



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. S. Inc. C.O.B. Gilmore Partners v. Canada Employment Insurance Commission*,
2016 SSTGDEI 100

Tribunal File Number: GE-15-3963

BETWEEN:

A. S. Inc. C.O.B. Gilmore Partners

Appellant

and

Canada Employment Insurance Commission

Respondent

and

B. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: May 10, 2016

DATE OF DECISION: July 25, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant (Employer), A. S. Inc. C.O.B. Gilmore Partners was represented at the hearing by Ms. Maria Triggiani from BeardWinter LLB and Mr. A. S., Managing Partner who also testified as a witness.

The Added Party, Mr. B. S. (Claimant) was represented at the hearing by Mr. Olanyi Parsons from OP Law. Mr. B. S. also testified as a witness.

The Respondent (Commission) was not represented at the hearing but made additional submissions on the day of the hearing (GD12).

At the outset of the hearing, the Employer's representative, Ms. Triggiani, presented Ms. V. C. from Full Circle Consulting and Mr. K. D., Partner as witnesses. The Member asked that these witnesses wait outside the hearing room until it was time for their testimony.

Although Ms. V. C. testified at the hearing (see below), part of the way through the hearing, Ms. Triggiani excused Mr. K. D. and advised that he would not be testifying. The Claimant, Mr. B. S. and the Employer, Mr. A. S., remained in the hearing room throughout the proceedings and both testified.

INTRODUCTION

[1] On August 24, 2015, the Claimant made an initial claim for regular benefits indicating that he was (constructively) dismissed from his employment effective July 22, 2015 whereas the Employer indicated that the Claimant voluntarily left his employment. On September 28, 2015, the Canada Employment Insurance Commission (Commission) denied the Claimant's application for regular benefits because he did not show just cause for leaving his employment.

[2] On October 20, 2015, the Claimant requested that the Commission reconsider its decision and on November 13, 2015, the Commission decided in the Claimant's favour and allowed the claim free of disqualification.

[3] On December 2, 2015, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] The hearing was held by in person given the complexity of the issue under appeal, the information in the file, including the need for additional information and the fact that the appellant or other parties are represented.

ISSUE

[5] The Member must decide whether the Claimant demonstrated just cause for leaving his employment on July 22, 2015, and whether he should be disqualified from receiving any benefits pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act) respectively.

THE LAW

[6] Section 29 of the EI Act stipulates that for the purposes of sections 30 and 33,

(a) “employment” refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which

case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

- (i) sexual or other harassment,
- (ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,
- (iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,
- (iv) working conditions that constitute a danger to health or safety,
- (v) obligation to care for a child or a member of the immediate family,
- (vi) reasonable assurance of another employment in the immediate future,
- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

[7] Subsection 30(1) of the EI Act stipulates that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[8] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

[9] The Claimant was employed as a Partner and Principal Search Consultant/Executive Career Manager with the Employer for almost 10 years until his last day of work on July 22, 2015. In his application, the Claimant indicated that he was constructively dismissed. He indicated that he was advised by the Employer's consultant, Ms. V. C., that they accept his letter of July 20, 2015 from his legal counsel (GD3-3 to GD3-15).

[10] The Record of Employment (ROE) submitted by the Employer indicates that the Claimant quit his employment on July 22, 2015 (GD3-16).

[11] The Claimant advised the Commission that he disagrees with the date of hire and reason of separation indicated on the ROE. The Claimant provided an account of the events leading to his last day of work (GD3-20 and GD3-21) and his notes from the two final meetings on July 22, 2015 (GD3-43 to GD3-45). The Claimant provided the following arguments and documentation (GD3-19 to GD3-33):

- To show that he planned to continue working until the matters outlined in his letter to the Employer were resolved, he submitted a copy of that letter dated July 20, 2015 from

his legal representative advising of his claim against the Employer. Therein, the Claimant's representative argued that the Claimant was subjected to harassment, breach of contract and the violation of his human rights. He provided an account of the events that led up to the Claimant having to seek medical treatment. In the letter he stated that given the abuse and harassment to which the Claimant was subjected, the workplace had become poisoned and intolerable so the Claimant could not continue to work at the Employer as a form of mitigation. The Claimant was prepared to complete his active files with the same accommodations already in place and then he wished to be compensated in lieu of notice of termination (GD3-29 to GD3-33).

