Citation: *CK v Canada Employment Insurance Commission*, 2022 SST 1012

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. K.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated April 28, 2022 (GE-22-366)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	September 22, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	October 12, 2022
File number:	AD-22-311

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was placed on an unpaid leave of absence from her job. She applied for Employment Insurance (EI) benefits. In her application for EI benefits, she indicated that she had quit her job.

[3] The Respondent (Commission) determined that the Claimant did not exhaust all reasonable alternatives before leaving her job. The Commission determined that instead of leaving when she did, the Claimant could have remained on unpaid leave until she found another job. She also could have complied with her employer's vaccination COVID-19 Policy (Policy) by submitting to the rapid tests supplied to her, or by attending free testing sites.

[4] The Commission decided that she voluntarily left her job without just cause, so it was not able to pay her benefits. After reconsideration, the Claimant appealed to the General Division.

[5] The General Division found that the Claimant voluntarily left (or chose to quit) her job. It found that the Claimant was not discriminated under the *Canadian Human Rights Act* (CHRA). The General Division found that there was no significant changes in her work duties. It also found that the employer did not have practices contrary to the law.

[6] The General Division further found that the Claimant had other reasonable alternatives then to quit her job. It found that she could have stayed employed until she found another job. She had the option of going back to work by accepting the terms of the Policy. If she did not want to be vaccinated, she had the option of agreeing to submit to the antigen tests provided by her employer when she was required to be present in-person.

[7] The General Division concluded that the Claimant did not show that she had just cause for leaving her employment when she did.

[8] The Appeal Division granted the Claimant leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division made several errors when it concluded that she did not have just cause to leave her job.

[9] I have to decide whether the General Division made an error in fact or in law when it concluded that the Claimant did not have just cause for leaving her employment.

[10] I am dismissing the Claimant's appeal.

Issue

[11] Did the General Division make an error in fact or in law when it concluded that the Claimant did not have just cause for leaving her employment?

Analysis

Appeal Division's mandate

[12] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[13] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[14] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make an error in fact or in law when it concluded that the Claimant did not have just cause for leaving her employment?

[15] The Claimant submits that the General Division did not address her principal argument that the employer could not unilaterally modify her contract of employment and impose changes to her job duties, notably: providing medical information, participating in on-going testing, privacy information shared with co-workers and many other new elements, which were not inherent to her job. She further submits that the employer eliminated her hours and withheld her contractual pay, contrary to her employment contract.

[16] The Claimant submits that the General Division mischaracterized in its decision the changes to her employment contract and work duties. She submits that the General Division made a mistake when it considered her return to the Resource Center to decide whether there was a significant change to her work duties.

[17] The Claimant further submits that the General Division made an error in law by not considering that her employer put undue pressure on her to leave her employment.

[18] The Claimant finally submits that the General Division made an error in law when it concluded that the employer's policy did not violate the *Genetic Non-Discrimination Act* and the *Canadian Human Rights Act* since it requires an individual to undergo a genetic test as a condition for continuing employment.

[19] The General Division had to decide whether the Claimant had just cause for leaving her employment when she did. This depends on whether the Claimant had no reasonable alternative to leaving having regard to all the circumstances.

[20] Before the General Division, and during the Appeal Division hearing, the Claimant put forward that she did not quit her job but that the employer forced her to resign (*constructive dismissal*).

[21] Whether or not an employee is entitled to treat the employment relationship as having been terminated on the grounds of constructive dismissal is a different issue from the issue of whether an employee has voluntarily left employment under the *Employment Insurance* (EI) *Act*. The determination of whether an employee has voluntarily left their employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?[3]

[22] The General Division found that the Claimant voluntarily left her job.

[23] The General Division determined that the employer placed the Claimant on an unpaid leave of absence. The Claimant did not dispute this before the General Division. The Claimant also provided the General Division with a letter from her employer confirming that she was placed on an unpaid leave of absence because she failed to adhere to the rapid antigen testing procedure outlined in the Policy.[4] The General Division noted that the employer specifically outlined what would be required for the Claimant to return to work.

