



Citation: *DG v Canada Employment Insurance Commission*, 2022 SST 759

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: D. G.

Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision under appeal: General Division decision dated March 23, 2022
(GE-22-581)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: July 20, 2022
Hearing participants: Appellant
Respondent's representative

Decision date: August 10, 2022
File number: AD-22-189

Decision

[1] The appeal is dismissed. The misconduct issue is moot. The Claimant left her employment soon within days after being placed on an unpaid leave of absence.

[2] As for whether the Claimant had just cause for voluntarily leaving her employment, the General Division should have considered whether the Claimant faced workplace harassment to justify leaving her employment, given her allegations. Even so, the employer's actions and communications did not amount to harassment. The Claimant also had reasonable alternatives to leaving her employment.

Overview

[3] This is an appeal of the General Division decision.

[4] The General Division found that the Canada Employment Insurance Commission (Commission) proved that the Appellant, D. G., (Claimant), had been suspended from her employment because of misconduct. It also found that the Commission proved that the Claimant had voluntarily left her job without just cause. Because she had voluntarily left her job without just cause, the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant denies any misconduct on her part. She acknowledges that she did not comply with her employer's vaccination policy that required all employees to get vaccinated. But, she argues that there was no misconduct because the employer's policy was unreasonable in her circumstances and she should not have had to comply with it. She argues that the General Division failed to consider the reasonableness of her employer's policy when it assessed whether there was misconduct.

[6] The Claimant also asserts that her employer harassed her over its vaccination policy. She argues that the General Division failed to consider whether her employer harassed her. If the employer harassed the Claimant, she may have had just cause for

voluntarily leaving her employment if she did not have any reasonable alternatives to leaving.¹

[7] The Claimant submits that she did not have any reasonable alternatives to leaving her employment. She felt threatened and harassed, even after her employer placed her on an unpaid leave of absence.

[8] The Claimant asks the Appeal Division to allow her appeal and to find that there was no misconduct and that she had just cause for voluntarily leaving her employment.

[9] The Commission argues that the General Division did not make any errors. The Commission says that there are no grounds of appeal. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

Issues

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

- a) Is the reasonableness of an employer's policy relevant when assessing misconduct? If so, did the General Division fail to consider whether the employer's vaccination policy was reasonable in the Claimant's circumstances?
- b) Did the General Division misinterpret what misconduct means under the *Employment Insurance Act*?
- c) Did the General Division fail to consider whether the Claimant had just cause for voluntarily leaving her employment because of harassment?

¹ Under subsection 29(c)(i) of the *Employment Insurance Act*, a claimant has just cause for voluntarily leaving an employment if they had no reasonable alternative to leaving, if there was harassment.

Analysis

[11] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.²

Background

[12] The Claimant worked as a sales representative for a call centre, where she started working in May 2007. Her employer was based in Nova Scotia. She worked remotely from home in another province.

[13] In late 2021, the Claimant's employer notified employees that it was introducing a COVID-19 vaccination policy.³ The employer explained that it was bringing in the policy to maintain a safe and healthy working environment for its employees. The employer indicated that it would review the policy after four months.

[14] The employer required all employees to be vaccinated. If employees did not provide proof of vaccination by the deadline, the employer did not let them work. The employer also placed these employees on unpaid leave.

[15] The policy applied to all employees, regardless of an employee's position and their work location. The employer offered to accommodate those with valid medical reasons and any grounds protected by human rights legislation. The employer stated that it would not accept requests for accommodation for any other reasons.

[16] The Claimant conducted her own research into the safety and effectiveness of the vaccine. She considers the vaccine experimental and dangerous. She views vaccinations as part of "COVID theatre." She noted that family and close friends had adverse reactions to the vaccine.⁴ She is strongly opposed to getting any of the COVID-19 vaccines.

² See section 58(1) of the *Employment Insurance Act*.

³ See employer's COVID-19 Proof of Vaccination Policy, at GD3-33 to GD3-36.

⁴ See Claimant's request for reconsideration, at GD3-27.

[17] On top of that, the Claimant claimed that she always worked from home and never went into the employer's place of business.⁵ She says that when her employer's vaccination policy was in effect, interprovincial restrictions restricted her from entering the province where her employer was located. So, she would not be in contact with any work colleagues. She says her employer did not have any justification to demand she get vaccinated.

