



Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 490

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

Decision

Appellant: L. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (488164) dated June 22, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: December 14, 2022

Hearing participant: Appellant

Decision date: February 6, 2023

File number: GE-22-2490

Decision

[1] I am dismissing L. M.'s appeal.

[2] The Commission has proven that his employer suspended him for not following its mandatory COVID vaccination policy. This counts as misconduct under the *Employment Insurance Act* (EI Act). So he isn't entitled to Employment Insurance (EI) regular benefits during his suspension.

[3] And he hasn't proven he was available for work during his suspension. This is another reason he isn't entitled to receive EI regular benefits during his suspension.

Overview

[4] The Claimant was suspended from his job working for the X (X or employer).¹

[5] The employer says it suspended him because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[6] He doesn't dispute this.

[7] The Commission accepted the employer's reason for the suspension. It decided that the Claimant's employer suspended him for a reason the EI Act considers to be misconduct. So the Commission didn't pay him EI benefits for the period of his suspension (December 13, 2021 to June 17, 2022).

[8] The Claimant disagrees. He says refusing to follow the vaccination policy wasn't misconduct. The vaccination policy wasn't reasonable and shouldn't apply to him because he worked from home. The Commission's policy and an arbitration decision support him. He also says his employer's vaccination policy violated his rights under the *Canadian Charter of Rights and Freedoms* (Charter) and privacy law, and violated the principle of informed consent to medical treatment.

¹ In this decision, I refer to L. M. as the "Claimant". I do this because the *Employment Insurance Act* (EI Act) uses the word "claimant", meaning the person who has made a claim for EI benefits. And he is appealing the Commission's decision to deny his EI claim.

[9] The Commission also decided that the Claimant is disentitled from receiving EI regular benefits because he wasn't available for.

[10] A claimant for regular benefits has to show they are available for work. In other words, a claimant has ongoing duty to look for work.

[11] The Commission says the Claimant hasn't proven he was available. He unduly restricted his availability for work in two ways. First, he restricted his job search. He was not looking for jobs in his field because of potential conflicts with his X job. Second, his decision not to be vaccinated unduly restricted his availability.

[12] The Claimant disagrees. He says he was ready, willing, and able to work since the first day of his suspension. He says his employer's conflict of interest guidelines unduly restricted his options, he didn't.

[13] I have to decide whether the Claimant was suspended from his job for misconduct under the EI Act. And I have to decide whether the Claimant has proven he was available for work.

Matter I have to consider first

The decisions the Claimant is appealing

[14] At the beginning of the hearing the Claimant and I discussed two things that affected the Commission's reconsideration decisions:

- The Commission says it made two clerical errors in its reconsideration decision.²

² See GD4A-2: "The attention of the Tribunal is drawn to the fact that a clerical error was made in the letter dated April 8, 2022. The Commission notified the claimant that he was not entitled to regular benefits effective December 12, 2021 as the claimant lost his employment due to misconduct whereas it should have imposed an indefinite disentitlement effective December 13, 2021 for a suspension from his employment by reason of his own misconduct " And see GD4B-2: "The attention of the Tribunal is drawn to the fact that a clerical error was made in the letter dated April 22, 2022. The Commission stated the following regarding availability for work: We cannot pay you Employment Insurance benefits from December 13, 2021 to June 17, 2022, because you have not shown your availability for work as, while

- Between the Commission's original decision and its reconsideration decision, the Claimant's employer ended its COVID vaccine mandate, and he went back to work.

[15] The Claimant agreed that he is appealing the Commission's decisions that:

- He was not entitled to EI regular benefits from December 13, 2021 to June 17, 2022 because he was suspended from his job as a result of his misconduct.³
- He was not entitled to EI benefits from December 13, 2021 to June 17, 2022 because he didn't show his availability for work during this period.

Issues

[16] There are two issues in this appeal.

- Was the Claimant suspended from his job for a reason the EI Act considers to be misconduct?
- Was the Claimant available for work during his suspension?

Misconduct

[17] 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.

[18] A suspension under the EI Act means the same thing as being put on a leave without pay by the employer.

