Citation: *TK v Canada Employment Insurance Commission*, 2023 SST 544

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (495522) dated July 15, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	November 23, 2022
Hearing participant:	Appellant
Decision date:	January 30, 2023
File number:	GE-22-2726

Decision

[1] The appeal is dismissed. There will be no change to the 3 negative decisions on this claim.

[2] The Claimant (who is the Appellant in this appeal) is disentitled to Employment Insurance (EI) benefits from December 26, 2021 to April 2, 2022 because he was suspended from his employment due to his own misconduct.

[3] The Claimant is disqualified from EI benefits from April 3, 2022 because he voluntarily left his job without just cause when he refused to return to work.

[4] He is also disentitled to EI benefits from December 27, 2021 because he did not prove his availability for work during his benefit period.

[5] This means the Claimant cannot be paid EI benefits.

Overview

[6] The Claimant applied for regular EI benefits on January 6, 2022. His Record of Employment (ROE) said that his last paid day of work was December 19, 2021 and that he abandoned his job on March 31, 2022.

[7] The Respondent (Commission) investigated why the Appellant stopped working.

[8] The employer said the Claimant was placed on an unpaid leave of absence on December 19, 2021 for failing to comply with its mandatory Covid-19 vaccination policy (the policy). When the Claimant declined to return to his job after the policy was lifted, the employer amended the ROE to show that he quit.

[9] The Claimant said he was dismissed because he refused to comply with the policy. He also told the Commission he had not applied for any jobs because he was unable to get work due to his vaccination status.

[10] The Commission decided the Claimant was suspended from his employment due to his own misconduct[1]. This meant he was disentitled to EI benefits during the period of his suspension[2].

[11] The Commission also decided the Claimant voluntarily left his employment without just cause when he refused to return to work[3]. This meant he was disqualified from EI benefits starting from April 3, 2022[4].

[12] The Commission also investigated whether the Claimant was available for work.

[13] The law says a claimant must be available for work in order to receive regular EI benefits[5]. Availability is an ongoing requirement[6]. This means that a claimant must be searching for full-time employment and cannot impose personal conditions that could unduly restrict their ability to return to work.

---

[1] The Commission's initial decision letter said the Claimant was not entitled to EI benefits because he voluntarily left his job on December 19, 2021 without just cause (see the April 29, 2022 decision letter at GD3A-22). During the reconsideration process, the employer confirmed the Claimant was on a continuing unpaid suspension for non-compliance with the policy starting on December 19, 2021 and had not been terminated. But when the Claimant was notified he could return to work as of April 4, 2022, he refused. That was when the employer considered the Claimant to have quit his job.

The Commission then changed the decision on his claim from voluntarily leaving without just cause to suspension due to misconduct. This was because the Commission determined the reason for the Claimant's unpaid leave of absence (namely, his non-compliance with the employer's mandatory vaccination policy) was misconduct. The reconsideration decision said the Claimant could not be paid EI benefits from December 26, 2021 to April 2, 2022 because he was suspended from his employment due to his own misconduct (see the October 6, 2022 reconsideration decision letter at GD3C-39).

[2] Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. In the Claimant's case, the period of his suspension runs from December 26, 2021 (the start of his benefit period) to April 2, 2022.

[3] See the October 6, 2022 reconsideration decision letter at GD3D-39.

[4] Section 30(2) of the EI Act says that a claimant who voluntarily leaves their employment without just cause will be indefinitely disqualified from EI benefits. The law says that voluntarily leaving includes the refusal to resume an employment (see section 29(b.1) of the EI Act).

[5] Section 18(1)(a) of the EI Act says claimants can only get EI benefits for a working day if they prove they were capable of and available for work on that day but could not find a suitable job.

[6] A claimant must show they were available on every working day during their benefit period.

[14] The Commission decided that the Claimant could not receive EI benefits starting from December 27, 2021 because he hadn't conducted an adequate job search and did not prove his availability for work[7].

[15] The Claimant appealed the 3 negative decisions on his claim to the Social Security Tribunal (Tribunal).

[16] I am confirming all 3 decisions. These are my reasons.

Issues

[17] As set out above, there are 3 negative decisions on the Claimant's claim. He has appealed them all.

[18] This means I must decide:

a) Was the Claimant suspended from his employment due to his own misconduct?

b) Did the Claimant voluntarily leave his employment without just cause when he refused to return to work on April 4, 2022?

c) Was the Claimant available for work starting from December 27, 2021?

Analysis

Issue 1: Was the Claimant suspended due to his own misconduct?[8]

[19] To answer this question, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

---

[7] The April 29, 2022 decision letter is at GD3A-22, and was maintained upon reconsideration (see July 15, 2022 reconsideration decision at GD3A-37).

[8] The reconsideration file for this issue is the document coded GD03**C**; and the Commission's representations on this issue are set out in the document coded GD04**C**.

A) Why was the Claimant suspended from his job?

[20] The Claimant was suspended because he refused to provide proof of vaccination as required by the policy and did not have an approved exemption.

