



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: S. V. v Canada Employment Insurance Commission, 2019 SST 482

Tribunal File Number: GE-19-970

BETWEEN:

S. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: April 3, 2019

DATE OF DECISION: April 29, 2019

DECISION

[1] The appeal is allowed. I find the claimant had just cause to leave her employment.

OVERVIEW

[2] The Appellant, S. V. (whom I will refer to as the claimant) established a claim for employment insurance benefits (EI) after leaving her employment due to health reasons. The claimant stated that her employer told her she was being dismissed but if she stayed around to train her replacement they would provide her with a layoff so she could collect EI. She stated that she did not feel comfortable under the circumstances and felt she had no other choice but to leave. The Respondent, the Canada Employment Insurance Commission (whom I will refer to as the Commission) determined the claimant was not entitled to receive EI benefits because she did not have just cause to voluntarily leave her employment. The claimant appealed the decision to the *Social Security Tribunal* (Tribunal).

ISSUES

[3] Did the claimant voluntarily leave her job?

[4] If so, did the claimant have just cause to voluntarily leave her job?

ANALYSIS

[5] An employee will have just cause by leaving a job if this is no reasonable alternative to leaving taking into account a list of enumerated circumstances. The test to be applied, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving his employment when he did.¹

[6] A claimant is disqualified from receiving any employment insurance benefits if they lost any employment because of their misconduct or voluntarily left any employment without just cause.²

¹Section 29(c) of the *Employment Insurance Act* (EI Act)

²Section 30(1) of the (EI Act)

Issue 1: Did the claimant voluntary leave her job?

[7] Yes, I find the claimant voluntarily left her job after her employer advised her she was going to be dismissed once they found a replacement and she trained the replacement. The claimant is not disputing the fact that she left the employment.

[8] The Commission has the burden of proof to show that the claimant voluntary left his employment.³

[9] I find the Commission has met the onus as the claimant does not dispute she left.

Issue 2: Did the claimant had just cause to voluntary leave her job?

[10] Yes, I find that in considering all the circumstances the claimant had no other reasonable alternative but to leave her employment.

[11] The onus is on the claimant who voluntarily left an employment to prove that there was no other reasonable alternative for leaving the employment at that time. MacDonald J.A. of the Federal Court of Appeal the Court stated, “The test to be applied having regard to all the circumstances is whether, on the balance of probabilities, the claimant had no reasonable alternative to leaving his or her employment.”⁴

[12] The Commission concluded that the claimant did not have just cause for leaving her employment on August 30, 2018, because she failed to exhaust all reasonable alternatives available prior to leaving. After considering all of the evidence, a reasonable alternative would have been to discuss her medical/work concerns with her employer, speak with a doctor about her medical issues, and/or seek or obtain other suitable employment prior to leaving.

³Canada (Attorney General) v. Peace, 2004 FCA 56

⁴ Rena-Astronomo (A-141-97), Tanguay (A-1458-84) Canada (AG) v. White, 2011 FCA 190

[13] The Act provides for certain situations that justify voluntarily leaving an employment in particular: (iv) working conditions that constitute a danger to health or safety and (xiii) undue pressure by an employer on the claimant to leave their employment.

Was there undue pressure by an employer on the claimant to leave their employment?

[14] Yes, I find the employer subjected the claimant to undue pressure to leave her employment, and the circumstances that existed left the claimant no reasonable alternative but to leave when she did.

[15] The claimant explained in her application for EI benefits that she had been away from work for a few days due to sickness and a bereavement leave. She stated a couple of weeks later her manager told her she was being let go as they wanted someone there all the time. She stated her employer offered if she stayed on until they found a replacement and she trained them they would, issue a layoff, and she would be able to collect EI. She stated that she felt she could not work there any longer and made the decision to leave then. She stated that she was being let go because of things she could not control.

[16] The claimant reiterated to the Commission that D. O. (manager) told her they were letting her go but if she continued to work until they found a replacement, and she trained the person, they would issue a notice of layoff. She stated that she was not comfortable with this and told the manager that she would rather leave now. She stated that her employer did not tell her how long she would continue to work. She stated he said it could be a month or even longer and maybe until after Christmas.

