



Citation: *KK v Canada Employment Insurance Commission*, 2023 SST 549

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** K. K.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Josée Lachance (by videoconference) and Isabelle Thiffault (by written submissions, January 13, 2023)

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**Decision under appeal:** General Division decision dated July 13, 2022  
(GE-22-1743 and GE-22-1745)

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**Tribunal member:** Janet Lew

**Type of hearing:** Videoconference

**Hearing date:** November 29, 2022

**Hearing participants:** Appellant  
Respondent's representatives

**Decision date:** May 3, 2022

**File number:** AD-22-464 and AD-22-465

## Decision

[1] The appeal is allowed for the most part. The General Division overlooked some of the evidence on both the misconduct and availability issues.

[2] There was no misconduct on the part of the Appellant, K. K. (Claimant). She was available for work for the purposes of the *Employment Insurance Act* and was not disentitled from receiving Employment Insurance benefits after November 15, 2021, other than from December 16, 2021 to January 12, 2022.

## Overview

[3] The Claimant is appealing the General Division decision. The General Division found that the Claimant's employer, a long-term care facility, had suspended the Claimant from her employment for misconduct. The Claimant had not complied with the employer's COVID-19 vaccination policy that required her to get two vaccine doses by November 15, 2021.

[4] The General Division also found that the Claimant was not available for work, for the purposes of the *Employment Insurance Act*, from November 16, 2021 to March 11, 2022. So, she was disentitled from receiving Employment Insurance benefits from November 16, 2021 to March 11, 2022.

[5] The Claimant argues that the General Division made legal and factual errors when it decided that she had been suspended for misconduct and that she was unavailable for work. She denies that there was any misconduct. She claims that she was always ready, willing, and available for work.

[6] The Respondent, the Canada Employment Insurance Commission (Commission) initially argued that the General Division did not make any errors. During the Appeal Division hearing, the Commission acknowledged that the General Division overlooked some of the evidence that could have changed the outcome. The Commission argued that the appropriate remedy is to return the matter to the General Division for

assessment as the trier of fact. This would also allow the Claimant to file new evidence to support her claim.

[7] I find that the General Division overlooked some of the evidence. Instead of returning the matter to the General Division for a redetermination, I find that there is sufficient evidence to enable me to give the decision that the General Division should have given. I find that the evidence shows that there was no misconduct. I also find that the Claimant was available, other than from December 16, 2021 to January 12, 2022, when she did not undertake any job search efforts.

## Issues

[8] The issues in this appeal are as follows:

- a) Did the General Division overlook any of the Claimant's evidence regarding her medical condition?
- b) Did the General Division overlook some of the evidence when it assessed the Claimant's availability for work?

## Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.<sup>1</sup>

### **Did the General Division overlook any of the Claimant's evidence regarding her medical condition?**

[10] The Claimant argues that the General Division failed to consider the fact that she had medical issues that required her to go on a medical leave of absence. The Claimant does not deny that she was aware of her employer's vaccination policy, but says that:

- i. The employer's policy should not apply to employees on leaves of absences;

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<sup>1</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

- ii. The policy did not say that it applied to those on leave, or that they had to comply while on a leave of absence; and
- iii. As she was on a medical leave of absence and as the policy did not say it applied to those on leave, the Claimant believed that she did not have to comply with it until after she returned to work.

[11] The Claimant was unable to work from October 4, 2021, to November 17, 2021, because of significant mental health issues.<sup>2</sup> She was on a medical leave of absence from work throughout this timeframe.

[12] The Claimant testified that she was immobilized and unable to get out of bed most of the time because of her illness. She testified that, although she was aware of her employer's vaccination requirements, she was in a dark place, was having bad thoughts, and was unable to deal with getting vaccinated.<sup>3</sup>

[13] The Claimant also says that she did not know when she would recover from her medical condition and when she would be able to return to work. She testified that once she felt better, she immediately got vaccinated.<sup>4</sup>

[14] The Claimant argues that, if the General Division had considered this evidence, it would have accepted that she had not acted wilfully. And, if she had not acted wilfully, then there could be no misconduct.<sup>5</sup>

[15] The Commission argues that the Claimant is essentially saying that the policy was unreasonable and that her employer should have accommodated her for medical reasons.

