Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 1131

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (481984) dated May 31, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	February 2, 2023
Hearing participant:	Appellant
Decision date:	March 9, 2023
File number:	GE-22-2295

Decision

[1] With respect to the issue of whether the Appellant lost her job due to her own misconduct the appeal is allowed. The Tribunal agrees with the Appellant.[1]

[2] The Canada Employment Insurance Commission (Commission) has not met its burden of proving 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 not disqualified from receiving Employment Insurance (EI) benefits for this reason.[2]

[3] With respect to the issue of whether the Appellant was available for work from the appeal is allowed in part.[3] The Tribunal agrees with the Appellant that she was available for work from February 7, 2022 to May 16, 2022.

Overview

[4] The Appellant's employer put in a place a policy requiring all employees to be vaccinated for COVID-19 by October 4, 2021. If not already vaccinated, employees were required to participate in rapid antigen testing until that date.

[5] The Appellant did not want to be vaccinated or to be tested. So, her employer placed her on an unpaid leave of absence. The Appellant later decided she would be tested and returned to work. Before testing could be arranged, she became ill and was placed off work on sick leave.

[6] When the Appellant was cleared to return to work, she advised her employer she was able to return to work. She was asked if she was vaccinated, she replied she was not vaccinated and her employer terminated her employment.

---

[1] The *Employment Insurance Act* (EI Act) calls a person who applies for EI benefits "claimant." When a claimant disagrees with a decision of the Commission and appeals to the Tribunal they are called "appellant."
[2] Section 30 of the EI Act says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[3] The Commission disentitled the Appellant from receiving EI benefits from January 17, 2022 because she was not available for work. I have found the Appellant was available for work from February 7, 2022 to May 16, 2022.

[7] The Commission looked at the reasons why the Appellant was not working. It decided the Appellant was dismissed from her job because of misconduct within the meaning of the EI Act.[4] Because of this, the Commission decided the Appellant is disqualified from receiving EI benefits.

[8] The Commission also disentitled the Appellant from receiving EI benefits from February 7, 2022 to May 15, 2022 because, although she was cleared to return to work, she was only available for a short period of time each week. It said this meant she had not proven she was available for work.

[9] The Appellant does not agree with the Commission. She says the COVID-19 vaccine contains both chemical and biological agents and she has a right to speak up about the hazards, to ask for additional information. She says her employer did not comply with the provincial occupational health and safety act. She was working in a low-risk environment with little to no contact with others. She said vaccinated people can contract and spread the COVID-19 virus. She was looking for work once she was well and has secured a new job.

Matters I considered first

The employer is not an added party to the appeal

[10] Sometimes the Tribunal sends an appellant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[11] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer

[4] See section 31 of the EI Act

Post hearing documents

[12] At the hearing, the Appellant referred to Directive #6 and other documents from the Province of Ontario's Chief Medical Officer, medical notes from her doctor, her job search, and a milestone recognition from her employer. She also read from a prepared statement. The Appellant forwarded copies of these documents to the Tribunal after the hearing.

[13] I have decided to accept the documents into evidence as the information they contained was referenced in the hearing.

[14] The Commission was sent a copy of the documents. As of date of writing this decision, it has not provided any submissions on the documents.

Issues

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

[16] Was the Appellant available for work from February 7, 2022 to May 15, 2022?

Analysis

Misconduct

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

Why did the Appellant lose her job?

[18] I find that the Appellant lost her job because she did not comply with her employer's COVID-19 vaccination policy.

[19] The Appellant testified that in early September 2021 her employer adopted a policy requiring employees to be vaccinated for COVID-19 by October 4, 2021. If an employee did not want to get vaccinated, they were required to have rapid antigen tests

for COVID-19 until October 4, 2021. The Appellant told her employer she did not want to get vaccinated and she did not want to undergo rapid antigen testing. She was placed on a two-week unpaid leave of absence on September 13, 2021.