[17] The claimant stated to the Commission that during her first performance review the employer extended the probation period to six months. She stated they did not have a second review after June and they did not speak to her until the day she left. She stated when the probation period ended she was to get a raise and be enrolled in the benefits program.

[18] The claimant testified that she met with the manager and supervisor in June and they told her they really liked her but her attendance was not good. She stated that she agreed but

explained that she had a medical condition. The manager advised her that they would extend her probation for another three months.

[19] The claimant stated to the Commission that she was approved to take her medical time off. She stated that she was on a bereavement leave and when she returned her employer was acting strangely and she felt like she was being blackmailed into staying to train her replacement.

[20] The claimant testified that after she returned from her bereavement leave she felt her manager was giving her the cold shoulder because the manager had not spoken to her. She stated about a week later she took a day off and when she returned the manager called her into his office for a meeting that lasted about 5 to 10 minutes.

[21] The claimant testified that when she was called into the meeting on August 30, 2018, she did not think there were any issues with her job performance. She testified that she did not expect her employer to tell her she was going to be let go.

[22] The claimant testified he told her that he was going to let her go but she could stay until they found a replacement. She stated he told her it might take a couple of weeks or a couple of months. She stated there was no discussion regarding her job performance. She stated that she was crying and told him, she would rather leave right then but he told her to think about it and get back to him in the afternoon and if she stayed, he would lay her off so she could get EI.

[23] The claimant testified that she went back to her desk and was crying and she called her mom. She stated that she was extremely anxious and under a great deal of stress. She stated that she left and by the time, she got to the parking lot she knew she could not stay so she sent an email to her manager.

[24] The claimant provided a copy of the email she sent to her manager that states after their discussion she decided not to return to work because she did not want to work there while they were in the process of letting her go.

[25] The claimant stated that the comments made by the manager that she was going to look for work for a government job where she could get more time off is not true. She testified that she never said that.

[26] The representative submitted that they believe the claimant met section 6.4.2 of the Digest of Benefit Entitlement Principals and met the crucial test of “no reasonable alternative”. She submitted that the claimant exhausted all reasonable alternatives available to her at the time of leaving. The claimant explained to her employer her circumstances. They knew about the emotional events in her life (grandfather’s passing) and the fact that she suffered from anxiety. Still, they made their decision to dismiss her that day, only prolonging her stay for six or more weeks in order to utilize her experience to train her replacement.

[27] The representative submitted that the claimant left her employment with just cause. The employer pressured the claimant in such a way that it triggered her anxiety; so seriously, that she could not stay in that the employment any longer. She exhausted all the reasonable alternatives available to her in her particular circumstances. The employer has not provided any direct evidence that contradicts the claimant’s statement of facts.

[28] According to the case law, only the facts in existence at the time that the claimant left his or her employment must be taken into consideration when determining if one of the exceptions applies.⁵

[29] I am satisfied that the claimant had no reasonable alternative but to leave her employment.⁶ I conclude the claimant did have health issues, which is supported by the medical evidence and am of the view that the claimant did disclose that she had health issues to her manager and although she did not feel comfortable discussing in detail she did offer to provide medical notes to support her absences. Which I find was a reasonable alternative.

[30] I am of the view that the manager had already made a decision before the end of her probation period that the claimant was no longer a fit for the company when he called her to tell her she was being let go. I am satisfied the manager’s offer or ultimatum was such, to cause undue pressure on the claimant and create a very stressful work environment that would have had a detrimental effect on the claimant’s health.

⁵ *Lamonde*, 2006 FCA 44

⁶ 29(c)(xiii) undue pressure by an employer on the claimant to leave their employment

[31] I am of the view that the employer's offer constitutes undue pressure on the claimant. Although the employer did not feel they laid the claimant off, she admitted after speaking to the manager that the claimant was told she was being let go but that she could continue to work until someone was hired to take over her position and was trained.

