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

Citation: *L. M. v Canada Employment Insurance Commission*, 2019 SST 462

Tribunal File Number: GE-19-746 and GE-19-747

BETWEEN:

L. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: April 2, 2019

DATE OF DECISION: April 10, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant voluntarily took two periods of leave from her employment without just cause.

OVERVIEW

[2] The Appellant worked as a lead hand in the food services industry in a college environment. She exercised her right under the collective agreement over a number of years, to elect to be laid off based on her seniority with the employer. After conducting an investigation, the Respondent determined that the Appellant voluntarily took two periods of leave from her job in 2017 and 2018 without just cause, and denied her application for employment insurance benefits. The Appellant argued that she only did what her collective agreement allowed, as did others, but she was the only one whom the Respondent singled out to investigate.

ISSUES

[3] Did the Appellant voluntarily take two periods of leave when she took early lay-off from her employment?

[4] If so, did the Appellant have just cause to take the periods of leave from her employment voluntarily?

ANALYSIS

[5] Claimants are disentitled from receiving employment insurance benefits where they take a period of leave from their employment without just cause (subsection 32(1), *Employment Insurance Act*). The Respondent must prove that the Appellant voluntarily took a period of leave from her employment. Then, the Appellant must establish just cause for voluntarily taking the leave by showing, in the circumstances, that she had no reasonable alternative to leaving her employment (*Green v. Canada (Attorney General)*, 2012 FCA 313; *Canada (Attorney General) v. White*, 2011 FCA 190).

Issue 1: Did the Appellant voluntarily take two periods of leave when she took early lay-off from her employment?

[6] I find that the Appellant voluntarily took two periods of leave when she took early lay-off from her employment.

[7] To determine whether a claimant voluntarily left their employment, I must ask whether the employee had a choice to stay or leave (*Canada (AG) v. Peace*, 2004 FCA 56).

[8] During the course of the Respondent's investigation, the Appellant's employer told the Respondent that the Appellant had requested early lay-off in 2017 and 2018. The employer sent the Respondent an article from the Appellant's collective agreement concerning layoff and recall, the company's seniority list, and the Appellant's request for time off for early lay-off dated April 3, 2018. The employer confirmed that employees are allowed to take leave per the collective agreement, and that the employees complete a standardized form indicating when they would return to work, then the lay-offs start and employees are recalled later. The employer told the Respondent that the process was the same in 2017 as in 2018.

[9] The Respondent gave the Appellant an opportunity to give information concerning the reason for her separation from her employment. The Appellant said that she was exercising her right under the collective agreement to elect to be laid off in order of seniority. When asked why she was laid off, the Appellant stated that management approached employees requesting that they complete a form and declare their intentions under the collective agreement concerning summer lay-offs, so she exercised her right to accept early lay-off. The Appellant told the Respondent that she chose to take the lay-off to allow junior employees who would not be able to collect employment insurance benefits to get the money they needed to live.

[10] The Appellant's employer issued records of employment in 2017 and 2018 indicating that the reason for which they were issued was shortage of work/end of contract or season. The Respondent determined that the Appellant voluntarily took two periods of leave, the first from April 17, 2017 to July 4, 2017, and the second from April 27, 2018 to July 6, 2018.

[11] At the hearing, the Appellant reiterated that all she was doing was following her collective agreement, which she had been doing for 27 years. She confirmed that she had

completed the time off request form that the employer sent to the Respondent, adding that she asked the union representative if she should be completing the forms and the union representative said that it was fine and not to worry about it.

[12] Section 12.07 of the Appellant's collective agreement states that "[w]here a layoff not exceeding five (5) months must occur, employees may elect to be laid off in order of seniority and failing sufficient numbers, employees shall be laid off in reverse order of seniority". I accept the Appellant's statements concerning section 12.07 of her collective agreement, and find that she exercised her rights to elect to be laid in April 2017, and April 2018. The Appellant testified that the some of the handwriting on the time off request form was that of her employer. However, I am satisfied based on the Appellant's statement that she chose for the employer to lay her off to allow junior employees to continue to work that she voluntarily elected to be laid off and could do so because she was the second employee listed on the seniority list at her place of employment.

