Citation: *EM v Canada Employment Insurance Commission*, 2023 SST 1471

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (465535) dated June 15, 2022 (issued by Service Canada)

Tribunal member:	Jean Yves Bastien
Type of hearing:	Videoconference
Hearing date:	July 6, 2023
Hearing participants:	Appellant
Decision date:	July 17, 2023
File number:	GE-23-719

Preamble

Decision

[1] There are two issues under appeal: misconduct and availability. Both are dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from and then **lost her job because of misconduct** (in other words, because she did something that caused her to lose her job).

[3] This means that, while the Appellant was suspended, she was disentitled from receiving Employment Insurance (EI) benefits under section 31 of the EI *Act* (Act), from November 1, 2021, until April 29, 2022.

[4] This also means that after the Appellant was dismissed effective May 1, 2022, she was, and remains, disqualified from being paid benefits under section 30 of the Act.

[5] The Appellant has not proven that she was available as required by the Act from November 1, 2021, to June 14, 2022. This means the Appellant was disentitled from receiving EI for this period only.

Overview

- Misconduct

[6] The Appellant was first suspended and then lost her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated.

[7] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy wasn't misconduct.

[8] The Appellant chose not to be vaccinated. She stated that the clinical trials of the vaccination had not been completed and she didn't know if the vaccine was safe or effective. She said that she would not get vaccinated until the clinical trials were

conducted, completed, and the results published. The Appellant considered the vaccine experimental and felt that it was unsafe and ineffective.

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

[10] I have to decide if the Commission has proven misconduct on the Appellant's part under sections 29 and 30 of the Act.

- Availability

[11] The Commission decided that the Appellant was disentitled from receiving EI regular benefits from November 1, 2021, to June 14, 2022, because she wasn't available for work. A claimant has to 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.

[12] I must decide whether the Appellant has proven that she was available for work between November 1, 2021, to June 14, 2022. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[13] The Commission says that the Appellant wasn't available because she:

- did not have a desire to return to the labour market as soon as possible
- was not making efforts to find a suitable job
- set personal conditions unduly limiting her chances of returning to the workforce

[14] The Appellant disagrees and states that it was the Canadian government who made her unavailable by imposing an improper and unconstitutional vaccine requirement.

Matter I have to consider first

- The Appellant raised constitutional issues

[15] The Appellant raised a number of objections based on her reading of the *Canadian Charter of Rights and Freedoms*. Specifically, she quoted section 7, about life liberty and security of the person. She says that the Government of Canada and her employer's COVID-19 vaccination policy infringes on her right to security of the person, including a person's right to control her own bodily integrity.

[16] The Appellant cited a recent finding of the Military Grievance External Review Committee in which it found that the Canadian Armed Forces vaccination policy infringed on the protected human rights under Section 7 of the *Canadian Charter of Rights and Freedoms*, namely the right to the liberty and security of the person. [1] The Committee also found similarly in two other cases.[2]

[17] The Military Grievance External Review Committee is an administrative tribunal. It provides its findings and recommendations to the Chief of the Defence Staff who is the final decision maker and "is not bound by any finding or recommendation of the Grievances Committee."[3] The Committee's findings are not binding, not even on the Canadian Armed Forces.

[18] It should also be noted that in these cases the military grievors were contesting the vaccination policy of the Canadian Armed Forces itself, not the Government of Canada's mandatory vaccine requirement for federally regulated transportation workers.

[19] This Tribunal has very limited jurisdiction when it comes to Charter issues. When dealing with EI issues, Tribunal members can only consider whether the following Acts and Regulations are in line with the Constitution, including the *Canadian Charter of Rights and Freedoms*:

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[1] See *Military Grievance External Review Committee #2022-078 Careers, COVID-19*, 2023-05-30
[2] See *Military Grievance External Review Committee #2022-109 Careers, COVID-19*, 2023-05-30, and *Military Grievance External Review Committee #2022-162 Careers, COVID-19*, 2023-05-30
[3] See section 29.13(1) of the *National Defence Act*.

