



Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 1148

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

Decision

Appellant (Claimant): M. B.

Respondent (Commission): Canada Employment Insurance Commission

Added Party:

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (495564) dated June 22, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: In person

Hearing date: January 25, 2023

Hearing participant: Appellant

Decision date: January 31, 2023

File number: GE-22-3080

Decision

Issue 1 (Misconduct)

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost his job because of misconduct (in other words, because he did something that caused him to be suspended and lose his job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from November 22, 2021, to December 30, 2021, and disqualified from receiving EI benefits from December 26, 2021.¹

Issue 2 (Availability for Work)

[3] The appeal is allowed on this issue only.

[4] The Claimant has shown that he was available for work from November 22, 2021.

Overview

Issue 1

[5] The Claimant worked as an Operator for the “Toronto Transit Commission” and was placed on an unpaid leave of absence effective November 21, 2021. The Claimant was then dismissed from his job on December 31, 2021. The Claimant’s employer said

¹ Section 31 of the *Employment Insurance Act* says that a claimant who is suspended from his employment because of his misconduct is not entitled to receive EI benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

the Claimant was placed on an unpaid leave of absence and then let go because he didn't comply with their vaccination policy.

[6] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and letting him go. It decided that the Claimant was suspended and lost his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from November 22, 2021, to December 30, 2021, and disqualified from receiving EI benefits from receiving EI benefits from December 26, 2021.

[7] The Commission says the Claimant's conduct was wilful and he knew that his conduct could lead to serious disciplinary consequences.

[8] The Claimant says his actions weren't misconduct. He further says the employer's vaccination policy violated his collective agreement and lacked informed consent.

Issue 2

[9] The Commission decided the Claimant was disentitled from receiving EI benefits as of November 22, 2021, 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. 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 for work, because he didn't broaden his willingness to seek and accept less favourable types of employment.

[12] The Claimant disagrees and says he was looking for different types of work from early January 2022 to March 2022. He further says he started performing painting and renovation work in early March 2022.

Matters I have to consider first

Post-Hearing Documents

[13] The Claimant submitted additional documents that were received post-hearing. I accepted these documents and they've been listed in the Appeal Record as GD14-1 to GD14-11.

Observer didn't attend Hearing

[14] I was advised by the Registry Officer that an Observer would attend the hearing. I waited until the scheduled start time for the hearing. However, the Observer didn't appear. So, we proceeded with the hearing, but without the Observer.

Issue 1

[15] Was the Claimant suspended and dismissed from his job because of misconduct?

Analysis

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

Why was the Claimant suspended and dismissed from his job?

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

[18] The Commission says the reason the employer gave is the reason for the Claimant's suspension and dismissal. The employer told the Commission that the Claimant was placed on an unpaid leave of absence and then let go because he didn't comply with their vaccination policy.

[19] The Claimant doesn't dispute that he was placed on an unpaid leave of absence and then dismissed because he didn't comply with the employer's vaccination policy. However, the Claimant says his actions weren't misconduct.

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

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

[21] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[22] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

[23] 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 and let go because of that.⁵

[24] The Commission has to prove that the Claimant was suspended and lost his job because of misconduct. The Commission has to prove this on a balance of probabilities.

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

This means that it has to show that it is more likely than not that the Claimant was suspended and lost his job because of misconduct.⁶

[25] The Commission says there was misconduct because the Claimant knew that his conduct could lead to serious disciplinary consequences.

[26] The Claimant says there was no misconduct because he has the freedom to choose not to be vaccinated.

[27] I find the Commission has proven there was misconduct, because they showed the Claimant was aware that remaining unvaccinated went against the employer's vaccination policy (GD3B-31). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who remained unvaccinated by December 31, 2021, would be terminated from their employment with cause (GD3A-48 to GD3A-49). I realize the Claimant argued he had the freedom to choose not to be vaccinated and his actions weren't misconduct. However, I must apply the legal test for misconduct as established in the **case law (listed above)**. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

Additional Testimony and Submissions from the Claimant

[28] I realize the Claimant argued that the employer's vaccination policy violated his collective agreement and lacked informed consent. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for Claimant to make these arguments.⁸

[29] I further recognize the Claimant argued that the Covid-19 vaccine wasn't effective and caused numerous problems. However, the efficacy of the Covid-19

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

⁷ *Knee v Canada (Attorney General)*, 2011 FCA 301.

