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

Citation: *C. M. v Canada Employment Insurance Commission*, 2019 SST 874

Tribunal File Number: GE-19-1199

BETWEEN:

C. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: April 12, 2019

DATE OF DECISION: May 17, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant has not proven she had just cause for voluntarily leaving her employment and is, therefore, disqualified from receipt of employment insurance benefits (EI benefits).

OVERVIEW

[2] The Appellant established a claim for EI benefits effective December 2, 2018. The Respondent, the Canada Employment Insurance Commission (Commission), imposed a disqualification on her claim because it concluded she voluntarily left her job at X on November 30, 2018 without just cause. The Appellant argued that her contract of employment was ending on December 31, 2018, but she decided to leave her job a month beforehand because of harassment by an individual in the workplace, namely the Director of Marketing. The Commission maintained the disqualification on the Appellant's claim, and she appealed to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The Appellant was accompanied at the hearing by J. R., who advised he was a personal friend of the Appellant's and would be assisting the Appellant with the presentation of her evidence and submissions.

ISSUES

[4] Is the Appellant disqualified from receipt of EI benefits because she voluntarily left her employment at X on November 30, 2018 without just cause?

[5] Can the Appellant establish a claim for EI benefits starting as of the date her contract of employment would have ended if she had not quit early, namely as of December 31, 2018?

ANALYSIS

[6] A claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can establish "just cause" for leaving: section 30 *Employment Insurance Act*

(EI Act). Just cause exists where, having regard to all of the circumstances, on balance of probabilities, the claimant had no reasonable alternative to leaving the employment (see *White 2011 FCA 190, Macleod 2010 FCA 301, Imram 2008 FCA 17, Astronomo A-141-97, Tanguay A-1458-84*).

[7] The initial onus is on the Commission to prove the Appellant left her employment voluntarily; once that onus is met, the burden shifts to the Appellant to prove she left her employment for "just cause" (see *White, (supra); Patel A-274-09*).

[8] Under the Appellant's original employment contract, her last day of work at X was to be November 21, 2018 (GD3-27).

[9] Two days before the expiry of the Appellant's employment contract - on November 19, 2018, X offered to extend her employment for a further 5 weeks to December 31, 2018 (GD3-31). The Appellant agreed to the contract extension on the same day, thereby prolonging her employment to December 31, 2018 rather than putting herself in a position of unemployment as of November 21, 2018.

[10] On November 22, 2018 – which was during the contract extension period, but prior to its expiry, the Appellant gave notice to X that her last day of work would be November 30, 2018 – and not December 31, 2018 (GD3-32). For this reason, the Commission considers her separation from employment to be a quit, rather than the result of a shortage of work or the end of a contract. The Tribunal agrees, and finds that the Appellant voluntarily left her employment prior to the expiry of the term of her employment under the contract extension. The Appellant took the initiative to sever her employment relationship with X when she gave notice to the employer that her last day of work would be November 30, 2018 instead of December 31, 2018. The Appellant does not dispute this, having advised the Commission that she was on a fixed contract with X that was ending on December 31, 2018, but that she gave notice to leave her job effective November 30, 2018 because of harassment from a superior (see Supplementary Record of Claim at GD3-19).

[11] The onus of proof then shifts to the Appellant to prove she had no reasonable alternative to leaving her job when she did.

[12] The Tribunal must consider the test set out in sections 29 and 30 of the EI Act and the circumstances referred to in subsection 29(c) of the EI Act, and determine whether any existed at the time the Appellant left her employment. These circumstances must be assessed, according to *Lamonde A-566-04*, as of the date the Appellant left her job: **November 30, 2018**. The Appellant need not fit precisely within one the factors listed in subsection 29(c) of the EI Act in order for there to be a finding of "just cause". The proper test is whether, on a balance of probabilities, the Appellant had no reasonable alternative to leaving her employment when she did, having regard to all the circumstances, including but not limited to those specified in paragraphs 29(c)(i) to (xiv) of the EI Act (see *Canada (Attorney General) v. Landry (1993) 2 C.C.E.L. (2d) 92 (FCA)*).

[13] The Appellant submitted she had just cause for leaving her job on November 30, 2018 because of workplace harassment and because she had an obligation to care for her child who required medical treatment and had a series of medical appointments in December 2018.

Issue 1: Did the Appellant have just cause for leaving her job because of workplace harassment?