[32] I accept the claimant's testimony that she was not able to accept this offer or ultimatum as she testified that as soon as the meeting started she felt under appreciated and the manager was asking personal questions and she felt she was being tricked. She stated the manager told her they cared about her and her getting EI but if she did not stay until they found a replacement, she would not get EI.

[33] I am of the view, on the balance of probabilities that if the employer did offer the claimant to stay and he would lay her off so she could receive EI, there was no guarantee how long the claimant would have stayed on. In addition, there was no guarantee that the manager could have changed his mind and let her go at any time.

[34] I find that it would not be reasonable to expect a person to stay working in an environment knowing you had been let go but the company was keeping you employed until they no longer needed you. In my view, this would hardly be a place where one could or would want to continue to work.

[35] The employer stated to the Commission there were some attendance issues and some critical errors on her work and they wanted her to improve her work performance. She stated there were about 34 hours of missed time from May 3, 2018, to August 27, 2018.

[36] The employer stated to the Commission that they were trying to work with the claimant and does not know why she worded the email that way. The employer was asked about the claimant's statements that she would be offered a layoff if she stayed and trained her replacement and she answered she never heard of this before. She stated they would not do that. She stated she would speak to the manager and P. (supervisor).

[37] The employer provided copies of the performance review and time sheets.

[38] The employer stated that they extended her probation by three months to September. She stated that they did cut her loose but not right there and then. Their intention was to allow the claimant to find work. She stated that according to the notes by the manager and supervisor, the main issue was in attendance and her performance. The employer confirmed that it was their intent to find a replacement and have the claimant train that person.

[39] The representative submitted that the Commission failed to follow section 6.4.5 of the Digest of Benefit Entitlement Principals regarding the fact-finding process and the process of giving the benefit of the doubt. She submitted that the Commission did not pursue direct evidence from the employer. The reconsideration agent did not speak with the manager or the supervisor, who participated in the conversation with the claimant. Therefore, if the Tribunal Member finds that there is a balance of probabilities, the benefit of the doubt should be given to the claimant.

[40] I agree with the representative and that Commission failed to speak to the manager who was directly involved with the meeting that was held on August 30, 2018. I find the Commission relied on hearsay evidence from the employer, who was not a part of the conversation. I am giving more weight to the claimant's version of the conversation that took place.

[41] I find the statements from the employer are inconsistent and would lead question as to her knowledge of the chain of events. There is evidence of this with the employer statements with the Commission with the timing of the actual events that would have been another reason for the Commission to speak directly to the manager or supervisor. The facts on the file support that the claimant left her employment on August 30, 2018, and not on June 9, 2018, as stated by the employer.

[42] I am also of the view, it was only the employer's opinion that the manager would never have made the offer to lay off the claimant and therefore can be given any weight. In addition, there is no evidence on the file to support that the manager had given the claimant a firm date of three more months as stated by the employer.

[43] What I do find credible and supports the claimant's version of events is that manager confirmed that the claimant was let go but was told that she could continue to work while they

looked for a replacement for her. The employer confirmed that it was their intent to find a replacement and have the claimant train that person.

[44] The employer stated to the Commission that the information on the claimant's file states she quit her job as they had a performance review for her probationary period and advised her, they would be extending based on the agreement of improvement. She stated that the next day the claimant gave her notice.

[45] The employer stated to the Commission that the meeting took place on June 8th and the probation was extended to September 11th. She stated that the next day they received a text saying she did not want to continue.

[46] The employer stated to the Commission that the manager confirmed that the claimant was told that she could continue to work while they looked for a replacement for her. The employer felt they did not lay her off, but were offering her work until they found someone to take over her position and time to be trained. She stated the manager gave the claimant another three months.

[47] I find the claimant to be credible because she has always maintained her version of the facts, that is, her employer was going to dismiss her and provided her with an ultimatum that if she stayed on until a replacement was hired, and she trained them, the employer would lay her off so she would qualify for employment insurance benefits.