- The Claimant submitted that he believed himself to be employed and that he continued to perform his duties until he was terminated on July 22, 2015. He provided copies of two new clients secured on July 20, 2015, emails with the colleagues dated July 16, 21 and 22, 2015 showing client appointments scheduled for July 24 and 27, 2015; the Claimant participated in a company-wide meeting on the morning of July 22, 2015 where he submitted that he discussed 10 of his active engagements (GD3-38 to GD3-42).
- The Claimant submitted that the Employer advised the staff that he was let go/walked off the premises on July 22, 2015. He provided a copy of an email from another employee to the him dated July 22, 2015 (at 2:31 pm) informing him that the Employer and Ms. V. C. informed staff that he was no longer with the company; that the Claimant took legal action against the Employer and that Mr. A. S. had to do what was best for the company, even though his choice was hard on him, but that it needed to be done (GD3-46). Another employee's email to the Claimant dated September 1, 2015, indicates that the Claimant was walked out on July 22, 2015. The staff was told by Mr. A. S. that it was an unfortunate situation but it had to be done; that he had to protect the company and other people from being hurt. At no time did the Employer indicate that the Claimant quit his employment and all communication indicated that the Claimant was fired (GD3-47). Another employee's email reached out to the Claimant and questioned the version of events presented (GD3-48).

- To show that he requested a 12 week medical accommodation that ended July 22, 2015, the Claimant submitted a medical note from his physician dated April 29, 2015. It indicated that the Claimant is required to work (full-time) from home for the next 12 weeks and then be reassessed (GD3-50). He also submitted a medical note dated June 2, 2015 recommending that the Claimant continue to work from home, full-time, and that he can attend external meetings and appointments outside his home as required to fulfill his job (GD3-49).
- To show that he wouldn't voluntarily quit his employment of 10 years without securing other employment or completing his active files for which he would get commissions, the Claimant submitted his T4 slips for the 2013, 2013, 2014 tax years showing he was 100% commissioned employee (GD3-51 to GD3-54).

[12] The Employer retained a third party consultant, Ms. V. C. In her report dated July 19, 2015, Ms. V. C. indicates that she was mandated to investigate and determine the veracity of the Claimant's claim by reviewing the evidence, make findings about the alleged incident and provide recommendations on how to respond. Ms. V. C. conducted an investigation from June 11- 25, 2015 by interviewing the Claimant, Mr. K. D. and 3 other employees (only Ms. A. L. was a witness to the event). Ms. V. C. found all parties interviewed credible. Ms. V. C. found that the Claimant and Mr. K. D. did encounter each other in the reception area in the presence of Ms. A. L. Ms. V. C. found that Mr. K. D. did touch/pat the Claimant around the upper arm/shoulder but it was not an aggressive massage however; the Claimant was unhappy about being touched by Mr. K. D.. There was prior tension between Mr. K. D. and the Claimant. Ms. V. C. concluded that the touch on the shoulder could not be seen as an assault based on the fact that (a) their relationship was not positive (b) the Claimant did not ask Mr. K. D. to stop touching him or inform his employer in a timely basis and (c) did not seek medical attention or police intervention. Ms. V. C. provided recommendations including coaching and mentoring for both Mr. K. D. and the Claimant, individual sensitivity and management skills training for Mr. K. D., the creation of policies regarding respect and bullying, training for all staff and she made suggestions regarding communication in the workplace (GD3-34 to GD3-45).

[13] To the Commission, the Claimant stated that ever since Mr. K. D. joined the company in 2011, there has been an employee retention issue due to his harassment and bullying. Those employees went to him (he did recruiting, mentoring) and then Mr. K. D. started to attack him personally. The Claimant stated that Mr. K. D. directly threatened him in 2014 and used physical force in June. As a result of the stress, he sought medical treatment and asked to be accommodated by working at home. He was subsequently treated badly by the employer who also hired a consultant that started calling him and asked to speak to his doctor directly, which he refused. On July 20, 2015 his lawyer sent a letter to the Employer indicating human rights violations, constructive dismissal and violation of their compensation agreement. He was going to continue working until he could see his doctor the following week. On July 22, 2015, he was told that the Employer accepts his resignation. He was asked to return company property/files, he was told that his email was cut off, he was walked out and security was notified (GD3-55 and GD3-56).

[14] The Employer advised the Commission that the Claimant resigned verbally to him and the consultant (V. C.) on July 22, 2015. He stated that the Claimant quit his employment both verbally on his last day and in writing on July 20, 2015. He stated that the Claimant had issues with Mr. K. D. and Mr. K. D. had issues with him. Mr. A. S. told the Commission to speak to the Claimant regarding his reasons for leaving (GD3-57 and GD3-81). He submitted a copy of the company response to the Claimant's lawyer dated August 24, 2015 indicating that the Claimant's resignation was accepted. The Employer denies any allegations of harassment, bullying, mental distress or that the Claimant was a victim of workplace violence. The Employer's lawyer contends that the company has gone out of its way to accommodate and investigate the Claimant's allegations (GD3-58 and GD3-59).

