



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: W. L. v Canada Employment Insurance Commission and X, 2019 SST 822

Tribunal File Number: GE-18-3698

BETWEEN:

W. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: February 6, 2019

DATE OF DECISION: February 11, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked as an early childhood educator assistant at the daycare centre X (daycare) for several months. Her employment ended in August 2018. The Appellant argues that she was dismissed from her employment after taking days off to care for her daughter, who was recovering from surgery.

[3] However, the employer argues that the Appellant resigned from her employment because her husband contacted the daycare to tell them his wife would not be returning to work.

[4] After reviewing the claim for benefits, the Canada Employment Insurance Commission (Commission) determined that the Appellant had voluntarily left her employment at the daycare without just cause. The Appellant was therefore disqualified from receiving benefits.

[5] The Appellant now disputes the Commission's decision. She maintains that she did not leave her employment voluntarily, that she liked her work, and that she was simply taking a few days off to care for her daughter.

ISSUES

[6] Did the Appellant voluntarily leave her employment at the daycare?

[7] If so, did she have just cause for leaving her employment? In other words, did the Appellant have no reasonable alternative to leaving?

ANALYSIS

[8] According to section 30 of the *Employment Insurance Act* (Act), a claimant who voluntarily leaves their employment without just cause is disqualified from receiving Employment Insurance benefits. However, just cause for voluntarily leaving an employment

exists if the claimant had no reasonable alternative to leaving, having regard to all the circumstances (section 29(c)).

[9] The onus is on the Commission to show that the leaving was voluntary, and a claimant has to show that they had just cause for leaving their employment (*Green v Canada (Attorney General)*, 2012 FCA 313).

[10] Therefore, as a first step and before ruling on the issue of just cause, the Tribunal must determine whether there was, in this case, a situation of voluntary leaving.

Did the Appellant voluntarily leave her employment at X?

[11] The Tribunal finds that the Appellant did not voluntarily leave her employment for the following reasons.

[12] To understand the nature of the dispute, it is useful to summarize the parties' versions of the facts and arguments.

Appellant's version of the facts

[13] The Appellant argues that her employer dismissed her after she took several days off to care for her daughter, who was recovering from surgery. She submits the following:

- a) She liked her job and had no reason to want to leave.
- b) On Saturday, August 18, 2018, her daughter was hospitalized and had surgery on her appendix during the night. The Appellant informed the daycare director of the situation the following day (Sunday, August 19).
- c) The Appellant could not go to work on Monday, August 20, because her daughter had not yet recovered from surgery and needed her mother's care for a few days. Despite this, the director asked her to work the following day (August 21).
- d) During the day on August 20, the Appellant's husband, X, called the daycare to tell them his wife would not be at work on August 21 either, because of his daughter's

surgery. Initially, he spoke to a daycare employee to inform them of her absence. Later, he spoke to the director's husband, X, to inform him that, based on labour standards, the employer would normally be required to provide his wife with up to 10 days of unpaid compassionate leave. He also said that the employer's attitude (refusing such leave) would push employees to leave.

- e) On August 21, the Appellant contacted the daycare director to find out her work schedule for August 22. The daycare director referred her to X, who told her [translation] "you no longer work for us."

[14] The Appellant's version of the facts is supported by statements from her husband, who was significantly involved in the events surrounding the termination of her employment.

Employer's version of the facts

[15] The daycare director (employer) submits a slightly different version of the facts:

- a) She considered the Appellant a friend and good employee and had no intention of dismissing her.
- b) During the week of August 18–19, she received a photo of the Appellant and her daughter at the hospital. That day, the employer said that she talked to the Appellant about her situation on friendly terms, but that there was never any question of a leave from work.
- c) On Monday, August 20, the Appellant did not show up to work. The employer contacted her, and the Appellant explained that she had to stay home because of her daughter's surgery. The employer gave her the day off, but told her she had to work on August 21.
- d) During the day on August 20, the Appellant's husband contacted the daycare to tell them his wife was resigning and would not be returning to work. The Appellant did not show up to work on August 21.

- e) During the day on August 21, the Appellant contacted the employer to ask for her work schedule as of August 22. The employer told the Appellant that her husband had already contacted the daycare to resign on her behalf. She told the Appellant:[translation] “X, your husband already gave a decision. He said you would not be returning to work. Let’s leave it at that; I don’t want to get involved in your issues. Can we please remain friends? It’s better that way.” The Appellant then spoke to the director’s husband, X, who had nothing more to add (he told her: [translation] “You spoke to X? I’ll leave you to sort it out with X.”¹).

[16] This version of the facts is supported by a written statement from a daycare employee, who submits that the Appellant’s husband called during the day on August 20 to say his wife would not be returning to work.²

Commission’s submissions

[17] The Respondent submits that the Appellant voluntarily left her employment. In the Commission’s view, the Appellant failed to demonstrate that she was dismissed and that the employer lied about the reasons for the termination of employment.

