



Citation: *MR v Canada Employment Insurance Commission*, 2023 SST 1087

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. R.
Representative: Nilanka Boteju

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (535793) dated October 7, 2022
(issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference
Hearing date: April 18, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: May 3, 2023
File number: GE-22-3591

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

Issue 1 - Misconduct

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words because she did something that caused her to lose her job). This means the Appellant is disqualified from receiving EI benefits.

Issue 2 – Availability

[3] The Appellant hasn't shown that she is available for work from April 11, 2022. This means that she is disentitled from receiving EI benefits.

Overview

[4] The Appellant lost her job. The employer says she was let go because she didn't comply with its Covid-19 (Covid) vaccination policy.¹

[5] The Commission accepted the employer's reason for the Appellant's dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[6] The Appellant doesn't dispute that this happened. However, she didn't agree with the employer's policy. She has concerns about the vaccine being unsafe, and didn't feel that the employer should have been able to force her to take it. Taking the vaccine went against her personal and religious beliefs.

[7] The Commission also decided that the Appellant is disentitled from receiving EI benefits from April 11, 2022, because she wasn't available for work. A claimant has to

¹ See GD3A-20.

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.

Issues

[8] Was the Appellant dismissed from her job because of misconduct?

[9] Was the Appellant available for work from April 11, 2022?

Analysis

Issue 1 - Misconduct

[10] The law says that you can't get EI benefits if you lose your job because of misconduct.²

[11] 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 was dismissed from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant dismissed from her job?

[12] I find that the Appellant was dismissed from her job because she didn't comply with the employer's vaccination policy – she didn't get vaccinated.

[13] The Commission says that the Appellant didn't follow the employer's vaccination policy, and that by her own admission, she expected to be dismissed from her job as a result.³

² Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

³ See GD4A-4.

[14] The employer issued a Record of Employment (ROE). In it, the reason for issue was indicated as “OTHER,” with a note saying the Appellant was “terminated with cause for non-vaccination compliance.”⁴

[15] The Appellant confirmed in her testimony that she was dismissed because she didn’t get vaccinated.

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

[16] I find that the reason for the Appellant’s dismissal is misconduct under the law.

[17] The Act doesn’t say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant’s dismissal 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.

[18] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[19] 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 being dismissed from her job because of that.⁸

[20] The Commission has to prove that the Appellant was dismissed from her job because of misconduct. The Commission has to prove this on a balance of probabilities.

⁴ See GD3A-20.

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

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ 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 Appellant was dismissed from her job because of misconduct.⁹

[21] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether her employer wrongfully dismissed her, or should have made reasonable arrangements (accommodations) for her.¹⁰ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.¹¹ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[23] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹²

[24] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹³

[25] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.¹⁴ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹⁵

[26] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.¹⁶ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.¹⁷

[27] These cases aren't about Covid vaccination policies. But what they say is still relevant. In a very recent decision, which did relate to a Covid vaccination policy, the Appellant argued that his questions about the safety and efficacy of the Covid vaccines and the antigen tests were never satisfactorily answered. The Appellant 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.¹⁸

[28] 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.¹⁹

[29] 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

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

¹⁹ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted “misconduct.”²⁰

[30] Case law makes it clear that my role is not to look at the employer’s behaviour or policies and determine whether it was right to dismiss the Appellant from her job. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a mandatory Covid vaccination policy;
- the employer clearly communicated the policy’s requirements, deadlines, and consequences of non-compliance;
- the Appellant’s exemption request was denied, but she continued to be non-compliant with the vaccination policy;
- the Appellant knew that not complying with the policy would lead to serious disciplinary consequences, including losing her job; and
- the Appellant lost her job because she chose not to comply with the employer’s vaccination policy.²¹

[32] The Appellant says that there was no misconduct on her part, because:

- she worked for the employer for over 20 years, and had an excellent work record;
- she was concerned about the safety and effectiveness of the vaccine;
- it is her right to choose whether or not she gets vaccinated;

²⁰ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

²¹ See GD4A-4-GD4A-5.