[14] The Tribunal considered whether the harassment the Appellant alleged she was subjected to at work was "other harassment" within the meaning of paragraph 29(c)(i) of the EI Act, which provides that an employee has just cause where "sexual or other harassment" exists and he or she has no reasonable alternative to leaving the employment.

[15] The "harassment" complained of must render the workplace genuinely intolerable and, even where the harassment has been proven, there may be an obligation to make all reasonable efforts to rectify the situation before quitting (*CUB 57619*). A review of the jurisprudence where the Umpires have found just cause for harassment under paragraph 29(c)(i) of the EI Act contemplates numerous incidents and/or a pattern of behavior over a period of time (*CUBs 55611, 56604, 57338*).

[16] The Tribunal finds that such circumstances did not exist for the Appellant.

[17] The Tribunal considered the Appellant's evidence about the workplace harassment she was subjected to, namely:

a) **<u>In her Initial Statements to the Commission</u>** (GD3-19)

- "L.", the X at X would show up at the Appellant's location and "bug her about her work" and ask why things were not done. L. was not the Appellant's boss, but was continually bothering her.
- The Appellant's boss was friends with L., so the Appellant didn't want to complain to her boss.
- The Appellant knew her contract was ending soon, so she decided she didn't need to deal with it anymore and gave her notice to finish work on November 30, 2018.
- She didn't request a transfer or start looking for another job or contact the employer's Human Resources (HR) department. She just decided to leave.
- On her last day at work on November 30, 2018, the Appellant spoke to an HR representative and explained the situation. The HR representative said they would follow up on it, but the Appellant doesn't know if they did because she left her job that day.

b) **<u>In her Request for Reconsideration</u>** (GD3-22 to GD3-24)

- The Appellant's original 12-month contract of employment was scheduled to end on November 21, 2018 (GD3-27). The Appellant wanted to stay on at X until December 31, 2018 – which was a contract extension, but left early "due to being harassed by a woman in upper management" (GD3-24). This continued for 4 or 5 weeks, at which time the Appellant felt it would be easier if she stayed "only to fulfill my contract obligations" (GD3-24).

c) **<u>During her Reconsideration Interview</u>** (GD3-43 to GD3-44)

- The events of harassment included condescending emails from the Director of Marketing, who sent an email to upper management with ridiculous instructions for the Appellant.

[18] During the reconsideration process, the employer advised that, on November 19, 2018, the Appellant's contract was extended to December 31, 2018 (GD3-31). But soon afterward, on

November 22, 2018, the Appellant told the employer she had "other commitments" and had decided that her last day of work would be November 30, 2018 (GD3-32).

[19] The employer also advised the Commission as follows (at GD3-29 to GD3-30):

- X had a policy governing workplace harassment (a copy of the policy was provided and can be found at GD3-33 to GD3-42).
- The Appellant only advised the employer that she was experiencing workplace harassment after she had submitted her resignation, namely at her exit interview.
- If the Appellant felt she was being bothered by upper management, she should have brought it up with HR, who would have reviewed the situation prior to her resignation. The process would have consisted of HR speaking with the parties involved, as well as changing the reporting structure and the way the Appellant was spoken to. The employer's investigation would have started immediately.

[20] In her Notice of Appeal, the Appellant advised that she initially agreed to the contract extension to December 31, 2018, but within days advised the employer "that it was not convenient" to her situation. The Appellant wrote:

> "Due to the attitude from a member of upper management, I decided that I needed to commence my job search immediately." (GD2-3)

[21] The Appellant testified at the hearing about the harassment as follows:

- The problem was with "a lady in upper management" named L., who was the X.
- L. was not the Appellant's direct supervisor.
- The Appellant was "involved in a conversation" with her boss, "J.", in which L. was also present. That conversation "entailed a little bit too much information" about J. and L.'s "personal lives."
- Shortly after that, "L. just turned" and was "like a different person", and displayed a "snappy attitude" towards the Appellant.
- L. would "just come in and do everything" and "make my life miserable for about the last 5 weeks before I left".

- L. made life miserable for the Appellant "by just showing up at the property in Guelph" and by badgering the Appellant about her work, such as when L. showed up and wanted to know if the Appellant had done the new contracts for a building that was opening up. The Appellant was on it and did not appreciate L.'s questioning.
- The Appellant also received condescending emails from L.
- At one point, L. dropped by the Appellant's office "and she had them send me a copy of my job description" and then she "sat beside me and told me to read it". The Appellant was well aware of what her job entailed, having been there for nearly a year at that point, and did not appreciate this action.