[18] The Claimant asked her employer for an exemption from its vaccination policy. She did not qualify for a medical or religious exemption. But, she worked remotely. And, she would not be going to the employer's place of business. She argues that these considerations alone justified getting an exemption. The employer denied the Claimant's exemption request.

[19] The vaccination deadline passed. On November 25, 2021, the employer placed the Claimant on an unpaid leave of absence. The following day, the Claimant applied for Employment Insurance benefits. And, on December 2, 2021, the Claimant resigned from her employment.⁶

[20] The Commission denied the Claimant's application for benefits. The Claimant appealed the Commission's decision to the General Division, which, in turn, also denied her appeal. The General Division decided that there was misconduct and that the Claimant had voluntarily left her employment without just cause.

Misconduct and voluntary leaving

[21] The General Division considered two separate issues, whether there was misconduct and whether the Claimant had voluntarily left her employment without just cause.

⁵ I note a minor discrepancy. In one of her emails, at GD15-4 to GD15-5, the Claimant suggests that she had been to the office, though that was several years before the pandemic began. Nothing turns on this however.

⁶ See Claimant's resignation letter (email) dated December 2, 2021, at GD14-1 to GD14-2.

[22] A claimant who is suspended from their employment because of their misconduct is disentitled to receive Employment Insurance benefits until they leave their employment.⁷

[23] Depending upon how they leave their employment, they could be disqualified from receiving benefits. If a claimant voluntarily leaves their employment without just cause, or if they lose their employment because of misconduct, for instance, they are disqualified from receiving benefits.⁸

[24] Disqualification has different consequences from a disentitlement.

– **Misconduct: The Claimant was on unpaid leave for only a short time**

[25] The Claimant argues that the General Division made a mistake in finding that there was misconduct because she had refused to comply with her employer's vaccination policy. She says that she was fully justified in refusing to comply. She argues that the General Division should have considered the reasonableness of her employer's policy. Besides, she says misconduct only arises if there is conduct like theft, misleading customers, poor phone etiquette, not performing one's work or not showing up for work.

[26] The Claimant does not challenge the overall reasonableness of her employer's vaccination policy. She accepts that the employer's policy is overall reasonable, but only as it relates to other employees who work at the employer's business.⁹ But, she had always worked from home and never had to attend at her employer's place of business. So, she says the policy is unreasonable in her case and should not apply to her.

[27] However, the Claimant resigned within a week after her employer placed her on a leave of absence. There is a one-week waiting period before a claimant receives any benefits. The Claimant would not have received any benefits during the period she was

⁷ See section 31 of the *Employment Insurance Act*. Under that section, a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until (b) the claimant loses or voluntarily leaves the employment. But, even when the disentitlement ends, a disqualification might apply under section 30.

⁸ See sections 29 and 30 of the *Employment Insurance Act*.

⁹ Claimant's oral submissions at the Appeal Division, July 20, 2022.

on leave, under any circumstances. Setting aside the misconduct issue, the Claimant simply did not remain on a leave of absence long enough before leaving her employment.

[28] Because of this, there is no reason to address the disentitlement issue. It is pointless to consider whether the reasonableness of an employer's policy is relevant when assessing whether there has been misconduct. The Claimant would not have received benefits anyway because of the one-week waiting period that she would have had to serve.

– **Reasonableness of the employer's policy**

[29] Even if the Claimant had stayed on the job longer, it is questionable whether the Commission or the General Division had to consider the reasonableness of the employer's policy. Having to consider it could become onerous and burdensome for the Commission.

[30] How would the Commission even determine what is reasonable? The employer's policy might seem unreasonable from the Claimant's perspective, but it might be entirely reasonable from the employer's standpoint.

[31] For instance, the Claimant raises valid points about her employer's policy, in her particular circumstances. She was a long-standing employee who lived in another province. Over 13 years, she never went to her employer's business. There were interprovincial restrictions. She never came into contact with other employees.

[32] However, from an employer's perspective, it may have been just as reasonable to implement a vaccination policy for all employees. The employer may have thought there could have been workplace implications with an unvaccinated workforce. Without this requirement, the employer might not have had sufficient employees working from the office if everyone was given the option to work from home and everyone chose not to get vaccinated.

[33] More importantly, as the employer stated, it was trying to ensure its employees, including others who worked remotely, from getting the virus or becoming severely ill from it, whether at the workplace or being about in the community. The employer cited that the purpose behind its policy was to maintain a safe and healthy working environment, in keeping with its obligations under applicable occupational health and safety legislation.

