



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. D. v. Canada Employment Insurance Commission*, 2018 SST 1074

Tribunal File Number: GE-18-556

BETWEEN:

D. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Glen Johnson

HEARD ON: July 31, 2018

DATE OF DECISION: September 4, 2018

Decision

- [1] The appeal is dismissed. The Tribunal finds the Appellant voluntarily left employment without just cause; despite his health concerns he had reasonable alternatives to leaving when he did.

Overview

- [2] The Appellant successfully made an initial claim for employment insurance (EI) sickness benefits due to deteriorating health and sleep problems caused by working the night shift as a scaffolder at a gas refinery.

- [3] The Appellant later applied for regular EI benefits; however, the Respondent decided that the Appellant was disqualified from receiving EI benefits because he voluntarily left his employment as a scaffolder without just cause when he had reasonable alternatives to leaving in the circumstances

- [4] The Appellant claims that he did not voluntarily leave employment. He left due to a shortage of work. He had been hired to work a day shift, but when he arrived at the job site the shift was not available to him. He was offered a night shift instead, but he was not willing to work nights. He asked for a verbal lay-off.

Issues

- [5] Issue 1: Did the Appellant voluntarily leave employment when the employer refused his request for day shift work?
- [6] Issue 2: If so, did the Appellant have just cause to voluntarily leave employment due to deteriorating health and sleep problems caused by working the night shift at employment?

Analysis

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

[8] A claimant is disqualified from receiving any EI benefits if they voluntarily left any employment without just cause (subsection 30(1) of the *Employment Insurance Act (EI Act)*).

[9] The Respondent has the burden of proof to show that the Appellant left voluntarily. The burden then shifts to the Appellant, who must demonstrate that, having regard to all the circumstances, on a balance of probabilities, there were no reasonable alternative to leaving (*Canada (Attorney General) v. White*, 2011 FCA 190).

Issue 1: Did the Appellant voluntarily leave employment when the employer refused his request for day shift work?

[10] The Tribunal finds that the Appellant voluntarily left employment despite the Appellant's claim that he left due to a shortage of work because he was hired to work a day shift, but that was not available when he arrived at the job site and he was given a night shift.

[11] When determining whether the Appellant voluntarily left his employment, the question to be answered is: did the employee have a choice to stay or leave (*Canada (Attorney General) v. Peace*, 2004 FCA 56)?

[12] The Tribunal finds that the Appellant initiated the departure from employment. The Appellant had a choice to stay or leave.

[13] A "*dispatch sheet*" for the scaffolding job at a gas refinery indicates that he was hired for the night shift and there is no written employment contract or other information to support the Appellant's claim that he was hired for the day shift. His employer completed a Record of Employment indicating "*quit*" as the reason for leaving.

[14] The Appellant testified and former co-worker, L. W. confirms that he asked his immediate supervisor to change his shift from nights to days, and when that request was refused, he asked for and received a “*verbal lay-off*”.

[15] The Appellant and witness H. E. (employed in the office of his Member of Parliament) argue that because the employer agreed to a verbal lay-off, his departure was due to a shortage of work. However, the Tribunal finds that the Appellant has not provided information to support that he left employment because work was no longer available to him. Instead, he chose to leave employment because the employer refused his request for day shift work.

Issue #2: Did the Appellant have just cause to voluntarily leave employment?

[16] The Tribunal finds the Appellant did not have just cause to voluntarily leave employment when leaving was not the only reasonable alternative having regard to all the circumstances.

[17] In order to establish just cause, the Appellant must show that, having regard to all the circumstances, on a balance of probabilities, there were no reasonable alternatives to leaving employment (*White*).

[18] Working conditions that constitute a danger to health or safety is listed under the non-exhaustive list of circumstances to be considered when determining whether there is just cause (*EI Act*, subparagraph 29(c)(iv)).

[19] However, the Tribunal finds that the medical information and information from the Appellant does not support that the work conditions were a danger to his health or safety. The Appellant decided to leave his employment because he felt that working the night shiftwork was causing health problems.

[20] In his initial application for sickness EI benefits the Appellant claims that he quit employment because of deteriorating health and sleep problems caused by working the night shift. However, he stated that he did not discuss his health concerns with a doctor

before leaving, he did not pursue a grievance through his union and he did not seek alternate work before leaving employment.

[21] Although the Appellant's doctor wrote a note in support of sickness EI benefits due to his acute stress with anxiety and insomnia after he had left employment, he does not mention that the Appellant was advised to quit his employment. The Appellant testified that he did not get medical advice to support that he was unable to return to his scaffolding job.

[22] The Tribunal finds that the Appellant made a personal choice to leave work that he found difficult and was adversely affecting his health. Although a personal choice may constitute good cause, it is not the same as just cause for leaving employment and causing others to bear the burden of the Appellant's unemployment (*Canada (White; Tanguay v. Canada (Unemployment Insurance Commission)*, A-1458-84).

[23] Just cause is not the same as a good reason. The question is not whether it was reasonable for the Appellant to leave employment, but rather whether leaving employment was the only reasonable course of action open to him, having regard to all the circumstances (*Canada (Attorney General) v. Imran* 2008 FCA 17; *Canada (Attorney General) v. Laughland*, 2003 FCA 12).

[24] The Tribunal finds that information from the Appellant's employer also does not support that he had just cause to leave employment when he did. The employer said that he abandoned his job; he just stopped coming in to work. They said that they unsuccessfully tried to reach him by telephone and there was nothing in his employment file about an agreement to work the day shift or about medical issues affecting his work.

[25] The Appellant had reasonable alternatives to leaving when he did.

[26] The Appellant worked shift rotations where he would return home and have several consecutive days off. He could have tried to secure alternate work after his first rotation. Remaining in employment until a new job is secured is generally a reasonable

alternative to taking a unilateral decision to quit a job (*Canada (Attorney General) v Graham 2011 FCA 311*).

[27] The Appellant found that work was becoming difficult for him and leading to health concerns, but he left work before getting reasonable assurances of another job in the immediate future (subsection 29(c)(vi) of the *EI Act*). As in most cases the Appellant has an obligation to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (*White*).

Conclusion

[28] The appeal is dismissed. The Tribunal finds that the Appellant has not proven just cause for voluntarily leaving his employment when there was a reasonable alternative to leaving having regard to all the circumstances and he is accordingly disqualified from receiving any benefits in accordance with sections 29 and 30 of the *Act*.

Glen Johnson

Member, General Division - Employment Insurance Section

HEARD ON:	July 31, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. D., Appellant L. W., witness H. E., witness

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 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.

30 (1) 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.

(2) 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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.