Citation: *CK v Canada Employment Insurance Commission*, 2022 SST 1013

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (449448) dated January 19, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Type of hearing:	Videoconference
Hearing date:	March 28, 2022
Hearing participants:	Appellant
Decision date:	April 28, 2022
File number:	GE-22-366

Decision

[1] The appeal is dismissed. The Tribunal does not agree with the Claimant.

[2] The Claimant, C. K., hasn't shown just cause (in other words, a reason the law accepts) for leaving her job when she did. The Claimant didn't have just cause because she had reasonable alternatives to leaving. This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Claimant was placed on an unpaid leave of absence from her job. She applied for EI benefits. In her application for benefits, she said that she had quit her job. The Canada Employment Insurance Commission (Commission) looked at the Claimant's reasons for leaving. It decided that she voluntarily left (or chose to quit) her job without just cause, so it wasn't able to pay her benefits.

[4] I have to decide whether the Claimant has proven that she had no reasonable alternative to leaving her job.

[5] The Commission says that the Claimant did not exhaust all reasonable alternatives before leaving her job. 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 policy by submitting to the rapid tests that were supplied to her, or by attending free testing sites. They argue that the Claimant herself had mentioned other alternatives in her appeal, but that she did not formally request those options.

[6] The Claimant disagrees and says that she had good cause for leaving her job. She believes her employer's actions were constructive dismissal as they had changed the terms of her employment. She argues these changes were not necessary and put her in a position where they could put her on a leave of absence while disregarding her concerns. She feels she was discriminated against and her rights were not respected.

Matter I have to consider first

The Employer is not a party to the appeal

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

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

Issue

[9] Is the Claimant disqualified from receiving benefits because she voluntarily left her job without just cause?

[10] To answer this, I must first address the Claimant's voluntary leaving. I then have to decide whether the Claimant had just cause for leaving.

Analysis

The Claimant left her job

[11] I find that the Claimant voluntarily left her job.

[12] The Claimant argues that she was constructively dismissed and she had no choice but to sever the employment relationship with her employer. This was her only financial option as she needed to access her pension funds.

[13] When determining if a Claimant left their job voluntarily, the burden is on the Commission to establish that the claimant left the job voluntarily. To decide if an

employee left voluntarily, the question to be asked is whether the employee had a choice of whether to stay or to leave.[1]

[14] While the circumstances of the Claimant's job at the time it ended are relevant to understanding the reasons she had for deciding to leave, that is a different issue than whether she had a choice to stay or to leave. Even if the Claimant feels she was constructively dismissed at common law, this does not mean that she left her employment involuntarily within the meaning of the EI Act.[2]

[15] The parties all agree that the Claimant was put on an unpaid leave of absence by her employer on October 21, 2021. The Claimant said that this was what happened. She also provided the Tribunal with a letter from her employer confirming that she was placed on an unpaid leave of absence. The letter says this was because she failed to adhere to the rapid antigen testing procedure outlined in the employer's COVID-19 Workplace Vaccination Policy (Policy).

[16] On October 23, 2021, the Claimant applied for EI benefits. In her application, under the reason for separation from her employment, she chose "I quit". She wrote in the application that she had a personal conflict with a person in Human Resources (HR). The involvement of HR was new and unusual and changed the dynamic of her workplace experience.

[17] There are two Records of Employment (ROE) in this file. The first, issued on November 8, 2021, says that the record is being issued because the Claimant was on a leave of absence. The second, issued the next day (November 9, 2021) says that the record replaced the previous record of employment and was being issued because the Claimant had quit.

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[1] *Canada (Attorney General) v. Peace*, 2004 FCA 56

[2] In *Canada (Attorney General) v*. *Peace* the court finds that constructive dismissal is a common law concept which entitles, but does not require an employee to treat the employment contract as coming to an end. Whether or not they are entitled to treat the employment relationship as having been terminated by constructive dismissal is a different issue from the issue of whether they have voluntarily left.

