Citation: *TL v Canada Employment Insurance Commission*, 2023 SST 536

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (442406) dated December 14, 2021 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	February 9, 2023
Hearing participant:	Appellant
Decision date:	February 13, 2023
File number:	GE-22-3503

Decision

[1] The appeal is dismissed on both issues.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended[1] because of misconduct (in other words, because she did something that caused her to be suspended). This means she is disentitled from receiving Employment Insurance (EI) benefits for the period of her suspension, from October 19 to December 16, 2021.

[3] The Appellant has not proven she was available for work. This means she is disentitled from receiving EI benefits from October 19, 2021.

Overview

[4] The Appellant was put on an unpaid leave of absence from her job for not complying with her employer's vaccination policy.

[5] The Commission decided that the Appellant took a voluntary leave of absence from her job without just cause. It also decided the Appellant was not available for work as of October 19, 2021. For these reasons, the Commission said the Appellant could not be paid EI benefits.

[6] The Appellant disagrees with both of these decisions. She did not agree with the employer's policy. She felt the policy went against the law and her human rights. She had the right to make a personal choice regarding vaccination. She also tried to find other work, but eventually got vaccinated and returned to her employer as she felt it was her best option for employment.

[1] The Appellant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Appellant's leave, this is considered a suspension.

Matters I have to consider first

The employer is not a party to the appeal

[7] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party. The employer did not respond. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

Issue

[8] Is the Appellant disentitled while she was on unpaid leave from work?

- Did she take a voluntary leave of absence without just cause?
- Was she suspended because of misconduct?

[9] Was the Appellant available for work?

Analysis

The Appellant was suspended from her job because of misconduct

[10] I find the evidence supports that the Appellant was suspended because she did not have a choice whether to take the unpaid leave of absence from her job.

[11] The reason for her suspension was misconduct because the Appellant's actions led to her dismissal. She acted deliberately. She knew or ought to have known that failing to comply with the employer's policy was likely to cause her to be suspended, and she chose not to comply.

Why did the Appellant stop working?

[12] A claimant who voluntarily takes a leave of absence from a job is disentitled from receiving EI benefits, unless they can prove that they had just cause for taking leave.[2]

[13] Similarly, claimants who have been suspended from a job because of misconduct are also disentitled.[3]

[14] Sometimes it is not clear whether a claimant took a leave of absence voluntarily or the employer suspended them. Both of these notions are linked in the *Employment Insurance Act* (Act). They relate to whether someone caused their own unemployment, either by initiating their separation from employment without just cause, or by losing their job due to misconduct.

[15] Because the reasons for these disentitlements are linked, it is open to me to make a decision based on either of these grounds. In other words, where the reason for the Appellant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on a voluntary leave of absence or suspension due to misconduct.

[16] In this case, it is not clear that the Appellant took a voluntary leave of absence from her job. She has consistently stated to the Commission and the Tribunal that her leave was not voluntary. Rather, it was the employer who mandated that she take an unpaid leave of absence from her work. A mandatory unpaid leave of absence is another way of saying the Appellant was suspended from her job.

[17] I find the evidence on file supports that the employer initiated the Appellant's separation from employment. It is clear that the employer did not allow the Appellant to work any longer because it said she did not comply with its vaccination policy. She was able to return to work when she met the vaccination requirements, which she did on December 16, 2021.

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[2] See section 32 of the *Employment Insurance Act* (Act).
[3] See section 31 of the Act.

[18] As the Appellant was suspended from her job, I must decide whether she was suspended because of misconduct.

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

Why was the Appellant suspended?

[20] Both parties agree that the Appellant was suspended leave because she did not comply with the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for her suspension misconduct under the law?

[21] The reason for the Appellant's suspension is misconduct under the law.

[22] The Act doesn't say what misconduct means. But case law explains how to determine whether the Appellant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[23] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] 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.[6]

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[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.

[24] 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 the employer and that there was a real possibility of being let go from her job because of that.[7]

[25] The Commission must prove that the Appellant lost her job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost her job because of misconduct.[8]

[26] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[27] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[10] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner due to the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[28] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found that the question in misconduct cases is, "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is,

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[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

"clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[29] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[11] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[12]

[30] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[13] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[14]

[31] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[15]

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[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[13] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.

[32] In dismissing the case, the Federal Court wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises…the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[16]

[33] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[17]

[34] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[35] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

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[16] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at para 32.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at para 47.