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<sup>2</sup> See Claimant's family physician's medical note dated March 10, 2022, at GD 3-99.

<sup>3</sup> At approximately 28:00 to 28:15, 1:01:23 to 1:02:41, and 1:11:00 to 1:12:16 of the audio recording of the General Division hearing.

<sup>4</sup> At approximately 1:02:00 of the audio recording of the General Division hearing.

<sup>5</sup> The General Division defined misconduct at para 25. It wrote that for misconduct to occur, the conduct has to be wilful.

– **The Claimant was aware of her employer’s vaccination policy**

[16] The evidence on file about when the Claimant might have learned about her employer’s policy includes the following:

- The employer’s vaccination policy was approved on June 17, 2021.<sup>6</sup>
- The employer reported that an email dated September 23, 2021 advised all staff of the city’s vaccine policy. All city long-term care staff would have to be fully vaccinated by November 5, 2021.<sup>7</sup> The memo stated that employees who were not fully vaccinated would be placed on an unpaid leave of absence.<sup>8</sup>
- The employer reported that the Ministry of Long-Term Care sent a memo dated October 1, 2021, that all employees had to provide proof of two vaccine doses by November 15, 2021.<sup>9</sup>
- On October 1, 2021, the employer sent an email to staff about its vaccination policy. It also stated that a person without the second dose would not be permitted to enter the care home.<sup>10</sup>
- The employer advised the Commission that all staff were to have two vaccine doses by November 15, 2021. But, if they had just one dose, they could keep working until December 15, 2021. After that, the employee would need two doses to continue working.<sup>11</sup>

[17] As it is, the General Division did not make any findings as to when the employer communicated its policy to the Claimant, or when the Claimant became aware of her employer’s requirements under the policy. This evidence was important because if, as the Claimant alleges, she did not learn about the policy until late September or

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<sup>6</sup> See Resident Care Manual, at GD 3-77.

<sup>7</sup> See Supplementary Record of Claim dated March 2, 2022, at GD 3-45 and at GD 3-46, points 6 and possibly 9.

<sup>8</sup> See employer’s memo dated September 23, 2021, addressed to all staff, at GD 3-63.

<sup>9</sup> See Supplementary Record of Claim dated March 2, 2022, at GD 3-46, point 1. See also memo from Ministry, dated October 1, 2021, at GD 3-51.

<sup>10</sup> See Supplementary Record of Claim dated March 2, 2022, at GD 3-46.

<sup>11</sup> See Supplementary Record of Claim dated March 1, 2022, at GD 3-44.

October 1, 2021, by the latest, then she may not have had sufficient time to get two doses to be able to comply with her employer's policy.

[18] The General Division found that the employer emailed all staff on October 1, 2021, and that the email stated that all employees were to provide proof of full vaccination status by November 15, 2021.

[19] The General Division also found that the employer sent a letter to the Claimant on October 18, 2021. The Claimant was on a medical leave of absence at this time. The letter stated that, if she waited until after November 15, 2021, to get vaccinated, she could only return to work once she proved that she was fully vaccinated. The letter stated that unvaccinated employees would be put on leave.<sup>12</sup>

[20] Even so, the General Division determined that the Claimant knew that her employer would not allow her to return to work until after she gave proof that she had two vaccine doses. The General Division found that the Claimant knew that her failure to follow the employer's vaccination policy risked her employment.<sup>13</sup>

[21] The General Division noted the Claimant's testimony. She agreed that she knew the employer's vaccination policy meant that she could not return to work if she did not have two doses after November 15, 2021.<sup>14</sup>

– **The General Division found the medical evidence established that the Claimant's conduct was wilful**

[22] The General Division did not mention when the Claimant began her medical leave of absence or when her doctor considered her fit to return to work.