Working conditions that constitute a danger to health or safety

[48] The Commission submits that a reasonable alternative would have been to discuss her medical/work concerns with her employer.

[49] The representative submitted that they strongly disagree with the Commission's analyzing of the facts. She submitted that the claimant was put under significant pressure due to her medical leaves. Due to her chronic mental health condition, she could not handle the stress she felt when the employer said they did not want her working there anymore, but they would keep her for six more weeks just to train her replacement. The representative submitted CUB 62040 to support their appeal.

[50] I am of the view that CUB 62040, supports the appeal and is similar in that the employer was putting undue pressure on the claimant and leaving the employment was the only reasonable alternative.

[51] The claimant stated to the Commission and testified at the hearing that she tried to explain her medical situation to her employer but she did not ask her employer to accommodate them. She stated her employer would ask her personal questions and she was not comfortable talking about her illness with her employer. She stated she gave her employer one medical note and offered to provide additional ones if needed but they said no but made a big deal out of it. She stated that she had a couple of appointments with her psychologist that took about an hour. She stated she offered to make up the time but the employer did not want her to do that. She stated she was paid by the hour so it did not matter.

[52] The claimant stated to the Commission that she felt awkward after the conversation and because the employer did not understand her health issues. She stated she suffers from anxiety and this situation was playing on it.

[53] The claimant's representative submitted the medical document they provided supports that the claimant is on medication for anxiety and epilepsy. This is in addition to the medical note on the file that the claimant has been under doctor's care for the past four years.

[54] The representative submitted that the employer had no issues with her job performance and her manager clearly had issues with her requests for medical leaves. The fact that the claimant felt pressured to discuss her personal health issues with them did not improve the situation.

[55] I am satisfied that the claimant did make efforts to explain her health situation with her employer and by offering to make up the time or provide medical notes to support her reasons for needing time off.

[56] The claimant testified that she had been to see her neurologist who had increased her medication but she did not discuss her to quit her job.

[57] The claimant stated to the Commission that her doctor did not advise her to quit her job but she could have gone to her neurologist who would have given her a note.

[58] The case law informs us that the lack of a doctor's certificate does not mean that the testimony must be dismissed if the witness is credible.⁷

[59] I accept the claimant's testimony as credible and that discussing her work situation with her neurologist was an option she would have pursued had she known her employer was going to dismiss her. She testified that she liked working and she had no indication her employer was going to make the decision they did.

[60] I am satisfied from the medical evidence provided in the file and the evidence of the claimant's medications supports that she suffers from stress and that the undue pressure by her employer would have a detrimental effect on her health.

[61] The claimant described to me how sad she was and how hard it was to return to work after losing her grandfather but she was doing everything she could do perform her duties. I can understand how, following the loss, she was more psychologically and emotionally fragile and staying until the employer found a replacement would more likely than not been detrimental to her health issues.

[62] In this appeal, I find the claimant's testimony credible and I believe that she knew staying would lead to a deterioration of her mental and physical health, I find the clarity of her explanations of the effects she experienced, such as feeling unappreciated, crying which added stress and anxiety convinced me.

[63] The Commission concludes that a reasonable alternative would have been seek or obtain other suitable employment prior to leaving.

⁷ *Brisebois*, A-510-96)

[64] I do not believe that looking for suitable employment prior to leaving was a reasonable alternative because the claimant did not expect to be told she was going to be losing her job when she was called into the meeting.

[65] It is useful to recall that the issue is not whether it was reasonable for the claimant to leave his or her employment, but rather whether, having regard to all the circumstances, she had no reasonable alternative to leaving her employment.⁸

CONCLUSION

[66] I conclude that the claimant did voluntarily leave her employment and she did have just cause for doing so as, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment. Consequently, the claimant is not disqualified from benefits.⁹

[67] The appeal is allowed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	April 3, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	S. V., Appellant Sandra Guevara-Holguin, Representative for the Appellant

⁸ *Laughland*, 2003 FCA 129

⁹ Section 30(1) EI Act