant changes to his work duties, and whether his employer made significant changes to the terms and conditions of his employment. In short, the Claimant points to the circumstances set out in section 29(c) of the EI Act and says I have to consider these circumstances.

[36] But the law says I have to consider these circumstances in cases of voluntary leaving. In other words, if the Claimant had chosen to leave his job, then the law tells me I have to consider all of the circumstances that existed when he chose to leave his

job. The law gives a list of some circumstances, but I can consider circumstances that aren't listed in the law.

[37] But in this appeal, neither the Claimant nor the Commission are arguing that the Claimant chose to leave his job. So the parts of the law that talk about voluntary leaving aren't relevant to this decision. When I am making decisions about misconduct, I can't consider whether the Claimant had reasonable alternatives to leaving his job.

[38] The Claimant also argues that I should consider the *Canadian Bill of Rights* when I make my decision. He says that his employer violated his rights.

[39] 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 *Canadian Charter of Rights and Freedoms* (Charter) is just 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.

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

[41] The Tribunal is allowed to consider whether a provision of the EI Act or related legislation infringes rights that are guaranteed to a claimant by the Charter.

[42] But the Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond our 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.

[43] The Claimant can pursue his arguments about the *Canadian Bill of Rights* in other venues. But I can only make a decision about how the EI Act applies to his situation.

[44] The Claimant refers to many different court cases. He says that these decisions apply to his situation. But the case law the Claimant is relying on deals with provincial



employment law, constructive dismissal, and labour rights. These decisions don't bind me as I make decisions about the EI Act and misconduct.

[45] The Claimant argues that I must consider whether his employer's vaccination policy was reasonable. He says that other Tribunal decisions have considered whether vaccination policies are reasonable.

[46] The only example the Claimant provided was a decision about voluntary leaving. In this case, the Tribunal Member considered the employer's vaccination policy as a circumstance that existed when the claimant chose to leave their employment.

[47] But in this appeal, the Claimant didn't choose to leave his job. So, circumstances like the reasonableness of the vaccination policy aren't relevant to my decision.

[48] In fact, when I am looking at misconduct, case law explicitly says I can't look at the employer's conduct. I am not supposed to consider whether the employer acted reasonably or not. I am only considering the Claimant's actions and whether his actions are misconduct under the law.

[49] This is why the Federal Court decision in *Paradis*<sup>6</sup> is important. Even though the Claimant doesn't think this decision is relevant to his appeal, this decision talks about important principles I must consider when I make decisions about misconduct.

[50] Finally, the Claimant makes a lot of arguments about his religious exemption request. He provides evidence explaining his religious beliefs and how they affect his decisions about vaccination.

[51] But it is not my role to make any decisions about the Claimant's request for an exemption. I can't look at all his evidence and order his employer to grant his request for a religious exemption. I can't assess his evidence and decide whether his employer ought to have granted his religious exemption request.

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<sup>6</sup> *Paradis v Canada (Attorney General)*, 2016 FCA 1282.

[52] Again, the case law says I can only look at the Claimant's actions and decide if he lost his job because of misconduct, under the meaning of the EI Act.

[53] And in this case, I find that the Claimant's employer suspended him because of misconduct. This means he isn't entitled to EI benefits during his suspension.<sup>7</sup>

## **Analysis - Availability**

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

[55] 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.<sup>8</sup> The *Employment Insurance Regulations* (EI Regulations) give examples that help explain what "reasonable and customary efforts" means.<sup>9</sup>

[56] 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.<sup>10</sup> Case law gives three things you have to prove to show that you are "available" in this sense.<sup>11</sup>

[57] 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.

[58] 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.

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<sup>7</sup> Section 31 of the *Employment Insurance Act*.

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

<sup>9</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>10</sup> See section 18(1)(a) of the Act.

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

## **Reasonable and customary efforts to find a job**

[59] The Commission says it used the part of the law that talks about reasonable and customary job search efforts to make its decision about the Claimant's entitlement to EI benefits.