[21] The employer told the Commission that the Claimant was put on an unpaid leave of absence as of December 19, 2021 for failing to comply with the policy[9]. The policy was in place until April 4, 2022.

[22] The Claimant told the Commission that he disagreed with the policy and made a personal choice not to get vaccinated against Covid-19[10]. He said he was aware he would lose his job for making this choice and did not ask to be exempt from the policy for medical or religious reasons.

[23] He provided the following documents to the Commission:

- A copy of the employer's original Covid-19 FAQ information from May 2021[11].
- A copy of the employer's E-mail of September 23, 2021 advising of the implementation of the policy, which required all employees to become fully vaccinated against Covid-19 by December 1, 2021[12].
- A copy of the employer's E-mail on October 22, 2021 advising the Claimant to submit his immunization record with proof vaccination or as an indication he was in the process of becoming immunized against Covid-19[13].
- A copy of the employer's E-mail of November 23, 2021 advising the Claimant that he was required to submit proof he had received at least one dose of a Covid-19 vaccine by December 1, 2021 in order to access the worksite[14]. If he failed to do so, he would be suspended with pay as of December 1, 2021. The

[9] See GD3C-20 and GD3C-38.
[10] See GD3C-21, GD3C-24, and GD3C36 to GD3C-37.
[11] GD3C-34 to GD3C-35.
[12] GD3C-27.
[13] GD3C-28 to GD3C-29.
[14] GD3C-30 to GD3C-31.

Claimant was also told he had to submit proof he had received his second vaccine dose by December 21, 2021 or he would be suspended without pay from December 22, 2021.

- A copy of the December 21, 2021 suspension letter issued to the Claimant[15].

[24] At the hearing, the Claimant testified that:

- The employer originally said they would not be introducing "a vaccine mandate" in the original FAQ sheet from May 2021.
- But in September 2021, the employer changed its mind. The employer started mandating masks and testing, but employees who provided proof of vaccination did not have to test.
- The employer didn't provide any information about the safety and efficacy of the Covid-19 vaccines.
- He knew he would be placed on an unpaid leave of absence for not attesting to his vaccination status.
- He has made a personal choice not to get vaccinated.
- He did not attest to his vaccination status by the December 21, 2021 deadline or ask to be exempt from the policy. He was immediately placed on an unpaid leave of absence from his job for non-compliance with the policy.

[25] The evidence shows the Claimant was suspended from his employment because he did not provide proof of vaccination as required by the policy or have an approved exemption by the December 21, 2021 deadline.

[15] GD3C-32 to GD3C-33.

B) Is the reason for his suspension misconduct according to the law?

[26] Yes, the reason for the Claimant's suspension is misconduct for purposes of EI benefits.

[27] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[16]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[17] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[28] The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law[18].

[29] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended because of it[19].

[30] The Commission has to prove the Claimant was suspended from his job due to misconduct[20]. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

[31] The evidence from the employer is set out above under Issue One A) above.

[32] The Claimant told the Commission that the employer's policy was illegal and violated numerous of his rights, including his right to give informed consent to medical treatment and rights guaranteed to him under the Canadian Charter of Rights and Freedoms[21]. He also said he was constructively dismissed.

---

[16] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[17] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[18] See *Attorney General of Canada v. Secours*, A-352-94.
[19] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[20] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost his job because of misconduct.
[21] See GD3C-36.

[33] At the hearing, the Claimant submitted that[22]:

- The policy separated employees into vaccinated and unvaccinated groups. This categorization was a violation of the employer's Workplace Harassment and Violence Prevention Policy.

- The policy violated his right to make an informed choice about receiving medical treatment (ie. the Covid vaccines). Informed choice requires "all the facts", but they were never presented to him. Instead, the employer's information was "basic" and "generic" and had no information about the vaccine ingredients or trials. The employer said, "trust the science". This amounted to "forced compliance". Forced compliance is where you think you are making a choice, but you're really being tricked into making a choice that would be considered compliance.

- For there to be a finding of misconduct on his part, he had to have a genuine choice in the matter of vaccination, and he did not.

- Certain safety measures are valid, such as wearing safety boots at work. These measures do not injure an employee and can be removed when not on the job. But vaccines are different. The Covid-19 vaccines are still considered "experimental drugs", and the employer can't force him to take something that might alter his DNA.

- "Misconduct is a two-way street." The employer has "inverted" the meaning of misconduct and "used it in a manner of contempt" towards him by threatening his health and well-being through forced compliance.

- He should not be punished for exercising his rights when the employer was coercing employees to be vaccinated by threatening them with job loss.

[22] During his submissions, the Claimant referred to the supplementary appeal materials he filed at GD08, GD09, GD10, GD11, GD12 and GD14. I have reviewed and considered these materials in coming to this decision, but they are too voluminous to summarize here.

- The employer also committed an act of “terrorism” against him by putting the fear of job loss into him to cause him to make a choice he doesn’t want to make, namely to become vaccinated.