[23] However, the General Division was aware that the Claimant was disabled and unable to work because of her mental health issues. The General Division referred to

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<sup>12</sup> See employer's letter dated October 18, 2021, at GD 3-76.

<sup>13</sup> See General Division decision, at para 43.

<sup>14</sup> See General Division decision, at para 39.

the doctor's medical notes that stated the Claimant was disabled from work and unable to work for these reasons.

[24] The General Division found that these notes did not establish that the Claimant's health prevented her from being able to get vaccinated. The General Division also found that the notes did not say that the Claimant was unable to read or understand the employer's policy about vaccination because of her mental or cognitive health. (The Claimant does not suggest that she had been unable to read or understand her employer's policy, so this was not a relevant issue anyway.)

[25] The General Division concluded that the Claimant's decision to delay vaccination was wilful. It found that the Claimant had not proven that her mental, physical, or cognitive health prevented her from being able to act wilfully and make deliberate choices about the vaccine. Or, put another way, it found that the Claimant consciously, deliberately, or intentionally chose not to get vaccinated.<sup>15</sup>

– **What the medical notes said about the Claimant's medical issues**

[26] The Claimant's family physician produced medical notes. They showed the following:

- October 20 2021<sup>16</sup> - the doctor supported the Claimant's continued absence from work. He was of the opinion that the Claimant was unable to work due to medical reasons. He would follow up in two to three weeks.
- November 4, 2021<sup>17</sup> - the Claimant continued to be disabled. The doctor was of the opinion that she had been disabled since October 4 and that neither a change in work tasks nor a reduction in hours could accommodate the Claimant.
- March 10, 2022 - the doctor wrote that when he spoke with the Claimant by phone on October 5, 2021, it was apparent that "she could not at that time

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<sup>15</sup> See General Division decision at para 25, where it defined misconduct as conduct that is conscious, deliberate, or intentional.

<sup>16</sup> Medical note dated October 20, 2021, at GD 3-87.

<sup>17</sup> Medical note dated November 4, 2021, at GD 3-84.

perform the activities of her employment.”<sup>18</sup> By November 17, she had improved with regards to her mental health and function, such that she could return to work without any restrictions.

[27] The medical notes established that the Claimant was unable to work because of mental health issues.

– **The Claimant’s doctor was of the opinion that the Claimant could not perform the activities of her employment**

[28] In his last note, the doctor wrote that the Claimant was unable to perform the activities of her employment. The General Division did not address this specific opinion.

[29] The General Division should have indicated whether it considered if the “activities of [the Claimant’s] employment” included vaccination. As the employer required vaccination of its employees, the doctor’s opinion could have included vaccination when he wrote that the Claimant could not perform the activities of her employment.

[30] The doctor’s opinion about the Claimant’s inability to perform her employment activities should have prompted the General Division to review the other evidence before it. I will address this issue in more detail below.

– **The medical notes did not address the extent of the Claimant’s limitations**

[31] The doctor’s notes clearly do not establish that the Claimant’s health prevented her from being able to get vaccinated.

[32] But, at the same time, the notes do not suggest that the Claimant was able to get vaccinated during her medical leave of absence from work. Indeed, it does not appear that the Claimant’s doctor even turned his mind to the question of the Claimant’s capacity to choose to get vaccinated. The doctor did not specifically consider or address this issue at all in his notes.

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<sup>18</sup> Medical note dated March 10, 2022, at GD 3-99.



[33] For this reason, the General Division should have looked to see whether there was other evidence that shed light on the Claimant's mental health when it determined whether the delay in getting vaccinated was wilful. The General Division should have examined whether other evidence supported or was inconsistent with its findings on the medical opinions.

[34] If that evidence was inconsistent with its findings on the medical opinions, then the General Division had a duty to explain why it rejected that other evidence to justify its findings.

– **Other evidence: the Claimant testified that she was immobilized and bedridden**

[35] The General Division challenged the Claimant on the medical notes. The General Division tried to get the Claimant to agree that the medical notes did not say that her mental health prevented her from getting vaccinated.