[20] The Appellant contacted her employer to say she was willing to get tested. She returned to work on September 27, 2021 and worked that day. She was not tested on that day because it takes time to arrange testing appointments. The next day the Appellant was placed off work by her doctor due to illness. She received some paid sick leave but because she did not have enough paid sick leave, she applied for EI sickness benefits. The Appellant was paid the maximum 15 weeks EI sickness benefits from October 3, 2021 to January 15, 2022.

[21] The employer twice extended the deadline for full vaccination for COVID-19 with a final deadline of January 17, 2022. It emailed the Appellant about the extensions to the deadline and new consequences for not getting vaccinated by that date. The new consequences had the effect of ending employment for those who were not vaccinated by January 27, 2022.

[22] In late January 2022, the Appellant's doctor cleared her to return to work on a with reduced hours beginning on February 1, 2022. The Appellant contacted her employer to see when she could return to work. She was asked if she had proof of COVID-19 vaccination. The Appellant replied "no" and was told she would be contacted. The Appellant received a call from her employer terminating her employment effective February 7, 2022 for non-compliance with the employer's COVID-19 vaccination policy.

[23] The evidence tells me the Appellant was dismissed from her job because she failed to be fully vaccinated for COVID-19 as required by the employer's policy.

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

[24] The reason for the Appellant's dismissal is not misconduct within the meaning of the law.

– What the law says

[25] The EI 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 EI Act. Case law sets out the legal test for misconduct - the questions and criteria I can consider when examining the issue of misconduct.

[26] Case law says to be misconduct, the conduct has to be wilful. This means 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] Put another way, misconduct, as the term is used in the context of the EI Act and EI Regulations, does not require an employee to act with malicious intent, as some might think.

[27] There is misconduct if the Appellant knew or should have known her conduct could get in the way of her carrying out her duties toward her employer and there was a real possibility of being suspended or let go because of that.[8]

[28] A deliberate violation of the employer's policy is considered to be misconduct.[9]

[29] The Commission has to prove the Appellant was dismissed from her job because of misconduct. The Commission has to prove this on a balance of probabilities. 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.[10]

– What I can decide

[30] I only have the authority to decide questions under the EI Act. I can't make any decisions about whether the Appellant has other options under other laws or in other

---

[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to the court's decisions that apply to the circumstances of this appeal
[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.
[9] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.

venues. Issues about whether the whether the employer's policy violated other laws or the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[11] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the EI Act.

[31] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[12] Mr. McNamara, dismissed from his job under his employer's drug testing policy, argued he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[32] In response to these arguments, the FCA stated it has consistently said 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 EI Act." The Court went on to note the focus when interpreting and applying the EI Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out 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.

[33] A more recent decision is *Paradis v. Canada (Attorney General)*.[13] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. He argued he was wrongfully dismissed, the test results showed he was not impaired at work, and he said 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 EI Act.[14]

---

[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[14] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[34] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[15] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued his employer was obligated to provide an accommodation because alcohol dependence has been recognized as a disability. The Court again said the focus is on what the employee did or did not do, and the fact the employer did not accommodate its employee is not a relevant consideration.[16]

[35] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant.

[36] The Federal Court has rendered a recent decision in *Cecchetto v Canada (Attorney General)*,2023 FC 102, (*Cecchetto)* regarding misconduct and an appellant's refusal to follow the employer's COVID-19 vaccination policy.[17] Mr. Cechetto argued that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct. He said it was not proven the vaccine was safe and efficient. Mr. Cecchetto felt discriminated against because of his personal medical choice and argued he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[37] The Federal Court confirmed this Tribunal's Appeal Division's decision that, by law, this Tribunal is not permitted to address these questions. The Court agreed that by making a personal and deliberate choice not to follow the employer's vaccination policy, Mr. Cecchetto had breached his duties and lost his job because of misconduct within the meaning of the EI Act. The Court stated that there exist other ways in which Mr. Cecchetto's claims can properly advance under the legal system.