[19] I have to decide two things:

taking the training course, you were not looking for work. whereas it should have stated: We cannot pay you Employment Insurance benefits from December 13, 2021 to June 17, 2022, because you have not shown your availability for work because you told us that you were not prepared to accept work and/ or looking for other employment while on suspension/unpaid leave."

³ Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time. In this decision, a suspension means the same thing as an unpaid leave of absence, a leave of absence without pay, and a leave of absence.

- the reason the Claimant was suspended from his job
- whether the EI Act considers that reason to be misconduct

The reason the Claimant was suspended

[20] I find the Claimant's employer suspended him because he didn't comply with its vaccination policy.

[21] The Claimant and the Commission agree about this. It's what:

- the Claimant wrote in his EI application and told the Commission⁴
- he wrote in his notice of appeal⁵
- he testified to at the hearing
- his employer wrote on the record of employment⁶

[22] I have no reason to doubt what the Claimant and his employer said. And there is no evidence that goes against what they said.

⁴ See the Claimant's EI application at GD3A-7, where he says he is on a leave of absence because of vaccine policy. See the Commission's notes of its phone call with the Claimant at GD3A-17 and GD3A-40.

⁵ See his notice of appeal at GD2-5.

⁶ See the record of employment at GD3A-15, where the employer writes, "Leave due to non-compliance with the employer's vaccination policy, please treat as code M". Code M refers to a dismissal or suspension.

The reason is misconduct under the law

[23] The Claimant's refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[24] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the issues I have to consider when making my decision.

[25] The Commission has to prove it's more likely than not the Claimant was suspended from his job because of misconduct, and not for another reason.⁷

[26] I have to focus on what the Claimant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.⁸ I can't consider whether the employer's policy is reasonable, or whether a suspension was a reasonable penalty.⁹

[27] The Claimant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.¹⁰ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.¹¹ And misconduct also includes conduct that is so reckless that it is almost wilful.¹²

[28] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out a duty he owed to his employer, and knew or should have known there was a real possibility of being suspended because of that.¹³

[29] I can only decide whether there was misconduct under the EI Act.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁸ This is what sections 30 and 31 of the EI Act say.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Attorney General of Canada v Secours*, A-352-94.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *McKay-Eden v His Majesty the Queen*, A-402-96.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[30] I can't make my decision based on other laws.¹⁴ I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or decide whether an employer breached a collective agreement.¹⁵ I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.¹⁶ And I can't decide whether an employer breached a claimant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Claimant say

[31] The Commission and the Claimant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Claimant's conduct is misconduct under the EI Act.

[32] The Commission says that there was misconduct under the EI Act because the evidence shows:¹⁷

- the employer had a vaccination policy and communicated that policy to all staff¹⁸
- the policy applied to all employees, including those working remotely and teleworkers¹⁹

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See the Commission's Representations at GD4.

¹⁸ See at GD3A-19 to GD3A-35, Government of Canada, *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* (modified 2021-10-06) (vaccination policy).

¹⁹ See the vaccination policy as sections 3.1.3 and 6.1.1.

- under the vaccination policy, the Claimant had to disclose his vaccination status to his employer by October 29, 2021²⁰
- he knew what he had to do under the policy²¹
- he also knew his employer could suspend him under the policy if he didn't give proof of vaccination (or get an exemption) by two weeks after the attestation deadline²²
- he didn't apply for an exemption²³
- he made a conscious and deliberate personal choice not to get vaccinated by the deadline²⁴
- his employer suspended him because he didn't comply with its vaccination policy²⁵

[33] In his reconsideration request the Claimant wrote, “the vaccination policy was clearly communicated and I was informed of the result of non-compliance”.²⁶ He told the Commission he learned about the vaccination policy on November 10, 2021, the deadline to attest was November 30, and he had until December 10 to get vaccinated.²⁷

²⁰ See the vaccination policy at section 3.1.2 and 3.2.1. The policy says employees have to be fully vaccinated and attest to their vaccination status by October 29, 2021.

²¹ See the Commission's notes of its phone call with the Claimant at GD3A-17 and GD3A-40.