- *Employment Insurance Act*
- *Employment Insurance Regulations*
- *Employment Insurance (Fishing) Regulations*
- *Reconsideration Request Regulations*

[20] I explained that Charter appeals followed a particular process and that if Appellant wished, the hearing could be adjourned so that she could pursue her Charter arguments

[21] The Appellant agreed that she had no Charter challenge to any of the EI related Acts and Regulations mentioned above. A Charter challenge to the Government of Canada's COVID-19 requirement is a matter for another venue. The Appellant said that she was a member of an ongoing class action suit against the Government of Canada.

[22] Therefore, the hearing continued.

Issues

[23] There are two issues to be decided in this appeal. I will first look at whether the Appellant was suspended and then lost her job because of misconduct?

[24] The other issue is availability. Was the Claimant available for work as required by section 18 of the Act?

Analysis

- Misconduct

[25] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[4]

[26] 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

[4] See sections 30 and 31 of the Act.

lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

- Why did the Appellant lose her job?

[27] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[28] The Appellant says that she was put on leave and then later dismissed because she could not comply with the employer's mandatory vaccination policy.

[29] The Commission says that the Appellant was suspended and then dismissed from employment because of her own misconduct. She was informed of the employer's requirements regarding COVID-19 vaccination, and was informed that failure to comply with the requirements would result in loss of employment.

[30] Both the Appellant and the Commission agree that the Appellant lost her job because she refused to be vaccinated contrary to her employer's mandatory COVID-19 policy. The question I have to answer is whether the Appellant's actions amounted to misconduct under the Act.

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

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

[32] 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.

[33] 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

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

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]

[34] 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 let go because of that.[8]

[35] The Commission has to prove that the Appellant lost 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 lost her job because of misconduct.[9]

[36] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[37] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

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[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 *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.

[38] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[39] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[13]

[40] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[14] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[15]

[41] These cases are not about COVID vaccination policies. But the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Appellant. Instead, I have to

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[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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

- the employer had a mandatory vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the Appellant knew or should have known what would happen if she didn't follow the policy
- the Appellant wilfully went against the employer's policy

[43] The Appellant testified that there was no misconduct because the employer's vaccination policy was unconstitutional, improper, and imposed on her without her consent. The Appellant also noted that there was nothing in the Government of Canada's vaccination policy for federally regulated employees that said that [non-compliant] employees should be terminated.

[44] The Commission said the employer indicated that they are federally regulated, and therefore they require employees to be fully vaccinated. At the onset of the Government's mandatory requirement, the employer had a compliant policy requiring all employees to be fully vaccinated by October 30, 2021.

[45] The Appellant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. On the following dates, the employer told the Appellant about the requirements and the consequences of not following them:

- September 28, 2021 – A notice publicizing the employer's mandatory COVID-19 policy was sent out to all employees through the employer website.
- All employees were required to acknowledge this notice by clicking a selection on the employer's online notice.

- The last time the Appellant viewed the notice was October 6, 2021.[16]

[46] The employer also told the Commission that the Appellant didn't request any exemption and told the employer "That they can call her in 2-3 years when the vaccine is not required anymore".[17]

[47] The Appellant testified that she was made well aware of the employer's COVID-19 policy and the consequences of not following it. She said that on September 15, 2021, employees were given one month's notice that they had until October 15, 2021, to provide their COVID-19 vaccine status and then until October 30, 2021, to provide proof of vaccination.

[48] She testified that she didn't comply with her employer's vaccination policy because it did not respect her Charter rights. She said that her suspension was wrong because it went against basic human rights for something that was untested and unproven.

[49] The Appellant testified that she knew that she could lose her job if she didn't comply with the policy and that consciously (wilfully) chose not to be vaccinated contrary to her employer's policy.

[50] Despite the Appellant's reservations about the Government's and her employer's mandatory vaccine requirement, as explained above, the jurisdiction of this tribunal is limited to the actions of the Appellant.

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

- the employer had a vaccination policy that conformed with the Government of Canada's COVID-19 mandatory vaccination requirement for federally regulated transportation workers. The employer's policy said all employees had to be fully vaccinated by October 30, 2021,

[16] See page GD3-30 of the appeal record.
[17] See page GD3-30 of the appeal record.