- The management of the employer had a conflict of interest with the implementation of the policy. The “management committee” wanted to improve the employer’s “social score as a company” and with that, their own compensation. It was a conflict of interest for management to tell the employees to get vaccinated when their bonuses were directly linked to the “vaccine mandates” and employee compliance.

- Misconduct was not a factor in his suspension because it was the employer who engaged in misconduct.

[34] The Tribunal does not have jurisdiction to interpret or apply an employment contract[23]. Nor does the Tribunal have legal authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act[24].

---

[23] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

Our Tribunal members’ legal authority to make a decision in an appeal of the Commission’s decision doesn’t include interpreting and apply a collective agreement. This was recently confirmed by the Tribunal’s Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn’t do. Where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement. This means that if the claimant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

[24] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn’t.

[35] Said differently, it is not the Tribunal's role to decide if the employer's policy was reasonable or fair, or a violation of the employment agreement. Nor can the Tribunal decide whether the penalty of being placed on an unpaid leave of absence was too severe. The Tribunal must focus on the reason ***the Claimant*** was separated from his employment and decide if the conduct that caused him to be suspended constitutes misconduct under the EI Act.

[36] I have already found that the conduct which led to the Claimant's suspension was his failure to provide proof of vaccination or obtain an approved exemption by the December 21, 2021 deadline in the policy.

[37] The uncontested evidence obtained from the employer, together with the Claimant's testimony at the hearing, allows me to make these additional findings:

a) the Claimant was informed of the mandatory vaccination policy and given time to comply with it[25];

b) his refusal to comply with the policy was deliberate and intentional, which made his refusal wilful;

c) he knew his refusal to be vaccinated and provide proof of same, in the absence of an approved exemption, could cause him to be suspended from him job – which means he accepted the consequences[26]; and

d) his refusal to comply with the policy was the direct cause of his suspension.

[38] The employer has the right to set policies for safety in the workplace. Such policies may change over time. The Claimant's argument that the mandatory

---

[25] In his reconsideration interview, the Claimant agreed with the employer's evidence that employees were informed on September 23, 2021 that the mandatory vaccination policy would be in place in December 2021 (see GD3C-36).

[26] In his reconsideration interview, the Claimant agreed the employer gave employees at least 3 months notice to get vaccinated. He also confirmed that as early as September 2021 he was aware that anyone who did not comply with the policy by the December 2021 deadline would be suspended from their employment (see GD3C-36).

vaccination policy was not part of his employment agreement is not persuasive because there was no Covid-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as changing circumstances may require.

[39] The Claimant always had the right to refuse to comply with the policy. By choosing not to be vaccinated (and, as a result, failing to provide proof of his fully-vaccinated status), in the absence of an approved exemption, he made a personal decision that led to foreseeable consequences for his employment.

[40] This Tribunal's Appeal Division has repeatedly confirmed it doesn't matter if a claimant's decision is based on religious beliefs, privacy concerns, medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits[27].

[41] These cases are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[28] .

[42] I therefore find that the Claimant's wilful refusal to be vaccinated and provide proof of vaccination in accordance with the policy – in the absence of an approved exemption – constitutes misconduct under the EI Act.

[43] The Claimant believes he had a right to refuse to be vaccinated and to refuse to attest to his vaccination status. He believes the policy violated his human and constitutional rights. He says the policy – and the consequences for non-compliance with the policy – were not part of his employment agreement and violated the employer's code of conduct, as well as various other international and domestic laws.

---

[27] For example, see: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.

[28] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[44] But I have no authority to decide whether the employer breached the Claimant's employment agreement or any of the Claimant's human or constitutional rights when it put him on an unpaid leave of absence for failing to comply with the policy. Nor do I have authority to decide if the employer's accommodation request process was proper or whether the employer could have accommodated the Claimant in some other way.

[45] The Claimant's recourse for all of his complaints about the policy and the employer's actions is to pursue these claims in court or before another tribunal that deals with such matters.

[46] I therefore make no findings with respect to any of his allegations, and the Claimant remains free to make these arguments before the appropriate adjudicative bodies and seek relief there[29].

[47] However, none of the Claimant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that he was suspended because of conduct that is considered to be misconduct under the EI Act.

[48] And this means he is not entitled to EI benefits during the period of his suspension.

C) Conclusion

[49] The Commission has proven the Claimant was suspended from his employment because of his own misconduct.

[50] This means he is disentitled to EI benefits during the period of the suspension from December 26, 2021 and continuing until April 2, 2022[30].

---

[29] The Claimant told the Commission he has already filed a human rights complaint over the cessation of his employment (see GD3C-36). He also testified that he is part of a class action lawsuit against the employer for "wrongful dismissal, emotional damage and severance pay".

[30] Weeks of benefits are calculated from a Sunday to a Saturday. This is why the disentitlement runs from December 26, 2021 (the start of the Claimant's benefit period) until April 2, 2022 (the Saturday of the

Issue 2: Did the Claimant voluntarily leave his job without just cause when he refused to return to work[31]?