²² See the vaccination policy at section 7.1.2.2 under “Consequences of Non-Compliance”, which says the employer will place employees unwilling to be fully vaccinated or disclose their vaccination status on administrative leave without pay 2 weeks after the attestation deadline. And see the Commission's notes of its phone call with the Claimant at GD3A-17 and GD3A-40.

²³ See the Commission's notes of its phone call with the Claimant at GD3A-17 and GD3A-40.

²⁴ See the Commission's notes of its call with the Claimant, at GD3A-17. According to those notes he said, “Medical decisions are mine and I don't think its appropriate for an employer to tell me what medical procedures to have”. The Claimant said something similar at the hearing.

²⁵ See above where I reviewed the evidence about the reason his employer suspended him. And I found he was suspended because he didn't comply with his employer's vaccination policy.

²⁶ See GD3-45.

²⁷ See the Commission's notes of its phone call with the Claimant at GD3A-17 and GD3A-47.

The Commission has proven misconduct under the EI Act

[34] There's one key fact in this appeal where the evidence isn't consistent: the deadline for the Claimant to attest to his vaccination status. The vaccination policy says October 29, 2021.

[35] What's more important than the date is that the Claimant knew about the vaccination policy, what he had to do, by when, and his employer gave him time to do those things, he didn't do them, and he knew the consequences.

[36] I have no reason to doubt the Claimant's evidence (what he said to the Commission and at the hearing, and what he wrote in her reconsideration request and appeal notice). His evidence is consistent. He said the same thing to the Commission and the Tribunal. And his story stayed the same over time.

[37] I accept the Commission's evidence because it's consistent with the Claimant's evidence. And there is no evidence that contradicts it.

[38] Based on the evidence I have accepted, I find that the Commission has proven the Claimant's conduct was misconduct because it has shown that he:

- knew about the vaccination policy
- knew about his duty to get fully vaccinated and attest to that (or get an exemption) by the deadline
- knew that his employer would suspend him if he didn't get vaccinated
- consciously, deliberately, and intentionally made a personal decision not to get vaccinated by the deadline
- was suspended from his job because he didn't comply with the vaccination policy

The Claimant's other arguments

[39] In his appeal notice and at the hearing the Claimant said his conduct wasn't misconduct, so the Commission should pay him EI regular benefits, because:²⁸

- The EI Commission's website says that the Commission will look at "if applying the policy to you was reasonable within your workplace context". The Claimant says it wasn't because he worked 100% from home and had no contact with other employees.
- An arbitration decision involving the Electrical Safety Authority and Power Worker's Union (November 11, 2021) says a mandatory vaccination policy isn't reasonable for workers who work from home.
- Section 7.3.2 of the Employment Insurance *Digest of Benefit Entitlement Principles* (Digest) says there is no insubordination where a worker finds it impossible, in all conscience, to follow a policy set by the employer.²⁹ It goes on to say the Commission should consider whether the policy appears to be reasonable and whether there were other reasonable alternatives in the circumstances.

[40] I don't agree with these arguments. They don't change my decision that the Claimant's conduct was misconduct under the EI Act.

[41] I don't have to follow the Commission's website, the Digest, or an arbitration decision based on a collective agreement. I have to interpret and apply the EI Act based on court decisions—which I have to follow. None of the sources the Claimant refers to bind me to decide his case one way or another. And I am not going to follow them.

²⁸ See his notice of appeal at GD2-5 to GD2-7, and his reconsideration request at GD3-43 to GD3-46.

²⁹ The Digest is available online: [Digest of Benefit Entitlement Principles - Canada.ca](https://www.ei.gc.ca/en/employment-insurance/benefit-entitlement-principles).

[42] At the hearing the Claimant referred to two Social Security Tribunal (Tribunal) decisions that he says support his argument that an employer's policy has to be reasonable in the context of the worker and workplace.³⁰

[43] I don't have to follow other Tribunal decisions. I can if I find them relevant and the reasons persuade me. I have reviewed the two decisions the Claimant told me about.

[44] I find the two Tribunal decisions the Claimant referred me to don't his argument. So they make no difference to my conclusion that his refusal to follow his employer's vaccination policy is misconduct under the EI Act.