[36] The Claimant questioned how she could get vaccinated, given the severity of her mental health issues. The Claimant testified that she was largely immobilized and unable to leave her bed throughout her medical leave of absence. The Claimant also noted that, once she felt better, she immediately got vaccinated.

[37] This was consistent with what the Claimant told the Commission. The Claimant told the Commission of her health struggles.<sup>19</sup>

– **The General Division did not address the Claimant's evidence regarding her medical condition and its impact on her**

[38] The General Division did not say—one way or the other—whether it rejected the Claimant's evidence that she was immobilized and bedridden. The General Division also did not say whether it found the Claimant lacking in credibility, or her evidence unreliable. The General Division simply did not address the Claimant's testimony. Yet this evidence was important in showing whether the Claimant's conduct was wilful.

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<sup>19</sup> See, for instance, Supplementary Record of Claim, dated April 21, 2022, at GD 3-101.

[39] The General Division overlooked this evidence—the impact of the Claimant’s mental health issues on her functionality. This represents an error that allows the Appeal Division to intervene in the General Division decision.

[40] However, there is also the issue of the Claimant’s availability.

### **Did the General Division overlook some of the evidence when it assessed the Claimant’s availability for work?**

[41] The Claimant argues that the General Division made a factual error when it determined that she was not available for work from November 16, 2021 to March 11, 2022. She claims that she was ready, willing, and able to work throughout this period, and particularly after January 12, 2022. By that date, she had received a second dose of the COVID-19 vaccine.

[42] The Commission’s initial position is that the General Division did not make any errors about whether the Claimant was available for work. The Commission notes that the General Division looked at each of the “*Faucher* factors,”<sup>20</sup> when it assessed the Claimant’s availability. The General Division examined the following:

- i. whether the Claimant desired to return to the labour market as soon as a suitable job was offered;
- ii. whether the Claimant expressed that desire through efforts to find a suitable job; and
- iii. whether the Claimant set personal conditions that could have unduly limited her chances of returning to the labour market.

[43] The General Division found that the Claimant wanted to return to work. However, the General Division found that the Claimant was not doing enough to find a job. The General Division acknowledged that the Claimant had applied for work at a bakery and

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<sup>20</sup> In *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856, the Federal Court of Appeal set out three factors, all of which it said have to be considered and weighed when assessing availability.

had contacted two other care homes. The General Division did not find these to be reasonable job search efforts. It was not enough to wait for her employer to recall her to work.

[44] Similarly, the General Division found that the Claimant unduly limited her chances of returning to work because her main job search activity was waiting to return to work with her usual employer. Her employer required employees to be double-dosed and then later required employees to have a third vaccine shot, before they could resume working.

[45] Ordinarily, a claimant cannot just wait for their employer to call them in for work. Claimants have to be actively looking for work.

[46] As it would be sometime before the Claimant could fulfil her employer's requirements, the General Division found that the Claimant should have been more active in her job search and that she should have expanded her job search efforts.

[47] Yet, the General Division's conclusion on the availability issue neglected to reflect its own findings. The General Division found that the employer's policy on getting a third vaccine shot was unclear. It wrote:

... I find that the employer clearly communicated its policy about two vaccine doses, but it didn't clearly notify [the Claimant] of its updated policy on booster doses. The fact that the employer allowed the Claimant to return to work on March 14, 2022, before she had a booster dose, shows me that the employer's policy on the third COVID-19 vaccine wasn't clear.<sup>21</sup>

[48] The General Division did not consider the fact that the employer's policy on the third vaccine shot was unclear when it came to the availability question. The Claimant told the Commission that she thought she would be returning to work shortly after she got her second dose. The Claimant also told the Commission that some of her work colleagues who did not have a booster shot were working. She had also testified that

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<sup>21</sup> See General Division decision, at para 48.

her employer was short-staffed and looking for employees to pick up extra shifts. This fed into her belief that her employer would allow her to return to work sooner.<sup>22</sup>

[49] These were important considerations because they spoke to the reasonableness of the Claimant's efforts to find a suitable job and whether she set personal conditions that could have limited her chances of returning to the labour market.

