Citation: *KN v Canada Employment Insurance Commission*, 2024 SST 339

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (481463) dated June 13, 2022 (issued by Service Canada)

Tribunal member:	Stuart O'Connell
Type of hearing:	In person
Hearing date:	September 27, 2023
Hearing participant:	Appellant
Decision date:	January 4, 2024
File number:	GE-22-4039

Decision

[1] The appeal is dismissed in part.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant was suspended from her job because of misconduct (in other words, because she did something that caused her to lose her job).

[3] However, the Appellant has not established that she was available for work during the benefit period. She is therefore disentitled from receiving Employment Insurance (EI) benefits from December 5, 2021.

Overview

[4] The Appellant lost her job with a major Canadian airline. She was placed on an unpaid leave of absence because she did not comply with her employer's mandatory vaccination policy. An initial claim for employment insurance benefits was established effective December 5, 2021.

[5] The Commission decided that Appellant had been suspended from her employment by reason of her own misconduct and was therefore not entitled to receive EI benefits.[1]

[6] The Commission also decided that the Appellant had failed to establish that she had made reasonable and customary efforts to obtain suitable employment and had not established her availability for work during the benefit period. She was, as a result, disentitled to EI benefits from December 5, 2021.[2] I will consider the misconduct issue first.

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[1] The disentitlement was pursuant to section 31 of the EI Act.
[2] The disentitlement was pursuant to sections 6, 18 and 50 of the Act and sections 9.001 and 9.002 of the *Employment Insurance Regulations* (the Regulations). This appeal is an appeal of the Commission's reconsideration decision made June 13, 2022, (see GD3-62). The Commission's initial decision was made March 28, 2022 (see GD3-23).

Issue

[7] Did the Appellant lose her job because of misconduct?

Analysis (Misconduct)

[8] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

[9] The Appellant was suspended from her employment on October 30, 2021.[3]

[10] The Commission provided evidence that the employer, a federally regulated business, implemented a COVID vaccination policy. The employer sent notices to the Appellant informing her of the requirement that employees of the airline were to be fully vaccinated against COVID-19 and to report their vaccination status by October 30, 2021. The notices also informed the Appellant of the consequences of not following its vaccination policy.[4]

[11] The Appellant stated that she was put on unpaid leave because she was not vaccinated for COVID-19 by the date imposed by her employer.[5] There isn't any evidence in the appeal file that makes me think that the employer suspended the Appellant for any other reason. It is clear to me that there is a direct, causal link between the Appellant's failure to comply with her employer's vaccination requirement and her loss of employment. In other words, her failure to follow the vaccination policy caused her suspension from employment.

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[3] GD3-16 to GD3-17.
[4] GD3-18.
[5] Although the Appellant was put on an unpaid leave of absence, from the perspective of the *Employment Insurance Act*, the employer *suspended* the Appellant because she remained unvaccinated.

Is the reason for the Appellant's dismissal misconduct under the law?

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[8]

[13] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of her being let go because of that.[9]

[14] The Commission has to prove that the Appellant lost her job because of misconduct on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.[10]

Position of the Commission

[15] The Commission says that there was misconduct because the Appellant was aware of the employer's policy regarding vaccination. Multiple times the employer communicated its requirement that its employees must be vaccinated and that its employees would face suspension if they did not comply. The Appellant deliberately refused to attest to her vaccination status or to be vaccinated.

[16] The employer sent notices on August 25, 2021, September 10, 2021, and September 24, 2021 regarding its policy, making the Appellant aware of the date by which employees needed to comply. On March 7, 2022, while the Appellant was still suspended, the employer sent the Appellant a notice which stated that she could

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[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.

potentially be terminated if she did not comply with the vaccination policy by May 1, 2022.

Position of the Appellant

[17] The Appellant doesn't dispute that her employer had a vaccination policy and that it communicated to her that employees must be fully vaccinated by October 30, 2021 (unless they were exempted from the policy); otherwise, they would be placed on unpaid leave.

[18] The Appellant says that there was no misconduct. She objects to being vaccinated for many reasons, and she has filed over two hundred pages of material to support her arguments against compulsory vaccination. Clearly, the Appellant feels very strongly about compulsory vaccination and she has invested a lot of time, energy, and attention into this appeal. Without repeating all her arguments, they range from the claim that current vaccines have not been scientifically proven to be effective to the claim that she was discriminated against as a non-vaccinated person.

