Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *LA v Canada Employment Insurance Commission*, 2019 SST 1719

Tribunal File Number: GE-18-3655

BETWEEN:

L. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: January 28, 2019

DATE OF DECISION: February 27, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant is a paramedic. She had worked for almost five years on a casual on-call basis for a company that supplied industrial rescue services to various construction sites. The Appellant quit her employment on September 3, 2017 because of safety concerns, harassing behaviour from the couple who owned the company, excessive and unpaid overtime hours, and being offered pay for a prospective job that was not equal to that offered to a male counterpart for the same job. The Canada Employment Insurance Commission (the 'Respondent") disqualified the Appellant from regular Employment Insurance (EI) benefits from September 3, 2017 because she voluntarily left her employment on September 3, 2017 without just cause. The Respondent's position is that the Appellant had reasonable alternatives to leaving work available to her.

PRELIMINARY MATTERS

[3] This matter had first been heard by the General Division on May 9, 2018 and a decision rendered on June 6, 2018. The Appellant sought leave to appeal that decision and leave was granted by the Appeal Division on August 1, 2018. The Appeal Division issued a decision on November 28, 2018, finding that the Appellant had raised the issue of her excessive hours and unpaid overtime, as well as the manner in which she considered the employer's behaviour to be harassing as part of her justification for leaving but the General Division erred by failing to consider the relevance of these circumstances. As such, the matter was returned to the General Division for reconsideration.

[4] The Tribunal member reconsidering this matter canvassed with the Appellant's counsel his position on the hearing tape from the hearing held on May 9. 2018. The Tribunal member advised that the tape had not been listened to, as the member considered this a hearing de novo and that the decision should be based on evidence presented to this member. The Appellant's counsel agreed. Accordingly, the Tribunal member did not listen to the tape from the initial hearing on May 9, 2018 and has not considered the oral evidence given at that initial hearing in

rendering this decision.

[5] The Appellant had two former co-workers witnesses testify in support of her appeal, E. F. (E.F.) and E. C. (E.C.).

ISSUES

[6] Issue 1: Did the Appellant voluntarily leave her employment?

[7] Issue 2: If so, did the Appellant have just cause to voluntarily leave her employment?

ANALYSIS

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

[9] The Respondent has the burden of proof to show that the Appellant left voluntarily. The burden then shifts to the Appellant to establish she had just cause for doing so, by demonstrating that, having regard to all the circumstances, on a balance of probabilities, she had no reasonable alternative to leaving (*Canada (Attorney General) v. White*, 2011 FCA 190).

Issue 1: Did the Appellant voluntarily leave her employment?

[10] Yes. The Appellant voluntarily left her employment on September 3, 2017.

[11] Whether an individual has been constructively dismissed is a different issue than whether or not an individual has voluntarily left their employment within the meaning of the Act. When determining whether the Appellant voluntarily left her 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 Record of Employment (ROE) dated September 12, 2017 from the employer notes the Appellant worked from October 6, 2012 to September 4, 2017. The reason for issuance is noted as “E” (Quit). The ROE provides in the comments section “Quit with no notice provided”.

[13] The Appellant testified that she had submitted her resignation to the employer by email on September 3, 2017. The email is on file. It is directed to one of the owners of the employer and provides: "I am writing to inform you that I am resigning from my position with [employer's name] effective today September 3, 2017. I have enjoyed my time working with [employer's name] over the last almost 6 years and took pride in my work and dedication to the job. Thank you for the opportunities you have given to me over the years. I will drop off the trailer keys in my possession for the X project." (GD3-37)

[14] There is no evidence that the employer initiated the Appellant's separation from her employment.

[15] The Tribunal finds that the Appellant had a choice whether to stay or leave her employment and she chose to leave her employment on September 3, 2017.

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

[16] Yes. The Appellant had just cause to voluntarily leave her employment. Having regard to all the circumstances, the Tribunal finds that the Appellant had no reasonable alternatives to leaving her employment.

