Citation: *DP v Canada Employment Insurance Commission*, 2023 SST 2010

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (584734) dated April 27, 2023 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	In person
Hearing date:	September 20, 2023
Hearing participant:	Appellant
Decision date:	October 27, 2023
File number:	GE-23-1553

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant was placed on an unpaid leave of absence following his refusal to be vaccinated according to his employer's policy. After a 1.5 month extension to the original 3 month leave, he was terminated for cause and applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. It decided that he was dismissed for misconduct, so it wasn't able to pay him benefits.

[4] The Appellant says that he couldn't have been dismissed for misconduct because he asked to be terminated before his employer placed him on leave without pay. He says that because he was not willing to accept his employer's policy change and asked to end the employment relationship, the vaccination policy doesn't apply to him, so he could not have committed misconduct.

[5] I must decide whether the Appellant was dismissed (and if that dismissal was for misconduct) or voluntarily left his job. If I decide that he quit, I must decide if the Appellant has proven that he had no reasonable alternative to leaving his job.

Matter I have to consider first

Was the Appellant dismissed, or did he quit?

[6] The law says there must be a direct link between a finding of misconduct and the termination of employment. Not only does the misconduct have to cause the loss of

employment, it must be the primary reason.[1] It also says that the actual reason for the termination of the employment relationship is what is important, not the reason used by the employer.[2] The Court requires me to make my own objective assessment of the facts and not simply adopt the conclusion of the employer on misconduct.[3]

[7] Sometimes it isn't clear whether a person was dismissed or voluntarily left work. The same section of the *Employment Insurance Act* (Act) that says claimants are disqualified from benefits for being dismissed because of misconduct also says that they can be disqualified for voluntarily leaving a job without just cause.[4] So, the Courts have said that in these situations, I am not bound by how the Commission decided the employment relationship ended. I can decide if the Appellant was dismissed or quit, and if the situation meets the legal test for disqualification.[5]

[8] The Appellant argues that the Commission should not have decided he was dismissed for misconduct because he actually asked to end his employment on May 5, 2022, which was well over 4 months before his employer says it terminated him. He says that his request was ignored and his employer essentially "batch processed" his employment status like the rest of the employees refusing to be vaccinated, despite his unique request to sever the employment relationship.[6]

[9] The Appellant says that his employer's vaccination policy (HR25) wasn't clear. He didn't know if the vaccinations were considered a new job requirement, or if the termination for refusing vaccination would be "for cause." He says he asked his manager for clarification but didn't receive it. So, he decided he should consider the COVID-19 vaccination a new job requirement. He says that during a Skype meeting on May 5, 2022, he informed his manager that he respected the employer's right to

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[1] See *Canada (Attorney General) v Cartier*, 2001 FCA 274; *Smith v Canada (Attorney General)*, A-875-96; *Canada (Attorney General) v Brissette*, A-1342-92; and *Canada (Attorney General) v Nolet*, A-517-91.
[2] See *Davlut v Canada (Attorney General),* A-241-82, [1983] S.C.C.A. 398.
[3] See *Meunier v Canada Employment and Immigration Commission*, A-130-96.
[4] See Section 30 of the *Employment Insurance Act*.
[5] See *Canada (Attorney General) v Easson,* 1994 FCA 232*; Canada (Attorney General) v Eppel,* 1995 FCA 191; *Smith v Canada (Attorney General)*, 1997 FCA 529; *McDonald v Canada (Attorney General)* FCA A-297-97*;* and *Canada (Attorney General) v. Desson*, 2004 FCA 303.
[6] See GD02-11.

implement the policies it needed in the workplace, but this change in job requirements wasn't something he could accept. He asked his employer to dismiss him.