[51] To answer this question, I have to decide two things. First, I must determine if the Claimant voluntarily left (quit) his job. Then I have to decide whether he had just cause for leaving.

A) Did the Claimant voluntarily leave his job?

[52] Yes, he did.

[53] The law says that voluntarily leaving an employment includes the refusal to return to work when given an offer of recall[32].

[54] The employer told the Commission that[33]:

- The Claimant was put on an unpaid suspension starting from December 19, 2021 for failing to comply with the policy.
- On March 25, 2022, employees were notified that the policy was being rescinded and unvaccinated staff could return to work on April 4, 2022.
- The Claimant was asked to return to work when the vaccine mandate ended.
- On March 25, 2022, the employer sent a recall letter to the Claimant asking him to return to work on April 4, 2022. The letter was sent by E-mail and by registered mail. The Claimant "refused" the registered mail.

---

final full week of his suspension). His next week of potential entitlement to EI benefits would start April 3, 2022 (the Sunday of the following week).

[31] The reconsideration file for this issue is the document coded GD03**D**; and the Commission's representations on this issue are set out in the document coded GD04**D.**

[32] Section 29(b.1)(ii) of the EI Act provides that voluntarily leaving an employment includes the refusal to resume an employment.

[33] See GD3D-20 and GD3D-38

- The Claimant didn't respond to the recall letter or contact the employer. He just didn't show up for work. The employer has no idea why.
- When the Claimant didn't show up for work on or after April 4, 2022, the employer considered him to have quit.
- On April 27, 2022, the employer issued an amended Record of Employment for job abandonment[34].

[55] The Claimant told the Commission that[35]:

- He was suspended for non-compliance with the policy a of December 19, 2021.
- About 3 months later, he was contacted to return to work on April 4, 2022.
- He did not respond to the recall because he considered himself to have been permanently terminated in December 2021.
- When he was suspended, he was led to believe the policy was going to be permanent. He thought he would never be returning to work for this employer because he is not prepared to disclose his vaccine status.
- He understood the policy had changed when the recall occurred. But he did not contact the employer to clarify the situation because he felt he had been constructively dismissed.
- He was still unemployed at the date of recall but did not return to work.

[56] The Claimant testified at the hearing that:

- He didn't return to work when recalled.
- Nor did he contact the employer to discuss the recall letter.

---

[34] At GD3D-18.
[35] See GD3D-36 to GD3D-37.

- Instead, he “got a lawyer” and filed a lawsuit for “wrongful dismissal, emotional damage and severance pay”[36].

[57] The Claimant initiated the severance of the employment relationship when he failed to show up for work on April 4, 2022 or thereafter. In doing so, he declined to resume his employment at a time when the employer had work for him. I therefore find that he voluntarily left his job on April 4, 2022[37].

B) Did the Claimant have just cause for voluntarily leaving?

[58] No, he did not.

[59] The law says you are disqualified from receiving EI benefits if you left your job voluntarily and didn’t have just cause for doing so[38].

[60] Having a good reason for leaving a job isn’t enough to prove just cause.

[61] The law explains what it means by “just cause.” It says you have just cause to leave if you had ***no reasonable alternative to quitting*** your job when you did.

[62] It is up to the Claimant to prove he had just cause[39].

[63] He must prove this on a balance of probabilities. This means he has to show it is more likely than not that his only reasonable option was to leave his employment on April 4, 2022.

[64] When I decide whether he had just cause, I have to look at all of the circumstances that existed at the time he quit[40].

---

[36] The Claimant testified that there are now 80 plaintiffs bringing similar actions and that they are “going for certification as a class action”.
[37] Where a claimant refuses to resume their employment, the voluntary leaving is deemed to occur when the employment was set to continue. In the Claimant’s case, the employer made an offer of recall on March 25, 2022 and asked the Claimant to return to work on April 4, 2022. The Claimant did not show up for work on April 4, 2022 or thereafter, so April 4, 2022 is the date of his voluntary leaving.
[38] Section 30 of the EI Act.
[39] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.
[40] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the EI Act.

[65] The Claimant told the Commission that:

- He was asked to return to work once the vaccine mandate was lifted.
- He was supposed to start working again on April 4, 2022, but he chose not to return and quit instead.
- He felt he had been constructively dismissed when he was suspended because he considered the employer's actions to be coercion and abusive. The employer's actions also created a hostile work environment.
- He believed that if he returned to work, he could get fired for no cause and would not be able to take the employer to court.
- But he understood that if he didn't return, there would be consequences too.

[66] In his Notice of Appeal, the Claimant said the trust between employees and the employer was broken and the hostile work environment created by the employer was beyond repair. He also said he feared retribution from the employer for refusing to comply with the policy.