[18] The Tribunal finds that the employer’s and the Appellant’s versions of the facts are inconsistent. However, some of the inconsistencies are irrelevant to establishing whether the Appellant voluntarily left her employment. To address the issue, it appears that the Tribunal must respond to two subquestions at the heart of the parties’ discord: Did the Appellant’s husband contact the daycare on August 20 to tell them his wife was leaving? If so, can we find that the Appellant voluntarily ended her employment?

¹ Hearing recording (from 27 minutes and 20 seconds).

² GD3-34.

Did the Appellant's husband tell the daycare that his wife was leaving?

[19] Despite the Appellant's and her husband's statements on this issue, the Tribunal finds that X did contact the daycare around August 20 to resign on behalf of his wife. The Tribunal reached this conclusion for three reasons.

[20] First, the employer confirmed that she had no reason to want to get rid of the Appellant. Rather, the employer restated that the Appellant was a valued employee and that the daycare was short staff.³ In this context, the Tribunal does not see why the employer would want to hurt the Appellant by lying about the content of that conversation. Second, a daycare employee confirmed that she spoke with the Appellant's husband about her leaving. In the Tribunal's view, it is unlikely that this third party, who is not directly related to the issue, would have reason to fabricate comments the Appellant allegedly made during that conversation. Third, the Appellant's husband acknowledged telling the director's husband that the director would push her employees to leave in acting the way she did (that is in refusing compassionate leave).⁴ Depending on the exact wording of the conversation, it is possible that the employer interpreted it as a resignation.

Can we find that the Appellant voluntarily left her employment?

[21] Having said that, even if we find that the Appellant's husband did indeed contact the employer to let her know about his wife's resignation, can we find that the Appellant left her employment voluntarily? In other words, should the Appellant's husband's actions and words be interpreted as the Appellant's resignation? The Tribunal finds that they cannot, for the following reasons.

[22] First, it was legitimate for the Appellant to ask for several days off work to care for her eight-year-old daughter. Her daughter had just undergone surgery and needed her mother by her side, which is perfectly normal. The Appellant was not asking for several weeks off work; she asked for two days off work (August 20 and 21). Furthermore, despite what the employer argues, it appears that no one else was available to care for the Appellant's daughter during that time

³ GD3-36 and 42.

⁴ GD2-3.

because her father worked nights (and had to sleep) and her grandparents were in Niagara Falls until August 22. Therefore, the Tribunal finds that the Appellant had no reason to want time off work other than to care for her daughter for a few days. There is no indication that she wanted more time off or that she wanted to leave for good. It is possible that the Appellant celebrated Eid al-Adha during her absence from work (GD3-36), but the Tribunal does not find that to be the reason for her absence.

[23] Second, the Appellant was clearly unaware of the nature of the conversations between her husband and the employer. The Appellant contacted the daycare during her second day off (August 21) to find out her work schedule for August 22. This shows that she clearly intended to return to work after her two days off and that she was unaware that her husband had discussed her resignation with the daycare.

[24] Third, the Appellant herself did not resign, verbally or in writing, and there is no indication that she intended to do so. Rather, at the hearing, she testified clearly that she liked her work, that she planned to return to work as soon as possible, and that she simply needed some time to care for her daughter.

[25] The Tribunal acknowledges that the Appellant could have been more diligent, namely by clearly notifying the employer of her absence and by speaking to the employer directly. However, in the context of this case, the Tribunal finds that this was not determinative in establishing whether the Appellant voluntarily left her employment.

[26] In fact, to determine whether leaving is voluntary, the Tribunal must simply ask the following question: Did the Appellant have the choice to stay or to leave her employment? (*Canada (Attorney General) v Peace*, 2004 FCA 56)

[27] Based on the facts of this case, the Tribunal finds that the Appellant did not have the choice to stay or to leave. When the Appellant contacted the employer on August 21 to find out her work schedule, the employer refused to give it to her on the ground that her husband had resigned on her behalf the day before. Therefore, the Appellant's termination of employment was imposed on her and was not voluntary.

[28] There is no indication that the Appellant’s husband had power of attorney or any authority to make a decision as important as resigning from an employment on behalf of his wife.

[29] The Tribunal finds that the Commission appears to have imposed too heavy a burden on the Appellant in asking her to prove that she did not voluntarily leave her employment.⁵ However, case law in this type of file clearly establishes that the onus is on the Commission to show that the leaving was voluntary, and not the other way around (*Green, supra*).

[30] The Tribunal finds that the Appellant did not voluntarily leave her employment at the daycare. Given that the Tribunal finds that there was no voluntary leaving, it is not relevant to continue with the analysis of this issue.

CONCLUSION

[31] The Appellant did not leave her employment voluntarily. The appeal is allowed and the disqualification imposed by the Commission is rescinded.

Yoan Marier

Member, General Division – Employment Insurance Section

HEARD ON:	February 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. L., Appellant X, Representative for the Appellant / Witness X, for X

⁵ GD4-6 and 7.