> *I decided that, as I was not accepting HR25, it would be unfair for me to take the HR25's LWOP (the employer was ready to pay health benefits for the all 3 month of the leave), and I should ask the employer to let me go.*
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> *I saw this situation as being similar to ARTICLE 23 - TECHNOLOGICAL CHANGE from my Collective Agreement [5] (CA) where it was stated (in relation to technological changes): "Where the employee cannot meet job requirements upon completion of the training and familiarization period, the employee shall be offered either the vacancy options, early retirement or severance pay provisions of Article 13 - Layoff and Recall."*
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> *I informed the employer that, as I did not accept HR25, I expected that my employment should be terminated (I used the analogy with Article 23 from the CA) and, as well, that I definitely did not need the 3 month LWOP from HR25 to become vaccinated.*[7]

[10] As evidence for this conversation, the Appellant provided an email chain, dated May 6, 2022. The first email is from his manager, which states it is a follow up to their discussion and that, as "discussed in the next steps, [he] attached [a] letter which will begin the 3 month period of Leave of Absence Without Pay." The second email is the Appellant's same-day response, which states:

> *As I explained during our phone call, I am not going to take 3 months of Leave of Absence Without Pay. I do not need it.*
>
> *Please issue a separate letter that is a clear Letter of Termination of Employment if you would like to stop my employment with MCFD.*
>
> *In the case that I do not get a new letter, I will consider the letter you provided me as a Letter of Termination of Employment (taking into account that I informed you about my refusal of LWOP) starting May 09, 2022.*
>
> *I expect that all required employment termination payments will be done according to the law.*
>
> *Please provide this information to the PSA.*[8]

[11] The Appellant also argues that even though his employer generally behaved as though he was just like all the other employees that didn't comply with HR25, it must have considered his employment over in May because his benefits were terminated. The employer's vaccination policy said that all employees who are placed on Leave

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[7] See GD02-10.
[8] See GD02-282.

Without Pay (LWOP) would continue to receive benefits for three months.[9] However, the Appellant's dental expenses on June 15, 2022, were denied because "expenses incurred after termination of insurance are not covered."[10] He argues this is proof that he was not dismissed for misconduct on September 22, 2022, but that his employment ended when he requested in May.

[12] I find that the Appellant initiated the termination of the employment relationship, not the employer. This means that he voluntarily left work, and was not dismissed for misconduct. Even though the employer didn't accept his request to be dismissed, and the Appellant didn't formally resign, it was the Appellant who took the initiative in severing the employment relationship, and he had no intention of returning to the workplace. He clearly requested, verbally and in writing, to be dismissed as of May 9, 2022, because he was not willing to accept his employer's new conditions for employment. He also stated several times during the hearing that he wanted a "graceful termination."

[13] So, the Appellant voluntarily left his employment.

Issue

[14] Is the Appellant disqualified from receiving benefits because he voluntarily left his job without just cause?

Analysis

What is just cause?

[15] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[11] Having a *good reason* for leaving a job isn't enough to prove *just cause*.[12]

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[9] See GD02-285.
[10] See GD09-42.
[11] Section 30 of the *Employment Insurance Act* explains this.
[12] See *Canada (Attorney General) v Imran*, 2008 FCA 17.

[16] The law says that you have "just cause" if, considering all the circumstances, you had no reasonable choice but to quit your job when you did.[13] The Appellant has to prove that he had just cause.[14] He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to quit.[15]

[17] I have to look at all of the circumstances that existed when the Appellant quit to decide if he had just cause. The law sets out some of these circumstances.[16] After I decide which circumstances apply to the Appellant, he then has to show that there was no reasonable alternative to leaving at that time.[17]

The circumstances that existed when the Appellant quit

[18] The Appellant says that subsection 29(c)(xiii), undue pressure by an employer on the claimant to leave their employment, applies to his case. He argues that by forcing employees who refused to be vaccinated against COVID-19 onto a three-month LWOP, followed by an additional month and a half of LWOP and no benefits, his employer was trying to use financial hardship to force compliance or force employees to quit so that they wouldn't be entitled to severance pay.

[19] The Appellant argues that his Collective Bargaining Agreement has provisions about suspensions and leaves. He says that LWOP is a privilege not a punishment, and can't be used as a substitution for a suspension. He says his employer didn't follow the rules for a suspension, and ultimately his employer was trying to force employees to quit if they didn't want to be vaccinated. He argues he was the victim of constructive dismissal and is entitled to a severance package. He says that he has two active grievances filed through his union that are pending arbitration.