[50] The Commission agrees that these were relevant facts that the General Division should have considered when it assessed the *Faucher* factors.

## **Remedy**

[51] How can I fix the General Division's errors? The Commission asks me to send the matter back for a reconsideration to the General Division, as it is the trier of fact. The Claimant does not oppose this remedy.

[52] The Claimant says that there is new evidence she could file if the matter is returned to the General Division. For instance, she could file her employer's updated vaccination policies.

[53] These updated policies specifically refer to those who are on leave. In other words, the Claimant would rely on the updated policies to highlight the old policies that applied when she was on a medical leave of absence. She says the updated and old policies will show that it had been reasonable for her to believe that she did not have to get vaccinated when she had been on a medical leave of absence.

[54] But I have the evidence to make the decision that the General Division should have given on both the misconduct and availability issues. On top of that, both parties received a fair hearing and an opportunity to present their case at the General Division. So, I will substitute my own decision in the place of the General Division decision.

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<sup>22</sup> See Supplementary Record of Claim dated February 25, 2022, at GD 3-27, and Supplementary Record of Claim, dated April 14, 2022, at GD 3-100.

– **Background facts relating to the misconduct issue**

[55] The Claimant's employer implemented a vaccination policy. The employer required all employees to be vaccinated against COVID-19. Otherwise, they would be placed on an indefinite, unpaid leave of absence. The employer stated that all staff had known for nearly two years that they would need to be vaccinated.<sup>23</sup>

[56] The evidence shows that the employer approved the policy in June 2021.<sup>24</sup> According to the employer, it communicated this policy to all staff, including to the Claimant, on September 23, 2021, and again on October 1, 2021.

[57] The Claimant recalls that she received notice of her employer's vaccination policy on October 1, 2021. The memo from her employer indicated that staff would have to provide proof of full vaccination by November 15, 2021. (The employer's September 23, 2021 memo required full vaccination by November 5, 2021.) The employer later changed these dates.

[58] The employer advised the Commission that all staff were required to have two doses of the vaccine by November 15, 2021. But, if they had only one dose by then, they could continue working until December 15, 2021. The employer required staff to have two doses to continue working after December 15, 2021.<sup>25</sup>

[59] Around this time, the Claimant signed a "Pre-Notice of Liability Letter" addressed to her employer.<sup>26</sup> She objected to the employer's requirement that employees had to get vaccinated or face certain consequences such as dismissal or an unpaid leave of absence. This confirms that the Claimant was aware of her employer's vaccine policy. (The Claimant testified that she signed the Pre-Notice because her work colleagues asked her to sign it.)

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<sup>23</sup> See Supplementary Record of Claim dated March 1, 2022, at GD 3-44.

<sup>24</sup> See Resident Care Manual, at GD 3-77 to GD 3-79.

<sup>25</sup> See Supplementary Record of Claim dated March 1, 2022, at GD 3-44.

<sup>26</sup> See Pre-Notice of Liability Letter, at GD 3-66 to GD 3-75. The employer referred to this petition, but stated that the Claimant signed it on October 25, 2021. See Supplementary Record of Claim dated March 2, 2022, at GD 3-45.

- **The Claimant was off work because of mental health issues**

[60] Around the third week of September 2021, the Claimant began experiencing mental health issues.<sup>27</sup> She contacted her family physician on September 21, 2021 but was unable to get an appointment until October 4, 2021. She was already off on a leave.

[61] The Claimant's family physician provided a medical note dated March 10, 2022.<sup>28</sup> He confirmed that the Claimant was unable to work from October 4, 2021, to November 17, 2021 because of mental health issues.

[62] During her medical leave of absence, the employer wrote to the Claimant, on October 18, 2021.<sup>29</sup> The employer advised the Claimant that anyone who had not met the vaccination standard by November 15, 2021, would not be authorized to enter the long-term care facilities.

