



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 158

Tribunal File Number: GE-15-4074

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: October 12, 2016

DATE OF DECISION: December 21, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Ms. M. M., attended the teleconference hearing.

With permission from the Claimant, a member of the Social Security Tribunal (Tribunal), Ms. Maria Marchese, acted as an observer (for training purposes) and did not participate.

INTRODUCTION

[1] On August 31, 2015, the Claimant made an initial claim for employment insurance regular benefits.

[2] On September 22, 2015, the Canada Employment Insurance Commission (Commission) disqualified the Claimant from receiving regular benefits because she did not show just cause for leaving her employment on August 31, 2015.

[3] On September 28, 2015, the Claimant requested that the Commission reconsider its decisions however; on October 27, 2015, the Commission maintained its initial decisions.

[4] On May 7, 2014, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[5] The hearing was held by teleconference given that the Claimant was going to be the only party in attendance and the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[6] The Member must decide whether the Claimant should be disqualified from receiving any benefits as of August 30, 2015 because she voluntarily left her employment without just cause pursuant to section 29 and 30 of the *Employment Insurance Act* (EI Act).

[7] The Member notes that in addition to appealing the above issue, the Claimant indicated in her Notice of Appeal that she was appealing the Commission's decision because it infringed on her Charter rights (GD2-2).

[8] On February 16, 2016, the Claimant attended a prehearing conference so that the Charter process can be explained (GD5). The Claimant indicated at the prehearing conference that she was going to pursue a constitutional challenge before the Tribunal. As such, she was provided until April 18, 2016 to submit her formal notice (GD7).

[9] On March 28, 2016, the Claimant made submissions regarding the merits of this appeal (GD8) but did not submit a formal notice of a constitutional challenge. On April 26, 2016, the Tribunal advised the Claimant that the appeal was going to proceed as a regular appeal on the issue/merits (GD9).

[10] At the hearing, the Claimant stated that she decided to not pursue a constitutional challenge because it was going to be a long and tedious process and she did not have the time or the resources. She will proceed with her appeal on the merits of this case.

EVIDENCE

[11] The Claimant left her employment on August 31, 2015 and on the same day applied for employment insurance benefits (GD3-3 to GD3-12).

[12] The record of employment (ROE) confirms that the Claimant quit her employment as a Payroll Administrator on August 31, 2015 noting that she did so because she was "relocating to be with fiancé (eng. 3/22/2015) distance too great to commute, no possibility of transfer, actively seeking employment in PEI, arrival 9/18/15" (GD3-13). The Member notes that the issuer of the ROE is the Claimant.

[13] To the Commission, the Claimant stated that the reason she left her employment was to relocate to Prince Edward Island (PEI), where her fiancé resides. She moved when she did because of the seriousness of the relationship, her daughter moving to university residence and to job search in her new location. The Claimant and her fiancé have had a long distance

relationship, had never resided together and have no children together. They married in July 2016. The Claimant searched for employment in PEI prior to leaving and thereafter (GD3-15).

[14] On September 22, 2015, the Commission disqualified the Claimant from receiving benefits because she did not show just cause for leaving her employment within the meaning of the EI Act (GD3-16).

[15] The Claimant requested that the Commission reconsider its decision noting that she has been in conjugal relationship with her partner since April 1, 2014, which by definition, does not include co-habitation. They were engaged on March 22, 2015 and married July 16, 2016. The Claimant questioned why other families that live apart qualify for benefits. She is a long time contributor to the employment insurance system and is actively seeking employment. (GD3-18 to GD3-21). To the Commission, the Claimant confirmed that she moved to PEI to be with her partner and that she looked for work prior to leaving (GD3-22).

[16] On October 27, 2015, the Commission maintained its decision noting that had the Claimant been living with her spouse prior to quitting her employment and she had to accompany her to another residence/province, then she would have just cause for quitting. In her case, since they were living apart, there was no urgency for her to relocate so it was reasonable for her to continue doing so until she secured other employment or until closer to their wedding date (GD3-22 to GD3-24).