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[13] See *Canada (Attorney General) v White*, 2011 FCA 190; *Canada (Attorney General) v Macleod*, 2010 FCA 301; *Canada (Attorney General) v Imran*, 2008 FCA 17; and *Astronomo v Canada (Attorney General)*, A-141-97.
[14] See *Green v Canada (Attorney General)*, 2012 FCA 313; *Canada (Attorney General) v White*, 2011 FCA 190; *Canada (Attorney General) v Patel*, 2010 FCA 95.
[15] See *Canada (Attorney General) v Laughland*, 2003 FCA 129.
[16] See section 29(c) of the Act.
[17] See section 29(c) of the Act.

[20] The Appellant says that he thought that by asking for a "graceful termination," he would be entitled to the "early retirement or severance pay provisions of Article 13 Layoff and Recall," of his Collective Bargaining Agreement. In his view, the vaccination policy was no different than the "Technological Change" provision, where an employee is unable to meet new job requirements after a familiarization period. He was not able to meet a new job provision because of a technological change (a new vaccine).[18]

[21] I cannot determine if his employer violated the terms of the Appellant's collective bargaining agreement, or if he is entitled to severance pay. My jurisdiction lies solely within the bounds of the *Act* and its related statutes and case law. I can't make any decisions about whether the Appellant has other options under other laws.[19] I can consider only one thing: whether the Appellant had no other reasonable option than to quit, given all of the circumstances.

[22] I don't accept the Appellant's argument that he was being forced to quit. He testified that he respects his employer's right to institute new workplace policies to meet its needs. He said he believed that the new HR25 policy didn't apply to him because he refused to accept this new condition of employment, so he should be exempt from it, or dismissed. He also said that if he had access to the provincial government's vaccine Regulation before his conversation with his manager in May, he would have known that the termination stated in HR25 was for "just cause" and he wouldn't have any other issues with the situation.

[23] So, by the Appellant's own admission and arguments, he was not pressured to quit his employment because he acknowledges his employer's right to create new workplace policies. He said that if he refused to accept them, he should be dismissed. Asking to be dismissed instead of complying with a new policy is not the same as being pressured to quit. The only reason the Appellant is claiming constructive dismissal is because he says he wasn't told if the termination after the LWOP was "for cause," or not at the time he asked to be dismissed.

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[18] See GD02-10.
[19] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[24] I find it is more likely than not that the Appellant at least suspected that the HR25 termination would be "for cause," given his belief that the LWOP was punitive, and was requesting a "graceful termination" before being placed on the automatic LWOP so that he would receive a severance package. He argues that the provincial government regulation was not readily accessible and submitted google searches restricted to dates prior to May 31, 2022, to prove it wasn't available. However, on his second search, the policy is the first result, followed by results explaining the policy, and two case summaries where arbitrators decided grievances related to it.[20]

[25] Furthermore, I take official note that the provincial government's mandate for all employees to be fully vaccinated in November 2021 was widely publicized and discussed on all media formats and news forums.[21] So, it is unlikely that the Appellant was unable to find out the finer details regarding the policy or the provincial government's regulation. Since the Appellant was not required to comply with HR25 while on he was on disability leave (until May 2022), and the policy was introduced in November 2021, he had far more time to consider the impact that HR25 had on him than his colleagues. He could have reached out to his human resources department and manager for information and options prior to his meeting on May 5, 2022, and could have made plans for alternative employment if he knew he was not willing to get vaccinated. He had considerable time to prepare for a known 3-month period without pay, which removes the concept of "undue pressure to comply or quit," completely.