[38] Case law makes it clear my role is not to look at the employer's conduct or policies and determine whether they were right in terminating the Appellant's employment, failed to accommodate her, if the vaccination policy was in conflict with

---

[15] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[16] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[17] *Cecchetto v Canada (Attorney General)*,2023 FC 102.

other employer policies or laws. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

– **The Commission's submissions**

[39] The Commission says the Appellant was well aware, from September 1, 2021, that non-compliance with the vaccine policy would result in her not being able to report to work. It says the employer has shown the Appellant was aware of the policy, and it sent letters to the Appellant on December 1, 2021 advising of the updated vaccination policy and the new deadline of January 17, 2022. The letter said that following January 17, 2022 if employees had not obtained the second dose of two-dose vaccine series or one dose of a single-dose vaccine series, they would not be permitted to return to work and their leave would be extended.

[40] The Commission says it concluded that the Appellant's refusal to comply with the mandatory vaccination policy constituted misconduct within the meaning of the EI Act because she knew of the consequences that would be imposed on her should she fail to comply with the policy. It says the Appellant was aware she would lose her employment for failing to be vaccinated but she made the personal choice anyway. The Commission says there is a causal link between the Appellant's misconduct and the Appellant's employment and she ought to have known that her actions would result in dismissal.

– **The Appellant's submissions**

[41] The Appellant testified she worked for a hospital in a building dedicated to administration. She rarely interacted with patients and the other people working in her office worked in cubicles that were adequately spaced apart. She said she received two emails from her employer in late August 2021 and early September 2021 saying that she needed to provide proof of vaccination for COVID-19.

[42] The Appellant testified she sent a letter to the employer's Corporate Occupational Health department outlining her concerns about the safety of the vaccine and antigen testing. The Appellant's letter says, among other things, "I do not consent to a policy that requires mandatory vaccination against COVID-19 and enforcement of regular antigen tests." The letter goes on to outline the basis for the Appellant's

decision in that only the unvaccinated were being tested when the vaccinated could spread COVID-19 in equal measure, the level of risk in her workplace was low, the risks associated with PCR tests with various questions about who would accept liability, and that the vaccines were still experimental. She stated she believed having experimental injections to keep her job was a profound violation of an employee's constitutional rights.

[43] The Appellant said the employer's Occupational Health and Safety department told her she had to send her letter to Human Resources. She did so and received a response that Human Resources did not have the answers at that point, and she was asked to come to Human Resources for a meeting. The Appellant met with Human Resources and was placed on an unpaid leave of absence from September 13, 2021 to October 4, 2021 for not complying with the employer's policy.

[44] The letter to the Appellant placing her on unpaid leave says that on October 4, 2021 all staff are expected to provide evidence of full vaccination or evidence of completion of one dose of two dose vaccine (with continued 2x weekly testing). The letter continued with "At that time, should you still not meet those requirements, your unpaid leave of absence will be extended for a further period to be communicated by the employer and for the purposes of supporting you with additional time to consider your options and become vaccinated."

[45] The Appellant testified she contacted her employer to let them know she was willing to go through with the testing and wanted to return to work on September 27, 2021. The employer agreed and the Appellant returned to work on that date. On September 28, 2021 the Appellant emailed her manager to say she was unable to work because of personal illness and would be using one of her personal sick days to cover her absence. Her manager replied that for the Appellant to be paid she would have to "submit objective medical to Corporate Health if you are feeling unwell."

[46] The Appellant provided copies of the doctor's notes she sent to her employer. The first note, dated September 28, 2021 placed her off work until October 31, 2021 for medical reasons. On September 29, 2021 the Appellant completed an authorization

form allowing her doctor to release functional/medical information to the employer's Corporate Health and Safety Services. The form is titled Statement of Fitness to Work and asks for information about the nature of the employee's illness, treatment, prognosis and work restrictions for returning to work.