Evidence to the Tribunal

[17] In her notice of appeal to the Tribunal, the Claimant indicated that she left her employment: to relocate her daughter to X for her first year at university and to relocate to PEI to reside with her fiancé with whom she has had a conjugal relationship since April 1, 2014. A transfer to PEI was not an option, it was financially impractical to travel to PEI in order to secure employment before quitting and she had applied to 6 jobs in PEI before leaving. The claimant included evidence of the 6 jobs to which she had applied at two employers in PEI over four days, August 14, 20, 25 and 26, 2015 (GD2-19 to GD2-56). The Claimant submitted a letter from the Site Manager at Career Development Service Inc. attesting to her committed job search efforts from when she first presented in their office on September 24, 2015 (GD2-5). The

Claimant also provided copies of CUB 33865 and CUB27800 in support of her position (GD2-6 to GD2-13).

[18] The Claimant submitted that she had just cause for leaving her employment pursuant to paragraphs 29(c)(i),(ii),(iv),(x) and (xii). The Claimant indicated that she was harassed and discriminated against by her then (2012 and 2013) supervisor, Mr. D. R., because she was gay. She experienced daily stress over several months for which she sought medical attention and was diagnosed with “GAD”, depression and PTSD. She continued to work despite her mental illness, pursued and won a union grievance and had started a Human Rights Tribunal process when he decided to retire. He was replaced by another supervisor, Ms. C. B., who also belittled and harassed her many times. Then while training in her new position in February 2014, she felt belittled, harassed and bullied by the trainer, Ms. C. M. Her supervisor did not handle her complaints of the trainer and training well, and when she went off on surgery, the supervisor talked about her to other staff. She indicated that she was coerced into breaking Canadian Payroll Guidelines rules. The Claimant submitted that she did not have the financial means to travel to PEI to actively search for work, she was unable to transfer out of her payroll administrator position and she applied to many jobs before she quit. She submitted that she had no reasonable alternative but to quit because she was dealing with far too much stress/anxiety in her workplace and over a long period of time she had been harassed, bullied, mistreated, discriminated against for her sexual identity, gender and her involvement with her union (GD8).

Testimony

[19] The Claimant testified that she primarily decided to leave her employment because of the ‘toxic workplace’ noting the last 5 years were hard and the last 1.5 years were the hardest. She endured mental health issues, sought medical attention and was diagnosed with post-traumatic stress disorder (PTSD). She testified that she initially indicated that she was relocating but another reason was the state of her mental health and the need for time off to get better. She stated that in hind sight, she should have applied for a medical leave as she would have had ample medical time (entitlement), instead of leaving her job all together. The Claimant explained that at the time, her partner was financially well off which gave her the opportunity to recover from her ongoing mental illness (still on medication for anxiety, depression and PTSD). The Claimant pointed to her GD8 submission stating that she should

have been off initially for sickness stating “I was not able to work when I got here” instead she tendered her resignation.

[20] The Claimant testified that she did not bring up these reasons to the Commission because she was just trying to get herself out of that situation. She testified that when she came back (from surgery, 6 weeks) August 10, 2015, she gave notice to her employer, she got an offer on her house and stayed in the house until September 2, 2015, moved her daughter to X for university, then moved in with her brother until she left British Columbia on September 10, 2015.

[21] The Member asked the Claimant to comment on her submissions regarding paragraphs 29(c) (i),(ii),(iv),(x) and (xii). The Claimant reiterated her reasons for feeling harassed and antagonized by two supervisors and the trainer as per her GD8 submission. She did not feel that it was a safe environment and it was a danger to her health noting that others left for the same reason. She spoke to the Chief Administration Officer (Ms. Y.) but she didn’t do anything. Further, as a union executive member she knew others were treated the same, she was being set up to fail, she was yelled at, brought to tears, always friction and hostility in a toxic environment. She stated that she was discriminated against because she was a union shop steward by being told not to go to the union and by not being allowed to go to union events. The Claimant testified that the union did discuss the harassment issue with the employer but nothing was done and nothing improved.

[22] Regarding her alternatives to leaving, the Claimant agreed that there were a lot (23) of job posting given her submission (GD2-55 to GD2-57) and that this was an option, however, she also noted that she was not able to secure anything until December 2015. She could not wait to secure something and then leave, given her toxic work environment. She doesn’t recall speaking with the employer when she was leaving but she had spoken to Ms. Y. over time about how she felt. Many times she was in tears and she was seeking treatment. She stated that if she asked for sick time off, she may have been denied because when she had surgery, she was questioned about how time she really needed so she felt that they would have given her a hard time.