[18] In reading the employer's letter telling the Claimant she was on an unpaid leave of absence, I note that the employer specifically outlines what would be required for the Claimant to return to work. This shows me that the Claimant did have an opportunity to return to work.

[19] In her application for benefits, the Claimant says that she contacted someone at ProBonoLaw Ontario and was told that if she wanted to pursue a constructive dismissal complaint, she would need to formally resign. The Claimant wrote in the application that this is what she did.

[20] The Claimant also testified that after being put on a leave of absence, she contacted the insurance provider to have access to her pension. She was told that she could only have access to the pension if she was no longer working for the employer.

[21] Regardless of where the advice to quit came from and why the Claimant made that choice, it is clear that the end of the employment relationship came about because she made the decision that she would not go back to work for her employer. That choice was available to her because she was only on an unpaid leave of absence, not dismissed.

[22] The Claimant herself wrote to the Tribunal that she would still be on leave "had I not deemed the actions of my employer to be constructive dismissal". This tells me that she was the one who made the choice to end her job. Since she could have gone back, but made the choice to leave, the Commission has met the burden of showing that the Claimant voluntarily left her job.

The parties don't agree that the Claimant had just cause

[23] The parties don't agree that the Claimant had just cause for voluntarily leaving her job when she did.

[24] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[3] Having a good reason for leaving a job isn't enough to prove just cause.

[25] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.[4]

[26] It is up to the Claimant to prove that she had just cause. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that her only reasonable option was to quit.[5]

[27] When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when she quit. The law sets out some of the circumstances I have to look at.[6]

[28] After I decide which circumstances apply to the Claimant, she then has to show that she had no reasonable alternative to leaving at that time.[7]

The circumstances that existed when the Claimant quit

[29] The Claimant's statements and testimony suggests that she believes that some of the circumstances set out in the law may apply. I will consider those specific circumstances in the sections that follow.

– Discrimination

[30] The EI Act says that discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*, is a circumstance that should be considered.[8]

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[3] Section 30 of the *Employment Insurance Act* (Act) explains this.
[4] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.
[5] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.
[6] See section 29(c) of the Act.
[7] See section 29(c) of the Act.
[8] See sub-section 29(c)(iii) of the Act.

[31] The Claimant says that she felt she was punished for asserting her human right to bodily autonomy. She says she believes that the HR manager was trying to make an example of her.

[32] I do not see any evidence that the Claimant was discriminated against based on a ground of discrimination under the *Canadian Human Rights Act*. There is no evidence that her employer applied its policies to her in any way that was different from the application they would have made for any other employee. She has not been singled out because of her race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or pardoned or suspended conviction.

[33] There is also no indication that the employer's decision to place the Claimant on an unpaid leave of absence is related to any factor that is inherent to her. Rather, the employer says that the leave is a result of the Claimant not respecting the Policy and testing requirements. The Claimant confirmed that she did not provide proof of vaccination and that she did not agree to do rapid antigen testing with a nasal swab.

[34] The Claimant argues that the Commission disregarded the Genetic Non-Discrimination Act as a factor in her claim. She says that the employer told her that if she did not want to use the rapid tests she was given, she could purchase her own test or attend a public PCR testing center and report the results back. Her position is that the PCR test is a genetic test and cannot be required to continue in an existing contract.

[35] I find that it was reasonable for the Commission not to consider this argument because the employer's policy says that PCR tests were only required for non-vaccinated employees who had to work in-person and had a positive rapid antigen test. The PCR tests were not a requirement of employment. An employee could still be employed without taking a PCR test if they were vaccinated, or if they were unvaccinated and had negative rapid antigen tests on days that they were required to work in-person. The PCR tests were part of an accommodation offered to employees who chose not to be vaccinated, had to work in person and had a positive rapid antigen test.

[36] Also, the circumstance referred to in the EI Act specifically relates to discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*, not any other legislation. I see no discrimination of that sort in this claim.