[47] The Appellant's doctor completed a Statement of Fitness to Work on September 30, 2021. She was diagnosed with depression and anxiety. Her treatment was outlined and she was to be reassessed in one month. A second Statement of Fitness to Work was completed by the Appellant's doctor on October 28, 2021 with an unknown date of return to work.

[48] On November 23, 2021 the employer's Corporate Health and Safety Services wrote to the Appellant's doctor requesting an updated medical for review regarding the Appellant's progress, treatment plan, and fitness to work. There followed a number of questions concerning the Appellant's mental health. The letter also indicated the employer would be willing to provide the Appellant with modified work and/or graduated hours. On November 25, 2021 the Appellant's doctor completed two of these forms. The first form covered the period October 28, 2021 to November 30, 2021 and indicated the Appellant remained unfit for work modified hours/duties. The expected date of return to modified hours/duties or full duties was to be determined. The second form covered the period from November 30, 2021 to December 31, 2021. On this form the expected date for return to modified hours/duties was early January 2022 and the expected date to resume full duties was to be determined.

[49] The Appellant's doctor completed a third form on January 5, 2022. In this form the doctor agreed with the employer's suggestion the Appellant return to work starting with four hours a day three days a week and indicated the Appellant could return to work starting January 25, 2022. This was followed up with a doctor's note on January 25, 2022 stating the Appellant was unfit for work this week and is fit to return to work February 1, 2022 to a graduated schedule as previously documented.

[50] While the Appellant was off work due to illness her employer sent her two letters.

[51] The first letter on November 10, 2021 is unsigned by an individual but ends with "Sincerely, Human Resources, [Employer]." The letter begins with "Further to our previous written communication, you are currently on an unpaid leave of absence until November 15, 2021." The letter noted the Appellant had yet to submit proof of vaccination in accordance with the employer's COVID-19 vaccination policy and the Appellant did not have an approved exemption to vaccination. The letter goes on to state if the Appellant remained non-complaint with the policy or did not submit proof of one dose of a two-dose vaccine or one dose of single-series vaccine by November 15, 2021 "your current leave of absence will be extended for further period of time up to January 17, 2022."

[52] The letter went on to say:

> Please be advised that [employer] has recently updated our **COVID-19 Vaccination Policy**. A copy of the revised policy is attached for your review. Please draw your attention to page #6 under the heading "**Compliance**". [Employer] has established a **final compliance deadline of January 17, 2022** for vaccination and has confirmed the impacts for staff of ongoing non-compliance beyond this date. Following January 17, 2022, if you have not obtained the second dose of a two-dose vaccine series or one-dose of a single dose vaccine series, you will not be permitted to return to work and your leave will not be extended. (emphasis in original)

[53] The letter the employer provided to Service Canada does not have a copy of the employer's revised COVID-19 policy attached. It does have a Staff Information Sheet attached. The Staff Information Sheet has provisions for return to work that apply in advance of the January 17, 2022 deadline.

[54] On December 1, 2021 Human Resources sent a second letter to the Appellant. It notes the Appellant was on unpaid leave from September 14, 2021 to September 27, 2021 for failure to submit to the required antigen testing. The letter goes on to say:

> You were subsequently approved for a sick leave of absence from September 28, 2021 to October 26, 2021. To date you have not submitted medical evidence

> to substantiate a sick leave of absence beyond October 26, 2021. As a result, this letter is to confirm you are once again being placed on an unpaid leave of absence effective October 27, 2021 until January 17, 2022 for failure to comply with the vaccination requirements in [employer's] COVID-19 Vaccination Policy. Our records indicate that you have not submitted any evidence of vaccination (1st dose or 2nd dose) and you do not currently have an approved medical or Human Rights exemption.

[55] The letter goes on to repeat the final deadline for compliance is January 17, 2022 and the consequences for non-compliance but does not have the employer's COVID-19 policy attached.