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

vaccine was beyond my jurisdiction.⁹ In short, the only issue before me was whether the Claimant was suspended and then dismissed from his job because of misconduct.

[30] I realize the Claimant further testified the employer had denied his request for a religious exemption. I recognize the Claimant was frustrated and displeased with the employer on this matter. Still, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.¹⁰

[31] Finally, the Claimant provided documentation that he was re-instated by the employer. However, the only issue before me was whether the Claimant was suspended from his job on November 21, 2021, and then dismissed from his job on December 31, 2021, because of misconduct.

So, was the Claimant suspended and dismissed from his job because of misconduct?

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

Conclusion

Issue 1

[33] The Commission has proven the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant was disentitled and disqualified from receiving EI benefits.

[34] This means the appeal is dismissed.

Issue 2

[35] Was the Claimant available for work?

⁹ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

¹⁰ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

Analysis

[36] 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.

[37] 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.¹¹ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.¹² I will look at those criteria below.

[38] 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.¹³ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁴ I will look at those factors below.

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

[40] 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

[41] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.¹⁵ I have to look at whether his 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.

¹¹ See section 50(8) of the *Employment Insurance Act* (Act).

¹² See section 9.001 of the *Employment Insurance Regulations* (Regulations).

¹³ See section 18(1)(a) of the Act.

¹⁴ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁵ See section 9.001 of the Regulations.

[42] 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:¹⁶

- assessing employment opportunities
- registering for job-search tools or with online job banks or employment agencies
- contacting employers who may be hiring

[43] The Commission says the Claimant didn't enough to try to find a job. Specifically, the Commission says the Claimant didn't broaden his willingness to seek and accept less favourable types of employment.

[44] The Claimant disagrees. The Claimant testified that he assessed employment opportunities in various fields and contacted potential employers about jobs. The Claimant says that his efforts were enough to prove that he was available for work.

[45] I find the Claimant has made reasonable and customary efforts to find a job, because he contacted numerous employers about work (including "Uber") and eventually started performing painting and renovation work in early March 2022. I realize the Commission submitted the Claimant didn't broaden his willingness to seek and accept less favourable types of work. However, the Claimant did look at various types of employment and started performing painting and renovation work in March 2022.

[46] In summary, the Claimant has proven that his efforts to find a job were reasonable and customary.

¹⁶ See section 9.001 of the Regulations.

Capable of and available for work

[47] 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:¹⁷

- 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 unduly (in other words, overly) limited his chances of going back to work.

[48] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁸

– Wanting to go back to work

[49] 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 testified that he contacted numerous employers about potential jobs starting in early January 2022. Furthermore, the Claimant testified he started performing painting and renovation work in early March 2022.

– Making efforts to find a suitable job

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

[51] 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.¹⁹

¹⁷ 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.

¹⁸ 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.

¹⁹ 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.

[52] The Claimant's efforts to find a new job included: Assessing job opportunities online, contacting employers, and applying for jobs. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[53] Those efforts were enough to meet the requirements of this second factor, because the Claimant contacted numerous employers (including "Uber") about potential employment.

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

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

[55] The Claimant says he hasn't done this because he applied to various jobs and eventually started performing painting and renovation work in early March 2022.

[57] The Commission says the Claimant didn't broaden his willingness to seek and accept less favourable types of employment.

[58] I find the Claimant didn't set personal conditions that might have unduly limited his chances of going back to work. I make this finding because the Claimant looked at potential jobs in various fields. I recognize the Commission argued the Claimant limited his willingness to seek and accept less favourable types of work. However, the Claimant demonstrated he didn't unduly limit his chances of going back to work because he applied to various employers (including "Uber") and started performing painting and renovation work in early March 2022.

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

[59] 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

[60] The Claimant has shown that he was available for work within the meaning of the law.

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

Gerry McCarthy

Member, General Division – Employment Insurance Section