[34] I raise these considerations to illustrate the difficulty in assessing misconduct if reasonableness of an employer's policy is a factor. It is debatable whether reasonableness is or should be a factor in assessing misconduct, particularly when the policy is or can be relevant to one's employment.

[35] However, given the facts of this case, I do not have to decide whether reasonableness of an employer's policy is a factor. The Claimant did not stay at her job long enough, so she would not have received benefits for the time she was on a leave of absence, even if there had been no misconduct.

– **Misconduct: Did the General Division misinterpret what misconduct is?**

[36] The Claimant argues that the General Division misinterpreted what misconduct is. The Claimant denies that there was any misconduct on her part. The Claimant argues that misconduct only arises if there is conduct like theft, misleading customers, poor phone etiquette, not performing her work or not showing up for work.

[37] As I indicated above, I do not have to consider whether there was any misconduct. So, I do not have to consider whether the General Division might have misinterpreted what misconduct is.

[38] That said, I do not see any errors with the General Division's interpretation of what misconduct is. The General Division properly defined misconduct as follows:

To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Claimant does not have to have wrongful intent (in other

words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law. [Citation omitted]

There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that. [Citation omitted]¹⁰

[39] The General Division's interpretation of misconduct is consistent with the case law.

– **Voluntary leaving: Did the Claimant argue the issue of harassment at the General Division?**

[40] The Claimant argues that the General Division made a mistake in finding that she had voluntarily left her employment without just cause. She argues that the General Division failed to consider the fact that her employer had harassed and threatened her. She claims her employer harassed her to the point that she felt forced to leave her employment. She denied that she had any reasonable alternatives to leaving.

[41] As part of the harassment, the Claimant alleges that her employer repeatedly emailed her. The repeated emails were an effort to force her into getting the vaccine. This despite having told the employer that she was unprepared to get vaccinated.

○ **The Commission's position**

[42] The Commission denies that there was any harassment, or that the Claimant felt harassed or threatened. The Commission argues that, very early on in her claim, the Claimant never suggested that there had been any harassment from her employer.

[43] For instance, on December 15, 2021, the Commission asked the Claimant whether non-compliance with the employer's vaccination policy was the only reason for leaving her job. The Commission notes that the Claimant replied that there was no other reason for her to be placed on leave.¹¹

¹⁰ See General Division decision, at paras. 14 and 15.

¹¹ See Commission's representations to the Social Security Tribunal - Appeal Division, at AD10-4, referring to a Supplementary Record of Claim dated at February 15, 2022, at GD3-37.

[44] The Commission argues that the fact that the employer informed its employees of a new policy does not amount to harassment, nor does sending one or two reminders of the deadline to provide proof of vaccination.

[45] The Commission cites other documents as well.¹² The Commission argues that the Claimant never stated in any of her documents up to March 12, 2022 (when she filed document GD14) that she was quitting because her employer was harassing her to comply with its vaccination policy.

[46] The Commission argues that several months had passed after the Claimant resigned from her employment before she ever claimed that her employer had harassed her.¹³

[47] In short, the Commission says that it is doubtful that the Claimant truly felt harassed by her employer, or that she left her employment because of harassment. The Commission argues that, if the Claimant left her employment because of harassment, she would have raised the issue much earlier—rather than waiting until several months had passed.

- **Review of documents in hearing file**

[48] It may be that the Claimant did not mention that her employer had harassed her until several months after she had left her employment. Even so, if she claimed that her employer had harassed her, the General Division should have examined whether she had just cause for leaving her employment because of harassment.

[49] I will review the documents filed with the General Division, to see if they show whether the issue of harassment ever arose. The evidence before the General Division consists of the following:

¹² See Commission's representations to the Social Security Tribunal - Appeal Division, at AD10-5, citing GD7-1, GD8 to GD12, GD14, GD15-2 to GD17 and GD21 to GD23.

¹³ See Commission's representations to the Social Security Tribunal - Appeal Division, at AD10-5.