[56] On February 9, 2022 the employer's Human Resources Manager sent an email to the Appellant. The email noted the employer had reached out to the Appellant on January 26, 2022 in regard to the January 17, 2022 COVID-19 Vaccination Policy final deadline. The email said the Appellant contacted the employer on February 1, 2022 and declined to meet with them to discuss her on-going non-compliance with the vaccination requirements. The email has attached a copy of the termination letter for the Appellant's failure to submit vaccination records in accordance with its policy. The Appellant's employment was terminated effective February 7, 2021.

[57] I note the Appellant's doctor completed a Statement of Fitness for Work for the Appellant on October 28, 2021. That form provided a diagnosis and stated it was unknown when the Appellant could return to work. The employer's Corporate Health and Safety Services department wrote to the Appellant's doctor on November 23, 2021 thanking him for the form completed on October 28, 2021 and requested further medical information "for review." The doctor provided the diagnosis, treatment and an update on return to work in two forms dated November 25, 2021. On December 23, 2021 the employer's Corporate Health and Safety Service department again wrote the Appellant's doctor thanking him for completing the forms on December 2, 2021.

[58] Contrary to the employer's assertion on December 1, 2021 that the Appellant had not provided any medical evidence to substantiate her absence from work, the evidence

tells me the Appellant had provided medical evidence to substantiate her absence from work for medical reasons from October 28, 2021 to February 1, 2022 when she was cleared to return to work on graduated duties as was suggested by the employer.

[59] The evidence also tells me the employer's Corporate Health and Safety Services department and the employer's Human Resources Department were not communicating with each other about the nature of the Appellant's illness and the reason for her unpaid leave. The Human Resources department's ignorance of the Appellant's medical condition meant that it framed the Appellant's continued absence from work as an unpaid leave of absence for non-compliance with the employer's policy when it was, in fact, for medical reasons.

[60] The Appellant testified she was off work because she was experiencing issues with her mental health. She was receiving treatment in the form of counselling and medication. This is confirmed by the medical notes completed by her doctor from September 28, 2021 to December 31, 2022.

[61] The Appellant testified she was sick and not functioning properly during this time. The Appellant said she was not capable of responding to or following up on the November or December letters from her employer. She was unable to read or process the two letters she received from her employer in November or December.

[62] When the Appellant stopped working on September 28, 2021 the employer's COVID-19 Vaccination Policy stated that employees who were not vaccinated by October 4, 2021 would be placed on an unpaid leave of absence for failure to comply with the employer's COVID-19 Vaccination Policy. That leave of absence ended on September 27, 2021 when she returned to work. She then began a period of paid sick leave on September 28, 2021 and was placed on unpaid leave for medical reasons beginning October 8, 2021.

[63] The employer wrote the Appellant on November 10, 2021 to say that it had "recently updated" its COVID-19 Vaccination Policy. The effect of the update was to establish a final compliance date of January 17, 2022. The Appellant was advised in this letter that if she had not received the second dose of a two-dose vaccine or one

dose of a single-series vaccine by that date she would not be permitted to return to work and her leave would not be extended.

[64] The letter from the employer dated December 1, 2021 repeated the information in the November 10, 2021 letter.

[65] As noted above the letters of November 10, 2021 and December 1, 2021 also had a Staff Information Sheet attached. Under the heading “How can I return to work?” there are three provisions that applied “in advance of the January 17, 2022 final compliance date.” Staff on a leave of absence for failure to submit any evidence of vaccination by October 4, 2021 and who subsequently obtained a first dose of a COVID-19 Vaccine could return to work with a commitment to obtain a second dose within eight weeks from the date of their first dose or by January 17, 2022 whichever date occurred first. Staff on leave for failure to submit evidence of a second dose of a two-dose COVID-19 vaccination could return to work after providing evidence of a second dose no later than January 17, 2022.

[66] The Appellant testified her doctor cleared her to return to work on February 1, 2022. She was to return to work with modified duties. She called her employer to discuss her return to work and was asked if she was vaccinated. She replied, “no.” The Appellant’s employment was terminated effective February 7, 2022 for non-compliance with the employer’s policy.