[67] At the hearing, the Claimant testified that:

- In his experience, when people go back to work "after being disciplined – for whatever reason", they'd be terminated quickly thereafter so as to extinguish any wrongful dismissal or severance claims.
- He didn't go back to work when recalled because he "feared" termination for not complying with the prior policy.
- He'd be viewed as "an outcast and a trouble-maker" and the employer would be looking for an excuse to fire him.
- So instead, he got a lawyer and sued the employer for wrongful dismissal, emotion damage and severance pay.

- He also intends to submit a human rights complaint to the Alberta Human Rights Commission.

- It was not a reasonable alternative for him to go back to work because he feared "reprisal" in the form of a termination for cause that would negatively affect his ability to sue the employer and to be hired elsewhere.

- He is very grateful for his 12 years with this employer. He made a lot of friends and is "very sad" it had to end this way.

- But his goal is to get public awareness for what happened to him and show other people how "not to let corporations trample your rights".

[68] The Claimant says the employer's actions in implementing the policy and suspending employees such as him created a hostile work environment which gave him just cause for quitting. He also says his fear of reprisal for failing to comply with the policy when the vaccine mandate was in place meant he had no reasonable alternative but to quit.

[69] The Commission says a reasonable alternative to leaving would have been for the Claimant to return to work and see if there were any repercussions from non-compliance with the policy. Another reasonable alternative would have been to speak to the employer about his concerns to see if they were founded or not.

[70] I agree with the Commission that the Claimant had reasonable alternatives to leaving his job when he did (on April 4, 2022).

[71] The question is not whether it was understandable for the Claimant to leave his employment, but rather whether leaving was ***the only reasonable course of action open to him***, having regard to all of the circumstances. The Commission has proven the Claimant had reasonable alternatives to quitting when he did.

[72] I will address the Claimant's arguments in turn.

Hostilities in the Workplace

[73] Unsatisfactory working conditions will only constitute just cause for quitting where they are so ***manifestly intolerable*** that the Claimant had no other choice but to leave when he did[41]. But there is a high obligation on a claimant to seek solutions to intolerable conditions before leaving[42].

[74] I find that such circumstances did not exist for the Appellant at April 4, 2022.

[75] The Claimant strongly disagreed with the policy and was deeply unhappy about being suspended because of it. I acknowledge that there could have been hostility and stress in the workplace when the policy was implemented and in the lead-up to the deadline for compliance.

[76] But the policy that the Claimant says caused these tensions was rescinded and was not in effect on April 4, 2022 – and that's the date I need to consider. There is no evidence ***whatsoever*** about the work environment as of that date – let alone evidence of conditions in the workplace that could be considered manifestly intolerable – because the Claimant did not return to work after the policy was lifted.

[77] There are no examples of the Claimant being treated as an "outcast" or "trouble-maker" as of April 4, 2022, or the employer looking for excuses to fire him. There is just his assumption that the workplace had become toxic because of the policy and the suspensions. But the Claimant failed to return to work to see if his assumption was correct. And he failed to take any steps to address the potential for unsatisfactory working conditions prior to leaving the employment.

[78] I acknowledge the Claimant's reasons for wanting to avoid potential hostilities from co-workers or management after refusing to comply with the policy. But I cannot ignore that he voluntarily put himself into a position of unemployment without taking any steps to first preserve his employment.

---

[41] See *CUBs 16704, 12767*, and 11890.
[42] See *CUBs 57005, 57605, 57628, 69200, 69227, 71573*, and *71645*.

[79] A reasonable alternative would have been for the Claimant to speak with his supervisor and/or manager to alert them to his concerns prior to returning to work and give the employer a chance to address the issue. The fact he did not allow the employer to address his concerns is indicative of the Claimant's lack of interest in preserving this employment.

[80] I therefore find that the Appellant has not met the onus on him to prove that he was experiencing hostile working conditions that were so manifestly intolerable that he had no reasonable alternative but to quit his job on April 4, 2022. This means he has not proven just cause for leaving his job because his workplace had become intolerable.

[81] A decision to leave a job for personal reasons, such as wanting to avoid being viewed in a negative light for prior non-compliance with a workplace policy (as described by the Claimant), may well be ***good cause*** for leaving an employment. But the Federal Court of Appeal has clearly held that good cause for quitting a job is not the same as the statutory requirement for **"just cause"**[43]; and that it is possible for a claimant to have good cause for leaving their employment, but not "just cause" within the meaning of the law[44].

[82] The Federal Court of Appeal has also clearly held that leaving one's employment to improve one's situation – be it the nature of the work, the pay, or other lifestyle factors – does not constitute just cause within the meaning of the law[45].

[83] I find that the Claimant made a personal decision to leave his employment. I acknowledge his desire to put the policy and the suspension behind him and avoid the potential for negative interactions (such as being treated as an outside or a trouble-maker) because of his non-compliance. But he cannot expect those who contribute to the employment insurance fund to bear the costs of his unilateral decision to leave his employment in an attempt to do so.

---

[43] See *Laughland* 203 FCA 129
[44] See *Vairumuthu* 2009 FCA 277
[45] See *Langevin* 2001 FCA 163, *Astronomo* A-141-97, *Tremblay* A-50-94, *Martel* A-169-92, *Graham* 2001 FCA 311, *Lapointe* 2009 FCA 147, and *Langlois* 2008 FCA 18.