- When the Claimant resigned from her employment on December 2, 2021, she did not allege any harassment.¹⁴ She wrote that her employer was trying to coerce her into getting vaccinated. She defined coercion as “using force or threatening to persuade an unwilling person into doing something that they don’t want to do, regardless their reason for not wanting to.)
- When the Claimant spoke with the Commission in January 20, 2022, the Claimant did not mention any harassment¹⁵
- On January 24, 2022, when the Claimant asked the Commission to reconsider its initial decision, she did not mention any harassment¹⁶
- The Claimant filed submissions at the General Division. On February 25, 2022, she wrote that she felt “coersed [*sic*], shamed, ridiculed, punished and threatened by taking [her] job away from [her] for not complying to a Policy that is actually an unjustifiable violation of [her] rights and freedoms.”¹⁷
- On March 5, 2022, she wrote that she felt like a rape victim because she had been “coerced, threatened, shamed, called names and punished for standing up for [her]self.”¹⁸ She did not specifically mention her employer.
- In another email dated March 13, 2022, the Claimant wrote that her lawyer advised her to resign, as she did not accept the vaccination policy “and the harassment and the stress” it was causing her.¹⁹
- In another email that same day, the Claimant wrote that she had a compelling reason for quitting involuntarily. She was “being harassment [*sic*], course, and

¹⁴ See Claimant’s resignation letter (email) dated December 2, 2021, at GD14-1 to GD14-2.

¹⁵ See Supplementary Record of Claim dated January 18, 2022, at GD3-22.

¹⁶ See Request for reconsideration, filed on January 24, 2022, at GD3-30.

¹⁷ See Claimant’s email dated February 25, 2022, at GD7.

¹⁸ See Claimant’s email dated March 5, 2022, at GD10.

¹⁹ See Claimant’s email dated March 13, 2022, at GD15-7.

forced to submit proof of vaccination.” She claimed that she was subjected to “excessive harassment and discrimination.”²⁰

- On March 15, 2022, the Claimant explained that she had resigned as there had been a significant change in her employment agreement, and it no longer made the employee-employer relationship credible. She explained that it would have been impossible for her to continue her professional performance and dedication for the company.²¹
- On March 18, 2022, the Claimant wrote, “on [her] last shift for [her employer], total mental breakdown experience that still scares [her] to death, couldn’t breathe, shaking like a seizer, crying like [she] was being tortured and [she] couldn’t even continue taking [her] inbound calls, [she] had to sign out and leave. So if that is not workplace harassment to the point of undue mental breakdown ...[She] begged, and pleaded to keep [her] job, and there was nothing voluntary about it whatsoever.”²²
- And in the same email, she wrote, “Just case [*sic*] [...] Harassment human rights act Canadian Constitution working conditions endanger health and safety undue pressure from the employer to leave their employment and any other reasonable circumstances that are prescribed.”²³

[50] These documents show that the Claimant was alleging that her employer harassed her.

- **The General Division did not consider the harassment issue**

[51] There is no indication that the General Division considered whether the Claimant’s employer had harassed her.

²⁰ See Claimant's email dated March 13, 2022, at GD15-2.

²¹ See Claimant's email dated March 15, 2022, at GD16-1 and GD17-1.

²² See Claimant's email dated March 18,, 2022, at GD23-2.

²³ See Claimant's email dated March 18,, 2022, at GD23-2.

[52] Given the allegations of harassment--even if they arose weeks or months after the Claimant's resignation from her job-- the General Division should have at least examined whether there had been workplace harassment.

[53] If the General Division found that there had been harassment, it should have then also considered whether the harassment caused the Claimant to leave her employment. Finally, when determining whether the Claimant had any reasonable alternatives to leaving, it should have considered the reasonableness of those alternatives, taking into account the extent and effect of any harassment. If there was harassment, it could have had some impact on the reasonableness of any options that the Claimant might have had to leaving her employment.

[54] If the General Division had considered the harassment issue, the Claimant might have been able to establish that she left her employment because of harassment. She may have had just cause for leaving her employment if she did not have any reasonable alternatives to leaving.

Remedy

[55] Having found that the General Division should have considered the harassment issue, now I have to look at whether there actually was harassment, whether it led to the Claimant's departure, and whether it left her without any reasonable alternatives but to leave her job. If so, then I can substitute the General Division's decision for my own.

[56] I can substitute my own decision instead of sending this matter back to the General Division for reconsideration because the underlying facts are not in dispute and the evidentiary record is complete.²⁴ There is no allegation by either party that they did not get a fair hearing at the General Division (neither attended the hearing) or that they did not have a reasonable opportunity to present their case at the General Division.

