



Citation: *CL v Canada Employment Insurance Commission*, 2022 SST 1153

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: C. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458289) dated March 7, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: September 28, 2022

Hearing participant: Lu Chen
Appellant

Decision date: November 10, 2022

File number: GE-22-1910

Decision

[42] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[43] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant was disentitled from receiving Employment Insurance (EI) benefits.¹

[44] The Claimant has also not shown that she had just cause (in other words, a reason the law accepts) for leaving her job when she did. The Claimant did not have just cause because she had reasonable alternatives to leaving. This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[45] The Claimant, C. L., worked as a medical researcher. The employer put the Claimant on an unpaid leave of absence on October 16, 2021 because she did not comply with the COVID-19 vaccination policy at work. The Claimant then applied for Employment Insurance (EI) regular benefits.

[46] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy is not misconduct. The Claimant says that her employer refused to consider her sensitivity to anything that is put in her body.

[47] The Canada Employment Insurance Commission (Commission) accepted the employer's reason for the suspension. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided on January 24, 2022, that the Claimant was disentitled from receiving EI benefits.

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

[48] On January 31, 2022, the Claimant resigned. The Claimant says that she was in financial need and had not been able to find another job. The Claimant says that by resigning she was able to access some of her pension funds.

[49] On reconsideration, the 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.

[50] I have to decide whether or not the Claimant was suspended from her position due to misconduct. I also have to decide whether the Claimant has proven that she had no reasonable alternative to leaving her job.

Matter I have to consider first

Additional Representations

[51] The Commission was asked to clarify its position regarding the period of disentitlement and period of disqualification. The Claimant was made aware during the hearing that this may occur. After the Commission's Supplementary Representations were received they were coded as GD12.

[52] The Claimant was given an opportunity to respond to the Commission's Supplementary Representations. Her response was coded as GD14.

[53] The Commission sent in a further response coded as GD15. The Claimant sent in additional response coded as GD16. An earlier copy of the Claimant's responses dated October 16, 2022 was coded as GD17. All supplementary representations were reviewed.

Issues:

[54] Is the Claimant disentitled from receiving benefits from October 17, 2021 because she was suspended from her job as a result of misconduct?

[55] Is the Claimant disqualified from being paid benefits from January 31, 2022 as a result of leaving her employment without just cause?

Analysis

i) The Claimant is disentitled to benefits from October 17, 2021

[56] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.² This does not result in a disqualification, but a disentitlement from benefits.³

[57] To answer the question of whether the Claimant was suspended because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant get suspended from her job?

[58] I find that the Claimant was suspended from her job because she did not follow her employer's mandatory vaccination policy. The Claimant says that she was not suspended but rather put on an unpaid leave of absence because she did not follow her employer's vaccination mandate. The Claimant does not feel it is misconduct for not following the policy. The Claimant feels that the employer's policy was an unfair "one size fits all". The Claimant feels she should be entitled to benefits.

Is the reason for the Claimant's suspension misconduct under the law?

[59] The Claimant says that she was not suspended but rather put on an unpaid leave of absence for not being vaccinated. The Claimant's Record of Employment (ROE) also indicates that the reason for issuing the ROE is due to "leave of absence". I am not bound by how the employer and employee characterize their separation.⁴ Section 31 refers to a "suspension" from employment due to misconduct.⁵ In other words, when it

² See sections 30 and 31 of the Act.

³ See section 31 of the Act.

⁴ See, for example, *Canada (Attorney General) v. Morris*, 1999 CanLII 7853 (FCA).

⁵ See section 31 of the Act.

was the employer's decision to place an employee on an unpaid leave of absence, due to misconduct, it is typically the same as a suspension for the purposes of the *Employment Insurance Act* (Act). I will be referring to the Claimant's unpaid leave of absence as a suspension because that is the word used by the Act.

[60] The reason for the Claimant's suspension is misconduct under the law.