[36] The Commission says that there was misconduct because:

- the employer had a vaccination policy and communicated that policy to the Appellant
- the employer's policy required the Appellant to be vaccinated against COVID-19 or have an approved exemption
- the Appellant knew what she had to do under the policy
- she made a personal choice to not get vaccinated
- the employer suspended her because she did not comply with its vaccination policy

[37] The Appellant says that there was no misconduct because:

- the employer didn't have the right to force her to get a vaccination
- the employer's vaccination policy went beyond what was required by the provincial directive
- the vaccination was not reasonable within her workplace context and was not a *bona fide* occupational requirement.
- she had valid concerns about the vaccine's safety and efficacy
- the employer denied her exemption and accommodation requests
- the vaccination policy was not a condition of employment when she was hired and was not part of her collective agreement

[38] The evidence is clear that the employer implemented a mandatory vaccination policy. The Appellant knew that she would be suspended if she did not have at least one dose of a COVID-19 vaccination October 19, 2021.

[39] The Appellant asked her employer to do a job analysis and show that the vaccine should be a requirement for her position. She asked for an accommodation from the policy and for an exemption for spiritual and creed-based reasons But, the employer denied her requests.

[40] The employer put the Appellant on an unpaid leave of absence starting October 19, 2022.

[41] The Appellant testified that she got her first dose of a COVID-19 vaccination in order to return to work. She returned to her job on December 16, 2022.

[42] I find the Appellant knew that her employer instituted a mandatory vaccination policy and knew what would happen if she didn't follow it.

[43] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[18]

[44] I understand that the Appellant applied for an exemption and accommodation from the mandatory vaccine policy. But, the employer denied her requests. While exemptions were available, an exemption was never guaranteed to the Appellant. She knew that she was not exempted from the requirements of the policy and chose not to comply, regardless.

[45] The Appellant submits the employer could not force her to get vaccinated. She had concerns about the COVID-19 vaccine because of the lack of long-term data. She should be allowed to refuse a vaccine that she feels is unsafe or ineffective.

[46] In a case called *Parmar*, the Court looked at whether an employer was allowed to suspend an employee for failing to comply with a mandatory vaccination policy.[19] The Court wrote:

> Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. **They do not force an employee to be**

[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Parmar v Tribe Management Inc.,* 2022 BCSC 1675.

> **vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income.** Ms. Parmar made her choice based on what appears to have been speculative information about the potential risks.
> *(emphasis added)*

[47] In other words, Ms. Parmar did have a choice: she could get vaccinated and keep working, or remain unvaccinated and be suspended from her job.

[48] In a case called *Lewis*, this was considered in the context of a patient in the transplant program at an Albertan hospital.[20] The program required patients to get vaccinated against COVID-19 before getting a transplant. Ms. Lewis was unable to get an organ transplant because she refused to be vaccinated against COVID-19. Ms. Lewis argued that the vaccine requirement violated her Charter rights.

[49] The Alberta Court of Appeal agreed that Ms. Lewis had a right to refuse to be vaccinated against COVID-19. As a competent adult, she was entitled to decide what to put into her body. But exercising that choice came with consequences.

[50] These courts have found that the issue is not forcible vaccination but the consequences of a person's choice to remain unvaccinated. That is the issue here, too.

[51] The employer's vaccination policy required vaccination as a condition for continued employment. Employees, including the Appellant, were left with a choice. They could choose to remain unvaccinated, even if that meant being placed on a leave of absence.

[52] The Appellant submits that the employer's policy violated the law and her human rights.

[53] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws.

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[20] See *Lewis v Alberta Health Services,* 2022 ABCA 359.

There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45, that protect rights and freedoms.

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

[55] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to a claimant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating his Charter rights.

[56] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

[57] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[21]

[58] The Appellant may have other recourse to pursue her claims that the employer's policy violated her rights. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[22]

[59] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to provide proof that they received their first dose of COVID-19 vaccination by October 19, 2021.
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated

[21] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[22] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102.

- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

So, was the Appellant suspended because of misconduct?

[60] Based on my findings above, I find that the Appellant was suspended from her job because of misconduct.

Was the Appellant available for work?

[61] 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.

[62] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[23] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[24] I will look at those criteria below.

[63] 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.[25] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[26] I will look at those factors below.

Reasonable and customary efforts to find a job

[64] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[27] I have to look at whether her

[23] See section 50(8) of the Act.
[24] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[25] See section 18(1)(a) of the Act.
[26] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[27] See section 9.001 of the Regulations.

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

[65] I also have to consider the Appellant'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:[28]

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[66] The Commission says the Appellant didn't do enough to try to find a job. The Appellant told the Commission that she was planning on attending a medical cosmetics course and starting her own business. She said that she may not be able to find another job as a nurse because of the vaccine mandates for health care workers.

[67] The Appellant agreed that she had told the Commission that she would be attending school and starting a business, but she testified that her plans quickly changed. The educational program was quite expensive, and it would take a long time to complete the program and establish herself in that field. She decided she did not have the financial ability to pursue that plan. Instead, she needed to return to work. So, she didn't attend the courses and started looking for another job.