²⁴ When deciding how to fix the General Division's error, I have two basic choices under section 59 of the *Department of Employment and Social Development Act*. I can substitute my decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact: *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

[57] The Claimant argues that the General Division should have accepted that she had just cause for leaving her employment because of harassment, and that she did not have any reasonable alternatives to leaving. The Commission denies that there was any harassment and asks me to dismiss the appeal.

– **Did the employer harass the Claimant?**

○ **The Claimant's perspective**

[58] The Claimant says that harassment occurs when there is manipulation, coercion, and victimization from an employer trying to get an employee to make a decision against one's will, as in her case.²⁵ She says her employer harassed her by repeatedly sending threatening emails trying to force her to get vaccinated.

[59] The language in the emails was not threatening, but the Claimant says she found the emails excessive in number and the underlying message frightening. The Claimant recalls receiving five to eight emails, all within a span of a month. The Claimant found the emails threatening because her employer said it would put non-vaccinated employees on unpaid leave. She felt she risked losing her job and livelihood if she did not get vaccinated. This caused her stress and anxiety.

[60] The Claimant felt that her employer should have accommodated her by allowing her to work from home. That way, she could have avoided being on an unpaid leave of absence. She was an outstanding employee who had won employee awards, as recently as the week before the employer introduced its policy.

[61] The Claimant did not file copies of the emails with the General Division. But phone long notes²⁶ largely confirm what the Claimant says her employer did to harass her:

²⁵ See Claimant's submissions to the Appeal Division, including at AD1C, Volume 1.

²⁶ See Supplementary Record of Claim dated January 18, 2022, at GD3-22.

- i. The employer circulated an email about its vaccination policy;
- ii. The employer rejected the Claimant's exemption request;
- iii. The employer sent at least one reminder in November 2021. At the Appeal Division hearing, the Claimant stated that her employer sent reminders on November 22, 23, and 24, 2021, for her to provide proof of vaccination or to request an exemption; and,
- iv. The employer sent the Claimant an urgent notice on November 24, 2021 that she should submit a proof of vaccination or submit an exemption or accommodation request by the end of the day. If she did not, she would be placed on an unpaid leave of absence. The Claimant responded that she would not be submitting a proof of vaccination.
- v. After November 24, 2021, the employer placed the Claimant on a leave of absence.

[62] The Claimant says her employer's emails were always the same. They set out the employer's vaccination policy and the deadline by which her employer expected employees to get vaccinated.

[63] After the employer placed the Claimant on an unpaid leave of absence, it sent her an "unpaid leave" letter. The employer outlined the duration of her leave and asked whether she wanted to keep her insurance,²⁷ what the Claimant describes as "position maintenance." Her employer did not contact her again until after she resigned her employment.

[64] The Claimant argues that being placed on an unpaid leave of absence is a form of harassment. She did not agree to being on an unpaid leave of absence. The consequences were devastating: she was unable to provide for her family, came close to losing her home, and had to rely on her mother for financial support.

²⁷ At approximately 39:50 of the audio recording of the Appeal Division hearing.

[65] The Claimant also says that being on unpaid leave showed that her employer did not respect her. The Claimant questioned how she should have to accept being on an unpaid leave, let alone be able to return to her employment and show her employer any respect. She argued that the situation with her employer was identical to being in an abusive relationship because the employer did not respect her. Because of this, she did not see how she could ever return to her employment.²⁸

[66] The Claimant says that staying on an unpaid leave of absence for four months while looking for work was an unreasonable option for the following reasons:

- The Claimant says that she had been looking for work but could not find anything. She had limited experience outside her 14 years as a sales representative with this employer. She found the labour market highly competitive, as everyone else was also looking for work. She discovered that employers lost interest in her once they learned that she had been non-compliant with her employer's policy. Either it was because any prospective employers also had a mandatory vaccination policy or they viewed her as a difficult employee.
- The Claimant could not conceive of ever returning to work for the call centre. Her employer disrespected her and put her on an unpaid leave. She felt that she could no longer respect her employer either. She cannot work under such conditions.

[67] The Claimant also stated that her lawyer advised her that, if she did not agree with the employer's vaccination policy, she should not accept being placed on an unpaid leave of absence.

[68] The Claimant felt that she did not have any option but to immediately resign from her employment. Otherwise, if she remained on unpaid leave for four months, her employer would say that she accepted the unpaid leave of absence. By immediately resigning, she showed that she did not accept being placed on an unpaid leave of

²⁸ At approximately 40:40 to 41:33 of the audio recording of the Appeal Division hearing.

absence. And, it would bolster any constructive dismissal claims she might have against her employer.