[17] The test for determining whether the Appellant had "just cause" under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, the Appellant had no reasonable alternative to leaving the employment (*Canada (Attorney General) v. White* 2011 FCA 190). Subsection 29(c) of the Act provides a non-exhaustive list of various circumstances that is to be taken into account in considering whether a claimant has just cause for voluntarily leaving his or her employment.

Circumstances of leaving

[18] The Appellant testified that she left her employment on September 3, 2017 for various reasons. Her primary reason was due to concerns with having to work with unsafe safety equipment and having to work with and supervise staff that were not properly trained, putting her own safety at risk as well as her paramedic licence. She testified that a further reason was harassment by the couple who owned the company, who would constantly phone or text her or

show up at her house on days she was not working. Also factoring into her decision were having to work excessive hours with no overtime pay and being offered a lower rate of pay than a male colleague was offered for the same job, despite her having more seniority than her colleague did.

Working conditions that constitute a danger to health and safety

[19] The Tribunal has considered whether the Appellant's circumstances fit within the provisions of paragraph 29(c)(iv) of the Act: working conditions that constitute a danger to health or safety.

Appellant's evidence

[20] The Appellant testified that the employer hired her in November 2012 to do rescue work. A couple (Mr. "A." and Mrs. "A.") owned the company. The company supplied rescue workers and medics to industrial construction sites. The Appellant testified that she is certified as a paramedic, a medic, a rescue technician and is also certified to do high angle and confined space rescue.

[21] The Appellant gave evidence that she left her employment on September 3, 2017 for many reasons. However, the primary reason had to do with safety concerns. In particular, some of the staff she was required to work with had no background in industrial rescue. She related that sometime after 2014, the caliber of the staff working with this employer had diminished. Some of the staff were still in school training to become paramedics or firefighters and some thought it was just easy work and did not understand the potential severity of how quickly something could go wrong on a job site. The Appellant explained that when she started with this employer, new staff were given 3 days of training by the employer, which was comprised of a day and half of theory and a day and a half of practical training where the staff practiced using the equipment, and entering confined spaces. However, over time the employer reduced the training to only a day and a half. The Appellant testified that the employer's comment to the Respondent that employees had 40 hours of training before going on the job site (GD3-38) was not accurate. No employee ever got 40 hours of training before going on a job site. A new employee only received 16 hours of training.

[22] The Appellant explained due to the nature of the job being on-call and casual, there was a high turnover rate of staff. Often, fill-in staff who had not completed their training would be thrown into a job at the last minute because the jobs would come up at the last minute. The Appellant explained that the lack of adequate training meant that staff sometimes did not know how to properly use the safety equipment or actually perform the rescues.

[23] In addition to the poorly trained staff, the Appellant testified that the employer was not keeping up with paperwork regarding required certifications. She explained that on some job sites training and certification is mandatory and the contractors would require the employer to provide the certifications to them in case the Ministry of Labour requested them. She related that while it is the individual worker's obligation to keep their certifications up to date, the employer's obligation is to make up the certificates and keep records of the certifications. The Appellant was aware the employer was not properly documenting workers' training or keeping the records up to date. She gave an example of one job site where her employer provided a contractor with a certification for her confined space rescue training dated back to 2013, despite the fact she was certified in and could teach confined space rescue.

[24] The Appellant testified that another major safety concern was that staff were not provided with the appropriate safety equipment and the equipment was not properly maintained. She spoke to the owners numerous times about the condition of the equipment. The Appellant testified she was told that she could not use the new equipment the employer had, as it would get dirty. The Appellant explained that, however, in an industrial setting everything gets dirty. The failure to provide proper equipment put her life and the lives of others at risk. The owners would tell her they would deal with things but it never got done. Everything she tried to address kept falling on deaf ears.

[25] Despite the safety risk, the Appellant testified, that she got into a vicious cycle, as she did not have another full-time job. She kept saying yes to the jobs even though she did not want to put herself in a hazardous situation, as she needed a paycheque. However, over time things became intolerable. The Appellant related that she did not want to continue to be put in a situation where she or someone else could be potentially injured and that is why she ultimately left.