[61] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[62] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ The Claimant doesn't 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.⁸

[63] 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.⁹

[64] The law doesn't say I have to consider how the employer behaved.¹⁰ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹¹

[65] I have to focus on the Act only. I cannot make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See section 30 of the Act.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

arrangements (accommodations) for the Claimant are not for me to decide.¹² I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[66] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct.¹³

[67] The Commission says that the employer had a vaccination policy.¹⁴ The employer clearly communicated with the Claimant about its expectations about vaccination.¹⁵ The Claimant knew or ought to have known the consequences of not complying with the policy. The Commission says that the Claimant was aware of the policy and that there was misconduct because the Claimant knew there was a mandatory vaccination policy and made the choice not to get vaccinated.

[68] The Claimant says that there was no misconduct because she could have performed her duties if the employer allowed her to be at work. The Claimant also feels that her employer tried to make a “one size fits all” policy that was unfair.¹⁶ The Claimant says that she was refused an exemption and that her personal circumstances were not considered.

[69] The Claimant does not dispute that her employer had a vaccination policy and that she was aware of it.

[70] The policy indicates that if one was not fully vaccinated, or had not obtained an exemption, that employee was to: undergo an education session and do antigen testing

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁴ See GD3-31 the employer's policy.

¹⁵ See August 6, 2021 email GD3-42; August 17, 2021 email GD3-45; September 2, 2021 email GD3-46; September 10, 2021 email GD3-52; September 16, 2021 email GD3-56; September 23, 2021 email GD3-58; September 30, 2021 email GD3-60; and October 15, 2021 email GD3-62.

¹⁶ See, for example, GD2-20.

prior to reporting to work.¹⁷ The Claimant says she complied with this. I accept that she did.

[71] The Claimant feels that her employer's policy was not reasonable. She feels she had the ability to continue to distance herself.

Medical or other exemption

[31] The Claimant was aware that her employer required that if she did not get vaccinated she had to get an exemption to remain employed. The employer's policy allowed for exemptions from the vaccine policy based on documented medical or other human rights grounds.¹⁸ The Claimant submitted an exemption request¹⁹ which explained adverse reactions she has to medications and other things. The Claimant says that her medical doctor was new to her and did not have any medical records that corroborated the Claimant's position. The employer did not accept the Claimant's request for an exemption.²⁰

[32] The Claimant provided testimony along with additional documents about her genuinely held belief about vaccinations and her adverse reactions. I accept that the Claimant is refusing to have the COVID-19 vaccine due to her concerns about her personal safety.

Elements of misconduct?

[33] I find that the Commission has proven that there was misconduct for the reasons that follow.

[34] There is no dispute that the employer had a vaccination policy. The Claimant knew about the vaccination policy, including that the consequences included being put on an unpaid leave of absence. I find that the Claimant made her own choice not to get

¹⁷ See GD3-35.

¹⁸ See GD3-34.

¹⁹ See GD3-23.

²⁰ See GD2-44.

vaccinated. This means that the Claimant's choice to not get vaccinated was conscious, deliberate and intentional.

[35] The Claimant's employer did not grant her an exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee could face discipline, including being placed on an unpaid leave of absence (in other words, be suspended from work).²¹ The Claimant said that she was aware of this risk to her employment.

[36] The Claimant was unvaccinated and did not have an exemption. The policy required all employees to either have an exemption or get vaccinated. The Claimant was aware of these requirements. This means that she was not in compliance with her employer's policy. That means that she could not work and carry out her duties owed to her employer. This is misconduct.

[37] The Claimant said that she was aware that by not getting vaccinated (or having an exemption) that she could be placed on an unpaid leave of absence (a suspension). I therefore find that the Claimant knew there was real possibility that she could be placed on an unpaid leave of absence (suspension from work) for not following the policy.

[38] By not getting vaccinated or by not getting an exemption, the misconduct, led to the Claimant being suspended from her employment.

[39] The law does not say I have to consider how the employer behaved.²² Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.²³

[40] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was

²¹ See GD3-36 Non-compliance with the policy.

²² See section 30 of the Act.

²³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.²⁴ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[41] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant did not follow a mandatory vaccination policy or get an exemption for doing so and knew that, as a result, being placed on an unpaid leave of absence (a suspension) was a real possibility.

[42] As a result, I find that the Claimant is disentitled from receiving benefits from October 17, 2021 as she was suspended from her job because of misconduct.