- she had Covid in May 2021 and fully recovered, so she didn't need to get the vaccine;
- she requested a religious exemption from being vaccinated, and provided a letter as proof of her faith, creed, and belief;
- she was undergoing regular testing right up until she was suspended;
- the employer didn't clearly communicate the consequences of not complying with the policy, so she didn't think her employer would go so far as to dismiss her; and
- the Commission didn't speak to the employer about her dismissal, so its decision is biased and unfair.²²

[33] The Appellant's employer issued a policy on September 9, 2021, that required her to be vaccinated against Covid. The policy said that she had to provide proof of being fully vaccinated by October 19, 2021, or she would be suspended, and possibly terminated, from her job.²³ She didn't get vaccinated and was placed on unpaid leave (suspended) on October 18, 2021, and then dismissed from her job on March 28, 2022.

[34] The Appellant told the Commission that the employer told employees they had to take the vaccine or they would be suspended. The Appellant didn't feel comfortable taking the vaccine, and didn't like the way she was being forced. So, she declined to be vaccinated, and was suspended from her job.

[35] She said that the employer sent her a letter, saying if she didn't get vaccinated, she would be dismissed from her job. She didn't think this was right, and didn't want to take the risk of getting the vaccine, so she again declined to be vaccinated, and was dismissed from her job. She said that she had some idea that not complying with the employer's policy meant she was risking losing her employment. But at the same time, she didn't think the employer would go that far. She should have a say about what she

²² See GD6.

²³ See GD3-23-GD3-30.

takes, and a choice when it comes to her own body. It wasn't fair that she didn't have the choice.²⁴

[36] The Appellant told the Commission that she requested a religious exemption from being vaccinated. She gave the employer a letter that her Pastor had written, as well as a letter she found on the internet, supporting what her Pastor had written. The employer told her that they didn't accept her religious exemption request. She said that she made a personal decision not to get vaccinated, based on her own beliefs and not feeling it was right to be forced to take the vaccine.²⁵

[37] During the reconsideration process, the Appellant told the Commission that she made the decision not to get vaccinated based on her faith, as well as personal opinion. She didn't have enough information about the vaccines, and saw family members suffer because of it. The vaccines just are not for her. She said that while her religion doesn't prohibit vaccination, her own personal faith led her to reject the Covid vaccine, based on its contents and questionable effectiveness. She said that her request for a religious exemption was denied by the employer the day before her last day of work. She said she was dismissed from her job on March 28, 2022, and that she knew her employment would be terminated due to "a few warnings leading up to it."²⁶

[38] The Commission attempted to contact the employer, without success.²⁷

[39] The Appellant testified that:

- She worked in a health facility as a dietary aide.
- She lost her job because she didn't comply with the employer's vaccination mandate.
- The employer posted notices in the workplace, about its vaccination policy. She looked at the notices and also heard from other employees that there was a

²⁴ See GD3A-22.

²⁵ See GD3A-22.

²⁶ See GD3-36.

²⁷ See GD3A-34.

vaccination policy in place. Other than a quick glimpse, she didn't really read the notices or pay full attention to them.

- The employer held a meeting about two weeks before the Appellant was suspended, and told employees that they had to be vaccinated, or they would be put on unpaid leave.
- She thinks the employer might have posted the vaccination policy on its website, but she had difficulty with computers, and with security codes for getting on to the computer system. She didn't ask her manager or supervisor to help her access the website so that she could read the policy. She never accessed the policy to read it, before she was suspended. The employer mailed her a copy of the policy, about two months after she was suspended, and that was the first time she read it.
- She didn't think the policy would affect her. She thought it would affect the nurses and security guards. Other than when she was handing out meal trays, she didn't have direct contact with clients. And she thought that handing in her exemption request would be enough.
- Employees were undergoing regular testing before the vaccination policy was put in place. She thought that if she was exempted from being vaccinated, she would have to continue with testing, which she had no problem with.
- The employer's policy required employees who weren't vaccinated to complete an online educational session about Covid vaccination. But because of her issues with security codes to access the computer, she didn't do the educational session. Her employer didn't reach out to her because she didn't do the educational session.
- She submitted a religious exemption request two weeks before the vaccination deadline.