[26] The Appellant testified about the timing of her actual resignation. She explained that she had been on a three-week leave of absence from August 15, 2017 to September 4, 2017 as she had suffered a miscarriage. The owners were aware of the reason for the leave but did not respect the leave. During the period of leave, the owners were constantly calling her and texting her, asking her to work, as they were short staffed. In the last week of the leave, on the Tuesday leading up to the Labour Day weekend in 2017, Mrs. A. messaged the Appellant to tell her they had secured a new contract at the X site to look after the medical, confined space and high angle rescues. They wanted her to go up to the site to be the site liaison and to oversee a rescue team of 2 to 3 people. The Appellant testified that at the time of this offer, she was mentally and physically drained but the owners were rushing her to make a decision. She told Mrs. A. that she had to discuss this with her spouse.

[27] The Appellant testified that the employer had a previous contract on this site to do confined space rescue in 2015. She worked there for 5 weeks until her employer lost the rescue contract. The Appellant also worked at the X site from March 2016 to July 2017 as a medic. When she was there on the rescue contract in 2015, the employer sent a new hire to work with the Appellant who Mrs. A. told her was a certified paramedic. However, he had no idea what to do and no idea how to set up the equipment. The Appellant spoke to Mrs. A. about this and was told by her that she needed to make do with whom she was working with. When the Appellant got back home from the project, she spoke to Mrs. A. again who confirmed that the new hire was not, in fact, a paramedic. The Appellant was concerned this was going to happen again if she returned to the X project in a rescue capacity.

[28] The Appellant explained that the X site was a massive construction project where a power plant was being built. The job site itself was 25 acres and sat on a 93-acre property. The building had 800 people working on it. There were people working 100 feet in the air and also working underground. The Appellant related that this was a very complex site and to have people with no industrial rescue experience working on this job was not safe.

[29] The Appellant was worried about taking this position as it meant being away for long periods and she was concerned, based on her previous experience with new employees, that they would not have adequate training. She was also worried about supervising staff who might not

have proper certifications. She explained that this could result in fines by the Ministry or even jail time if a fatality occurred, for which she would be responsible as the supervisor.

[30] The Appellant testified that she did attend the X site on the Thursday and Friday of that week as requested by the owners. She met one of the new employees and it was her understanding that the owners had hired him over the phone. She was asked by the owners to bring this employee's certification back with her to them. She checked into this employee's certification and he had only done an online certification for confined space awareness, which did not mean that he could actually do confined space rescues. The Appellant testified that it is essential to be able to rely on your co-workers in industrial rescue situations. This individual was not certified to do confined space rescue.

[31] On the way home from the site, the Appellant phoned Mrs. A. to discuss her concerns. She talked to her about the hurdles that were present on this job site as the company was replacing another rescue company and they had not been on this job site for almost 2 years in a rescue capacity. She tried to explain to Mrs. A. that it was going to be a major undertaking to get things up and running. The Appellant confirmed that they did not speak specifically about the staff not being properly trained as Mrs. A.'s stance to her other concerns was that "I am going to run the job as I see fit.". The Appellant testified that Mrs. A. did not care what the Appellant was saying. After considering matters over the weekend, the Appellant then submitted her email resignation on the following Monday, September 3, 2017.

[32] The Appellant's information in her application for benefits and provided to the Respondent was consistent with her testimony. In her application for benefits, the Appellant relates that she did not wish to risk her paramedic licence or the lives of others in this situation by having untrained workers on the job.

E.F.'s evidence

[33] The Appellant's witness, E.F., corroborated the Appellant's concerns with safety issues. He is now a full-time firefighter in Texas. E.F. explained that he had extensive training in rescue. He is one of 125 people in the world certified as an urban search and rescue specialist. He testified that he had been employed with the same employer as the Appellant as a rescue

technician doing ropes rescue and confined space rescue from May 2016 to August 2017 and attended about 15 to 20 job sites for this employer. E.F. testified that he had worked on many sites with the Appellant and that she was very educated in rescue. He explained that in Ontario, if there were confined space or high angle work being done on a construction project, the employer would have to hire a company such as the one they were employed at, to be on standby in case such a rescue is required.