SUBMISSIONS

[23] The Claimant initially submitted that the reason she left her employment was to relocate to PEI to be with her fiancé with whom she has been in a conjugal relationship since April 1, 2014, engaged since March 22, 2015 and planned to marry on July 16, 2016. On appeal, the Claimant submitted that she also left her employment because she could no longer endure the toxic work environment and that given the state of her mental health; she had to leave to get better. The Claimant submitted that she has just cause for leaving pursuant to paragraphs 29(c)(i), (iii), (iv), (x) and (xii). She also submitted that she left on August 31, 2015 because she had sold her house, her daughter moved to university residence and her partner had already left. She had no alternative but to leave because there was no possibility of a transfer with her employer and although she tried to secure employment in PEI before she left, she was not successful. She had discussed her past issues with the employer but to no avail. The Claimant submitted that CUB 33865 and CUB 27800 support of her position (GD2-6 to GD2-13).

[24] The Commission submitted that the Claimant did not meet the requirements under paragraph Section 29(c)(ii) the EI Act for voluntarily leaving employment with just cause because she did not meet the definition of having a ‘common law partner’ or ‘common law relationship’ prior to quitting her employment. The Commission submitted that the Federal Court decision, Thompson (A-26-06) and CUBs 80737 and 76512 support its position noting that although the Claimant is in a committed relationship, she did not cohabit with her partner (thus not in a common law relationship) until after she quit and relocated in September 2015.

[25] Further, the Commission submitted that the Claimant did not show an urgency to leave and she did not exhaust the reasonable alternative of continuing to live apart until she secured employment in PEI. Regarding the Claimant’s submission with respect to CUB 33865, the Commission submitted that it differs from the Claimant’s case because in that case (a) there was an established common law relationship and (b) since that case in 1996, there have been significant changes to social networking and job searching anywhere in Canada is a regular occurrence thus, a reasonable expectation. Regarding CUB 27800, the Commission submitted that this case differs from the Claimant’s situation because there was child involved and a

father-child relationship had been established before the claimant's relocation to accompany the fiancé.

ANALYSIS

[26] The relevant legislative provisions are reproduced in the Annex to this decision.

[27] 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.

[28] The Member recognizes 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).

[29] The Member however must first consider that it is incumbent of the Commission and the employer to show that the Claimant left her employment voluntarily. The onus of proof then shifts to the Claimant to show that she left her employment for just cause (White A-381-10, Patel A-274-09). In this case, the Member finds that it is undisputed that the Claimant left her employment voluntarily on August 31, 2015 (GD3-5 and GD3-13).

Why did the Claimant leave her employment?

[30] The onus of proof now shifts to the Claimant to show that she left her employment for just cause. In this case, the Claimant indicated in her written submissions (GD3-20 and GD3-21), verbally to the Commission (GD3-22) and on her ROE, acting on behalf of the employer, (GD3-13), that she left her employment to relocate to PEI in order to be with her fiancé. The Claimant indicated the same reason in her notice of appeal to the Tribunal (GD2-4). Further, the Claimant indicated to both the Commission and the Tribunal that she left/moved when she did on August 31, 2015 due to other factors including the fact that her daughter was moving into university residence starting September 2015, the seriousness of her relationship (was to be married in July 2016), plus transferring was not an option with her employer and because it was impractical to travel to PEI to job search before leaving her employment (GD2-4, GD3-13 and GD3-15). The Claimant also testified that she had sold her house on September 2, 2015.

[31] The Claimant subsequently submitted to the Tribunal (GD8) that she had just cause for leaving her employment pursuant to paragraphs 29(c)(i),(ii),(iv),(x) and (xii). She testified that her primary reason for leaving her employment was due to her inability to cope in the “toxic workplace” in which she was employed. She indicated that she had been harassed, bullied, mistreated, discriminated against for her sexual identity, gender and her involvement with her union for several years and she was no longer able to deal with the stress/anxiety. The Member notes that the Claimant provided examples of occurrences in 2012, 2013 and February 2014 yet testified that she submitted her resignation after returning from a 6 week sick leave on August 10, 2015. The Member considered that according to case law, only the facts that existed at the time the Claimant left her employment must be considered when determining if one of the exceptions in subsection 29(c) applies. That is, the circumstances pursuant to section 29(c) of the EI Act must be assessed as of the time of resignation (Lamonde A-566-04). In this case, the Claimant did not provide any supporting evidence to support her present position of harassment, discrimination and/or dangerous working conditions at the time she quit.