[84] A reasonable alternative to leaving would have been to alert the GM to his concerns and allow the employer the opportunity to address and resolve his concerns. Another reasonable alternative would have been to return to work on April 4, 2022 and continue working until he found suitable employment elsewhere.

[85] The Claimant failed to pursue either of these reasonable alternatives.

[86] I therefore find that the Claimant has not met the onus on him to prove that his personal concerns around hostilities in the workplace were such that he had no reasonable alternative but to quit his job on April 4, 2022. This means he has not proven just cause for leaving his job.

[87] It also means he is disqualified from receiving EI benefits.

Fear of Reprisal

[88] The employer rescinded the policy and quickly invited the Claimant to return to work. This shows the employer valued the employment relationship with the Claimant and was prepared to look beyond the suspension to the future.

[89] The Claimant made a deliberate and intentional decision not to return to work when he chose not to respond to the recall letter or show up for work on April 4, 2022 (or thereafter).

[90] I see no evidence of hostility from the employer or that the employer intended to terminate the Claimant after recall. And I see no basis for the Claimant's fear of reprisal, let alone to a level that would support quitting his job without even responding to the recall letter or engaging in a dialogue to address his concerns about the recall.

[91] I find that the Claimant made a personal decision to leave his employment. He did not want to return to work after being suspended according to a policy he disagreed with and thought was abusive – even after the policy was no longer in effect. He believed termination was inevitable and decided to quit instead - to avoid a potential blemish on his record and to continue his wrongful dismissal action.

[92] As stated above, having good personal reasons for leaving a job isn't enough to prove just cause. The Claimant may have wanted to avoid the potential for retribution due to his prior non-compliance with the policy – and to hold the employer accountable through various legal actions. But he cannot expect those who contribute to the employment insurance fund to bear the costs of his unilateral decision to leave his employment in an attempt to do so.

[93] If the Claimant had any concerns about resuming his employment after his suspension, it was incumbent on him to protect his employment by responding to the recall letter and arranging to have a fulsome discussion with the employer about his concerns.

[94] Considering the circumstances that existed at April 4, 2022, the Claimant had reasonable alternatives to leaving:

a) He could have responded to the March 25, 2022 e-mail with the recall letter and questioned the employer about what the work environment would be like for unvaccinated (or unattested) employees returning to work after suspension.

b) He could have asked to meet with his supervisor and/or manager prior to the April 4, 2022 return to work date to resolve his concerns about reprisal for failing to comply with the policy when it was in effect.

c) He could have returned to work on April 4, 2022 and looked for other employment while attempting to resolve any workplace issues (if any issues arose). This is especially the case given that the policy had been lifted and there is nothing beyond the Claimant's own assumptions to support his view that returning to work would have been problematic for him.

[95] I make no findings as to whether the Claimant was wrongfully or constructively dismissed. He is free to pursue his lawsuit against the employer

[96] But leaving his job was not the only reasonable course of action for him. He failed to pursue any of the reasonable alternatives I have listed.

[97] I therefore find that the Claimant has not met the onus on him to prove that his personal concerns around fear or reprisal were such that he had no reasonable alternative but to quit his job on April 4, 2022. This means he has not proven just cause for leaving his job.

[98] It also means he is disqualified from receiving EI benefits.

C) Conclusion

[99] The Claimant had reasonable alternatives to leaving his job on April 4, 2022. He did not avail himself of these reasonable alternatives and, therefore, has not proven just cause for voluntarily leaving his employment.

[100] This means he is disqualified from EI benefits starting from April 3, 2022[46].

Issue 3: Has the Claimant proven his availability for work[47]?

[101] No, he has not.

Preliminary Matter

[102] Given my findings under Issues 1 and 2 above, it is not possible for the Claimant to be paid regular EI benefits on the application he filed January 6, 2022.

[103] Therefore, it is not strictly necessary for me to render a decision on the Claimant's availability because my decision – whether for or against the Claimant – cannot change the fact that he is not entitled to receive regular EI benefits on his claim. Said differently, my findings on the issue of the Claimant's availability for work have no impact on my findings that the Claimant is not entitled to EI benefits for the reasons set out under Issues 1 and 2 above.

---

[46] Weeks of benefits are calculated from a Sunday to a Saturday. This is why the disqualification runs from April 3, 2022 (the Sunday of the first potential week of entitlement after his suspension) and not April 4, 2022 (the date he voluntarily left his employment).

[47] The reconsideration file for this issue is the document coded GD03**A**; and the Commission's representations on this issue are set out in the document coded GD04**A.**

[104] However, given that the Claimant addressed the availability issue in his appeal materials and at his hearing, I will proceed with the availability analysis for purposes of completeness.

Availability Analysis

[105] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that he is capable of, and available for work and unable to obtain suitable employment[48] .