[15] On September 28, 2015, the Commission denied the Claimant's application for regular benefits because he did not show just cause for leaving his employment as it was not his only reasonable alternative (GD3-60).

[16] On October 20, 2015, the Claimant requested that the Commission reconsider its decision and provided further documentary evidence that he had recently (on October 9, 2015) filed a claim against the Employer for wrongful and constructive dismissal based (GD3-62 to

GD3-78). The Claimant reiterated the events that had occurred since the hiring of Mr. K. D. in 2013 and the issues that arose with other employees because of the hostile environment created by him. The Claimant added that he brought their complaints to the Employer, Mr. A. S., however he seemed disinterested and did nothing to rectify the issue. In 2014, Mr. K. D. started to attack him personally and he again advised the Employer but there was no resolution (GD3-80).

[17] On November 13, 2015, the Commission decided in the Claimant's favour, rescinded its initial decision of September 28, 2015 and allowed the claim free of disqualification (GD3-83 to GD3-86).

[18] In the notice of appeal to the Tribunal, the Employer provided copies of both parties' submissions to the Ontario Superior Court of Justice (GD2-7 to GD2-32).

[19] The Claimant submitted further documentation to support his claim including: emails between another employee and the Employer regarding complaints about Mr. K. D.'s negative behavior towards him and his refusals to work with Mr. K. D. from 2013 (GD10-5 to GD10-6), two resignations due to stress and anxiety in 2013, 2014 (GD10-9 and GD10-12), the parties' email exchange of January 1, 2014 regarding the Claimant's request that Mr. K. D. not be seated near the Claimant (GD10-10 and GD10-11), emails and letters between the parties regarding his compensation from April 23, 2015 to June 11, 2015 (GD10-16 to GD10-21), email exchanges regarding a discipline letter from the Employer to the Claimant and their meeting of May 29, 2015 (GD10-22 to GD10-35 and GD10-62), email exchange between the parties June 10, 2015 regarding the hiring of the consultant and the Claimant's participation (GD10-36 to GD10-41), email exchange between the parties on June 11 and 12, 2015 regarding the Claimant's calendar entry and job posting (GD10-42 to GD10-52), four emails/statements to the Claimant from four former employees of the Employer regarding their experiences of verbal abuse, harassment, bullying and intimidation by Mr. K. D. and the effects on their well-being, their witnessing of his verbal abuse/bullying of other employees and those resignations, the Employer's non-response, witnessing of events in 2015 and the Claimant's last day of work (GD10-53 to GD10-60); the Employer's letter of July 14, 2015 regarding the Claimant's discomfort of allowing them direct access to his family physician - noting that they do not have short or long term disability (GD10-

63), and the Claimant's reply and defence to the Employer's counterclaim in other proceedings (GD10-64 to GD70).

[20] Ms. A. L., provided a written, signed statement of what she witnessed to occur between the Claimant and Mr. K. D. in the reception area on May 21, 2015. Ms. A. L. indicated that she resigned for health reasons however; a secondary reason was to leave the toxic culture that is, the verbal harassment, bullying and "singling out" that she witnessed. On May 21, 2015, she witnessed Mr. K. D. apply 'physical contact' to the Claimant but does not recall the words spoken between the parties as she was doing her work. She advised Ms. V. C. what she witnessed and Ms. V. C. documented it. She also advised Ms. V. C. of the other employees' complaints about Mr. K. D. to her and that she witnessed (facial expressions) and overheard (tone and manner) him speaking poorly to others. She indicated that mocking, insults regarding stature, verbal harassment and inappropriate work conduct, are all situations she has witnessed at the company. Ms. A. L. noted an improvement in Mr. K. D.'s behaviour since being coached. She believes that the Employer was aware of the verbal harassment since before 2015 (GD11).

Testimonies at the Hearing

Ms. V. C., Full Circle Consulting

[21] Ms. V. C. testified that she was retained by the Employer in June 2015. As a result of her investigation, she concluded that Mr. K. D. did come up behind the Claimant and placed his hands on the Claimant's shoulder(s) which was meant to be a greeting interaction with no malice or intent. Ms. V. C. confirmed that the Claimant did state that he felt 'creeped out and disgusted' and that he felt that the touch was unwelcome. She testified that there were allegations of workplace harassment but she did not find that there was workplace harassment (she was investigating the incident). She testified that she recommended and started to coach Mr. K. D. because he was a strong personality and he needed to soften his approach. Sensitivity training was also suggested to augment the coaching. Ms. V. C. confirmed that staff wanted someone with whom to speak regarding workplace issues; she assumed other than Mr. A. S. She stated that her name has been offered to staff should they have any concerns. Regarding alternatives available to the Claimant, Ms. V. C. testified that she recommended training for both Mr. K. D.

and the Claimant and that a third party should be available for complaints, a policy should be created and there should be annual reviews.