[60] But the Commission didn't make any arguments about the Claimant's job search efforts in its submissions. The first decision letter doesn't say anything about the Claimant's job search efforts. In its records of conversation, Commission agents didn't warn the Claimant about his job search efforts.

[61] So, I find that the Commission hasn't shown that it really used this part of the law to make a decision about the Claimant's entitlement to EI benefits. I won't look at this part of the law.<sup>12</sup>

[62] I still have to look at the other part of the law that talks about availability for work.

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

[63] 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.

[64] 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:

- 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;
- You must show that you made reasonable efforts to find a suitable job;

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<sup>12</sup> I am guided by the AD decision *LD v Canada Employment Insurance Commission*, 2020 SST 688.

- 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.<sup>13</sup>

– **Wanting to go back to work**

[65] The Claimant has always said he wanted to work. At the hearing, he said he returned to work with his usual employer on June 20, 2022.

[66] The Commission hasn't made any arguments on this point, and I have no reason to doubt the Claimant's statements. So, I find that the Claimant has shown that wanted to return to work as soon as a suitable job was available.

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

[67] The Claimant told the Commission he was trying to find a job. He talked about his job search efforts. And at the hearing, he gave me more information about his efforts. He said he looked for work several times a week. He looked for jobs online using job banks and Linked In. He spoke to a recruiter. He networked with former employers, neighbours, and friends. He applied for jobs and spoke to prospective employers.

[68] The Commission hasn't made any arguments about the Claimant's job search efforts. For instance, the Commission isn't arguing that it thinks the Claimant wasn't doing enough to try to find a job.

[69] I think the Claimant described reasonable job search efforts. I find that he has proven that he was making reasonable efforts to find a suitable job.

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<sup>13</sup> 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.

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

[70] The Commission's arguments are mostly about this point. The Commission says the Claimant unduly limited his chances of returning to the labour market because he isn't vaccinated against COVID-19.

[71] The Claimant disagrees. He says that not all employers have a vaccination requirement. He also says that he would ask for an exemption from the vaccination policy if he got a job offer from an employer with a vaccination requirement. He says he didn't limit his chances of returning to the labour market.

[72] I agree with the Claimant. I am not convinced that the fact that he isn't vaccinated against COVID-19 unduly limits his chances of returning to the labour market.

[73] The Commission hasn't shown me that the Claimant works in an industry where vaccination requirements are the standard. For example, the Claimant isn't a healthcare worker. So I am not convinced that most or all of the jobs in the Claimant's field require vaccination.

[74] The Claimant says he applied for some jobs without a vaccination requirement and I believe him. I also believe that he would have asked for an exemption from a vaccination policy. I don't know if a prospective employer would have granted the Claimant an exemption from a vaccination policy, but I am not convinced that the need to ask for an exemption is a personal condition that would unduly limit the Claimant's chances of finding a job.

[75] The Claimant said he expanded his job search to 100 km from his home city. He said he was willing to commute and that working from home is common in his type of work. I give weight to the fact that the Claimant expanded his job search in other ways.

[76] So, I am satisfied that the Claimant didn't set personal conditions that unduly limited his chances of returning to the labour market.

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

[77] I find that the Claimant wanted to work. He made reasonable efforts to find a job. Even though he isn't vaccinated against COVID-19, I am not convinced that this is a personal condition that unduly limited the Claimant's chances of returning to the labour market.

[78] So, I find that the Claimant has proven that he was capable of and available for work.

**Conclusion**

[79] I am allowing the Claimant's appeal on the issue of availability for work. But this doesn't mean that he can get EI benefits. This is because I am dismissing his appeal on the issue of misconduct. I find that his employer suspended him for misconduct. This decision means that he can't get EI benefits during his suspension.

Amanda Pezzutto

Member, General Division – Employment Insurance Section