[106] The Claimant testified at the hearing that he was only ***capable*** of work starting from January 16, 2022[49]. I accept this evidence and find that the Claimant was not ***capable*** of work from December 27, 2021[50] until January 16, 2022.

[107] Now I will proceed to the availability analysis to assess his entitlement to regular EI benefits starting from December 27, 2021[51].

[108] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

---

[48] Section 18(1)(a) of the EI Act.

[49] The Claimant testified that he was medically unable to work between December 15, 2021 and January 15, 2022, but does not have a doctor's note to submit. He nonetheless maintained that he was incapable of work during this period of illness.

[50] The start date of the disentitlement imposed on his claim.

[51] This is the disentitlement date in the reconsideration decision that has been appealed.

The Commission says it used ***both*** sections 18 and 50 of the EI Act to disentitle the Claimant to EI benefits. But I do not think the Commission has shown it used section 50. I see no evidence that the Commission asked the Claimant about his job search efforts or requested proof he was making reasonable and customary efforts to find a job starting from December 27, 2021. There is also no evidence that the Commission told the Claimant that he wasn't making reasonable and customary efforts to find a job or explained why his efforts were insufficient – prior to imposing the disentitlement on his claim. Therefore, I will not consider section 50 of the EI Act in my analysis and will limit my consideration to whether the Claimant should be disentitled under section 18 of the EI Act.

b) the expression of that desire through efforts to find a suitable job; ***and***

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[52] .

[109] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court. When I consider each of these factors, I have to look at the Claimant's attitude and conduct[53].

[110] The court has also said that availability is determined for each working day in a benefit period[54].

[111] I find that the Claimant has not satisfied any of the *Faucher* factors starting from December 27, 2021.

a) Wanting to go back to work

[112] In his Notice of Appeal, the Claimant said he was **not** available for work from November 24, 2021 to the end of March 2022[55] because he was caring for his wife who was ill. He confirmed this at the hearing when he testified that he had to care for his wife "24-7 and could not work" during this period.

[113] I therefore find the Claimant did not have a desire to return to work as soon as a suitable job was available, starting from December 27, 2021[56] and continuing until the end of March 2022, because he did not want to work while he was caring for his wife who was ill[57].

---

[52] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

[53] 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.
[54] See *Canada (Attorney General) v. Cloutier, 2005 FCA 73.*
[55] See GD2-7.
[56] This is the disentitlement date imposed by the Commission for failing to prove his availability for work – see decision letter at GD3A-22. It runs from the first working day (Monday) after the start of the Claimant's benefit period (which is a Sunday).
[57] However, I take this opportunity to remind the Claimant of the Commission's recommendation that if he was unable to work due to caring for his wife during a period of illness, he may wish to explore his eligibility for EI Family Caregiver Benefits for Adults (see GD4A-3).

[114] I accept that Claimant's caregiver responsibilities ceased at the end of March 2022 and that he had a desire to return to full-time employment from that point onward. But to satisfy the first *Faucher* factor, the Claimant must prove that he wanted to return to work ***as soon as a suitable job was available***. To do this, he must show that he had a desire to return to work for every working day of his benefit period.

[115] I cannot ignore the fact that the Claimant refused the offer of recall from his prior employer. The offer was made while the Claimant was still unemployed and, if accepted, would have had him back at work starting on April 4, 2022. His decision not to accept the recall offer shows he did not have a desire to return to work as soon as a suitable job was available.

[116] I therefore find the Claimant has not satisfied the first *Faucher* factor.

b) Wanting to go back to work

[117] To satisfy the second *Faucher* factor, the Claimant must prove he was making enough effort to find a suitable job for every working day during his benefit period, starting from December 27, 2021.

[118] He has not done so.

[119] The Claimant testified that he was not looking for work while he was caring for his wife between November 24, 2021 and the end of March 2022. He put his job search efforts on hold while he was caring for his wife because he felt there was no point looking for work until he no longer had to care for his wife during her illness.

[120] The Claimant also testified that:

- He updated his resume in January 2022.
- He works in "power engineering – 3rd class", and would like to be working full-time.

- A contact at a prospective employer (X) told him that a job posting was “coming up” and the contact would let him know when it was posted.
- He applied for the X job on May 4, 2022, as soon as it was posted.
- He also looked on the online job board, “Indeed”, but didn’t see anything in his field to apply to until May 29, 2022.
- He applied for 6 jobs between May 4, 2022 and August 9, 2022[58].
- X called him mid-July 2022 to come in for an interview, but the weekend before he tested positive for Covid-19. X said not come in and they7’d call him to reschedule, “but the call never came”.
- On September 8th and 30th, 2022, he applied for jobs posted at X.
- But the only request for an interview came from X – and that was cancelled when he got Covid and never re-scheduled.
- He also keeps in touch with his son, who resides in B.C. and has a friend who might be opening a construction business he could work in. But that would require him to move to BC.
- He has not applied to any construction positions in Alberta.
- “That’s it” for his job search efforts to date.