[24] The General Division found that in her application for benefits, under the reason for separation from her employment, the Claimant chose “I quit” because of a personal conflict. She did not chose that she was dismissed.[5]

[25] The General Division also found that in her application for benefits, the Claimant stated that she contacted someone at ProBonoLaw Ontario and was told that if she wanted to pursue a constructive dismissal complaint, she would

[3] *Canada (Attorney General) v. Peace*, 2004 FCA 56.
[4] See GD2-15 to GD2-16.
[5] See GD3-7.

need to formally resign. The Claimant wrote in the application that this is what she did.[6]

[26] The General Division further found that during a reconsideration interview, the Claimant stated that she had quit her job because she needed to access her pension to have money to live on. She could not do that is she was on leave.[7]

[27] The employer stated that the Claimant decided to quit because she did not want to provide the required tests and did not provide medical documentation to support a medical accommodation. The employer stated that it would take back the Claimant if she followed the Policy because she was very good at her job.[8] The employer further stated that it had not dismissed any employees for non-compliance with the Policy.[9]

[28] The General Division took notice that the two Record of Employment's confirmed that the Claimant was put on an unpaid leave and subsequently quit her job.

[29] The General Division concluded that the preponderant evidence showed that the Claimant decided to leave her job.

[30] I find that the General Division made no error when it concluded that regardless of where the advice to quit came from and why the Claimant made that choice, the end of the employment relationship came about when she made the decision that she would not go back to work for her employer. The Claimant had a choice to stay but decided to leave her job.

[31] The General Division then looked at whether the Claimant had no reasonable alternative to leaving her job having regard to all the circumstances.

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[6] See GD3-17.
[7] See GD3-58.
[8] See GD3-41.
[9] See GD3-59.

[32] The General Division did not find any evidence that the Claimant was discriminated against based on a ground of discrimination under the CHRA. It found no evidence that her employer applied its Policy to her in any way that was different from the application they would have made for any other employee. The General Division found no indication that the employer's decision to place the Claimant on an unpaid leave of absence related to any factor that is inherent to her. Furthermore, it is well established that the CHRA does not apply to personal choices or preferences.[10]

[33] In regards to the Claimant's argument that the General Division made an error in law when it concluded that the employer's Policy did not violate the *Genetic Non-Discrimination Act*, the evidence does not support a conclusion that the employer discriminated against the Claimant based on her actual or assumed genetic make-up.[11]

[34] The General Division did not find that the employer's policy that imposed certain requirements on employees in order to protect the health and safety of its employees in their workplace during the exceptional circumstances created by the COVID-19 pandemic to be a significant change to the terms and conditions of her employment.[12] The Claimant made the decision to end her contract of employment instead of complying with the Policy.

[35] The General Division found that there was no evidence that the employer engaged in practices that are contrary to law by implementing a Policy and applying the measures set out in the Policy. The Policy reflects the employer's obligations under the *Occupational Health and Safety Act*, the directive from the Office of the Chief Medical Officer of Health for Ontario, as well as Ministry requirements.

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[10] *Canadian National Railway Company v Seeley*, 2014 FCA 111.
[11] See definition of genetic test under article 2 of the *Genetic Non-Discrimination Act*.
[12] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

[36] The General Division found that there was no evidence that the employer acted improperly when it placed the Claimant on an unpaid leave of absence for failing to comply with its Policy. The evidence does not support a conclusion that the employer put undue pressure on the Claimant to leave. The employer wanted the Claimant to return to work because she was good at her job.

[37] The General Division found that a reasonable alternative to leaving her job would have been for the Claimant to be vaccinated or agreeing to submit to the antigen tests provided by her employer or attending a free testing site and reporting the results, when she was required to be present in-person. If the Claimant believed that the rapid antigen tests her employer was providing put her at risk because of her underlying health issues, she could have sought out medical evidence to support a written request for medical accommodation.

[38] The General Division also found that another reasonable alternative would have been for the Claimant to remain employed with her employer until she found another job.

[39] As stated by the General Division, the Claimant made a personal choice to end her employment, which perhaps was a good personal choice for her at that time. However, a good personal choice does not establish just cause for leaving employment under the law.[13]

[40] After reviewing all the evidence, the General Division decision, and the Claimant's arguments, I find that the General Division's decision is consistent with the evidence before it and complies with the law and the decided cases on voluntary leave. There is no reason for me to intervene.

[13] *E. S. v Canada Employment Insurance Commission*, 2019 SST 299.

[41] I am fully aware that the Claimant may seek relief before another forum, if a violation of her rights is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant did not have just cause for leaving her employment.

[42] For these reasons, I have no choice but to dismiss the Claimant's appeal.

Conclusion

[43] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division