– **Findings**

[67] I do not think the Commission has met its burden of proving the Appellant was dismissed from her job due to her own misconduct. My reasons for this finding follow.

[68] I have to follow the Federal Court’s decisions. I would be making an error of law if I focused on the employer’s conduct, which includes making determinations under other laws as to whether the employer was correct or it was legal for the employer to create, implement and enforce a policy. I do not have the jurisdiction to do that. The Tribunal has expertise in the interpretation and the application of the EI Act and EI Regulations to a appellant’s (appellant’s) circumstances and the Commission’s

decision. The Federal Courts' decisions, including its most recent decision in *Cecchetto,* has said this is all the I should do.

[69] Fundamental legal, ethical, and factual questions about COVID vaccines and COVID mandates put in place by governments and employers are beyond the scope of appeals to the Tribunal. There are other ways an appellant can challenge these directives and policies.

[70] An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the Appellant's employer implemented its COVID-19 vaccination policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[18]

[71] As of September 27, 2021 the Appellant was in compliance with her employer's policy because she consented to the rapid antigen testing. On that date the employer's policy required all employees to be vaccinated for COVID-19 by October 4, 2021. Those who were not vaccinated would be placed on an unpaid leave. At that time there was no provision for termination of employment in the employer's policy.

[72] The Appellant went on sick leave on September 28, 2021. Her doctor continued to certify to the employer that she was unable to work due to medical reasons which he detailed in the employer's forms.

[73] The employer changed its policy in November 2021 and set January 17, 2022 as the final date for vaccination. Those who were not vaccinated by that date and on a leave of absence for failure to comply with the policy would not have that leave extended. However, there was no mention of what would happen to employees who were on a leave for other reasons, or whose leave for those other reasons extended beyond January 17, 2022, if they did not comply with the employer's policy.

---

[18] See *Attorney General of Canada v. Secours*, A-352-94; *Canada (Attorney General) v Bellavance*, 2005 FCA 87, *Canada (Attorney General) v Gagnon*, 2002 FCA 460, and *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[74] Although I am not bound by decisions from other Tribunal Members, I find the reasoning in *TC v Canada Employment Insurance Commission*, 2022 SST 891, (*TC*) to be persuasive. In *TC* the appellant was given two days' verbal notice from his employer he had to comply with its COVID-19 vaccination policy by getting vaccinated. His employer dismissed him for non-compliance. In that appeal, the Tribunal Member found the appellant could not have known the consequences for non-compliance would lead to his dismissal. He was simply not given enough time to comply with the policy.

[75] The evidence is clear the Appellant was not on a leave for failure to comply with the policy. She was on unpaid leave for medical reasons up to February 1, 2022. She testified she was not functioning properly and was not capable of responding to or following up on the employer's letters in November or December 2021. The employer's policy did not say what would happen to employees on leave for other reasons past January 17, 2022 if they did not comply with the employer's COVID-19 Vaccination Policy by that date. This evidence tells me the Appellant was not aware of the change to the employer's policy whereby non-compliance with the policy past January 17, 2022 could result in her losing her job.

[76] There is no evidence that, when Appellant contacted the employer to discuss her return to work, she was informed of the revised consequences for non-compliance with the employer's policy. She was asked "are you vaccinated?" she replied "no" and was told someone would get back to her. This evidence tells me the Appellant did not know when she replied no to the question, "was she vaccinated?" that she could be terminated from her job.

[77] I find the Commission has not met its burden of proving the Appellant lost her job due to her own misconduct. This is because the Appellant did not know that by continuing her non-compliance with the policy when she planned to return to work on February 1, 2022 she could be dismissed for doing so. As a result, I find, on a balance of probabilities, the Commission has not met its burden of proving the Appellant was dismissed from her job due to her own misconduct.

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

[78] Based on my findings above, I find that the Appellant did not lose her job because of misconduct.