[43] Since I have found that the Claimant was disentitled to benefits from October 17, 2021, I now have to consider if that changed when the Claimant quit on January 31, 2022.

ii) The Claimant is disqualified from benefits from January 31, 2022

Issue: Voluntary Leaving

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

[45] 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.

²⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Analysis: Voluntary Leave

The parties agree that the Claimant voluntarily left

[46] I accept that the Claimant voluntarily left her job. The Claimant agrees that she quit on January 31, 2022. I see no evidence to contradict this.

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

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

[48] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.²⁵ Having a good reason for leaving a job is not enough to prove just cause.

[49] 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.²⁶

[50] You have just cause to leave if, considering all of the circumstances, you had no reasonable alternatives to quitting your job when you did.²⁷ It is up to the Claimant to prove this.²⁸ The Claimant has to show that it is more likely than not that she had no reasonable alternatives but to leave when she did.²⁹

[51] When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when the Claimant quit. The law sets out some of the circumstances I have to look at.³⁰

²⁵ Section 30 of the Act explains this.

²⁶ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.

²⁷ *Canada (Attorney General) v White*, 2011 FCA 190, at para 3, and s29(c) of the Act.

²⁸ *Canada (Attorney General) v White*, 2011 FCA 190, at para 3.

²⁹ *Canada (Attorney General) v White*, 2011 FCA 190, at para 4.

³⁰ See section 29(c) of the Act.

[52] 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.³¹

[53] 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.³²

[54] A claimant may have just cause to leave their employment voluntarily if they have no reasonable alternative to leaving in response to a significant change in work duties,³³ or if the practices of an employer are contrary to law,³⁴ or if there is undue pressure by an employer on the claimant to leave their employment.³⁵ The presence alone of any or all of these circumstance does not necessarily mean that the Claimant had “no reasonable alternative” to leaving her job when she did.

The circumstances that existed when the Claimant quit

[55] The Claimant says that three of the circumstances set out in the law apply. Specifically, she says that there were significant changes in her work duties; that some of the practices of her employer were contrary to law; and that she believes that her employer was putting undue pressure on her to leave her employment.

Significant change in work duties

[56] The Claimant argues that the employer significantly changed her work duties by implementing a vaccination policy. The Claimant’s original contract may not have specified certain vaccination requirements. However, the employer could not have known that a pandemic would occur that would make new requirements necessary. As well, the employer is permitted to develop workplace policies in order to protect the health and safety of others. The employer’s policy did not specify changes to the Claimant’s duties. The policy specified requirements for employees to be at work. As a

³¹ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.

³² See section 29(c) of the Act.

³³ See section 29(c)(ix) of the Act.

³⁴ See section 29(c)(xi) of the Act.

³⁵ See section 29(c)(xiii) of the Act.

result, the employer's policy does not constitute a change in work duties it is a policy about requirements to be at work.

[57] The Claimant argues that she was constructively dismissed. This is not the appropriate forum for that argument.³⁶

Practices of the employer were contrary to law

[58] The Claimant argues that her employer's policy went beyond Directive #6³⁷ and therefore is contrary to the law.³⁸

[59] Employers are typically permitted to make policies for their organizations. The employer imposed a vaccination policy on all employees equally. The employer gave the employees notice. The employer told employees what to expect if they did not comply. It is open to an employer to develop reasonable policies when health and safety issues are involved. Therefore, I do not find that the Claimant has convinced me, on a balance of probabilities, that her employer's policy was contrary to the law.

There was undue pressure by the employer on the claimant to leave her employment

[60] The Claimant argues that she was constructively dismissed.³⁹ The Claimant argues that her employer was trying to avoid paying severance and termination pay.⁴⁰ The Claimant argues that her employer was taking "advantage of the pandemic and used their invented vaccine mandate not only to coerce vaccination and punish me for making my personal medical decision to receive the regular COVID-19 test instead of the vaccine, but also engage in reprisal because they were upset by my legitimate challenges/questions/concerns regarding their unjustified vaccine mandate. My employer ordered me to stop expressing my opinions since they could not defend their

³⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

³⁷ A directive made by the Ontario Chief Medical Officer of Health.

³⁸ See GD14-12.

³⁹ See GD14-10.