[32] The Claimant also indicated that she had been diagnosed with, and was on medication for anxiety, depression and PTSD. The Claimant testified that although she had initially indicated that she left her employment because she was relocating, she also left because she needed time to get better given the state of her mental health. The Claimant testified that in hindsight, instead of leaving her job all together, she should have applied for a medical leave because she was unable to work when she got to PEI. The Member notes that her present reason for leaving her employment is contrary to her prior statements to the Commission, her written submissions, and the documentary evidence that she provided to support her position that she was able and eager to secure employment and that she was actively seeking work both prior and immediately upon arriving in PEI (GD2-5, GD2-19 to GD2-56, GD3-13, GD3-15 and GD3-22).

[33] Further, the Member considered that it has been well established case law that claimants who submit that they had just cause for leaving their employment as a result of health issues must (a) provide medical evidence to substantiate their claim by indicating that the claimant is unwell and that he or she was obligated to leave work due to the medical condition (b) demonstrate that he or she had attempted to reach an agreement with the employer to accommodate the health concerns and (c) prove that he or she attempted to find alternative

employment prior to leaving (CUB 80905). In this case, although provided evidence that she made some attempts to find employment prior to leaving, the Claimant has not met the first two conditions.

[34] For all these reasons, the Member placed more weight on her initial, consistent, signed submissions and to her verbal statements to the Commission, than on her subsequent unsupported, contradictory submission (GD8) and testimony that she provided after a decision was rendered by the Commission and after she had appealed to the Tribunal (GD2).

[35] The Member's consideration is supported by case law that states that:

“An abundant and uniform case law has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision.” (CUB 25154)

[36] The Member acknowledges that the Claimant may have had prior issues with her employer and with her health, and that these were factors that contributed to her decision to leave her employment. The Member finds however, that the Claimant voluntarily left her employment when she did on August 31, 2015 because she wanted to relocate to PEI in order to be with her fiancé.

Did the Claimant have just cause for leaving her employment?

[37] The Member considered the circumstances referred to subsection 29(c) and whether any existed at the time the Claimant took leave from her employment. Given the Claimant's reason for leaving, the Member specifically considered paragraphs 29(c)(ii) as a possible circumstance where the Claimant may have just cause for quitting. The Member considered whether the Claimant had no alternative but to leave her employment because she was obligated to accompany a spouse or common-law partner or a dependent child to another residence.

[38] According to paragraph 2(1) of the EI Act, a ‘common-law partner’, in relation to a claimant, means a person who is cohabiting with the claimant in a conjugal relationship, having

so cohabited for a period of at least one year. The Federal Court of Appeal confirmed that in order for a claimant to have just cause for leaving his/her employment in order to accompany a common-law partner in a different location pursuant to paragraph 29(c)(ii), it must be established that the claimant was in a common-law relationship prior to leaving his/her employment. That is, it must be established that the claimant, by definition, had a common-law partner under the Act (Thompson, A-26-06).

[39] The Member also considered that according to section 51.1 of the *Employment Insurance Regulations* (Regulations), another reasonable circumstance to consider for the purposes of paragraph 29(c)(xiv), is whether the Claimant was obligated to accompany a person with whom she has been cohabitating in a conjugal relationship for a period less than a year and, where they had a child, expecting a child or adopting a child during that time.

[40] The Claimant submitted that she was in a conjugal relationship with her partner since April 1, 2014, was engaged on March 22, 2015 and planned to marry on July 16, 2016. She argued that a proper definition of ‘conjugal’ does not include cohabitation. She questioned how her situation is different than any other family that is separated due to work locations and yet they qualify for benefits (GD3-20). On the other hand, the Commission submitted that the Claimant was not considered to be living in a common-law relationship since she had never lived with her fiancé until she moved to PEI in September 2015.