[26] The Appellant is arguing that his employer has breached the employment contract as an additional reason for just cause. He has submitted an SST decision that allowed a similar misconduct appeal because the member found that an employer cannot unilaterally change conditions for employment where an employment agreement exists.[22] This decision has been appealed. I don't agree with the member's determination because I think he exceeded his jurisdiction. The Courts have been clear:

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[20] See GD09-40.
[21] Tribunals are entitled to take notice of facts that are so notorious as not to require proof. The Appellant also provided evidence of this in his Google search results in GD09-38 through 42.
[22] See *AL v Canada Employment Insurance Commission*, 2022 SST 1428 and *Canada Employment Insurance Commission v AL*, 2023 SST 1032.

it is an error of law for the Tribunal to determine if the employer's policies are just, if an employment agreement has been violated, or if dismissal is warranted. The Tribunal is only to decide if the claimant committed misconduct under the Act without regard to the employer's conduct. The Appeal Division has agreed with my opinion. Regardless, a breach of contract does not, on its face, create a situation where the only reasonable option is to leave one's employment.

[27] The Appellant made a brief argument that his employer's policy was not legal or reasonable. He has submitted that Ontario Superior Court cases have held that separated parents who don't agree on the vaccination of their children, can't force a COVID vaccination because it was not guaranteed to be safe or effective. Again, it is not within my jurisdiction to determine if his employer's policy was legal or reasonable. However, vaccinating children is a completely separate issue from vaccinating adults—which is why there was a separate process in approving the COVID-19 vaccines that occurred after they were conditionally approved for adults. Parental rights over minors has nothing to do with employment obligations for adults.

[28] I also note that the British Columbia Supreme Court held that being placed on an unpaid leave of absence for refusing to be vaccinated does not constitute constructive dismissal.[23] In that case, the Court highlights that the employment contract expressly states that the employee agrees to follow all of the company's policies as amended from time to time. A similar clause exists in the Appellant's collective bargaining agreement: "The Union acknowledges that the management and directing of employees in the bargaining unit is retained by the Employer, except as this agreement otherwise specifies."[24] The agreement does not include any provisions regarding vaccination or public health measures.

[29] So, the Appellant was not constructively dismissed, or subject to undue pressure to leave his employment.

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[23] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[24] See GD02-48.

The Appellant had reasonable alternatives

[30] I must now look at whether the Appellant had no reasonable alternative to leaving his job when he did.

[31] The Appellant has not raised any direct arguments about why he refused to be vaccinated. Instead, he said that he had experience working in medical research and he believed the vaccinations were not properly tested. He also mentioned that he had a heart condition that required surgery in 2017 and ongoing medication. He testified that his doctor told him his condition was not something she would give him a medical exemption for, she would only write one for an allergy to the vaccine.

[32] The Appellant could have raised his medical issues with his employer to see if there was an accommodation or some flexibility for his situation. But, he didn't.

[33] The Appellant says that he had no reasonable alternative but to request a "graceful termination" because he was not going to get vaccinated, and a leave without pay would not change that. He says he didn't look for work during his LWOP because he had two grievances waiting to be heard, and didn't think the process would take as long as it has.

[34] I find that the Appellant had ample time to consider all of his options and the vaccination policy while on his sick leave and leave without pay, and so, had ample time to seek alternate employment before asking to be terminated in May 2022.

[35] Considering the circumstances that existed when the Appellant quit, the Appellant had reasonable alternatives to leaving when he did, for the reasons set out above.

[36] This means the Appellant didn't have just cause for leaving his job.

Conclusion

[37] I find that the Appellant is disqualified from receiving benefits.

[38] The Appellant made a personal choice to leave his job and he had several reasonable alternatives to quitting when he did. While he may have had good personal reasons, that is not the same as just cause under the law,[25] and the law generally requires claimants to find alternative employment before quitting.[26]

[39] This means that the appeal is dismissed.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section

[25] See *Canada (Attorney General) v White*, 2011 FCA 190; and *Tanguay v Canada (Unemployment Insurance Commission)*, A-1458-84.
[26] See *Canada (Attorney General) v Hernandez*, 2007 FCA 320; *Canada (Attorney General) v Campeau*, 2006 FCA 376; and *Canada (Attorney General) v Murugaiah*, 2008 FCA 10.