Availability

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

[80] First, the EI Act says a claimant has to prove they are making "reasonable and customary efforts" to find a suitable job.[19] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[20]

[81] Second, the EI Act says a claimant has to prove they are "capable of and available for work" but aren't able to find a suitable job.[21] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[22] I will look at those factors below.

[82] The Commission decided the Appellant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

– Section 50(8) need not be considered

[83] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Appellant to prove she made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Appellant, her proof was insufficient.

[84] I note the Commission did not make any submissions on how the Appellant failed to prove she was making reasonable and customary efforts. The Commission only

---

[19] See section 50(8) of the EI Act.
[20] See section 9.001 of the EI Regulations.
[21] See section 18(1)(a) of the EI Act.
[22] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

summarized what the legislation says in section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[85] Based on the lack of evidence that the Commission asked the Appellant to prove her reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Appellant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.[23]

[86] I will only consider whether the Appellant was capable and available for work under the section 18 of the EI Act

– **The period under review**

[87] The Commission disentitled the Appellant from receiving EI benefits due to her not proving her availability for work from January 17, 2022.

[88] The Appellant told the Commission she was looking for EI benefits from February 7, 2022 to May 26, 2022. At the hearing, the Appellant explained she was cleared to return to her former employment and had no need to look for work before February 7, 2022 because she was employed until that date. She was successful in getting a job on May 16, 2022.

[89] A disentitlement means that there is something that is preventing you from receiving EI benefits and once that something is addressed or removed the disentitlement can end. A disentitlement from receiving EI benefits due to not proving availability for work is in place for the period when a person is not able to prove they are available for work.

[90] In this case, the Appellant has said she is looking for benefits and was available for work from February 7, 2022 until she started a new job on May 16, 2022. I agree with the Appellant that this should be the period under review.

---

[23] Although I am not bound by the Appeal Division (AD) decisions, the AD has made this finding in similar circumstances. See *LD v Canada Employment Insurance Commission*, 2020 SST 688 at para 16

– The Commission's submissions

[91] The Commission says the Appellant did not show she had recovered from illness or injury and is only available for three hours a week for a maximum of three hours per day. It says claimants are, from the beginning of their claim, not allowed to restrict their willingness to work certain hours of work. Rather, from the beginning of their claim they are obligated to be available for, and must seek and accept, all hours of work that are available in the labour market, including full-time, part-time, evenings, nights and shift work, as well as work that may involve inconvenient or long hours or overtime. The Commission says in this case, the Appellant advised she is unable to work a full day due to her medical condition. Therefore, the Commission says, the Appellant has not proven she is available and seeking full time work.

– Suitable employment

[92] A claimant need only be available for suitable employment.

[93] To assess the Appellant's availability, I must first define what is considered suitable employment for the Appellant. The law sets out the criteria I must consider when determining what constitutes suitable employment. Those criteria, at section 9.002(1) of the EI Regulations, are:

> (a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
>
> (b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and
>
> (c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[24]

[94] What is suitable employment must be decided in context.[25] This means it is relevant whether a claimant has reduced their hours of availability, whether they have a

[24] See section 9.002, EI Regulations
[25] *SS v Canada Employment Insurance Commission*, 2022 SST 749

history of working at the hours for which they are now available and whether there are any opportunities for work within the claimant's schedule.

[95] I do not agree with the Commission's submission a claimant has to be available for work all hours of the day and all days of the week. The law is clear that a claimant must be available for working days and a working day is any day of the week except Saturday and Sunday.[26] The law is equally clear that a claimant need only be available for suitable employment which is defined to include employment that the health and physical capabilities allow her to perform.

[96] The Appellant's doctor agreed with her former employer's recommendation that she return to work gradually. Her former employer suggested four hours a day three days a week and she could take microbreaks. Her return to work was to occur on January 25, 2022. The Appellant's doctor placed her off work for an additional week and indicated she would be able to return to work on the graduated schedule starting February 1, 2022.