- She knew that if her exemption request was denied, she would have to be vaccinated to keep her job. But she didn't think her request would be denied. She thought that if she had a medical or religious reason not to get vaccinated, she would be approved for an exemption.
- After submitting her exemption request, she spoke to her union representative about filing a grievance if the employer didn't give her an exemption. She signed a grievance form at that time.
- She went to work on October 17, 2021, and was told not to return the next day if she hadn't gotten vaccinated.
- She didn't get vaccinated, and was suspended on October 18, 2021. Her employer gave her a suspension letter.
- The employer contacted her by phone while she was suspended, in January or February, 2022, to tell her that her exemption request was denied. She still wouldn't consider getting vaccinated, and told the employer that she wouldn't be getting vaccinated. In March, 2022, the employer sent her a letter that said she was dismissed from her job, effective March 28, 2022.
- Nobody told her that she would be dismissed from her job if she didn't get vaccinated. She only had the one phone call from the employer, after she was suspended. After that call, she thought maybe she would be dismissed, but she wasn't sure because the employer didn't say that during the phone call.
- She was somewhat surprised when she was suspended, and was shocked when she was dismissed. She worked for the employer for 20 years and had never had any issues.
- She received an email from her union representative after she was dismissed, saying that the employer was willing to pay her \$1000 for violation of her human rights, and another sum of money for wrongful dismissal. She didn't accept the employer's offer, because it was too low considering how much she has suffered

because of this situation. She is waiting to hear from the union again, about the next steps to take.

[40] The Appellant's representative made submissions on her behalf, and referred to his written submissions, which are coded as GD6 on the file.

[41] The Appellant says that the Commission making its decision without being able to reach the employer means that its decision is biased or unfair, and that this constitutes a breach of natural justice. I disagree. The Commission attempted to reach the employer to discuss the Appellant's dismissal, but was unable to. The Appellant provided the information that the Commission required to make a decision regarding her entitlement to benefits.

[42] I find that the Appellant made a conscious and deliberate choice not to get vaccinated, contrary to the employer's policy. She testified that she didn't get vaccinated.

[43] Although the Appellant has indicated that she didn't access the employer's written policy on the computer because of issues with logging on, and didn't get a written copy of the policy until she was already suspended, she also told the Commission, and confirmed in her testimony, that the employer held a meeting about the vaccination policy. At the meeting, the employer told employees that they had to be vaccinated, told them the deadline to comply with the policy, and told them what the consequences would be if they didn't comply with the policy.

[44] I find that the Appellant knew, or should have known, that not getting vaccinated meant that she could lose her job. She testified that the employer held a meeting and told employees that they had to be vaccinated, or they would be put on unpaid leave. She told the Commission that the employer sent her a letter, saying if she didn't get vaccinated, she would be terminated from her job. She said she knew she was going to be dismissed if she didn't get vaccinated, due to "a few warnings leading up to it."

[45] Although the Appellant testified that she knew she could be suspended, but didn't know she could be dismissed for not getting vaccinated, I place greater weight on the

statements that she made to the Commission. This is because she told the Commission on two occasions that she knew she could lose her job for not getting vaccinated, when she first spoke to the Commission, and then again when she spoke to a different person at the Commission during the reconsideration process. When she first spoke to the Commission, she said that the employer sent her a letter to tell her that if she didn't get vaccinated, she "would be terminated." During the reconsideration process, she said that she knew that if she failed to comply by March 28, 2022, her employment would be terminated, "due to a few warnings leading up to it."

[46] The Appellant testified that she didn't consider the possibility of her exemption request being denied. She said that she thought she would be exempted because she submitted a request. She also testified that the employer only told her that her request for a religious exemption was denied after she had been suspended. But she told the Commission that her exemption request was denied the day before her last day of work.