[13] The Appellant quoted a paragraph from the Respondent's policy, Employment Insurance's Benefit Entitlement Principles Chapter 6.3.7 – Seniority rights not exercised, in support of her position that she was permitted to exercise her right to take early lay-off. Although there appears to be a word missing in the quote as the Appellant has laid it out, I find that the paragraph applies to the Appellant's situation in that her collective agreement has a clause concerning inverse seniority in which employees with longer service can be laid off first. The paragraph goes on to say that, separation from employment is voluntary for employees who could have remained employed had they requested it or exercised their rights.

[14] I find, based on the employer's statement to the Respondent, which the Appellant did not dispute, that the Appellant could have remained in her employment instead of electing to be laid off. Because of this, I find that she voluntarily took two periods of leave from her employment, the first from April 17, 2017 to July 4, 2017, and the second from April 27, 2018 to July 6, 2018.

Issue 2: Did the Appellant have just cause to take the periods of leave from her employment voluntarily?

[15] I find that the Appellant has not demonstrated that she had just cause to take the periods of leave from her employment when she did.

[16] Just cause for voluntarily leaving an employment exists if the claimant had no reasonable alternative to leaving, having regard to all the circumstances (paragraph 29(c), *Employment Insurance Act*).

[17] Section 12.01 of the Appellant's collective agreement states that, "[i]n the event of a layoff, employees shall be laid off in the reverse order of seniority. An employee about to be laid off may bump a less senior employee in their classification or a lower classification, providing the employee exercising the right, has the skills, ability, and qualifications to perform the work … Laid off employees must exercise their bumping rights within five (5) working days of being notified of layoff".

[18] The Appellant's main argument is that for the past many years, she has only been doing what her collective agreement allows, as had others of her co-workers. Although the Appellant questioned why she would want to exercise bumping rights when she the collective agreement allowed her to be off, at the hearing, she confirmed the employer's statement to the Respondent that she had bumping rights and could have continued in her position. The employer told the Respondent that junior employees had continued to work while the Appellant was off.

[19] I find from the Appellant's confirmation of the employer's statement that as a reasonable alternative to taking a period of leave from her employment when she did, the Appellant could have continued in her employment instead of electing to be laid off. Indeed, as the Respondent submitted, there is no evidence that the Appellant was notified that she would be laid off before she elected to be laid off. I therefore find that the Appellant has not demonstrated that she had just cause to take the two periods of leave from her employment when she did.

[20] The Appellant does not accept that the Respondent had randomly chosen to investigate her, but stated that someone must have reported her to the Respondent. She testified that one of the Respondent's agents to whom she spoke told her that he did not know why this was an issue.

The Appellant's husband submitted that the Respondent appeared to be targeting unions by going after its members with high seniority rather than dealing directly with the union's head offices. He questioned why the Appellant, who is a union member who was following a legal and binding collective agreement and believes she has done nothing wrong, is being punished unjustly.

[21] I understand that the Appellant and her husband are frustrated concerning the situation in which the Appellant finds herself, in particular having to repay an overpayment of approximately $8,200 because of a choice she had been making for a number of years without knowing the impact it would have on her entitlement to collect employment insurance benefits. However, I agree with the Respondent's submission and find that the Appellant's collective agreement is not in conflict with the Employment Insurance Act. Instead, I find that the Appellant's choice to legally exercise her right to elect to be laid off instead of continuing to work until or if the employer laid her off in reverse order of seniority, means that she made a personal decision to voluntarily take a period of leave from her employment. It is this personal decision that led the Respondent to deny her application for employment insurance benefits.

[22] In arriving at my decision, I rely on the Supreme Court of Canada decision that held that the purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are out of work. The loss of employment must be involuntary (*Caron v. Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48).

[23] I find that because the Appellant has not demonstrated that she had just cause to take the two periods of leave from her employment when she did in the form of an early lay-off, she is disentitled from receiving employment insurance benefits.

CONCLUSION

[24] The appeal is dismissed.

Audrey Mitchell

Member, General Division - Employment Insurance Section

HEARD ON:	April 2, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	L. M. Appellant