- the employer clearly told the Appellant about it's mandatory COVID-19 vaccination policy and what it expected of its employees in terms of getting vaccinated through its internal and online communications.

- the Appellant knew about the policy, the deadlines for complying, and the consequences of not following the employer's vaccination policy.

- The Appellant wilfully chose not to get vaccinated in contravention of the employer's federally mandated COVID-19 vaccine requirement.

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

[52] Based on my findings above, I find that the Appellant lost her job because of misconduct.

[53] This is because the Claimant's actions first led to her suspension on November 1, 2021, and subsequently her dismissal on May 1, 2022. She acted wilfully. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Analysis

- Availability

[54] Section 18 of the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[18] Case law gives three things a claimant has to prove to show that they are "available".[19] I will look at those factors below.

[55] The Commission decided that the Appellant was disentitled from receiving benefits from November 1, 2021, to June 14, 2022, because she wasn't available for work.

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[18] See section 18(1)(a) of the Act.
[19] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[56] I will now consider section 18 of the Act myself to determine whether the Appellant was available for work in this period.

- Capable of and available for work

[57] 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:[20]

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

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

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

[58] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[21]

– Wanting to go back to work

[59] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available. She testified that she considered herself laid off and was hoping to return to work with her employer. She said that after working for the employer for 32 years she needed some decompression, and family time with her daughter. She testified that "something needed to give, and I needed to stay home to steady myself."

– Making efforts to find a suitable job

[60] The Appellant hasn't made enough effort to find a suitable job. She testified that "there was no use, I was unvaccinated." She told the Commission that "she has not

[20] 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.
[21] 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.

applied for any employment since she left her employment because of the stress her employer put on her for making her personal health choice."[22]

[61] I have considered the list of job-search activities given in section 9.001 of the *Employment Insurance Regulations* (Regulations) in deciding this second factor. For this factor, that list is for guidance only.[23]

[62] The Appellant testified that her efforts to find a new job were limited to trying to find employment in a few vitamin and organic food stores that didn't require their employees to be vaccinated. But she was not successful because some of her unvaccinated friends got in first. These types of jobs were very limited. She said that was OK, as her attention was at home.

[63] The Appellant's efforts to find a job weren't enough to meet the requirements of this second factor because they were sporadic and limited to jobs which didn't require applicants to be vaccinated. The Appellant's efforts were not sustained.

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

[64] The Claimant set personal conditions that might have unduly limited her chances of going back to work.

[65] The Appellant agrees that not being vaccinated unduly limits her chances of going back to work. But, she says that it is not a personal condition that she set, because it is the Canadian government that said that people have to be vaccinated.

[66] The Commission says that the Appellant set conditions unduly limiting her chances to return to the workplace. The Appellant was unable to work in her regular trade until June 20, 2022, because she had not been vaccinated against COVID-19. The Appellant had not identified work outside of her trade to which her skills would be transferrable. The Commission says that by not getting vaccinated against COVID-19

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[22] See page GD3B-27 of the appeal record.
[23] 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.

the Appellant set a personal condition that unduly limited her chance of returning to the workforce.[24]

[67] While the Appellant may believe that it was the Government who set a condition unduly limiting her chances of returning to the workplace, this Tribunal is limited to examining the actions of the Appellant herself, so that is what I will do.

[68] I find that the Appellant did indeed unduly limit her chances of returning to the workplace by not getting vaccinated against COVID-19. Since the Appellant wilfully remained unvaccinated, she set a personal condition that prevented her from returning to work at her former employer of 32 years.

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

[69] The Appellant's conduct and attitude throughout was one of decompression, reflection and "taking care of the important things." She didn't apply to any jobs. She needed to de-stress. She soon found out that her job prospects were very limited if she were not vaccinated.

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

Conclusion

[71] **Misconduct** - The Commission has proven that the Appellant was suspended and then subsequently lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[72] **Availability** - The Appellant hasn't shown that she was available for work between November 1, 2021, to June 14, 2022, within the meaning of the law. Because of this, the Appellant can't receive EI benefits for this period.

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[24] See page GD4B-4 of the appeal record.

[73] This means that the appeal is dismissed.

Jean Yves Bastien
Member, General Division – Employment Insurance Section