Findings

[19] I do not need to address the Appellant's arguments, however. I find that the Commission hasn't proven that there was misconduct because there is not sufficient evidence of the employer's policy.

[20] The Commission did not submit a copy of the employer's vaccination policy. Instead, the Commission relied on the employer's press release (dated August 21, 2021) which summarized the policy and stated some of the core values of the company.[11] The Commission appears to have attempted to contact the employer to obtain the policy but was unsuccessful.[12] The Commission provided the information that was available to it at the time.

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[11] GD3-21.
[12] GD3-20.

[21] Some details about the policy are missing from the press release, such as the employer's policy regarding accommodation. This information is significant to this particular appeal as the Appellant requested accommodation from her employer on the bases of religion and conscience. The Appellant gave evidence that the employer informed its employees that there were opportunities for accommodation.

[22] I am unable to find that the Appellant engaged in misconduct by violating her employer's vaccination policy based on a rough summary of that policy, as set out in the press release, and the acknowledgement of the Appellant that she received three notices about the policy via email. Beyond communicating a date by which employees must disclose their vaccination status and the consequences of non-compliance, the content of those notices is unknown. The notices themselves were not part of the appeal file. It is not the medium by which the employer's policy has been conveyed to this Tribunal (a press release) that is problematic; it is the lack of sufficient detail of the employer's policy within the press release. The Appellant was under no obligation to produce her employer's vaccination policy to the Tribunal, and she didn't.[13]

[23] The Appellant gave evidence that the employer decided not to accommodate her, though she had requested accommodation. However, I am unable to assess whether the employer applied its own policy on accommodation when making that decision.

So, did the Appellant lose her job because of misconduct?

[24] Based on my findings above, I find that the Appellant didn't lose her job because of misconduct.

Issue

[25] Was the Appellant available for work?

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[13] GD3-56.

Analysis (Availability)

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

[27] 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. The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.

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

[29] I will now consider these two sections myself to determine whether the Appellant was available for work. The burden of proving availability rests with the Appellant.

Position of the Commission

[30] The Commission says the Appellant did not make sustained efforts to find suitable work. When it contacted her in late March 2022, she had only applied for two jobs in the previous twenty weeks. The Appellant also placed restrictions on her ability to accept work as many jobs for which the Appellant was qualified required the employee to be vaccinated. The Appellant was not vaccinated.

Position of the Appellant

[31] The Appellant says she actively applied for jobs and has filed evidence which demonstrates her efforts. The Appellant acknowledges that being unvaccinated made it difficult for her to find suitable employment at the time. I take her argument to be that the requirement to be vaccinated was unfair (and unlawful), but she nevertheless adapted to the circumstances and sought out work that was available to her.

Evidence

[32] According to the Commission, on March 21, 2022, the Appellant indicated that she had applied for a total of two jobs within the previous twenty weeks: a cashier at the grocery store No Frills and a cashier/night stocker position at Costco.[14]

[33] At the hearing, the Appellant stated that her efforts went well beyond applying for a couple jobs.

[34] The Appellant acknowledged that she was restricted in her job search efforts as many of the employment sectors in which she was qualified to work required proof of vaccination. The Appellant gave evidence that that she had looked into working for different municipalities, at a retirement home, at banks, gyms, airlines, hospitals, etc.[15] There is no evidence that she went so far as to contact any employers within these sectors, though I accept that doing so may have been pointless given that she was not vaccinated.

[35] The Appellant says she also checked online job boards, did internet searches, and used online tools, e.g., Pinterest and Canva. She has not provided the specifics of her online searches (for instance, how often) or of her job search preparation (resume building, etc.).

[36] She says that she had a friend hand out her resume to prospective employers. The Appellant did not supply any details regarding when and to whom her friend submitted her resume.[16]

[37] The Appellant says she applied to the following business, mostly for cashier positions:[17] Costco (May 18, 2022);[18] Metro (she applied for two different positions at this business, May 17, 2022, and May 18, 2022);[19] Dollarama, Dollar Tree, FreshCo, the

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[14] GD3-19
[15] GD15-2, GD3-55.
[16] With one exception: she told the Commission that she had applied for a position at Costco through a friend.
[17] GD15-2.
[18] GD12-81
[19] GD12-87 and GD12-90.