[41] It is undisputed evidence that the Claimant and her partner did not have any children together and had never lived together prior to her quitting and moving to PEI in September 2015 (GD3-15). The Member finds therefore, that although the Claimant was in a serious relationship, the circumstances described in paragraphs 29(c)(ii) and 29(c)(xiv) of the EI Act and section 51.1 of the Regulations do not apply to her case.

[42] The Member notes that even though the Claimant’s reason for leaving is not one of the circumstances referred to in subsection 29(c), the Member considered that in order for just to exist, the Claimant must still show that she had no reasonable alternative but to leave when she did on August 31, 2015. In this case, the Claimant submitted that she could no longer endure the toxic work environment and, given her mental health issues, she had no alternative but to leave her employment in order to get better. The Claimant however did not leave her employment for

medical reasons (for the reasons already provided) nor did she provide evidence to show an urgency to leave for this reason. In fact, the Claimant indicated to the Commission and in her written submissions that she left when she did for personal reasons including the fact that her fiancé was working and living in PEI, her daughter was leaving for university, a transfer was not possible and it was impractical for her to job search from BC in PEI (GD2-4, GD3-13 and GD3- 15). She testified that on August 10, 2015 she gave her employer notice that she was leaving August 31, 2015. She had received an offer for her house; she stayed in the house until September 2, 2015, moved her daughter to X for university, and then moved in with her brother until she left BC on September 10, 2015.

[43] The Member therefore agrees with the Commission that the Claimant did not show that her situation was so intolerable and/or that there was urgency for her to immediately leave, so waiting until she secured other employment in PEI was a reasonable alternative to unemployment. The Member also finds that this is a practical and reasonable expectation as evidenced by the Claimant's own documentary evidence of applications she submitted from BC prior to leaving (GD2-19 to GD2-56) and the 23 job notices she considered (GD2-56 and GD2-57). Plus, the Claimant was able to secure employment in PEI by December 2015.

[44] The Member understands that a transfer to PEI with her employer was not possible and acknowledges that the Claimant attempted to secure employment prior to leaving. The Member finds however, that the Claimant had already provided notice (on August 10, 2015) that she was leaving when she applied for employment at two employers in PEI on August 14, 20, 25 and 26, 2015. The Claimant provided evidence of the 6 jobs to which she had applied at these two employers in PEI (GD2-19 to GD2-56) and a letter from the Site Manager at Career Development Service Inc. in PEI attesting to her committed job search efforts from September 24, 2015, after she had moved there (GD2-5). The Member finds that applying to just 6 jobs at two employers within 4 days, after she had already given notice that she was leaving, is not demonstrative of a concerted effort to secure alternative employment before quitting. The Member also finds that since the Claimant and her partner had never lived together and there was no urgency to leave, so continuing to live apart until she secured employment in PEI is a reasonable alternative that the Claimant did not exhaust prior to leaving. The Member finds

therefore that the Claimant did not meet the onus of demonstrating that she was left with no reasonable alternative but to leave her employment pursuant to subsection 29(c) of the EI Act.

[45] Finally, the Member considered the Claimant's submission that CUBs 33865 and 27800 support her position. The Member agrees with the Commission that these cases differ fundamentally with the Claimant's situation and thus, do not support her position. The Claimant did not have a 'common-law partner' or child/children with her partner as in these cases.

[46] The Member therefore, having regard to all the circumstances, finds that the Claimant has not shown just cause for voluntarily leaving her employment on August 31, 2015, and is therefore disqualified from any benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[47] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Paragraph 2(1) of the EI Act, defines a ‘common-law partner’, in relation to an individual, to mean a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year.

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.

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.

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.

Section 51.1 of the Regulations indicates that for the purposes of subparagraph 29(c)(xiv) of the Act, other reasonable circumstances include

(a) circumstances in which a claimant has an obligation to accompany to another residence a person with whom the claimant has been cohabiting in a conjugal relationship for a period of less than one year and where

(i) the claimant or that person has had a child during that period or has adopted a child during that period,

(ii) the claimant or that person is expecting the birth of a child, or

(iii) a child has been placed with the claimant or that person during that period for the purpose of adoption; and

(b) circumstances in which a claimant has an obligation to care for a member of their immediate family within the meaning of subsection 55(2).