[97] The Appellant testified when she was told her employment was terminated she experienced a set back in her mental health for a couple of weeks. She said beginning on February 26, 2022 her doctor cleared her for part-time work two to three days a week for one to three months. As a result, I find suitable employment for the Appellant to be employment that she could perform for four hours a day three days a week from February 7 to February 26, 2022 and two to three days a week from February 26 to May 26, 2022 (the three months as recommended by her doctor).

– **Capable of and available for work**

[98] As noted above, I only need to decide if the Appellant was available for work under paragraph 18(1)(a) of the EI Act.

[26] See section 18 of the EI Act and section 32 of the EI Regulations

[99] 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:[27]

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

b) She has made efforts to find a suitable job.

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

[100] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[28]

– **Wanting to go back to work**

[101] The Appellant has shown she wanted to go back to work as soon as a suitable job was available.

[102] The Appellant testified she needs to work to have money. She has lived in Canada for 15 years and has worked for most of that time. She explained she looked for work once she was terminated from her job and was able to get a new job starting May 16, 2022. This evidence tells me the Appellant has shown a desire to work.

– **Making efforts to find a suitable job**

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

[104] There is a list of job search activities to look at when deciding availability under a different section of the law.[29] This other section does not apply in the Appellant's

[27] 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.
[28] 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.
[29] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.

appeal. But, I am choosing look at that list for guidance to help me decide whether the Appellant made efforts to find a suitable job.[30]

[105] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[31]

[106] The Appellant testified she started to look for work after she was terminated from her job. She looked at job recruitment websites like Indeed for work. She signed up for the Commission's Job Bank. She has a resume and uploaded it to Indeed. She applied for four or five jobs a day. She got her current job, which is full-time permanent through Indeed.

[107] I am satisfied the Appellant's job search efforts expressed her desire to return to the labour market as soon as a suitable job was offered.

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

[108] The Appellant did not set personal conditions that might have unduly limited her chances of going back to work from February 7, 2022 to May 16, 2022.

[109] The Appellant testified she has access to transportation to go to work and has a driver's license. There are no restrictions on the length of time or distance she can commute to go to work. She has a university degree. She was willing to accept a job that might require on the job training. She would not decline any job offers based on salary, she wanted a job to be able to pay her bills. She was looking for work in administration that was consistent with her work experience and for work that was consistent with her education.

[30] 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.
[31] Section 9.001 of the EI Regulations.

[110] The Appellant said she was looking for work that would allow her to work within her medical condition and her doctor's clearance for her to work two to three days a week. She was offered and accepted full-time employment starting on May 16, 2022.

[111] The Appellant's medical limitations are not personal conditions that unduly limit her return to the workplace. A claimant is not required to be available for jobs unless the jobs are suitable. Any jobs that exceed a claimant's capabilities would not be suitable jobs.[32] As stated above, the Appellant's medical limitations of working two to three days a week restricts what is suitable employment for her. However, there is no evidence that the Appellant has set personal conditions outside of the ones imposed by her medical conditions.

[112] As a result, I find that the Appellant did not set any personal conditions from February 7, 2022 to May 16, 2022 that might limit her chances of returning to work.

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

[113] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work from February 7, 2022 to May 16, 2022.

[32] I agree with the reasoning of the Tribunal's Appeal Division (AD) in *S.A. v Canada Employment Insurance Commission*, AD-20-390. The AD stated that an appellant who is unwilling to work at any job that would exceed his or her health and physical capabilities is not setting "personal conditions."

Conclusion

[114] The Commission has not met its burden of proving the Appellant lost her job because of misconduct. Because of this, the Appellant is not disqualified from receiving EI benefits.

[115] This means that on the issue of misconduct the appeal is allowed.

[116] The Appellant has shown she was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving benefits from February 7, 2022 to May 16, 2022.

[117] This means that on the issue of availability the appeal is allowed in part.

Raelene R. Thomas
Member, General Division – Employment Insurance Section