[37] I also do not see any evidence that the Claimant was being made an example of by the HR manager. The employer was not required to provide the accommodations she says she asked for. While she disagrees with the fact that she was placed on an unpaid leave of absence, this was within the scope of the Policy.

– **Changes in work duties**

[38] The EI Act says that significant changes in work duties is a circumstance that should be considered when determining if there was just cause for leaving a job.[9]

[39] The Claimant argues that her employer had significantly changed the terms and conditions of her employment. They did this not only by introducing the Policy, but also by requiring her to do tasks that had to be done in-person and refusing to accommodate her. This caused her to become subject to the testing rules in the Policy, which then led to her being placed on a leave of absence when she was not comfortable with complying with them.

[40] The Claimant testified that she had been working from home for the past 18 months because of office shut downs due to the pandemic, and also for her and her family's own health and safety. Before that, she would travel between 3 different offices and once a week or month, she would work from home. Until January 2020, she was also called upon to occasionally staff a resource desk in-person, but that task was removed when her workload no longer allowed her to do this.

[41] The Claimant explained that the resource center was being re-opened and her employer was requiring her to occasionally staff the resource desk again. She was opposed to this because the conditions that had led to her being removed from that task

[9] See sub-section 29(c)(ix) of the Act.

because of her workload had not changed. Also, she considered this to be a significant change to her work duties because she would be required to go into the office. Then, because of the new Policy, since she was not vaccinated, she would be required to do rapid antigen testing, which she had not agreed to.

[42] I do not find that the Claimant's work duties had changed substantially in a way that would give her just cause for leaving her job. The only duty that seems to have changed for her was the requirement that she staff the resource desk. She had previously done this, so it was not outside the limits of her job tasks. I further find that being required to return to working in-person and in the office is only a return to previous work practices and not a change in duties.

[43] With respect to the obligation to comply with the employer's Policy, I do not find that this is a significant modification to the Claimant's work duties. I understand that the Claimant insists that had this policy been in place when she was hired, she would not have accepted the job. Although this requirement did impose certain requirements on employees in order to provide better health and safety measures during the COVID-19 pandemic, it does not change the nature of the Claimant's job, which is to provide services to vulnerable people requiring assistance with accessing work.

[44] I do not find that that a substantial change in work duties is a circumstance that existed at the time the Claimant left her job. She does not have just cause for leaving for that reason.

– **Practices of an employer that are contrary to law**

[45] The EI Act says that Practices of an employer that are contrary to law is a circumstance that should be considered when evaluating just cause for leaving a job.[10]

[46] The Claimant has written that the employer was using legislation, in particular the concept of Infectious Disease Emergency Leave (IDEL) under the *Employment Standards Act, 2000*, in a punitive manner. She argues her employer has a

[10] See sub-section 29(c)(xi) of the Act.

responsibility to not use the legislation to punish staff for asserting the Human Right of bodily autonomy.

[47] The employer's Policy makes reference to Infectious Disease Emergency Leave in the section dealing with Enhanced Safety Protocols. The Policy says that unvaccinated staff may be relocated to different areas, tasks, schedules, or may be placed on an Infectious Disease Emergency Leave.

[48] The Claimant is of the view that her employer had placed her on IDEL and that this was abusive and amounted to constructive dismissal.

[49] The employer's notice to the Claimant that she was being placed on unpaid leave. It does not say that the Claimant is on IDEL. Article 18 of the employer's Policy says that failure to comply with the policy may result in staff being placed on an unpaid leave of absence or subject to disciplinary actions. I see no evidence that the Claimant was on IDEL.

[50] The Claimant does not deny that she has not been vaccinated, and that she told her employer that she would not take the rapid antigen test that was provided to her. This is not complying with her employer's Policy. The Policy foresees that employees who do not comply may be placed on unpaid leave. Applying the measures set out in the policy is not an illegal act by the employer.

[51] The Claimant may believe that the employer's Policy is unreasonable or unlawful. She has not provided any evidence that would prove that. It is also beyond the jurisdiction of this Tribunal to make that determination.