[34] E.F. testified that when he first started with this employer, everything seemed well. However, as he gained more training on rescue, he started to notice more flaws in the employer's ways. They had to use malfunctioning equipment and equipment that was not up to par. Even though the company had rescue harnesses, the harnesses that were supplied to them were construction worker harnesses, not rescue style harnesses. He explained that construction harnesses could be dangerous to use in rescues and he told the owner about that. However, the problem was not addressed. He got so tired of using the wrong harness that he bought his own rescue harness. E.F. confirmed that on all the sites he worked together with the Appellant, they did not have the proper rescue harnesses supplied to them.

[35] E.F. explained there was also a problem with the ropes at every site he attended with the Appellant. He explained that life safety ropes have to be maintained in a certain way. They must be properly cleaned. However, to his knowledge, the employer only cleaned the ropes once a year. He would notice dirt, abrasions, liquid stains, and possible chemical stains on the ropes and those ropes should have been thrown out. He pointed out that he had asked the owners for new ropes on many occasions but they were not provided. E.F. stressed the necessity of being able to rely on the equipment in rescue work.

[36] E.F. gave another example of faulty equipment. He explained that the winches they were required to use would sometimes kink. If a hook on the winch popped out showing a red label, which meant the winch was to be taken out of service. However, this was not done with this employer and they had no other choice but to use winches that should have been out of service.

[37] E.F. testified that in addition to the equipment issues, he had a concern that many of the staff were not properly trained for the job. He gave an example of self-contained breathing apparatus equipment. He explained that individuals must be clean-shaven to wear a mask and it

is a lifeline if something goes wrong. However, some staff did not know this. Others did not know basic rope concepts, or about different pulley systems, or how to assemble the equipment, or how to use gas monitors. He testified that only a handful of staff knew how to properly use the equipment.

[38] E.F. testified that some of the employees had EMS or pre-EMS backgrounds. However, many of the staff simply wanted a paycheque. E.F. explained this is a concern because, if something goes wrong, your life, your partner's life and the worker's life is at risk. It is a necessity that you can rely on your partner. E.F. explained that in his opinion the employees were not being properly trained as to what the job required. He related that in Ontario, there are a certain number of training hours that have to be done to rescue work. However, it is up to the employer to take it to the next level. His sense was that over time the training got worse at this company. E.F. testified that staff may have had the required certifications on paper but a lot of them did not practically know what they were doing.

[39] E.F. explained what led up to his leaving of the company. He testified that he was supposed to start the X project in 2017 and to take turns with the Appellant as the lead rescuer and to supervise the project with the Appellant. They would be doing more or less the same job but on different schedules. He was told that he would be paid $28.00 to $30.00 per hour. He thought he was the only one being offered extra pay. He heard through the grapevine that different people were offered different deals. He was supposed to drive out to the X site to start but was then told by the employer that he had people out there and he was not needed. E.F. had asked other employees who was at the site and was told it was new hires that had not gone through the required training. He also talked to the training chief at the employer who told E.F. that he had not trained the new hires and he had no idea who had. E.F.testified that he left the company the next day, as he did not want to be subjected to unsafe conditions and he did not want to work with people who could not look after him. He felt the employer was risking workers' lives.

E.C.'s evidence

[40] The Appellant's witness, E.C. also corroborated the Appellant's safety concerns. She testified that she is a paramedic, an advanced emergency medical attendant and is certified in confined space rescue. She has worked as a military paramedic for the last 5 years.

[41] E.C. testified that she worked with this employer from 2014 and is still technically employed with the employer, although she had not accepted any jobs from them for a year and a half. She had worked at job sites all over the X and X, Ontario for this employer.