[63] The employer also wrote to the Claimant on November 4, 2021, in response to her email dated November 3, 2021.<sup>30</sup> The employer set out the Claimant's responsibilities to the employer, in the context of facilitating her return to work.<sup>31</sup> Essentially, the employer wanted to know whether and how it should accommodate the Claimant, given any medical limitations she might have. The exchange between the Claimant and her employer were unrelated to the vaccine policy.

- **The Claimant got her first vaccine dose in mid-November 2021**

[64] The Claimant attempted to get her first vaccine shot on November 15, 2021. She was refused because she was unwell. She got her first vaccine shot two days later, on November 17, 2021.<sup>32</sup>

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<sup>27</sup> See Supplementary Record of Claim dated February 25, 2022, at GD 3-27.

<sup>28</sup> See family physician's medical note dated March 10, 2022, at GD 3-99.

<sup>29</sup> See employer's letter dated October 18, 2021, at GD 3-76.

<sup>30</sup> Claimant's email of November 3, 2021, at GD3-84.

<sup>31</sup> See employer's letter dated November 4, 2021, at GD3-82.

<sup>32</sup> At approximately 1:35:50 of the audio recording of the General Division hearing, the Claimant confirmed when she got her first dose.

[65] The employer advised the Commission that since the Claimant did not get her first dose until after November 15, 2021, that she would have to wait until two weeks after her second dose before she could return to work.<sup>33</sup>

[66] The Claimant reported that she had an appointment booked for a second vaccine shot on December 15, 2021.<sup>34</sup> However, the Claimant reported that this appointment was rescheduled to January 12, 2022, as public health authorities had declared that it was better to have the doses eight weeks apart.<sup>35</sup> She stated that she would be pushing her employer to let her get back to work, without having to serve a 14-day waiting period after her second dose.<sup>36</sup>

[67] The Commission asked the Claimant why she waited until November 15, 2021 to be vaccinated against COVID-19. The Claimant responded that she “was still dealing with mental health issues and was under the care of her doctor.”<sup>37</sup>

[68] As the General Division observed, the family doctor did not state that health reasons prevented the Claimant from getting vaccinated. The Claimant testified that the issue of vaccination simply did not arise with her doctor.<sup>38</sup> The Claimant’s focus was on her mental health issues. So, the doctor did not address the vaccination issue.

[69] The Claimant testified that, at times, she was consumed by suicidal thoughts.<sup>39</sup> She was largely immobilized during her medical leave, overcome by her mental health issues to the point that she could not get out of bed.

[70] The fact that the Claimant was largely bedridden because of her mental health issues showed that she had a significant, disabling medical condition that prevented her from working. I find that they also prevented her from getting vaccinated.

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<sup>33</sup> See Supplementary Record of Claim dated March 2, 2022, at GD 3-45

<sup>34</sup> See Supplementary Record of Claim dated November 23, 2021, at GD 3-22.

<sup>35</sup> See Supplementary Record of Claim dated December 21, 2021, at GD 3-24.

<sup>36</sup> See Supplementary Record of Claim dated December 21, 2021, at GD 3-24.

<sup>37</sup> See Supplementary Record of Claim dated March 1, 2022, at GD 3-42.

<sup>38</sup> See General Division decision, at para 31.

<sup>39</sup> At approximately 1:15:38 to 1:19:10 of the audio recording of the General Division hearing.

– **Misconduct**

[71] The General Division set out the test for misconduct. The General Division wrote:

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Claimant 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. [Citation omitted]

[26] There is misconduct if the Claimant 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 a suspension because of that. [Citation omitted]

[72] Given the severity of the Claimant's medical condition, her conduct cannot be said to have been wilful. Her crippling mental health issues prevented her from being able to make a conscious, deliberate, or intentional decision about getting vaccinated.

[73] The Claimant followed treatment recommendations. Once her medical condition improved, she was able to turn her mind to getting vaccinated so she could return to work as soon as possible.

