



Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 863

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

## Decision

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

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (517874) dated September 6, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy  
**Type of hearing:** Teleconference  
**Hearing date:** January 12, 2023  
**Hearing participant:** Appellant  
**Decision date:** January 18, 2023  
**File number:** GE-22-3096

## Decision

### Issue 1 (Misconduct)

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from February 21, 2022, to September 5, 2022.<sup>1</sup>

### Issue 2 (Availability for Work)

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

[4] The Claimant has shown that he was available for work from February 21, 2022, to September 5, 2022.

## Overview

### Issue 1

[5] The Claimant worked as a Letter Carrier and was placed on an unpaid leave of absence by the employer on February 18, 2022. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence because he didn't comply with their vaccination policy. The Claimant confirmed he returned to work for the employer on September 6, 2022.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until they meet one of the following provisions: (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves their employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

[6] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. The Commission decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from February 21, 2022, to September 5, 2022.

[7] The Commission says the Claimant's failure to comply with the employer's vaccination policy was misconduct, because he was advised of the policy and the consequences of not getting vaccinated.

[8] The Claimant says the employer's vaccination policy violated his Charter Rights and was discriminatory.

## **Issue 2**

[9] The Canada Employment Insurance Commission (Commission) decided the Claimant was disentitled from receiving EI regular benefits February 21, 2022, to September 5, 2022, because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[10] I must decide whether the Claimant has proven that he was available for work February 21, 2022, to September 5, 2022. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[11] The Commission says the Claimant wasn't available because the Claimant listed only six undated job contacts without sufficient detail to indicate bona fide employment.

[12] The Claimant disagrees and says he was available for full-time work from February 21, 2022, to September 5, 2022.

## Issue 1

[13] Was the Claimant suspended from his job because of misconduct?

### Analysis

[14] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

### Why was the Claimant suspended from his job?

[15] I find the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy.

[16] The Commission says the reason the employer gave is the reason for the suspension. The employer indicated the Claimant was placed on an unpaid leave of absence for failing to comply with their vaccination policy.

[17] The Claimant doesn't dispute that he was placed on an unpaid leave of absence for not complying with the employer's vaccination policy. However, the Claimant says he didn't do anything wrong and followed the employer's mandate.

[18] I find the Claimant was suspended for failing to comply with the employer's vaccination policy.

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

[19] The reason for the Claimant's suspension is misconduct under the law.

[20] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>4</sup>

[21] 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 being suspended or let go because of that.<sup>5</sup>

[22] The Commission has to prove that the Claimant was suspended from 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 from his job because of misconduct.<sup>6</sup>

[23] The Commission says there was misconduct because the Claimant was advised of the employer's vaccination policy and the consequences of not getting vaccinated.

[24] The Claimant says there was no misconduct because he didn't do anything wrong and followed the employer's vaccination mandate.

[25] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the employer's vaccination policy and the consequences of failing to comply with the policy (GD3A-35). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who didn't attest to the vaccination status would be considered unwilling to be fully vaccinated and placed on leave without pay (GD3A-48). I realize the Claimant argued he didn't do anything wrong and followed the employer's mandate. However, the Claimant didn't follow the employer's vaccination policy because he made a personal choice not to be vaccinated. On this matter, I must apply the legal test for misconduct as established in the case law.

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<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

## **Additional Testimony from the Claimant**

[26] I recognize the Claimant further testified that the employer's vaccination policy violated his Charter Rights and was discriminatory. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.<sup>7</sup>

[27] Finally, I realize the Claimant testified that the employer made multiple mistakes and never provided a reason why he was denied a religious exemption. Nevertheless, as mentioned the matter of determining the whether the employer's policy was fair or reasonable wasn't within my jurisdiction. The only issue before me was whether the Claimant was suspended from his job because of misconduct. On this matter I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.<sup>8</sup>

### **So, was the Claimant suspended from his job because of misconduct?**

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

## **Conclusion**

### **Issue 1**

[29] The Commission has proven the Claimant was suspended from his job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from February 21, 2022, to September 5, 2022.

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<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

<sup>8</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301

## Issue 2

[30] Was the Claimant available for work?

### Analysis

[31] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[32] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.<sup>9</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>10</sup> I will look at those criteria below.

[33] Second, the Act says that a claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.<sup>11</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>12</sup> I will look at those factors below.

[34] The Commission decided the Claimant was disentitled from receiving benefits because he wasn’t available for work based on these two sections of the law.

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

### Reasonable and customary efforts to find a job

[36] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.<sup>13</sup> I have to look at whether his efforts were

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

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

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

<sup>12</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>13</sup> See section 9.001 of the Regulations.

sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[37] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:<sup>14</sup>

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs

[38] The Commission says the Claimant didn't do enough to try to find a job. Specifically, the Commission says the Claimant listed only six undated job contacts without sufficient detail to indicate bona fide employment.

[39] The Claimant disagrees. He says he contacted employers and applied for jobs from February 21, 2022, to September 5, 2022. The Claimant says his efforts were enough to prove that he was available for work.

[40] I find the Claimant made reasonable and customary efforts to find employment, because he provided a job search list with contact information for potential employers (GD3B-35). I realize the Commission submitted the Claimant's job search list didn't provide any dates. Nevertheless, I accept the Claimant's testimony that he contacted employers from February 2022 to early September 2022, because his statements were reasonably plausible and supported by contact details for potential employers on his job-search list.

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

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



## Capable of and available for work

[42] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:<sup>15</sup>

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has made efforts to find a suitable job.
- c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[43] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>16</sup>

## Wanting to go back to work

[44] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. I make this finding because the Claimant's testimony on this matter was forthright and supported by a job-search list.

## Making efforts to find a suitable job

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

[46] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.<sup>17</sup>

[47] The Claimant's efforts to find a new job included assessing employment opportunities and contacting employers about work. I explained these reasons above

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<sup>15</sup> These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

<sup>16</sup> Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

<sup>17</sup> I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[48] Those efforts were enough to meet the requirements of this second factor, because the Claimant provided a job search list with specific names of employers and contact details.

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

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

[50] The Claimant says he hasn't done this because he testified that he wasn't just waiting to return to his job but contacting potential employers about work.

[51] The Commission says the Claimant didn't show he was actively seeking employment (including temporary employment) for types of work where he was not required to be vaccinated against Covid-19.

[52] I find the Claimant didn't unduly limit his chances of going back to work, because he listed potential employers where it was possible to work without disclosing his vaccination status.

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

[53] Based on my findings on the three factors, I find the Claimant has shown that he was capable of and available for work but unable to find a suitable job.

## **Conclusion**

### **Issue 2**

[54] The Claimant has shown that he was available for work from February 21, 2022, to September 5, 2022, within the meaning of the law.

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

*Gerry McCarthy*

Member, General Division – Employment Insurance Section