[42] E.C. testified that in 2016 she worked on the X project as a medic. She rotated this job on and off with the Appellant. They would work 8 to 10 hours a day a week at a time. There was no overtime pay and she did not know if the employer had a permit to allow overtime work. The overtime hours were banked. She explained that this was a very large site. A power plant powered by natural gas was being built on the site. There were trailers and towers being built and confined space and high angle work going on.

[43] E.C. related that she had expressed concern over certification practices to the employer. She explained that she was supposed take a re-certification course every year to work as a confined space technician. However, she only did so maybe once. While she knew her job, she did not have the required certification. She would be scheduled to take the course and then a day or so before the course was to begin, Mr. A. would take her out of it and send her to another job site. She had expressed her concern about that but was never given the course. She was uncertain what the employer was putting on the certifications that were being provided to contractors when on paper she did not have the required certification. She suspected if this was happening to her, it might also have been happening with other employees.

[44] E.C. testified further that she had experiences with equipment not working. She gave an example from 2016, where a breathing apparatus was not working at a site she was on. She asked Mr. A. every day for a week to get the problem rectified but it was not. E.C. explained this piece of equipment is necessary for confined space rescue. She gave another example from 2017 when she was on a site in Woodstock where the hook on the winch that is used to lower people up and down out of a space had popped out. There were integrity issues with the winch

and she refused to take it to the site. She sent pictures to Mr. A. However, he told her it was good to use for the day. She however refused to use it. The employer did not remedy the situation and she was able to get a back up winch from someone other than the employer.

[45] E.C. also noticed issues with training. She pointed out that from 2016 on there seemed to be a severe lack of training. The new employees did not know what kind of standard of behaviour they should be demonstrating on job sites. There was one staff member who was falling asleep on one job site. E.C. explained that the training of new hires had decreased from three days to one and half days.

[46] E.C. explained why she had not taken any work from this employer in a year and a half. She testified that she was also asked by Mr. A. to attend the X job site in 2017. She told Mr. A. that she wanted to know what they were doing, how they would be paid and where they were staying. She was concerned because she had not previously been paid for her travel time back and forth to the X site. Despite her asking Mr. A. multiple times to email this information, he never did so she did not take this job. She stopped taking jobs after that from this employer because every time she brought up an issue, the owners would dance around it and make it seem like they were providing a solution but they were not which took a toll on her.

Employer's evidence

[47] Mr. A. advised the Respondent that the Appellant was asked to overlook the start up of a new project but not new employees. He stated that everyone was trained and the company never puts people in the field that are not trained as they do not want to tarnish their reputation. The employer explained that employees are required to have 40 hours of internal training and because the project had to begin quickly, they used their existing employees. He further explained that they would be adding other employees in time after they complete their training. He stated that all the roles and positions requires everyone to be certified. He stated that everyone has diplomas and certificates and are more highly trained than the Appellant was. She may have more hours of service but not more training. The employer stated that from a safety or training perspective, all employees are more than qualified.

[48] The Tribunal does not accept the employer's evidence that employees were given 40 hours of training. This is inconsistent with the credible tested evidence of both the Appellant and E.C. that only a day and a half of training was provided. The Tribunal also rejects the employer's evidence that existing employees were going to be working at the X project. This is inconsistent with the credible testimony of the Appellant that she had actually gone out to the site and met with a new hire she was to work with at the project who had only an online certification for confined space awareness.

[49] The Tribunal finds that the Appellant's working conditions constituted a danger to her safety within the meaning of paragraph 29(c)(iv) of the Act and this was one of the circumstances she left her employment. In that regard, the Tribunal accepts the Appellant's credible evidence, corroborated by the two witnesses, that this employer did not provide the required safety equipment on job sites, did not maintain the safety equipment, did not keep the safety certification information up to date and placed the Appellant in unsafe situations by not providing sufficiently training to workers that the Appellant would be required to work with and supervise. The overwhelming evidence presented by the Appellant and the two witnesses is of an employer who provided improper and poorly maintained safety equipment as well as poorly trained staff across its job sites.

