



[TRANSLATION]

Citation: *CO v Canada Employment Insurance Commission*, 2022 SST 1066

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (469437) dated May 3, 2022
(issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Teleconference
Hearing date: October 20, 2022
Hearing participant: Appellant
Decision date: October 26, 2022
File number: GE-22-1880

Decision

[1] The appeal is allowed. The Appellant didn't voluntarily take a leave of absence.

Overview

[2] The Appellant works in the laundry room at X Hotel. On January 1, 2022, he stopped working because he refused to provide a COVID-19 vaccination attestation in accordance with the employer's policy.

[3] The Canada Employment Insurance Commission (Commission) accepted the explanations the employer gave on the first Record of Employment. It decided that the Appellant voluntarily took a leave of absence, and it didn't pay him benefits.

[4] The Appellant disagrees with the Commission's decision. He admits that he didn't provide his employer with a COVID-19 vaccination attestation, but he says that he didn't voluntarily take a leave of absence. On the contrary, he says that he was available for work but that the employer put him on leave. He also argues that, unlike him, some co-workers in his situation received benefits.

[5] I have to decide whether the Appellant was on a leave of absence.

Issues

[6] Did the Appellant voluntarily take a leave of absence from January 1, 2022?

[7] If so, did the Appellant have no reasonable alternative to taking a leave of absence?

Analysis

Did the Appellant voluntarily take a leave of absence?

[8] An employee who voluntarily takes a period of leave from their employment without just cause isn't entitled to receive benefits if the period of leave was authorized

by the employer and if the employee and the employer agreed on the day the employee would go back to work.¹

[9] The facts of the case show that the employer provided the Commission with a first Record of Employment indicating that the Appellant was on a leave of absence. It later provided a second Record of Employment indicating that he actually stopped working because of a shortage of work.

[10] According to the Appellant, a Commission employee told him that the employer's amending the Record of Employment made [*sic*] automatically entitled him to benefits. He doesn't understand why he didn't get benefits when co-workers in his situation did.

[11] He says that the employer implemented a COVID-19 vaccination policy and repeatedly told him that it was in force. He knew that he had to provide a COVID-19 vaccination attestation by January 1, 2022, and that there would be consequences if he didn't comply with the policy. The employer told him that he would be put on leave without pay.

[12] At the hearing, the Appellant explained that his supervisor had held multiple meetings about this. Additionally, during the last week of December, she called him to find out whether he was going to provide his COVID-19 vaccination attestation.

[13] So, the Appellant admits that he was told about the employer's vaccination policy and about the consequences of not complying with it. On this point, he says that his supervisor met with employees every week to give them explanations and encourage them to get vaccinated.²

[14] But the Appellant didn't intend to get vaccinated. He says that he is healthy and isn't at risk.

¹ Section 32 of the *Employment Insurance Act*.

² GD3-18.

[15] On January 1, 2022, the Appellant still hadn't provided proof of vaccination, and the employer put him on leave without pay.³

[16] The Commission found that the Appellant had taken a leave of absence under section 32 of the *Employment Insurance Act* (Act). In the arguments it submitted, it indicates that the Appellant was suspended from his job under section 31. It says that the Appellant committed misconduct by not providing the employer with a COVID-19 vaccination attestation.

[17] I agree with the Commission in part. Under section 113 of the Act, I only have jurisdiction to hear an appeal of a reconsideration decision. The Commission's May 3, 2022, reconsideration decision says: [translation] "[W]e are unable to pay you benefits from January 3, 2022, to March 11, 2022 (*sic*), because you voluntarily took a period of leave authorized by X"

[18] In submitting arguments that the Appellant was suspended from his duties, the Commission admits that the Appellant didn't take a leave of absence. It argues that the employer suspended him.

[19] However, I have to deal with the Commission's decision, and I can't consider another section of the Act to decide the issue on the merits. The Federal Court has also confirmed a number of times that the jurisdiction of a tribunal—like the Social Security Tribunal of Canada—is limited to the decision that the Commission made. But, in *Easson*, the Court says that, when a section of the Act deals with two distinct notions (which is the case for section 30 with voluntary leaving and misconduct), there is no fault in making a finding based on the overall intent of the provision.⁴

[20] But leaves of absence and suspensions are determined by two different sections of the Act. Still, in accordance with the spirit of the existing case law, suspensions are treated like misconduct (section 30 of the Act).

³ GD6-24.

⁴ *Easson*, A-1598-92.

[21] In the arguments it submitted to the Tribunal on June 13, 2022, the Commission indicates that it would have been preferable to deal with the Appellant's case from the perspective of a suspension for misconduct rather than from the perspective of a leave of absence, since the Appellant stopped working at the employer's initiative.

[22] I agree, and I grant it to the Commission that the Appellant stopped working because he refused to comply with the employer's vaccination policy. Under that policy, he had to provide the employer with proof of COVID-19 vaccination by January 1, 2022, and he refused to do so.

[23] But the Appellant wanted to keep working. He didn't ask the employer for a leave of absence, and the employer put him on unpaid leave without specifying a return date. The employer suspended the Appellant because he didn't provide a COVID-19 vaccination attestation as required by its vaccination policy.

[24] In this case, the Commission made a decision finding that the Appellant had voluntarily taken a leave of absence. And, as explained earlier, I have jurisdiction to deal with the Commission's reconsideration decision. I can't decide whether the Appellant stopped working because of misconduct, especially since he disagrees that he committed misconduct.⁵

[25] On this point, the written statements of two witnesses for the Appellant suggest that the Commission made an initial decision on misconduct for at least one of those employees.⁶ At the hearing, the Appellant argued the hearing [*sic*] that the employer had also provided, for his two co-workers, a second Record of Employment amending the reason they stopped working (to a shortage of work). He argued that the Commission had accepted the employer's amended Records of Employment as is and that his two co-workers had been able to get benefits, unlike him.⁷

⁵ Section 18 of the *Social Security Tribunal Regulations*.

⁶ GD6-4.

⁷ GD6-2 and GD6-3.

[26] Each case has to be decided individually, and I can't decide the cases of the Appellant's co-workers that aren't before me. But, I would point out to the Appellant that just because the employer provided a second Record of Employment amending the reason he stopped working that it had initially reported doesn't mean that the Commission necessarily has to accept it as is. The employer is responsible for providing a Record of Employment that reflects reality. If the Commission had made a decision finding that the Appellant had stopped working because of a suspension, I would have found that it was because of the Appellant's misconduct. But that isn't the case.

[27] The question I have to answer in this case is this: Did the employee have a choice whether to take a leave of absence?⁸

[28] The answer is no. The Appellant didn't have a choice whether to take a leave of absence. He was [translation] "put on leave without pay" because his behaviour wasn't in compliance with the employer's vaccination policy.

[29] The facts of the case are clear, and the Commission also agrees that the Appellant stopped working at the employer's initiative. He didn't ask for or voluntarily take a leave of absence.

[30] Since the Appellant didn't take a leave of absence voluntarily, he doesn't have to show that he had just cause for taking it or that he had no reasonable alternative to taking it in this case.

Conclusion

[31] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

⁸ *Peace*, 2004 FCA 56.