- **The Commission's position**

[69] The Commission denies that there was harassment.

[70] The Commission argues that the fact that the employer informed its employees of its vaccination policy does not amount to harassment. The policy applied to all employees, not just to the Claimant. It did not matter where employees worked.

[71] The Commission argues that the employer's vaccination policy was in accordance with the employer's obligations under occupational health and safety laws. The employer respected the rights of those with the need for legitimate medical and religious accommodation.

[72] The Commission says that an employer has to inform employees what the consequences will be for non-compliance. The Commission says that an employer must then follow through with administering those consequences when an employee fails to comply with the employer's policy.

[73] The Commission argues that it was not harassment when the employer advised the Claimant that, if she did not comply with its policy, it would place her on an unpaid leave of absence, and then, when the Claimant did not comply with the employer's policy, went ahead and put her on unpaid leave.

[74] The Commission argues that the Claimant failed to provide any evidence that her employer harassed her to comply with its vaccination policy. Despite the Claimant's allegations, the Commission argues that one cannot conclude that the employer harassed the Claimant simply by enforcing its new vaccination policy.

- **Definition of harassment**

[75] Under Part II of the *Canada Labour Code*, harassment and violence in the workplace context means:

any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.²⁹

[76] The Canadian Human Rights Commission defines harassment as:³⁰

[Harassment] includes any unwanted physical or veritable behaviour that offends or humiliates you. Generally, harassment is a behaviour that persists over time. Serious one-time incidents can also sometimes be considered harassment.

[77] The website also states that harassment occurs when someone makes unwelcome remarks or jokes, threatens or intimidates, or makes unwelcome physical contact.³¹

[78] The Government of Canada provides a tool for employers to help analyze whether there might be workplace harassment. The website defines harassment as:

Improper conduct ... that is directed at and offensive to another individual in the workplace ... and that the individual knew or ought reasonably to have known that would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).

...

It is the repetition that generates the harassment. .. it is a behaviour that with persistence, pressures, frightens, intimidates or incapacitates another person.³²

²⁹ See section 122(1) of the *Canada Labour Code*.

³⁰ See website for Canadian Human Rights Commission, at [What is Harassment? \(chrc-ccdp.gc.ca\)](http://chrc-ccdp.gc.ca).

³¹ See website for Canadian Human Rights Commission, at [What is Harassment? \(chrc-ccdp.gc.ca\)](http://chrc-ccdp.gc.ca). Note, however, that this is in the context of harassment under the *Canadian Human Rights Act*.

³² This definition appears on the Government of Canada website at: [Is it Harassment? A Tool to Guide Employees - Canada.ca](http://www24.intel.gc.ca/employees/employees.html)

[79] The Merriam-Webster Dictionary defines the word harass as: to annoy persistently, to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct.

- **Was there harassment?**

[80] The Claimant says there was harassment because her employer repeatedly sent emails of a threatening nature and then placed her on an unpaid leave.

- **The employer's emails**

[81] The Claimant clearly did not welcome her employer's emails about the vaccination policy. She disagreed with the vaccination policy and the consequences that followed with non-compliance. She felt the number of emails were excessive. There may have been upwards of five to eight emails within a month or so, including the employer's response to the Claimant's request for an exemption.

[82] Although the Claimant did not welcome the emails, I do not find that the employer sent more emails than was necessary. Certainly, they were not excessive in number.

[83] The initial emails were reasonable and necessary to inform employees of the policy, the consequences of non-compliance with the policy, and options under the policy.

[84] Because of the serious consequences that would result from non-compliance, it was reasonable and necessary also to remind employees of the deadlines for compliance and the consequences for non-compliance or missed deadlines.

[85] As for the allegedly threatening nature of the emails, the Claimant acknowledges that her employer's language in the emails was not threatening. She considered the emails threatening because the employer "threatened" harsh consequences for non-compliance with its vaccination policy. The policy reads that, "if employees have not submitted the applicable proof of vaccination by the aforementioned dates, they will not

be able to attend work for [the employer] beyond the deadline, and will be placed on unpaid leave.”³³

[86] But, employers are permitted to introduce and implement policies that they deem necessary to ensure a safe and healthy working environment. After all, employers have a duty to ensure the health and safety of every person at work. Consequences for non-compliance may be a necessary element of such policies. Hence, it was not only reasonable, but appropriate to communicate those consequences to employees.