[52] The Claimant maintains that she was constructively dismissed by her employer. While it may ultimately be decided by a court that this was the case, at this time, there is no evidence that the employer acted improperly when they placed the Claimant on an unpaid leave of absence for failing to comply with the policy. The Claimant did not like the choices her employer was making in her regard, but I see no evidence that there was malice or bad faith in their decision to enforce the Policy.

[53] I find that there is no evidence that the employer engaged in practices that are contrary to the law.

[54] I find that none of the circumstances that are set out in the law existed at the time the Claimant left her job. Her decision to quit her job while she was on unpaid leave was a personal decision. I do not see that she was facing discrimination at work, that there were significant changes in her work duties or that her employer was engaged in practices that were contrary to law. She did not have just cause for voluntarily becoming unemployed.

The Claimant had reasonable alternatives

[55] I must now look at whether the Claimant had no reasonable alternative to leaving her job when she did.

[56] The Claimant says that she had no reasonable alternative to quitting her job because she was a single mother and had no income while on unpaid leave. Without access to her pension savings, she says she would be homeless.

[57] The Commission disagrees and says that the Claimant could have remained on unpaid leave until she found another job. She also could have complied with her employer's vaccination policy by submitting to the rapid tests that were supplied to her, or by attending free testing sites. They argue that the Claimant herself had mentioned other alternatives in her appeal, but that she did not formally request those options.

[58] I find that the Claimant did have options available to her other than quitting her job and becoming unemployed.

[59] First, the Claimant had the option of going back to work by getting vaccinated against COVID-19. 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. Since that was not to her liking, her employer gave her the option of purchasing her own tests or attending a free testing sites and reporting the results. Any of these actions would have allowed her to end her unpaid leave of absence and

continue working. While the Claimant may not have liked these options, they were available to her.

[60] Second, 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 that claim. While I do not doubt that the Claimant was concerned that the nasal swab could aggravate her sinusitis, she has not provided any medical evidence to support that she had been given a medical diagnosis of chronic sinusitis or that these tests increased her risk of infection. She does not appear to have provided any such information to her employer or the Commission either.

[61] The Claimant says that her employer never asked her to get a medical note. Given that it was the Claimant asking to be accommodated and treated differently from other employees, it was up to her to make a request for that accommodation. The policy specifically says that accommodation requires a written request with supporting documentation. I see no evidence that the Claimant ever made a written request or provided supporting documentation.

[62] The Claimant wrote in her application for benefits that she had made a written request to continue with remote work or to be transferred to another remote location. I do not see a copy of such a request in the file. During the hearing, she mentioned other email messages that she had sent to her employer. I gave her time to send in those documents if she felt they could support her claim. The Claimant did not send any additional documents to the Tribunal.

[63] Finally, if the Claimant was entirely opposed to complying with her employer's policy with respect to testing when she was required to be in the office, she still had the option of remaining employed with her employer until such time as she found another job. The Claimant had only been placed on an unpaid leave of absence, she had not been terminated. The Claimant immediately decided she had been constructively dismissed.

[64] I understand that the Claimant felt she was in financial distress and the only way to deal with this was to access her pension funds and to do this, she had to quit her job. However, she made the decision to quit her job to access these funds immediately after being placed on leave. She did not need to do this. She could have looked for another job while on leave, or explored other options for financial aid, without severing the employment relationship.

[65] The Claimant clearly feels that the employer has acted unfairly towards her, in the first instance by requiring her to work in-person at the resource desk, then by requiring that she submit to a particular type of rapid antigen testing she is not comfortable with and finally, by not accommodating her. Unfortunately, I cannot conclude that the Claimant had no choice but to leave her job. She had several reasonable alternatives available to her. Because of this she has not shown just cause for leaving her job when she did.

Conclusion

[66] I find that the Claimant is disqualified from receiving benefits. She has not shown that she had just cause for leaving her employment when she did. Other alternatives to leaving her job were available to her.

[67] This means that the appeal is dismissed.

Leanne Bourassa

Member, General Division – Employment Insurance Section