Practices contrary to law

[50] The Tribunal has considered whether the employer was engaging in practices that are "contrary to law" as contemplated by paragraph 29(c)(xi) of the Act.

[51] The Appellant submitted that a contributing reason for leaving her work was that she was required to work more hours than allowed and also was not paid overtime pay, in contravention of the *Employment Standards Act*. Further, the employer was intending on violating the equal pay for equal work provisions of the *Employment Standards Act* in offering a male co-worker a higher wage than her to do the exact same job, despite the fact she had more seniority.

[52] Section 17 of the ESA sets a maximum limit of hours worked to 8 hours per day and 48 hours in a work week unless the employer and employee have agreed otherwise and the agreement is approved by the Ministry of Labour.

[53] Section 22 of the ESA provides for payment of wages at a rate of one and half times the regular rate for each hour worked in excess of 44 hours per week.

[54] In her application for benefits, the Appellant related that she had been required to work five to six 12-hour shifts in a row not including 4 hours driving back and forth to the job site. She related having worked 140 hours in a 2-week pay period and that she was not paid overtime as the employer said they could not afford it. She also related not being paid to pick up other employees and run errands (GD3-12).

[55] The Appellant testified to the same effect. She said her hours were sporadic and different depending on the job sites. She could be working from 2 hours a day to 16 hours a day or more on a job site. When she was at the X site as a medic, she worked 10-hour shifts, 7 days a week, rotating between day shift and night shift. She would be in X for 2 weeks and then would come home for a week. She might have a day or two off in that 2-week period in X but sometimes would also have to work on weekends. She was not aware of any exemption that the employer obtained from the Ministry of Labour to allow these lengthy hours. As well, she was not paid overtime pay after working over 44 hours per week. Mr. "A." told her they could not afford to pay overtime so instead they banked her overtime hours, which they paid out to her at the regular pay rate in October 2016. The Appellant confirmed in her Notice of Appeal that the period she worked as a medic at the X site were from March 2016 to July 2017.

[56] Although the Appellant has not provided any pay stubs or time sheets corroborating the excessive hours and lack of overtime pay, the Tribunal accepts that the Appellant was required to work overtime hours in excess of 44 hours per week and was not paid overtime pay for her overtime hours when she worked at the X site from March 2016 to July 2017. The Tribunal also accepts that she was required to work in excess of 8 hours at other job sites, sometimes working 16-hour shifts. The Appellant's testimony of the hours worked and the lack of overtime pay was corroborated by that of E.C. who had worked with her on the X site.

[57] The Tribunal finds the employer breached both sections 17 and 22 of the ESA in its requirement of excessive hours and lack of overtime pay and these were practices contrary to law within the meaning of paragraph 29(c)(xi) of the Act. There is no evidence that the employer had obtained any approval from the Ministry of Labour to allow these practices. The Tribunal also

accepts the Appellant had a legitimate concern that this situation would arise again if she returned to the X site.

[58] The Tribunal is not satisfied there was breach of the equal pay for equal work provisions of the ESA. Section 42 of the ESA provides that no employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when, they perform substantially the same kind of work in the same establishment; their performance requires substantially the same skill, effort and responsibility; and (c) their work is performed under similar working conditions. Exceptions to this rule are where the difference in the rate of pay is made on the basis of, a seniority system; a merit system; a system that measures earnings by quantity or quality of production; or any other factor other than sex.

[59] The Appellant testified that the job she had been offered at the X site was the same work offered to E.F. She had greater medical certifications and more seniority than E.F., although E.F. he had higher rescue certifications. She requested $28.00 per hour to go back to this site. The employer offered $25.00, which she agreed to. However, she then found out that E.F. had been offered $28.00 for the same job. E.F. testified he had been offered $28.00 to $30.00 to do the same job as the Appellant on a different shift. However, he did not actually start work as the owner told him he was not needed.