[22] She stated that there was no urgency for the Claimant to leave and that accommodations were offered by the Employer including sending an IT person to the Claimant's home and giving him the option of working from home and coming into the office at his discretion.

[23] Ms. V. C. testified that she attended two meetings with the Claimant on July 22, 2016. The first was with Mr. A. S., Mr. K. D. and the Claimant to discuss the outcome of her investigation and move forward points to repair relationships as much as possible. Ms. V. C. testified that at that meeting, she asked the Claimant whether they can move forward from this situation and the Claimant responded "absolutely not". She stated that the Claimant did not want to continue but was prepared to work according to his doctor's note.

[24] Ms. V. C. stated that she later had a one-on-one meeting with the Claimant to accept his resignation on behalf of the Employer. She was instructed to do so by Mr. A. S.. Ms. V. C. testified that the Claimant did say "I am not resigning" and that he wanted to keep working. Ms. V. C. testified that the Claimant had previously stated that he had no intention of work with Mr. K. D. or coaching. She said that they were accepting his resignation based on his lawyer's letter.

Mr. A. S., President (Employer)

[25] Mr. A. S. testified that the first time the Claimant told him about the issue(s)/incident with Mr. K. D. was in May 2015 at which time he hired a third party consultant (Ms. V. C.) to investigate what is really going on. According to the Claimant's doctor's note he accommodated the Claimant who asked that he work at home, have a private office and to have a home internet connection. Mr. A. S. testified that a meeting was set for July 22, 2015 to discuss Ms. V. C.'s findings and suggestions going forward and he intended on continue with the doctor's and Ms. V. C.'s recommendations; he was prepared to provide work beyond July 22, 2015. The Claimant's lawyer however, sent a letter (July 20, 2015) that changed the outlook of the meeting as he took the letter to be a resignation. Mr. A. S. testified that Ms. V. C. asked the Claimant at the meeting "Do you want to be here?" and the Claimant stated "no". Mr. A. S. stated that the Claimant therefore resigned in writing first (letter of July 20, 2015) and then verbally at the

meeting of July 22, 2015 in the presence of Mr. K. D. and Ms. V. C. although the Claimant did not provide an effective date. Mr. A. S. stated that he did not provide the Claimant with the opportunity to work on active files beyond July 22, 2015 because the Claimant was not prepared to do so and because he accepted the Claimant's resignation on that day.

[26] Mr. A. S. testified that the Claimant had informed him of Mr. K. D.'s inappropriate conduct when dealing with other staff. Mr. A. S. was referred to Exhibits GD10 and GD11. He testified that I. A., Mr. J. J., Ms. M. M. and Mr. J. L. were all former Executive Search Consultants that worked with both Mr. K. D. and the Claimant; they reported to either depending on the client/file (GD3-53 to GD3-60). Ms. A. L., was formerly employed as a Coordinator and Reception and who worked with, and took direction from, both the Claimant and Mr. K. D. (GD11).

[27] Mr. A. S. testified that, had the Claimant not resigned, he would have continued to work with coaching and with accommodation. He testified that a medical leave on their benefit plan or, a leave of absence, were also options to leaving.

Mr. B. S., Former Partner (Claimant)

[28] The Claimant testified that he started as a Career Manager in 2005 and became a Partner in 2010 when he took on operational activities, staff training; was longest tenured person so all staff came to him first, then to Mr. A. S.. Issues with Mr. K. D. started in 2013 with other staff complaining to him about Mr. K. D.'s treatment of them. In October 2013, they moved offices and Mr. K. D. asked that he be seated next to the Claimant. Since the Claimant expressed that he was unhappy with this arrangement, Mr. K. D. threatened him. He mentioned this to Mr. A. S. In September 2014, he informed Mr. A. S. that the reason why another employee resigned (B. R.) was because of Mr. K. D. On April 15, 2015, Mr. A. S. called him into a meeting with Mr. K. D. At that meeting, Mr. K. D. was yelling; he stood over the Claimant and told him that he was "annoying" and that he "didn't like" him. The meeting was visible to the entire office so after the meeting, others texted him asking about his wellbeing. The Claimant testified that he advised Mr. A. S. of the "harassment" both prior to the meeting, and after, and that he was seeking weekly medical treatment because of the work environment.