[74] The Claimant received her first dose of the vaccine at her first available opportunity on November 17, 2021. She expected to be fully vaccinated with a second dose by mid-December 2021. However, she states that health authorities increased the interval time between doses to eight weeks, so the Claimant was unable to get doubly vaccinated until January 12, 2022.

[75] The Claimant's employer would not allow her to return to work until she was doubly vaccinated. The Claimant had to remain on a leave of absence after November 17 2021. Even so, I find that there was no misconduct on the Claimant's part.

○ **There was no misconduct in the Claimant's case**

[76] I find that there was no misconduct because the Claimant had been unable to comply with her employer's requirements because of the severity of her medical condition. The Claimant had not made a conscious, deliberate, or intentional decision



because her mental health interfered with her ability to get vaccinated. She was preoccupied with suicidal thoughts and was largely bedridden.

[77] The Claimant also demonstrated that, once her health no longer restricted her from getting vaccinated, she acted as swiftly as possible in attempting to meet her employer's requirements.

- **Does misconduct arise if compliance with a policy is required during a medical leave of absence?**

[78] I recognize that there is also the issue about whether an employer can effectively impose its policies on an employee who is on a medical leave of absence. In other words, can misconduct arise in relation to an employee's medical leave of absence?

[79] In this case, if the Claimant were to have been doubly dosed by November 15, 2021, she would have had to have gotten vaccinated at a time when she was mentally unable to do so. It seems to me that if an employee is unable to be compliant with an employer's policies or rules for reasons that relate to a medical leave of absence, then misconduct would not arise in those instances. However, I have not fully considered this issue

[80] The Commission urges me to return this matter to the General Division for a full airing of the issue. I find it unnecessary to do so in the context of the facts of this case before me and I see no need to prolong this matter.

– **Availability**

[81] The Claimant still has to prove that she was available for work but was unable to find a suitable job when she was off work.

[82] There are three distinct periods to see whether the Claimant was available for work: (1) between November 16, 2021 and December 15, 2021, (2) between December 16, 2021 and January 12, 2022 and (3) between January 13, 2022 and March 11, 2022.

[83] As I have noted above, when assessing availability, the following factors have to be considered:

- i. whether the Claimant desired to return to the labour market as soon as a suitable job was offered;
- ii. whether the Claimant expressed that desire through efforts to find a suitable job; and
- iii. whether the Claimant set personal conditions that could have unduly limited her chances of returning to the labour market.

[84] The General Division accepted that the Claimant expressed a desire to return to the labour market as soon as a suitable job was offered. The parties did not challenge this finding. So, I do not have to consider this factor.

[85] I am left to consider whether the Claimant made reasonable efforts to find a suitable job and whether she set any personal conditions that could have unduly limited her chances of returning to the labour market.

– **The Claimant’s availability between November 16, 2021 and December 15, 2021**

[86] There was little evidence at the General Division regarding the types of employment that would be considered suitable for the Claimant. But there is no dispute that the Claimant had limited training and work experience.

[87] In November 2021, the Claimant had been working as a personal support worker for over 25 years, with the same employer. She did not have any diverse work experience nor training. She also testified that she did not have many qualifications.<sup>40</sup> So, there simply were few suitable jobs for the Claimant outside the long-term or health care setting.

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<sup>40</sup> At approximately 1:22:25 to 1:23:14 of the audio recording of the General Division hearing.

[88] The Claimant testified that she applied for jobs in November and early December 2021.<sup>41</sup> She applied to a bakery and contacted a couple of nursing homes. She testified that she did not apply for jobs “outside of [her] realm.”<sup>42</sup>

[89] I find that the Claimant’s search efforts to find a suitable job from November 16, 2021 to December 15, 2021 were adequate,<sup>43</sup> taking into account the relatively short timeframe, and the types of employment that were suitable for the Claimant. Ultimately, the Claimant did not meet the qualifications of the nursing homes, as she was not fully vaccinated then.

[90] The General Division found that the Claimant set personal conditions because she waited to return to work with her usual employer. It is unclear from the General Division’s findings what timeframe this covered, but the fact that the Claimant was actively looking for work in November and early December 2021 shows that she did not set this personal restriction at that time.