[47] Either way, in my view, the Appellant didn't demonstrate any intention to comply with the vaccination policy, even if her exemption request was denied. She testified that she spoke to her union representative after submitting her exemption request, and filled out a grievance form, to be submitted if her request was denied. She testified that she spoke to the employer on the phone while she was suspended, and told it that she wouldn't be getting vaccinated.

[48] I understand that the Appellant hoped that the employer wouldn't go through with dismissing her for not following its vaccination policy. But I find that she knew, or should have known, that not complying with the policy would very likely result in her losing her job.

[49] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated, and provide proof of vaccination;

- the employer clearly communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated;
- the Appellant didn't have an exemption from being vaccinated;
- the Appellant knew the consequences of not following the employer's vaccination policy; and
- the Appellant didn't get vaccinated, and was dismissed from her job as a result.

[50] I also understand that the Appellant feels she should get EI because she's paid in to it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. She has not met the requirements to be eligible for benefits.

So, was the Appellant dismissed from her job because of misconduct?

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

[52] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that not getting vaccinated would cause her to be dismissed from her job.

Issue 2 - Availability

[53] 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.

[54] First, the Act says that a claimant has to prove that she is making “reasonable and customary efforts” to find a suitable job.²⁸ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” means.²⁹ I will look at those criteria below.

[55] Second, the Act says that a claimant has to prove that she is “capable of and available for work,” but isn’t able to find a suitable job.³⁰ Case law gives three things the Appellant has to prove to show that she is “available” in this sense.³¹ I will look at those factors below.

[56] The Commission decided that the Appellant was disentitled from receiving benefits from April 11, 2022, because she wasn’t available for work during that period, based on these two sections of the law.

[57] I will now consider these two sections myself to determine whether the Appellant was available for work from April 11, 2022.

Reasonable and customary efforts to find a job

[58] The law sets out criteria for me to consider when deciding whether the Appellant’s efforts were reasonable and customary.³² I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant had to have kept trying to find a suitable job during the entire period under review.

[59] 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:³³

²⁸ See section 50(8) of the Act.

²⁹ See section 9.001 of the Regulations.

³⁰ See section 18(1)(a) of the Act.

³¹ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

³² See section 9.001 of the Regulations.

³³ See section 9.001 of the Regulations.

- Submitting job applications
- registering for job search tools or with online job banks or employment agencies
- networking

[60] The Commission says that the Appellant didn't do enough to try to find a job from April 11, 2022. It says the Appellant told it that she didn't apply for any jobs, but was trying to find a job through word of mouth. She dropped off her resume at two places, and hadn't attended any job fairs due to personal issues. When asked about expanding her job search in the food industry, she said that she didn't have a chef certification.³⁴

[61] The Appellant disagrees and says that from the time she lost her job, she was trying to find suitable employment and was actively engaged in looking for work.³⁵

[62] In June 2022, the Appellant told the Commission that she tried to find work since becoming unemployed, but that it was hard because a lot of employers required vaccination against Covid. She was looking for a job in foods, but a lot of employers in that industry required vaccination. She said she was trying to figure out what she could do. She thought she might take retraining in something like accounting in the fall.³⁶

[63] The Appellant told the Commission that she would be willing to work in Toronto, and that she didn't want to have to commute too far, because she doesn't drive and uses public transit. She said that if she goes outside of Toronto proper, she has to pay double fare, which she is unwilling to do. So, she would only be willing to accept employment in Toronto proper.³⁷

[64] The Commission Officer asked the Appellant how many jobs she had applied for. She said that she had not handed in any resumes or searched for jobs online. She said she had only asked people she knew about possible jobs. She said there were maybe

³⁴ See GD4B-1.

³⁵ See GD2-5.

³⁶ See GD3B-14.