[29] On May 7, 2015 he provided the Employer with a doctor's note asking that he work from home and come into the office 2-3 days a week. The Claimant stated that he was not given an accommodation plan.

[30] On May 21, 2015 he was speaking with Ms. A. L. at reception when Mr. K. D. came up behind him, grabbed his shoulders and proceeded to do a massage motion. The Claimant testified that he was in shock; he gave Ms. A. L. a look of disgust. He then went into a meeting room and told colleagues how he was "creeped out" and that he felt a minor pain. The Claimant stated that he felt this way because Mr. K. D. had told him he was annoying, had threatened him before so any contact with him like an aggressive shoulder massage was weird and disgusting. He was suspicious especially after the April 15, 2015 incident/yelling at him. The Claimant testified that Ms. A. L. was the only witness to this event which Mr. K. D. initially denied happened. She stated that he 'physically touched' him but he was the one that was touched and only he can say how/what he felt. She was also witness (through glass) to his meeting with Ms. V. C. on the last day and him being escorted out of the office.

[31] The Claimant testified that he met with Mr. A. S. on May 29, 2015 regarding a further accommodation and that his email (GD10-22) is in response to that meeting. He was told that he couldn't go into (banned from) the office due to insufficient medical and was also told of his negative performance. The Claimant stated that as a result, he had a mini panic attack. He was told that he was not dismissed and to sit back down, he closed the door (but not slam) and stayed. He was given a warning letter for the first time in 10 years (GD10-24).

[32] The Claimant testified that on July 14, 2015 (referred to GD10-63) he received an email/letter indicating that the Employer does not have short-term or long-term disability plan and that they wanted him back from medical leave. He stated that he was still having problems with his accommodation. Plus, he was being harassed by Mr. A. S. looking for performance issues; who looked on his calendar and questioned an appointment there and who had his numbers published to the entire company (without copying/telling him). Ms. V. C. and Mr. A. S. were also requesting direct access to his doctor without documentation which he denied. The Claimant stated that he was in an environment of continuous harassment and attempts to embarrass him. The Claimant stated that he was still willing to consider coming back early after

he saw his doctor on July 28, 2015. The Claimant testified that he did not refuse to resume his work duties or continue working.

[33] The Claimant stated that the purpose of sending the July 20, 2015 letter was to respond to the Employer's and Ms. V. C.'s requests that he come back from medical leave early and the letter from the Employer of July 14, 2015. The Claimant testified that the letter was to engage Mr. A. S. to discuss the situation. There was no urgency to leave on July 22, 2015. The Claimant stated that he indicated that he could not continue unless he was given some relief and no more prying into his medical history. He stated that he was willing to work on his active engagements (files) for 2-3 months (finish what he started). Beyond that, he stated that he couldn't see how the situation would improve; none of the issues brought forward would come to a resolution. The Claimant testified that he did not say "absolutely not" at the meeting of July 22, 2015.

[34] The Claimant testified that on July 22, 2015 he had two meetings. There was one meeting with the Employer and Ms. V. C. (11:45am) to discuss what he thought was his accommodations, and another one with just Ms. V. C. (1:30pm) who came into his office and advised him that it was his last day. Then there was a company-wide meeting to inform that Ms. V. C. was retained. The Claimant testified that he planned to continue working that day and that it was work as usual: he had a meeting and phone calls scheduled for that afternoon; he had 10 active files of which 50% were new engagements secured after his medical leave. He referred to GD3-38 to GD3-40 that are two new job orders on July 20, 2015; GD3-41 (screen shot) on July 22, 2015 lists 10 engagements all within a week - July 17, 2015.

[35] The Claimant confirmed that he did not ask for a leave of absence nor was he offered one. He stated that as per GD3-68 he was not provided with the listed accommodations which included access to a facility to conduct meetings with clients, wireless connectivity for outside home and office to conduct meetings, voice over not connected, etc. He confirmed that he did want access to the office but was told not to come in. The Claimant stated that he wanted to come to the staff/public meetings to discuss his jobs (engagements). He knew that Mr. K. D. was going to be present at those meetings. The Claimant agreed that the doctor's note was vague but he needed the accommodation to work outside the office. The (first) note did not say he cannot

come into the office. He stated that the Employer was aware through his calendar when he was to be in the office although he personally did not advise him every time.

[36] Purpose of statements from prior employees (GD10-2 to GD10-52, GD11) was to show a history of harassment and intimidation from Mr. K. D. both before and after he was no longer working there; that others left for this reason and that Mr. A. S. was aware but nothing changed.