⁴⁰ See GD14-10.

one-size-fits-all vaccine mandate. When the forced vaccination was unsuccessful, my employer first denied my access to all [workplace premises] and [workplace] email (so that there was no more information I could access and no more challenge I could raise) and then dragged the unpaid leave of absence indefinitely so that the huge mental/emotional stresses and financial hardship they generated could force me to leave my employment.”⁴¹

[61] The Claimant argues that the employer put undue pressure on her. While not knowing how long the leave of absence would be certainly stressful, the Commission points out that the Claimant could have complied with the policy to end the unpaid leave of absence. The Claimant does not dispute that she made her own medical decision, as she is entitled to do. The employer not being able to provide the Claimant with an end to the leave of absence is not surprising. It was not known by the employer how long the pandemic would last. It was not known by the employer how long their vaccination policy would be in place. The Claimant, by her own choice, chose not to comply with their policy and decided that her only option was to sever employment so she could access her pension funds.

[62] I do not find that the employer was putting undue pressure on the Claimant to leave her employment.⁴² Again, while it must have been stressful for the Claimant not to have answers, there is nothing to suggest that the employer was attempting to have the Claimant sever the employment relationship. I do not find that the Claimant has established, on a balance of probabilities, that the employer put undue pressure on her to quit. In other words, the employer not having answers to the Claimant’s questions does not rise to the level of undue pressure to end the employment.

The Claimant had reasonable alternatives

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

⁴¹ See GD14-11.

⁴² See section 29(c)(xiii) of the Act.

[64] The Claimant says that she left her job because she needed money. After the Claimant was placed on an unpaid leave, she was frequently writing to her employer to ask if there was an anticipated date of return. The employer could not give a date of expected return. The Claimant says that it was difficult because she could not plan for her future.

[65] The Claimant says that she had no other income to rely on. The Claimant says that she looked for other jobs but most required full vaccination as a condition of employment.

[66] The Claimant said that because she had no other funds to access that she felt her only solution was to access her pension funds. In order to access those funds she needed to sever the employment relationship. The Claimant then gave her employer a resignation letter.⁴³

[67] The Commission says that the Claimant didn't have just cause, because she had already been on an unpaid leave of absence (suspension) due to her misconduct. The Commission says that the Claimant had reasonable alternatives to leaving when she did. Specifically, it says that the Claimant could have remained employed by complying with the employer's policy or finding another job before quitting.⁴⁴

[68] I accept that the Claimant was in a difficult financial position. I accept that the Claimant did not know when she would be allowed back to work. I accept that the Claimant felt that her only option was to quit in order to meet her financial obligations.

[69] However, the Claimant is responsible for the position that she was in. I heard and understood that the Claimant did not agree with her employer's vaccination policy. She made a medical choice for herself. The Claimant agreed she did not have any medical information that could substantiate her position. The Claimant was allowed to make the decision that she did. The decision came with consequences. The Claimant knew, and

⁴³ See GD2-21.

⁴⁴ See GD12-1.

understood, that if she did not comply with the policy she would be placed on a leave of absence (suspension). The Claimant does not dispute this.

[70] The circumstances that the Claimant argued applied to her situation I have found do not apply. If I look at all the circumstances taken together it does not amount to just cause. The Claimant made a financial decision for herself. I empathize why she made the decision that she did. Although the Claimant's reason for leaving was a good reason it is not sufficient to establish "just cause" within the meaning of the Act.⁴⁵

[71] The reason that the Claimant was on a leave of absence was, as laid out above, because of her misconduct. I realize that the Claimant does not agree with the term misconduct but that is the word that is contained in the Act and what I must apply.

[72] As I have found that there were no circumstances that establish just cause for leaving I find that the Claimant had other reasonable alternatives.

[73] The Claimant could have searched for additional jobs. After not finding anything in her field that did not require one to be vaccinated, she could have considered looking outside of her field in order to find employment.

[74] This means the Claimant did not have just cause for leaving her job.

Conclusion

[75] I find that the Claimant is disentitled from receiving benefits from October 17, 2021 to January 30, 2022.

[76] I find that the Claimant is disqualified from receiving benefits from January 31, 2022.

[77] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section

⁴⁵ See section 29(c) of the Act and *Canada (Attorney General) v Imran*, 2008 FCA 17.