Real Canadian Superstore, and No Frills. She filed resumes and cover letters with the Tribunal to support this. The Appellant says she also applied for a job online.

Reasonable and customary efforts

[38] The Commission expects that all claimants will be ready to prove their availability, and it can always ask them to do so. By law, claimants who cannot prove their availability for every working day in their benefit period are disentitled from receiving benefits (for the days that they cannot prove they are available).

[39] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[20] I have to look at whether the Appellant's efforts were sustained (that is, ongoing) and whether they were directed toward finding a suitable job. I also need to consider what efforts were undertaken. The Regulations set out nine job-seeking activities I must consider. They include the following:

- assessing employment opportunities,
- preparing a resume or cover letter,
- applying for jobs.

[40] The Appellant communicated with Service Canada hoping for assistance in finding a new job.

[41] I give little weight to her statement that her resume was distributed to some prospective employers by a friend (other than the evidence that one of her applications to Costco was submitted via a friend[21]). Details as to whom the resume was given and when were not provided.

[42] I also give little weight to the Appellant's claim that she performed online job searches and used online tools for job search preparation. This claim lacked specifics,

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[20] See section 9.001 of the Regulations.
[21] GD3-19.

such as how often she did this. The General Division of this Tribunal is not required to determine whether an appellant had adequate records or a sufficiently detailed recollection of her efforts.[22] Nevertheless, the burden is on an appellant to prove that her efforts were reasonable and customary.

[43] Only three of the Appellant's job applications/cover letters are dated. These reveal job seeking efforts on two days, May 17 and May 18, 2022.[23] While I accept the Appellant's evidence that she also applied for work at the other businesses listed above (sometimes in person), it is unclear when she did. In any event, I find that her efforts to find work were limited and do not appear sustained throughout the period in question.

So, did the Appellant make reasonable and customary efforts?

[44] I find that the Appellant did not make reasonable and customary efforts to obtain employment.

Capable of and available for work

[45] Availability is assessed by considering each working day in a benefit period for which a claimant can prove that they were capable of and available for work, and unable to obtain suitable employment.

[46] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:

a) She wanted 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 didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

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[22] *TM v Canada Employment Insurance Commission*, 2021 SST 11.
[23] The Appellant obtained casual employment at Costco in June of that year.

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

– Wanting to go back to work

[48] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available. She clearly and credibly expressed at the hearing that she had hoped to find other work. Her willingness to return to work is evident, for instance, in the fact she asked Service Canada about what job searching assistance it could offer her.

– Making efforts to find a suitable job

[49] To be eligible for benefits a claimant must establish her availability for work, and that requires a job search. No matter how little chance of success a claimant may feel a job search would have, the Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.[24]

[50] The Appellant's efforts to find a new job are explained above when I looked at whether she had made reasonable and customary efforts to find a job.

[51] The efforts to find a job must be reasonable.[25] I find that the Appellant's efforts to find a suitable job were sporadic and too limited to be reasonable in the circumstances. Over the benefit period they consisted of approximately nine job applications, some cursory online searches, and some other modest job seeking efforts.[26]

[52] The Appellant argues that Service Canada had an obligation to assist her in obtaining suitable employment, that it did not meet its obligation, and that she should therefore not be viewed as *unavailable*. I disagree. The burden is on the Appellant to prove that she was available for each working day of the benefit period. These efforts

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[24] *Canada (Attorney General) v Cornelissen-O'Neill*, A- 652-93, citing Godwin, CUB 13957.
[25] *Canada (Attorney General) v Whiffen*, A-1472-92.
[26] Such as communicating with Service Canada about available resources.

can be fulfilled in different ways, but they remain efforts to be made by the Appellant, not Service Canada.

– Unduly limiting chances of going back to work

[53] I find that the Appellant did not put restrictions on her job search that unduly limited her chances of returning to the labour market. The Appellant confirmed that her status as an unvaccinated person prevented her from working at her old job, in the travel industry generally, and in some other professions.

[54] Though she was unvaccinated, she expanded her search for work to industries that did not necessarily require employees to be vaccinated. Unfortunately, her efforts to find work in these industries were insufficient.

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

[55] Based on my findings on the three factors, I find that the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[56] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

Stuart O'Connell
Member, General Division – Employment Insurance Section