³⁷ See GD3B-14.

four jobs that she thought for sure she would get a call about, through word of mouth via people she knows, but none of those worked out.³⁸

[65] The Appellant told the Commission that she would be willing to accept a job that paid in the \$18-\$20 range. She said she would be very hesitant to accept a lower wage than this, because living costs are high. She said it would be a “hard pill to swallow” to accept a job that paid minimum wage. She said when you’re working, you should at least be able to put a roof over your head and food on your table.³⁹

[66] In October, 2022, during the reconsideration process, the Appellant told the Commission that up to that time, she had only been looking for work through word of mouth, which was how she got her job with the employer 20 years earlier. She said she had just had her resume done, and had dropped copies off at a clinic in a nearby mall, and at a care facility not far from her home. She said she had been unable to attend job fairs, because she had some family issues. She said she didn’t know whether the healthcare sector had lifted its vaccine mandate, and that she remained unvaccinated against Covid. She said she had no plans to be vaccinated. She said she had to look for work in the food sector, as she worked as a dietary aide before. When asked if she had expanded her job search criteria, such as looking into and applying for jobs in the food industry, the Appellant reiterated that she doesn’t have a certification to work as a chef.⁴⁰

[67] The Appellant testified as follows:

- She knew that she had to be looking for work to qualify for EI benefits. She wanted to find other work right away, and she still does. She is giving herself until August 2023 to find a job and if she doesn’t, she will pursue career retraining. She didn’t expect to be without a job for this long.

³⁸ GD3B-14.

³⁹ See GD3B-14

⁴⁰ See GD3B-19.

- When she lost her job with the employer, nobody was hiring because of lockdowns related to the Covid pandemic. Everything was shut down – where was she supposed to go look for work? She said that was an unreasonable expectation.
- She started looking for work when vaccination requirements started being lifted, around May 2022, and she saw on TV that the government was no longer pushing for regular workplaces to have vaccine requirements.
- She started asking friends and relatives whether they knew of any employers who were hiring.
- She talked to her social worker about what she would be able to do.
- She doesn't have a computer that she can use to search for work online. But she went to the library a few times, and looked on Indeed.
- She would accept a job that pays minimum wage, but not outside of Toronto. She said she only wants to work in Toronto because she would have to pay additional fares on public transit if she were to commute to work outside of Toronto. She said that this limits what jobs she would be willing to apply for.
- Her friend introduced her to a cleaning company that she was interested in applying to, but the first thing that employer asked her was whether she is vaccinated. So that employer wasn't an option.
- Employers in the food industry weren't hiring people who aren't vaccinated.
- A restaurant near her home had a notice posted that they were hiring, but when she went to apply, the position had already been filled.
- Even supermarkets are saying they're laying people off, not hiring.
- She gave her resume to her sister and to a friend. Her friend recently contacted her and "said it looked promising."

[68] In order to be found to have made reasonable and customary efforts, the Appellant's job search efforts need to be sustained, which means ongoing, during her disentanglement period. A mere statement of availability isn't enough to prove that the Appellant was making enough efforts to find a suitable job.

[69] The Appellant told the Commission, and confirmed in her testimony, that she didn't look for work when she first lost her job. She said that she started talking to people she knew around May 2022, when the government started relaxing Covid-related restrictions.

[70] Her job search included asking friends and relatives whether they knew of any employers who were hiring. She told the Commission in June 2022 that she hadn't handed in any resumes or searched for jobs online. She told the Commission in October 2022 that she had still been looking for work through word of mouth, but she had just had her resume done, and had dropped copies off at a clinic in a nearby mall, and at a care facility not far from her home. She testified that she went to the library a few times to look on Indeed.

[71] I find that the Appellant wasn't making reasonable and customary efforts to find a job. This is because she hasn't shown that she was engaged in sustained, or ongoing, efforts to find a job from April 11, 2022. Although she asked people she knows about possible jobs, she only dropped off resumes to a couple of employers, and gave her resume to her sister and a friend, since April 11, 2022.

The Appellant argues that there were no suitable jobs to apply to due to the pandemic. I agree that it was a difficult job market because of Covid. But you still have to show that you tried to find work, even if you believe you have little chance of success.