[91] I find that the Claimant was available for work between November 16, 2021 and December 15, 2021.

– **The Claimant’s availability between December 16, 2021 and January 12, 2022**

[92] The Claimant had scheduled an appointment to get her second dose on December 15, 2021. But, at some point, the provincial health authorities increased the interval time between first and second doses. Hence, her appointment was rescheduled to mid-January 2022.

[93] It is unclear from the evidence when the Claimant learned that the interval between doses had increased. But the Claimant had to have been aware by at least December 15, 2021 that she would not be returning to work that month, and not returning until after she received her second dose.

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<sup>41</sup> At approximately 1:21:50 to 1:23:55 of the audio recording of the General Division hearing.

<sup>42</sup> At approximately 1:23:10 of the audio recording of the General Division hearing.

<sup>43</sup> The General Division found the Claimant’s job search efforts inadequate, but the General Division used a longer timeframe, up to March 2022. And the General Division seemingly did not consider what constituted suitable employment for the Claimant, taking into account her work experience and training.

[94] So, knowing that she would not be working at her usual employment between December 16, 2021 and January 12, 2022, the Claimant had to show that she was available for work for this timeframe.

[95] There is no evidence or any indication from the Claimant that she undertook any efforts to find a suitable job within this timeframe. While she might have had limited work experience and training, she did not, for instance, assess any employment opportunities, network, contact prospective employers, or other.

[96] For this reason, I find that the Claimant was not available for work for the purposes of the *Employment Insurance Act* from December 16, 2021 to January 12, 2022.

– **The Claimant’s availability between January 13, 2022 and March 11, 2022**

[97] The parties did not contest the General Division’s finding that the employer’s policy on the third COVID-19 vaccine was unclear.

[98] The Claimant emailed her employer on January 13, 2022, to confirm that she could return to work on January 26, 2022. However, her employer informed her that it had a new policy. Any employees who had been on leave now needed to have a third dose before returning to work. So, the Claimant would not be able to return to work until April 6, 2022.<sup>44</sup>

[99] I accept the General Division’s finding that the employer’s updated policy was unclear. Despite the updated policy, the Claimant continued to believe that she would soon be returning to work. For one, some of her work colleagues who did not have a third dose were working. On top of that, the Claimant’s employer was short-staffed and looking for employees to pick up extra shifts.

[100] Given this context, it was unnecessary for the Claimant to look for work. Because of her employer’s confusing messages, the Claimant reasonably (even if mistakenly) understood that her employer would let her return to work immediately after getting her

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<sup>44</sup> See Supplementary Record of claim dated February 25, 2022, at GD 3-27.

second dose. She pointed to the fact that work colleagues returned to the workforce without having to wait two weeks after a second shot.

[101] The issue about whether the Claimant set personal conditions between January 12, 2022 and March 11, 2022 is irrelevant, in light of the Claimant's expectations that she would be returning to work soon after January 12, 2022.

– **Summary on availability**

[102] The Claimant was available for work between November 16, 2021 and December 15, 2021, when she was actively looking for work.

[103] As for the timeframe between January 13, 2022 and March 11, 2022, the employer held out that it was welcoming employees back to the workforce. The Claimant reasonably expected that she would be returning to work soon. So, from this perspective, her lack of job search efforts was in fact reasonable. This meant that she was available for work.

[104] The Claimant was not available for work from December 16, 2021 and January 12, 2022, when she did not actively look for any work. She is disentitled from receiving Employment Insurance benefits for this timeframe.

## **Conclusion**

[105] I am allowing the appeal, for the most part.

[106] There was no misconduct in the Claimant's case. She had mental health issues that left her unable to act wilfully.

[107] The Claimant was available for work after November 15, 2021, other than from December 16, 2021 and January 12, 2022. She knew that her employer would not let her return to work yet did not undertake any job search efforts during this time. She is disentitled from receiving Employment Insurance benefits for this timeframe only.

Janet Lew  
Member, Appeal Division