[60] Although it appears to the Tribunal that the employer intended to violate the equal pay for equal work provisions of the ESA, E.F. never actually started work on the X project and was not paid for work on that project. As such, the Appellant and E.F. were not actually paid at a differential rate. The Tribunal finds there was no violation of section 42 of the ESA. An intended breach is not the same as an actual breach.

Harassment

[61] The Tribunal has also considered whether the Appellant was subject to "harassment" as contemplated by paragraph 29(c)(i) of the Act.

[62] "Harassment" is not defined in the Act. A definition of harassment found in the Oxford Reference Dictionary is "to trouble and annoy continually; to make repeated attacks on (an

enemy)" (Oxford University Press, 1986). The Oxford's online dictionary defines "harassment" as "aggressive pressure or intimidation."

[63] The Ontario *Occupational Health and Safety Act* defines "workplace harassment" as (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or (b) workplace sexual harassment; (section 1).

[64] The Appellant's counsel submitted that the definition of "harassment" in the Act should not be restricted to the definition in Ontario's *Occupational Health and Safety Act*, and that the term "harassment' should be given a broad interpretation consistent with the remedial nature of the legislation.

[65] The Tribunal accepts the Oxford Dictionary online definition of harassment as an acceptable definition of "harassment" within the meaning of paragraph 29(c)(i) of the Act. The Tribunal finds that harassment under the Act would, therefore, include aggressive pressure or intimidation from an employer.

[66] The Appellant testified that in the beginning, she had a good working relationship with the owners of the company. However, over time, things became very strained due to the fact they relied on her so heavily to run their job sites. They never set foot on many of the sites. The owners lived around the corner from her and were constantly calling her and texting her when she was off work. Even when she was on a three-week leave after having suffered a miscarriage, they kept contacting her, asking her to work. They would also show up at her house unexpectedly to drop of paperwork. The Appellant testified that she did not welcome this constant contact by the owners. She mentioned to them it was unnecessary for them to come to her house a few years ago. She also asked Mrs. A. to call first as a courtesy before showing up but Mrs. A. just laughed it off.

[67] The Appellant related an incident that occurred on December 31, 2016. She had been scheduled to be off work that day. Mr. A. showed up at her house at 6 a.m. as another staff member had called in sick and Mr. A. wanted the Appellant on a job site at 7:30 a.m. As the Appellant had not answered her phone, Mr. A. took it upon himself to come over to her house.

The Appellant had answered the door with no clothes on as she thought it was her husband at the door. He leaves early and has on occasion locked himself out so she jumped out of bed to open the door, thinking it was her husband. When she opened the door, Mr. A. said it was a Happy News Years to him and that she should remember to keep her cell phone on so they could keep their morning meetings more PG rated. The Appellant testified that she felt awkward with Mr. A. after that. He would throw in little jabs here and there about the early morning incident that made her uncomfortable. She felt she had no privacy. The owners were always driving by and always knew if she was home. The Appellant felt they completely crossed the line of an employer-employee relationship.

[68] The Tribunal accepts the Appellant's credible evidence regarding the incident of December 31, 2016 and the constant contact by the owners by phone, text and showing up at her house unexpectedly even when she was not working.

[69] The Tribunal finds that these actions did amount to harassment within the mearing of the Act. The owners knew that attending at the Appellant's house was unwelcome, as she had told them it was not necessary and asked Mrs. A. to call before coming over. Even had she not brought that issue to their attention, the owners ought to have known that attending at a person's home when they are off work on a repeated basis was a course of conduct that was unwelcome and intimidating. Further, Mr. A. ought to have known that repeated references to the December 31, 2016 incident was inappropriate and unwelcome behaviour from an employer to an employee. Even more concerning was the failure of these owners to leave the Appellant alone when she was on a leave after having suffered a miscarriage.

[70] The Tribunal finds that the owners were engaging in harassing behaviour within the meaning of the Act and this was a factor in the Appellant's decision to leave.

Reasonable alternatives

[71] The Tribunal must now consider, whether considering all the circumstances, including the working conditions that constituted a danger to the Appellant's safety, the overtime hours and lack of overtime pay practices by the employer contrary to law, and the harassment, the Appellant had no reasonable alternative to leaving her employment.