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.⁴¹ The Appellant has to prove the following three things⁴²:

- She wanted to go back to work as soon as a suitable job was available;
- She made efforts to find a suitable job; and
- She didn't set personal conditions that might unduly (in other words, overly) limit 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.⁴³

[74] The Appellant has to show that she was available during working hours for every working day during the EI benefit period.⁴⁴

Wanting to go back to work

[75] I find that the Appellant wanted to go back to work.

[76] The Commission made no arguments regarding whether the Appellant wanted to go back to work. I found her testimony in this regard to be credible. This is because she gave her evidence directly to me under affirmation, and she answered my questions about whether she wanted to go back to work in a clear and consistent manner.

[77] The Appellant testified that she wanted to go back to work right away, but she found it hard to look for work because there were pandemic-related restrictions in place,

⁴¹ See paragraph 18(1)(a) of the *Act*.

⁴² See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁴³ See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

⁴⁴ See section 32 of the Regulations, which says, "For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday." See also *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

limiting the number of jobs that were available. There were also vaccination requirements, and she isn't vaccinated. She asked around to her family and friends, about possible jobs. She said that she was ready and willing to work. I think that she wanted to go back to work after she was dismissed from her job with the employer.

[78] I find that the Appellant has met this first factor, as she has shown that she wanted to go back to work as soon as a suitable job was available.

Making efforts to find a suitable job

[79] I find that the Appellant didn't make enough efforts to find a suitable job from April 11, 2022.

[80] The Commission says that the Appellant didn't make enough efforts to find a job.

[81] 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.⁴⁵

[82] The Appellant testified that she looked for work after being dismissed from her job. She said that she was asking people she knew about possible jobs.

[83] The Appellant testified that she dropped off two resumes, at a clinic and at a care facility, and gave her resume to her sister and to a friend.

[84] I don't find that dropping off two resumes, giving a resume to her sister and a friend, and asking friends about possible jobs, is enough. I explained these reasons above, when looking at whether the Appellant had made reasonable and customary efforts to find a job.

[85] I find that the Appellant's efforts from April 11, 2022, were not enough to meet the requirements of this second factor.

⁴⁵ 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.

Unduly limiting chances of going back to work

[86] I find that the Appellant set personal conditions on her job search. When I look at these personal conditions together, I find that they unduly limited her chances of returning to the labour market.

[87] The Commission says that being unvaccinated, and not expressing interest in expanding her job search, has reduced the Appellant's chances of finding suitable employment.

[88] The Appellant testified that she isn't vaccinated against Covid. She told the Commission that she has no plans to change that. She also told the Commission that she has tried to find work since becoming unemployed, but it's hard because a lot of employers require vaccination against Covid. She was looking for a job in foods, but said that a lot of employers in that industry required vaccination. She testified that hospitals also required employees to be vaccinated. A cleaning company that her friend introduced her to required vaccination. I find that the Appellant's decision not to be vaccinated against Covid has limited her chances of finding work, because many employers require vaccination against Covid.

[89] The Appellant also told the Commission, and confirmed in her testimony, that she is only willing to work in "Toronto proper," because she would have to pay extra fare on public transit to commute to work outside of Toronto. While I understand that the Appellant is concerned about the cost of commuting outside of her community, I find that she has limited the number of jobs she can apply for, and her opportunities to return to work, by wanting to find work in Toronto proper only.

[90] I find that the Appellant hasn't met the requirements of this third factor, because she set limiting conditions by not being vaccinated against Covid, and only being willing to work in Toronto proper.

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

[91] Based on my findings on the above 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. She wasn't making enough efforts to find a suitable job from April 11, 2022, and she set personal conditions that may have unduly limited her chances of finding a suitable job.

Conclusion**Issue 1 - Misconduct**

[92] The Commission has proven that the Appellant was dismissed from her job due to misconduct. This means that she is disqualified from receiving EI benefits.

Issue 2 - Availability

[93] The Appellant hasn't shown that she is available for work within the meaning of the law from April 11, 2022. I therefore find that she is disentitled from receiving EI benefits.

[94] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section