[121] Case law says that the determinative factor in assessing availability is an active, serious, continual and intensive job search, demonstrated by a verifiable record of job applications[59].

[58] The Claimant referred me to the list in the Commission’s representations at GD4A-2.
[59] This principal was set out in the decision of *Cutts v. Canada (Attorney General)*, A-239-90.

[122] The evidence does not support a finding that the Claimant's job search efforts ever reached this level starting from December 27, 2021.

[123] The Claimant submitted no job applications until May 4, 2022, and only 8 applications in total during the 4 months between May 4, 2022 and September 3, 2022. It cannot be said that the Claimant's efforts were sustained or show an on-going effort to find employment for every working day during his benefit period. The fact that one of his job leads would have required him to move of province also does not show he was searching for suitable work for every working day of his benefit period – especially since he was not pursuing that type of work (construction) in his home province.

[124] I therefore find the Claimant has not satisfied the second *Faucher* factor.

c) Unduly limiting chances of going back to work

[125] To satisfy the third factor, the Claimant must prove he did not set personal conditions that limited his chances of returning to work for every working day of his benefit period, starting from December 27, 2021.

[126] He has not done so.

[127] The Claimant's was caring for his wife "24-7" between November 24, 2021 to the end of March 2022. He said he was unable to apply for ***or*** return to work during this period. I therefore find the Claimant's caregiver responsibilities were a personal condition that restricted his chances of returning to work until after the end of March 2022.

[128] The Claimant also said that his vaccination status was an impediment to finding a job.

[129] He testified that:

- His vaccination status limits the job opportunities he can apply to. He knows the job sites in his field well enough to know which ones require proof of vaccination to be on site.

- This is a part of the problem with his applications to X.

- He “exposes” himself as unvaccinated as soon as he gives the date of his last day of work (December 19, 2021) because it indicates to the oil industry in Alberta that he is a person who has not attested to being fully vaccinated against Covid-19.

- His resume alerts potential employers to the fact that he did not comply with his prior employer’s vaccination mandate, so they will only contact him depending on their own rules about vaccination.

- He’s aware that his vaccination status is part of the reason he’s not getting any job interviews. He knows “through word of mouth” that it’s easier for employers to “get somebody younger and vaccinated”.

- In his opinion, this is true even as vaccine mandates are lifted.

- X never had a mask or vaccine mandate, so the X job he applied for would have “been nice”. But they never re-scheduled his interview.

- He keeps hoping something will come up at X again, especially since it is only 30 minutes from his house and he just needs 2 more years of work until he retires.

[130] Availability for suitable employment is an objective question and cannot depend on a claimant’s particular reasons for restricting their availability, even if the reasons provided may evoke sympathetic concern or if the claimant believed in good faith that they were unable to work[60].

[131] By choosing not to disclose his vaccination status, the Claimant was restricting himself to employers and positions without a vaccination requirement – at a time when, by his own admission, most (if not all) of the employers he was targeting required candidates to be vaccinated. This meant the Claimant was not eligible for jobs he considered acceptable because of his personal choice not to provide proof he was fully

[60] See *Gagnon* 2005 FCA 321 and *Whiffen* A-1472-92.

vaccinated. It doesn't matter that he believed he had valid personal reasons for making this choice. All that matters is that the personal choice he made limited the jobs he could apply for.

[132] I therefore find that the Claimant's choice not to disclose his vaccination status was a personal condition that restricted and unduly limited his chances of returning to the labour market.

[133] This means he has not satisfied the third *Faucher* factor starting from December 27, 2021.

d) Conclusion on the *Faucher* factors

[134] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the EI Act. Based on my findings, he has not satisfied all 3 factors from the start date of the disentitlement.

[135] I therefore find the Claimant has not shown he was capable of and available for work, but unable to find a suitable job starting from December 27, 2021. This means he is not entitled to EI benefits on his claim.

[136] I acknowledge the Claimant's disappointment at not being able to receive EI benefits when he is in need of financial assistance. However, it is not enough to pay into the EI program. All claimants must meet the terms and conditions in the EI Act in order to be paid benefits. And if a claimant cannot prove their availability for work, they will be disentitled to EI benefits regardless of how many years they have contributed to the program.

[137] As a final matter, I apologize to the Claimant for taking longer to issue this decision than originally anticipated. This was due to unforeseen circumstances and events beyond my control. I thank him for his patience.

[138] The Claimant contacted the Tribunal recently asking for an update on his appeal. The issuance of this decision is the Tribunal's response to his enquiry.

Conclusion

[139] The Claimant is disentitled to EI benefits from December 26, 2021 to April 2, 2022 because he was suspended from his employment due to his own misconduct.

[140] The Claimant is disqualified from EI benefits from April 3, 2022 because he voluntarily left his job without just cause when he refused to return to work.

[141] He is also disentitled to EI benefits from December 27, 2021 because he did not prove his availability for work during his benefit period.

[142] This means the Claimant cannot be paid EI benefits.

[143] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section