[87] But, employer’s communications have to be respectful and professional. If there are, for instance, rude, humiliating, mocking, condescending, or offensive remarks, that would be harassment.

[88] There is no indication here that the employer’s emails were disrespectful or unprofessional. Indeed, it is difficult to find that the email communications were disrespectful, unprofessional, or threatening, when they did not even form part of the evidence at the General Division.

[89] Without seeing the actual emails, I can only assume that the employer’s language and tone in the emails was similar to those in the policy. If that is the case, then the language, the tone, the message, and the number of emails shows that the employer acted reasonably and appropriately.

[90] In short, there was nothing untoward or harassing about or from the employer’s emails about the vaccination policy and the consequences that could arise from non-compliance.

[91] Nothing about the employer’s communications could reasonably have been expected to offend, humiliate, or injure an employee. For that reason, I find that the Claimant did not have just cause for voluntarily leaving her employment because of harassment. The employer’s actions and communications could reasonably be seen as

³³ See employer’s COVID-19 Proof of Vaccination Policy, at GD3-33.

an appropriate and legitimate exercise of its duty in an effort to safeguard the health and wellbeing of its employees.

- **Being on unpaid leave**

[92] The Claimant says that being placed on an unpaid leave is a form of harassment. Being on an unpaid leave was humiliating for her. And, it was financially crippling. However, the employer was simply enforcing its vaccination policy. I do not find that this was harassment.

- **Even if there had been harassment, did the Claimant have reasonable alternatives to leaving her job?**

[93] The Claimant argues that she did not have any reasonable alternatives to leaving her job because she could not survive being on unpaid leave. As well, since her employer placed her on unpaid leave, she felt that this meant her employer no longer respected her. She felt relations had broken down and could not be repaired. The Claimant had been looking for work already, but had not found anything.

[94] On top of all of these considerations, the Claimant suggests that her employer continued to harass her. In other words, it would have been unreasonable for her to remain on unpaid leave if she had to endure being harassed.

[95] The difficulty with this latter assertion however is that, apart from one letter, there was no contact with the employer. The employer simply let the Claimant know how long her unpaid leave would be. The employer also asked whether the Claimant wanted to keep her insurance.³⁴

[96] The Claimant described this letter as “position maintenance.” She does not allege that she found the letter harassing. I do not find that there was any harassment from the employer.

[97] The General Division found that a reasonable alternative would have been to remain on the leave of absence with her employment instead of quitting her job.

³⁴ At approximately 39:50 of the audio recording of the Appeal Division hearing.

Although it is unclear whether the General Division considered the Claimant's explanation why this was unreasonable, I would not disturb the General Division's finding that the Claimant had reasonable alternatives.

[98] As the Federal Court of Appeal has consistently held, remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job.³⁵

[99] The Claimant could have stayed on the leave of absence while continuing to look for work. Even if the Claimant had felt her employer had been harassing her by sending her emails reminding her to get vaccinated, that did not continue once she was on unpaid leave. There is no evidence that her employer harassed her at all, including after she went on an unpaid leave.

[100] I recognize that the Claimant felt that relations with her employer had deteriorated, but this does not represent good cause for leaving one's employment, when an alternative could have been to remain on an unpaid leave.

[101] The Claimant states that her counsel advised that she should leave her employment. Otherwise, it would look as if she accepted being placed on leave. This would have deflated her claim against her employer for constructive dismissal.

[102] The Claimant is pursuing a constructive dismissal action against her employer, but that is a separate issue altogether from whether the Claimant had any reasonable alternatives to leaving.

³⁵ See, for instance, *Canada (Attorney General) v Graham*, 2011 FCA 311.

Conclusion

[103] The General Division failed to consider whether the employer had harassed the Claimant. Even so, I find that the General Division's error does not change the outcome.

[104] The employer was acting within its rights and duty to introduce a policy that it regarded was essential for workplace health and safety. It had a duty to communicate that policy to employees, and to let employees know what the consequences would be for non-compliance with that policy. The evidence shows that the employer acted appropriately and professionally in communicating that policy. The employer's actions and communications do not constitute harassment.

[105] Further, the Claimant had reasonable alternatives to leaving her employment. She could have remained on an unpaid leave of absence.

[106] I am not satisfied that the Claimant has established that she had just cause for having voluntarily left her employment. The appeal is dismissed.

Janet Lew
Member, Appeal Division