[45] Finally, the Claimant argued that vaccine mandates infringe his rights under the Charter, go against Ontario privacy law, and are inconsistent with the principles of informed consent and non-coercion in medical treatment.

[46] Unfortunately for the Claimant I can't consider these arguments. I can't apply the laws and principles he relies on.³¹ I can only consider the EI Act when I decide whether his conduct is misconduct under that Act.

Summary of my finding about misconduct

[47] After considering and weighing all the documents and testimony, I find the Commission has shown the Claimant was suspended from his job for a reason the EI Act considers to be misconduct.

Availability for Work

[48] I find the Claimant hasn't proven he was available for work from December 13, 2021 to June 17, 2022. This is the period of his suspension since the Claimant returned to work on June 20, 2022. Here are the reasons that support my finding.

³⁰ See *LJ v CEIC*, 2022 SST 149 and *AS v CEIC*, 2022 SST 215.

³¹ The Tribunal can hear Charter arguments if a claimant follows the rules to make a Charter challenge. The Claimant didn't in his appeal. So I have no power to hear and decide Charter arguments.

[49] Two sections of the EI Act require claimants to show that they are available for work.

- Section 50(8) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.
- Section 18(1)(a) says that a claimant has to prove that they are “capable of and available for work” but can’t find a suitable job.

[50] The law sets out the criteria I have to look at when I figure out whether a job is suitable for the Claimant.³² The court cases say that “suitable employment” can consider the claimant’s personal circumstances of the claimant.³³ And, more importantly what counts as suitable employment may vary as the period of gets longer.³⁴

[51] My findings on the facts don't depend on the legal tests. But my conclusions about whether the Claimant has met the legal tests depend on my findings of fact. So next I will look at the evidence and make findings of fact. Then, based on my findings of fact, I will apply the two availability sections of the EI Act to the Claimant’s circumstances.

³² Section 6(4) of the EI Act says employment isn’t suitable if (a) it arises in consequence of a work stoppage attributable to a labour dispute; (b) it is in the claimant’s usual occupation and is either at a lower rate of earnings or on conditions less favourable than those observed by agreement between employers and employees or, in the absence of any such agreement, than those recognized by good employers; or (c) it is not in the claimant’s usual occupation and is either at a lower rate of earnings or on conditions less favourable than those that the claimant might reasonably expect to obtain, having regard to the conditions that the claimant usually obtained in their usual occupation, or would have obtained if they had continued to be so employed. Section 6(5) says: After a lapse of a reasonable interval from the date on which an insured person becomes unemployed, paragraph (4)(c) does not apply to the employment described in that paragraph if it is employment at a rate of earnings not lower and on conditions not less favourable than those observed by agreement between employers and employees or, in the absence of any such agreement, than those recognized by good employers. Section 9.002 of the EI Regulations says the criteria for determining what constitutes suitable employment are: (a) the claimant’s health and physical capabilities allow them to commute to the place of work and to perform the work; (b) the hours of work are not incompatible with the claimant’s family obligations or religious beliefs; and (c) the nature of the work is not contrary to the claimant’s moral convictions or religious beliefs.

³³ See *Canada (Attorney General) v Whiffen*, A-1472-92.

³⁴ See *Canada (Attorney General) v Whiffen*, A-1472-92.

The parties' evidence and positions

[52] The Commission says it disentitled the Claimant under both sections.³⁵ But it makes its legal argument without referring specifically to either section.³⁶ In any event, it's up to the Claimant to prove he was available for work.

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

- First, the Commission says he was limiting himself because of his X job. He knew once his suspension ended, he was going back to that job, so he didn't make enough efforts to find work. And during his suspension he wasn't applying for jobs where they would go against the X's conflict of interest rules. The Claimant admitted he wasn't able to look for other employment, and hadn't applied for other positions, looked online, or registered on job sites for employment.³⁷
- Second, the Commission says his choice not to get vaccinated against COVID made it difficult to find another job because potential employers' job ads said the employers required proof of vaccination.