SUBMISSIONS

[37] The Employer submitted that the Claimant's letter of July 20, 2016 (GD3-31) is a resignation. Plus, he verbally resigned at the meeting of July 22, 2016. The Employer denied any allegations of the Claimant that he was subjected to bullying, harassment or reprisal in any way during his employment (GD3-58 and GD3-59). The Employer submitted that he was not told and he was not witness to any harassment, abuse or bullying until May 2015. He immediately addressed the situation by hiring a third party consultant to investigate the incident. The consultant, Ms. V. C. testified that the Claimant was not assaulted by Mr. K. D., he was not willing to be accommodated and did not consider the alternatives that she suggested. The Employer submitted that there was no urgency for the Claimant to leave when he did because he was fully accommodated for his disability. He had alternatives to leaving such as continuing to work with coaching and with accommodation, taking a medical leave on their benefit plan or, a leave of absence, and he could have considered other employment before quitting. The Employer submitted that the onus is on the Claimant to resolve conflict in the workplace.

[38] The Commission submitted that the Claimant did show that he had no alternative but to leave his employment when he did on July 22, 2015. It therefore, allowed for benefits effective August 23, 2015. The Commission submitted that the evidence shows that since 2013, numerous staff including the Claimant complained about the unprofessional behavior of Mr. K. D. and that they left citing mental/emotional health and stress issues. The Commission submitted that the Employer was aware of Mr. K. D.'s behavior yet did not address it until it escalated to that of a physical assault. The investigation by the third party was limited to that one incident (not the history). The Commission therefore, submitted that the "toxic" work environment existed for several years and not limited to the "physical contact" between the Claimant and Mr. K. D. This, coupled with the lack of action by the Employer within a reasonable time, the Claimant's feeling

that there was a breach in the compensation agreement and an unwillingness to accommodate the Claimant's medical condition constitutes constructive dismissal. The Claimant's employment had become so intolerable that he had no reasonable alternative but to leave (GD12).

[39] The Claimant submitted that he was constructively dismissed and/or simply dismissed on July 22, 2015 when he was walked off the Employer premises. He sent the July 20, 2016 letter to the Employer because the accommodations were not forthcoming and because the work environment was so intolerable that he was unable to endure the ongoing harassment in the workplace despite seeking medical treatment and especially not after a final incident of physical contact/assault by Mr. K. D.. The Claimant was prepared to stay working on July 22, 2016 and beyond, until his next appointment with his doctor the following week and to see his active files to completion. The Employer however, dismissed him by walking him off the premises. The Employer failed to adequately and immediately address the harassment and bullying behavior of Mr. K. D. The Employer was aware that other employees tendered their resignations due to Mr. K. D.'s harassment and abuse yet nothing was done to remedy or rectify the situation. The Claimant submitted that instead, he was subjected to a sudden, unfounded and unjustified performance review/plan and forced to leave on July 22, 2015.

ANALYSIS

[40] Sections 29 and 30 of the EI Act stipulate that a claimant who voluntarily leaves his/her employment is disqualified from receiving any benefits unless he/she can establish 'just cause' for leaving. In this case, the Commission determined that the Claimant voluntarily left his employment with just cause and allowed his claim free of disqualification pursuant to sections 29 and 30 of the EI Act respectively.

[41] The Member considered the Claimant's position that the Employer dismissed the Claimant when he was unexpectedly escorted/walked off the premises on July 22, 2015. The Claimant provided evidence to support his position (GD3-46 to GD3-48). The Member therefore, considered section 30 of the EI Act and case law for similar circumstances. Section 30 provides for an indefinite disqualification of benefits when a claimant is dismissed by his/her employer by reason of one's own misconduct or voluntarily leaving his/her employment without just cause. In this case, as in the jurisprudence, the issue is whether a disqualification under subsection 30(1) of

the Act is warranted, based on either of the two grounds for disqualification stated in this subsection, as long as it is supported by the evidence (Easson A-1598-92, Eppel A-3-95). The Member also considered that the decision that was made by the Commission pursuant to section 112 of the EI Act is that the Claimant voluntarily left his employment and did not consider this case as one where the Claimant was dismissed due to his own misconduct, so it is the only decision that is within the Member's jurisdiction pursuant to section 113 of the EI Act. The Member will therefore analyze the facts in a manner so as to determine whether the Claimant voluntarily left his employment with just cause.