[68] The Appellant said that she was actively looking for another job. She was signed up for job notifications through the Service Canada Job Bank. She looked at new postings for jobs and assessed whether she was qualified and whether they required her to be vaccinated. She networked with other health care workers in online groups and chats about job opportunities. She reached out to a prospective employer about a job at a new clinic. She did some volunteer work as a mental health support worker at a yoga studio.

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[28] See section 9.001 of the Regulations.

[69] She testified that she had some difficulty finding jobs because she had been working in a very narrow and specialized field of nursing. There were also many employers that would have required her to be vaccinated in order to be hired. Eventually, the Appellant decided that her best option for employment was to get vaccinated and return to her job. She returned to her position on December 16, 2021.

[70] The Appellant has proven that her efforts to find a job were reasonable and customary.

[71] The Appellant's testimony shows that she was engaged in a number of job-seeking activities. She assessed job opportunities on a regular basis, she networked with other health care workers about potential jobs, and she contacted prospective employers. I am satisfied her job search efforts show that she was making sustained efforts to find a suitable job.

Capable of and available for work

[72] 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:[29]

a) She wanted to go back to work as soon as a suitable job is available.

b) She 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.

[73] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[30]

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[29] 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.
[30] 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.

Wanting to go back to work

[74] The Appellant has shown that she wanted to go back to work as soon as a suitable job is available.

[75] The evidence shows me that the Appellant made reasonable and ongoing efforts to find work. She was seeking jobs through her contacts with other health care workers and by notifications of job postings on the Job Bank. She spoke with prospective employers and volunteered in a mental health support role in an effort to get hired in a paying job.

[76] Her attitude and conduct in looking for work, and getting vaccinated in order to return to her job, show that she wanted to go back to work as soon as she could.

Making efforts to find a suitable job

[77] The Appellant has made enough effort to find a suitable job.

[78] 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.[31]

[79] The Appellant's efforts to find a new job are enough to meet the requirements of this second factor because she was actively seeking work in her field. She made consistent efforts directed at finding suitable employment from October 19 to December 16, 2021.

Unduly limiting chances of going back to work

[80] The Appellant did set personal conditions that might have unduly limited her chances of going back to work.

[31] 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.

[81] The Commission said the Appellant's vaccination status and her intention to attend school and pursue self-employment were restrictions that she placed on her availability for work.

[82] The Appellant testified that she intended to attend school and start her own business when she was suspended from her job. However, she changed plans within the first week of her unemployment. She decided that she needed a job for financial stability and began seeking other work.

[83] The Appellant provided a detailed and thorough account of her job search efforts. I believe that she was looking for work. So, I find her initial plan to pursue self-employment was not a restriction on her availability.

[84] The Appellant agreed that her vaccination status limited the number of jobs that she could apply for.

[85] The Appellant wasn't vaccinated at this time. So, she was only able to apply for jobs that didn't require employees to be vaccinated against COVID-19. She testified that this was a barrier to finding work because a number of health care facilities were requiring vaccination for new employees, even if vaccination was not mandated for existing employees.

[86] I understand that the Appellant didn't want to be vaccinated. I recognize that she had good personal reasons for not wanting to get the COVID-19 vaccine. But, regardless of the Appellant's reasons, she admitted that the inability to accept a job that required the COVID-19 vaccination put serious limits on her chances of returning to work.

[87] The Federal Court of Appeal given guidance in cases where claimants have good reasons for being unable to accept some work:

> The question of availability is an objective one—whether a claimant is sufficiently available for suitable employment to be entitled to [Employment Insurance] benefits—and it cannot depend on the particular

> reasons for the restrictions on availability, however, these may evoke a sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the lack of it.[32]

[88] The Appellant's choice not to get vaccinated was a barrier that didn't allow her to apply for or accept the majority of job posting that she saw or return to her job. This was a personal condition that she had which unduly limited her chances of going back to work.

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

[89] Based on my findings on the three factors, I find that the Appellant has not shown that she was capable of and available for work but unable to find a suitable job from October 19, 2021.

Conclusion

[90] The appeal is dismissed on both issues.

[91] The Commission has proven that the Appellant was suspended from her job because of misconduct. This means she is disentitled from receiving EI benefits between October 19 and December 16, 2021.

[92] The Appellant has not shown that she was available for work within the meaning of the law from October 19, 2021. This means she is disentitled from receiving EI benefits from October 19, 2021.

Catherine Shaw

Member, General Division – Employment Insurance Section

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[32] See *Attorney General of Canada v Bertrand*, A-613-81