[54] According to the Commission, the Claimant told the Commission:³⁸

- it was hard finding new employment because of the X's conflict of interest rules, which limited the places he can apply to
- the only positions he would be able to do would be in finance, which would be a conflict of interest, and if he took a position where there was a conflict, he would lose his permanent X job

³⁵ See GD4B-1, where it states: "The claimant is appealing the Commission's decision resulting from his request for reconsideration under section 112 of the Employment Insurance Act (the Act) regarding a disqualification imposed pursuant to sections 6, 18 and 50 of the Act and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations) for failing to prove his availability for work"

³⁶ See GD4B-1

³⁷ The Commission refers to its notes of its call with the Claimant, at GD3-14.

³⁸ See the Commission's notes of its call with Claimant at GD3-11 (April 6, 2022) and GD3-14 (June 21, 2022).

- he wasn't applying to jobs outside his profession because he didn't know what he could do or what skills he had
- he applied to a couple jobs per week but was finding it difficult to get a new position (Commission's notes from April 2022)
- he had not applied for any position during his suspension (notes from June 2022)
- the majority of new employers that reached out to him asked for proof of COVID vaccination, but he didn't say how many employers had reached out
- he had not looked online or registered on job employment sites

[55] In his appeal notice the Claimant says that it was his employer's conflict of interest rules and vaccine mandates that restricted his options for finding suitable employment, not him. And he was "ready, willing and able to work" since the first day of his suspension.³⁹

[56] The Claimant testified at the hearing he has spent his entire career working for the X in taxation. And he had hoped his suspension would not last as long as it did.

[57] He testified that during his suspension:

- he spoke with his team leader at X, who told him he would be dismissed if he broke the X conflict of interest rules during his suspension
- it would be counterproductive for him to go to another employer in the same industry (and lose his job at X because of a conflict), since his lay-off was only temporary
- he did a lot of personal income tax returns for free during his suspension, but couldn't do business returns because of potential conflicts
- he looked at a couple hundred job ads, where there wouldn't be a conflict of interest, but he stopped doing that because the jobs required COVID vaccination and the "mandate thing" got him frustrated pretty quickly

³⁹ See GD2.

- these were entry level jobs that paid much less than his X job

[58] The evidence has one seeming inconsistency, about whether he applied for jobs. However, the evidence makes sense when I look at what happened over time—and the inconsistency is no longer there.

[59] I find the Claimant gave up looking for work and applying for jobs, sometime after April 2022. I accept the Commission's evidence that he was applying for a couple jobs a week (April 2022 notes). The Claimant testified in an upfront way and answered my questions. I have no reason to doubt his testimony. He was clear about being frustrated in his job search (because of the conflict rules and not being vaccinated). This supports my conclusion that he gave up looking for work.

[60] I don't accept that he never applied for jobs during his suspension (June 2022 notes). No other evidence supports that.

[61] I accept the Commission's evidence and the Claimant's evidence on all other points without hesitation. That evidence is consistent. The Claimant said and wrote more-or-less the same thing to the Commission and to the Tribunal. His story didn't change over time. And there is no contradictory evidence.

[62] I will refer to the evidence I have accepted when I apply the legal test under the two availability sections of the EI Act.

Reasonable and customary efforts to find a suitable job

[63] The law says claimants have to prove they are making reasonable and customary efforts to find a suitable job.⁴⁰ In other words, the Claimant has to keep trying to find a suitable job.

⁴⁰ See section 50(8) of the Act.

[64] I have to consider his efforts, consider whether they were sustained, and consider whether they were directed toward finding a suitable job.⁴¹ The EI Regulations list nine job-search activities I have to consider.⁴²

[65] *Based on the evidence I accepted above*, the suitability of employment isn't an issue in this appeal. To the limited extent he did search for work, the Claimant scanned ads for jobs in the larger finance field, not limited to his speciality of taxation. And he looked into less senior jobs that paid less than his X job.

[66] *Based on the evidence I accepted above*, I find the Claimant hasn't proven that his efforts to find a job were reasonable and customary. Here is a brief summary of the evidence I accepted above, relevant to "reasonable and customary efforts": He did a limited number of job search activities, for a limited period of time. He scanned job ads and applied for a couple jobs per week, limited to those jobs that didn't create a potential conflict. And even those activities he gave up on after he became frustrated with job searching (in April 2022).