[42] The Member also recognizes that it is the Claimant's and the Commission's contention that he was constructively dismissed (GD3-30 and GD12) however; the common law concept of constructive dismissal does not appear in the EI Act. The Member notes that although the factors which may constitute just cause under section 29 of the EI Act resemble those that may result in a finding of constructive dismissal at common law, it does not change the legal test under the EI Act for voluntary leaving one's employment. The EI Act creates an insurance scheme for employees who have been fired or laid off or left their positions because they had no other reasonable alternative. Whether a claimant has left voluntarily and is not entitled to benefits under the EI Act and whether a claimant has been constructively dismissed and is entitled to sue their employer are two different issues (Sulaiman A-737-93; Peace 2004 FCA 56).

[43] The Member noted therefore that it has been a well-established principle that just cause exists where, having regard to all the circumstances, the Claimant was left with no reasonable alternative to leaving pursuant to subsection 29(c) of the EI Act (Patel A-274-09, Bell A-450-95, Landry A-1210-92, Astronomo A-141-97, Tanguay A-1458-84).

[44] The Member first considered that it is incumbent of the Employer and the Commission to show that the Claimant left his employment voluntarily. The Employer has consistently submitted that the Claimant quit his employment (GD3-16) while the Claimant contends that he did not resign. Mr. A. S. testified that the Claimant was asked at the meeting of July 22, 2015, "Do you want to be here?" and the Claimant stated "no". Mr. A. S. stated that the Claimant therefore resigned in writing first in his letter of July 20, 2015 (GD3-31) and then verbally at the meeting of July 22, 2015 however; he also stated that the Claimant did not provide an effective

date. Ms. V. C. testified that she asked the Claimant at that same meeting, whether they can move forward from this situation and the Claimant responded “absolutely not”. The Claimant denied stating as such. On the other hand, she also testified that the Claimant said “I am not resigning” and that he wanted to keep working. Ms. V. C. testified that she was instructed by Mr. A. S. to accept the Claimant’s resignation on their behalf based on his lawyer’s letter of July 20, 2015. The Member notes that in this letter, among other things, the Claimant did in fact indicate his intent to leave by writing that he was prepared to complete his active files with the same accommodations already in place and then he wished to be compensated in lieu of notice of termination (GD3-31). Plus, the Claimant testified that he was willing to work on his active files for 2-3 months, and then beyond that, he stated that he couldn’t see how the situation would improve. His testimony is supported by the documentary evidence that shows the Claimant was working and intended to keep working on July 22, 2015 (GD3-31, GD3-38 to GD3-41 and GD3-55) and that he was to see his doctor the following week (GD3-50). Instead, the Employer unexpectedly walked him off the premises on July 22, 2015 (GD3-56, GD3-80 and GD10-54).

[45] The Member therefore agrees with the Employer and finds that on July 20, 2015, the Claimant indicated his intent to resign once he completed his active files, but he did not provide an effective date. The Member finds however, that it was the Employer that determined and imposed the effective date of that resignation to be July 22, 2015 without the Claimant’s agreement and/or allowing him to finish his active files. The Member finds therefore that although the Employer has shown that the Claimant left, or intended to leave his employment voluntarily, he imposed the effective date of July 22, 2015.

[46] The onus of proof then shifts to the Claimant to show that he left his employment for just cause (White A-381-10, Patel A-274-09). In this case, the Member agrees with the Commission that the Claimant met that onus for the reasons to follow. He showed that the work conditions were so intolerable that he was left with no reasonable alternative to leaving pursuant to subsection 29(c) of the EI Act.

[47] The Member first considered the circumstances referred to in subsection 29(c) of the EI Act and whether any existed at the time the Claimant took leave from his employment on July 22, 2015. According to case law, these circumstances must be assessed as of that time (Lamonde

A-566-04). In this case, the Claimant submitted that he was harassed and threatened by Mr. K. D. in the past, and on May 21, 2015; he was physically touched/assaulted by him which made him feel “creeped out” and “disgusted”. He submitted that the work environment was so intolerable that he was unable to endure the ongoing harassment in the workplace despite seeking medical treatment. The Member therefore, considered paragraph 29(c)(i) of the EI Act which stipulates that just cause exists if the Claimant had no alternative to leaving, having regard to all the circumstances, including harassment.

[48] The Member considered the Employer’s submission that there was no urgency for the Claimant to leave (and/or submit his resignation) when he did as he was being fully accommodated and he had reasonable options to leaving. The Member acknowledges that the Employer did immediately address the incident of May 21, 2015 by hiring a third party consultant to investigate and make recommendations. The Member agrees with the Commission however that the evidence shows that the work environment had become so intolerable that the Claimant had no reasonable alternative but to leave when he did.

[49] First, the Member agrees that the evidence shows that since 2013, the Claimant and other staff have been subjected to the verbal harassment, bullying and inappropriate, aggressive conduct of Mr. K. D., and that many have left their employment citing stress and concern for their well-being as result (GD10-5 to GD10-15, GD10-53 to GD10-60 and GD11).