[72] There is an obligation on the Appellant to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (*Canada (Attorney General) v. White*, 2011FCA 190).

[73] Where there are safety concerns, a reasonable alternative to leaving employment has been held to include first discussing with the employer what measures, if any, which could be taken to reduce the fear of the dangerous condition (*Canada (Attorney General) v. Hernandez*, 2007 FCA 320).

[74] The Respondent argues that the Appellant had reasonable alternatives to leaving available to her. The Respondent maintains that a reasonable alternative to leaving would have been to have remained employed until such time as the Appellant was able to secure other employment, to have voiced her concerns regarding the new employees to her employer to confirm what she believed regarding their training, and to have voiced her concerns regarding her pay.

[75] The Respondent argues another reasonable alternative would have been for the Appellant to contact outside agencies, such as regional occupational health and safety regulators, the body responsible for providing paramedic licensing in Ontario, or the labour board, about her concerns regarding safety and the proper certification of employees, and pay issues.

[76] The Appellant testified that she had no reasonable alternatives. She asserts that if she had gone back to the X project, she would have had to work with new untrained people on this massive construction site and possibly be fined or face jail time if a fatality occurred on the job site and the staff was not properly certified. She related that as their supervisor, she could be held responsible for this. Further, she was facing risk of critical injury to herself, her staff and the workers based on the safety issues. The job site took up 25 acres and had 800 working there. The complexity of the job site alone was astronomical and to throw people in who had no experience in industrial rescue or on this particular job site was a real concern. The Appellant testified that she considered reporting the employer to the Ministry of the Labour but she thought it would be a whole process to go through and she just wanted to remove herself from the situation. She and her co-workers had repeatedly tried to get the employer to address the safety issues but they were not addressed. She had tolerated as long as she could but the situation had

become intolerable. The Appellant related that speaking to the owners further would not have solved the problem. They would say that they would remedy things but never did.

[77] The Tribunal accepts the Appellant's evidence that she did try to address the safety issues with the employer on numerous occasions, as had her coworkers, to no avail.

[78] The Tribunal does not agree that it was a reasonable alternative to the Appellant to have specifically discussed the training of the new employees on the X project with the employer. The Appellant in trying to discuss the overall concerns of the project was met with a response from Mrs. A. that she was going to run the job as she saw fit. In those circumstances, it a discussion about the training of new workers, it the Tribunal's view would have been futile. Similarly, the Tribunal finds any discussion about overtime pay or hours would also have been futile. The pattern described by the Appellant and both her co-workers when attempting to address any issues with the owners was one of false assurance with nothing of substance being done to address their concerns.

[79] The Respondent maintains that a reasonable alternative to leaving would have been for the Appellant to have remained employed until such time as the Appellant was able to secure other employment or to have reported her concerns to outside agencies.

[80] The Tribunal does not agree that either of these alternatives are reasonable, in the circumstances. The Appellant had tolerated the situation as long as she could. Has she remained employed at the X project or even at any other project run by this employer for an indefinite period of time until securing other work, she would have placed her safety and potentially that of others at risk. Any report to an outside agency regarding her concerns would have taken time to deal with. The Tribunal does not find it reasonable for the Appellant to have remained employed in unsafe conditions until she had secured other work or reported the matters to outside agencies. These were not minor safety risks. Given the nature of the Appellant's job and the industrial job sites she was required to work in, the safety risk was immense. Further, the safety issue, while being the primary issue was not the only problem. Compounding the safety issue were the harassment, and practices of the employer contrary to law. The Tribunal does not agree that it is reasonable to expect the Appellant to continue working in this exploitive and unsafe

environment. The Tribunal finds that having, regard to all the circumstances, the Appellant had no reasonable alternatives to leaving her employment.

CONCLUSION

[81] The appeal is allowed.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	January 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. A., Appellant Wesley Jamieson, Representative for the Appellant