[67] So he didn't make sufficient or sustained job search efforts. And this means that he hasn't proven that his efforts to find a job were reasonable and customary.

Capable and available for work

[68] A claimant has to prove they are "capable of and available for work" but can't find a suitable job.⁴³ To do this, he has to prove three things:⁴⁴

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

⁴¹ See section 9.001 of the EI Regulations.

⁴² Section 9.001 of the EI Regulations lists: assessing employment opportunities; preparing a résumé or cover letter; registering for job-search tools or with online job banks or employment agencies; attending job-search workshops or job fairs; networking; contacting employers who may be hiring; applying for jobs; attending interviews; and doing competency tests

⁴³ See section 18(1)(a) of the EI Act.

⁴⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

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

[69] When I consider each, I have to look at his attitude and conduct.⁴⁵

[70] The Claimant has to show he was available during regular working hours for every working day during the EI benefit period.⁴⁶

Wanting to go back to work

[71] I find the Claimant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[72] Above I accepted that after April 2022 he gave up his job search and applying for jobs. And before that his job search was mostly made up of scanning ads—most of which he dismissed because of potential conflict, because he had to be vaccinated, or because they didn't pay as much as his X job. And I accepted the Claimant's testimony that he wasn't willing to start his career over at another employer.

[73] I find the Claimant was relying on the fact he knew he was going back to work at the X when his suspension was over. He was waiting for his employer to remove the vaccine mandate and recall him to work. So I find that he didn't want to go back to work as soon as a suitable job was available.

[74] So I find his attitude and conduct show that he didn't want to go back to work as soon as a suitable job was available.

⁴⁵ 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.

⁴⁶ See section 32 of the EI Regulations, which says, "For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday." See also *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

Making efforts to find a suitable job

[75] I find the Claimant didn't make enough effort to find a suitable job.

[76] When I analyze this second factor, I can look at the list of job-search activities under the EI Regulations—but I can't let it dictate my decision.⁴⁷ And I haven't in this appeal.

[77] Above I accepted evidence that the Claimant only did two things to find a job: he scanned job ads, and he applied to a couple jobs per week. He gave up doing those things sometime after he spoke to the Commission in April 2022. And he spent a lot of time doing personal income tax returns for free—rather than searching for work—during his suspension.

[78] So based on the evidence I have accepted, his attitude and conduct show me that he wasn't making the efforts the law requires to find a suitable job.

Unduly limiting chances of going back to work

[79] I find the Claimant set personal conditions that unduly limited his chances of going back to work:

- he wasn't looking for jobs that might create a conflict with his X job
- he chose not to get vaccinated against COVID

[80] The courts have held that I must judge this factor objectively—so I shouldn't consider the reasons for the restriction on availability.⁴⁸ In other words, the personal condition doesn't have to be imposed by the claimant or within their control. The issue is whether it unduly restricts a claimant's availability to get back to work.

[81] Above I accepted that the Claimant limited his job search to job where there was no potential conflict of interest. I find this was a personal condition that unduly limited his chances of going back to work. All his professional experience was in taxation. Because

⁴⁷ 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.

⁴⁸ See for example, *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

of his employer's conflict rules he refused to look for work in taxation. This unduly limited his chances of going back to work.

[82] Above I accepted the Claimant's evidence that the majority of employers asked for COVID vaccination. In other words, his vaccination status restricted him from being considered for or offered the majority of jobs he was considering. So I find that by not getting vaccinated against COVID the Claimant unduly limited his chances of going back to work.

Conclusion about availability for work

[83] After reviewing the evidence and arguments, I find the Claimant hasn't shown that he:

- made reasonable and customary efforts to find a suitable job
- was capable of and available for work but unable to find a suitable job

[84] In other words, the Claimant hasn't proven he was available for work during his suspension.

Conclusion

[85] The Commission has proven the Claimant was suspended for misconduct under the EI Act. So he isn't entitled to get EI regular benefits during his suspension.

[86] The Claimant hasn't proven he was available for work during his suspension. So this is another reason he isn't entitled to get EI regular benefits during his suspension.

[87] This is what the Commission decided. So I am dismissing his appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section