[50] Second, the Member considered the Employer’s denial of any allegations that the Claimant was subjected to bullying, harassment or reprisal in any way during his employment and that he was not aware of any of this until May 2015 (GD3-58 and GD3-59). The Member agrees with the Commission however, that the evidence shows that the Employer was aware of Mr. K. D.’s inappropriate behavior, witnessed it, yet did not attempt to rectify it until the Claimant requested a medical accommodation and after Mr. K. D. made “physical contact” with the Claimant in May 2015 (GD3-80, GD10-5, GD10-53 and GD10-59). Plus, at the hearing, Mr. A. S. testified that the Claimant had told him about the others’ issues with Mr. K. D. The Claimant also testified that he advised Mr. A. S. of the others staff issues in 2013; he was aware of Mr. K. D. threatening him in October 2013 (GD10-10) and saw Mr. K. D. yell at him in their meeting of April 15, 2015. The Member acknowledges that on June 9, 2015, the Employer did

hire Ms. V. C. to investigate the veracity of the incident of May 21, 2015 and to make recommendations. The Member agrees with the Commission however, and Ms. V. C. confirmed at the hearing and in her report (GD2-33 to GD2-36), that she was investigating the incident of May 21, 2015, thus her findings were not in the context of all the other evidence regarding Mr. K. D.'s behavior and incidents with both other staff and the Claimant. The Member therefore finds that the work environment had become 'toxic' for several years (which was not being addressed by the Employer) and was not limited to the final incident of May 21, 2015 between the Claimant and Mr. K. D.

[51] Finally, the Member considered the Claimant's position that he had to send the letter of July 20, 2015 letter to the Employer because the accommodations were not forthcoming and because the work environment was so intolerable that he was unable to endure the ongoing harassment in the workplace. The evidence shows that the environment immediately prior to this had become increasingly stressful and unbearable for the Claimant for several reasons. For instance, he was subjected to a performance review for the first time in 10 years (GD3-55), and a discipline letter on May 27, 2015 (GD10-22); issues arose regarding his compensation from April 23, 2015 to June 11, 2015 (GD10-16 to GD10-21), his numbers were published publically to all staff without his knowledge; on June 11, 2015, the Employer questioned a job posting and an appointment on his calendar (GD10-42 to GD10-52) and on July 14, 2015, the Employer wanted direct access to his family physician which the Claimant denied (GD10-63). The Member finds therefore, that given the circumstances of the last few months, the Claimant had no reasonable alternative but to submit his resignation on July 20, 2015.

[52] In the alternative that the Claimant did not show that his environment was so intolerable that he had to submit his resignation, the Member finds that by accepting the Claimant's letter of July 20, 2015 as a resignation without allowing the Claimant to complete his active files and/or at least until he saw his doctor the following week, the Employer precluded the Claimant from considering what would have been options to leaving. By doing so, the Claimant was denied the opportunity to consider alternatives that the Employer submitted were reasonable including, continuing to work with coaching and/or with accommodation, taking a medical leave on their benefit plan, or a leave of absence, and he could have considered other employment before quitting. Further, the Member noted that although the Employer testified that a medical leave

was possible on their benefit plan, he had previously advised the Claimant on July 14, 2015, that they did not have a short or long term disability plan (GD3-63). It is questionable therefore whether this was in fact an alternative.

[53] Finally, the Member considered, and agrees with the Employer's submission that the onus is on the Claimant to attempt to resolve conflict in the workplace, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (White 2011 FCA 190; Murugaiah 2008 FCA 10; Hernandez 2007 FCA 320; Campeau 2006 FCA 376). In this case, the Member finds that Claimant did attempt to resolve the conflict over several years, by staying employed and even dealing with other staff's complaints, repeatedly advising the employer of Mr. K. D.'s harassment, and by seeking medical treatment and accommodation to avoid the conflict and effects of the stressful work environment. Plus, had the Claimant stayed until he finished his files he could have made efforts to also seek alternative employment. The Claimant submitted evidence to show that he was on commission, and that he wouldn't leave without a new job and/or finishing his active files (GD3-51 to GD3-54).

[54] For all these reasons, the Member finds that, having regard to all the circumstances at the time of separation, the Claimant met the onus placed upon him to demonstrate that he had no reasonable alternative but to leave his employment when he did.

[55] The Member therefore finds that the Claimant showed that he had just cause for voluntarily leaving his employment on July 22, 2015 and therefore should not be disqualified from any benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[56] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section