[22] The Tribunal finds the Appellant's descriptions of L.'s behaviour to be more in the nature of unpleasant or slightly antagonistic work-related communications rather than harassment. Being treated rudely and not being appreciated for one's work – while upsetting for the Appellant, do not raise L.'s behaviour to the level of harassment. This is especially the case where L. was not the Appellant's supervisor and they did not work in the same location, there were no warnings about the Appellant's job performance, and the Appellant would shortly be free from any further interactions with L. when the contract extension expired on December 31, 2018.

[23] The Tribunal further finds the situation as at November 30, 2018 was not so unbearable that the Appellant could not have continued to work to the end of the contract extension. Nothing the Appellant has described was so bad that she could not have lasted until the end of the contract extension. The Tribunal also finds no evidence of a pattern of behaviour over time that L. belittled or bullied the Appellant, or of an escalating personal conflict or aggression. By the Appellant's own admission, the personal conflict in question had been going on for about 5 weeks when she agreed to the contract extension. She also testified that, if it were not for a series medical appointments for her son in December 2018, she "probably would have" remained in her employment with X to the end of the contract extension on December 31, 2018 (see paragraph 29 below).

[24] The situation with L. was such that it required the Appellant to involve her own immediate supervisor and attempt to diffuse and resolve any personal conflict before simply walking away from a further 5 weeks of full-time employment. This is especially the case given that the employer had a workplace harassment policy in place and a Human Resources department. The Tribunal gives significant weight to the evidence from the employer's Human Resources representative that an investigation would have started immediately and simple changes implemented as a result (see GD3-29 to GD3-30).

[25] The Tribunal finds that a reasonable alternative to quitting her job on November 30, 2018 would have been for the Appellant to continue working at X until December 31, 2018, when her contract extension expired. Another reasonable alternative would have been for the Appellant to contact the Human Resources department and have a fulsome discussion about the situation with L. and how it made the Appellant feel, and allow the Human Resources department to resolve any misunderstandings and clarify who was responsible for supervising the Appellant and speaking to her about her work. The Appellant pursued neither of these reasonable alternatives.

[26] The Tribunal therefore finds the Appellant has not met the onus on her to prove that the personal conflict she experienced was "other harassment" within the meaning of paragraph 29(c)(i) of the EI Act such that she had no reasonable alternative but to quit her job on November 30, 2018. As a result, the Tribunal finds that the Appellant did not prove she had just cause for leaving her job at X on November 30, 2018 because of workplace harassment.

Issue 2: Did the Appellant have just cause for leaving her job because of an obligation to care for a child?

[27] The Tribunal next considered whether the Appellant had an obligation to care for her adult son within the meaning of paragraph 29(c)(v) of the EI Act, which provides that a claimant has just cause for quitting their job if there was "an obligation to care for a child or a member of the immediate family" and he or she had no reasonable alternative to leaving the employment. The Appellant raised this ground at the hearing of her appeal.

[28] The Appellant did not raise her son's situation with the Commission - either during its initial contact with her or during the reconsideration process. In her reconsideration interview,

the Appellant talked about being harassed by the Director of Marketing as being her reason for leaving her job on November 30, 2018, but did not provide any information about her son's medical appointments (GD3-43 to GD3-44). When asked by the Commission's agent if there were any other factors for quitting her job, the Appellant stated she could not think of any (see GD3-44).

[29] The Appellant and J. R. provided the following testimony at the hearing about her obligation to care for her son:

- In August 2018, her son "ran into some mental health issues" and was "too depressed" to return to University for his third year of studies.

- The Appellant and her ex-husband had to "make alternate arrangements", get in touch with doctors, and take him to medical appointments at St. Joseph's Hospital in Hamilton.

- The Appellant resides in Brantford and it takes her 45 minutes to drive to Hamilton.

- Between August 2018 and December 2018, it took a bit of time for her son to "meet with his G.P. in Hamilton", who then had to arrange for the referral to a clinic at St. Joseph's Hospital in Hamilton. Then there were a couple of initial "intake interviews" in November with "the team" of 4 practitioners (the psychiatrist, the psychologist, and 2 clinical nurses) at St. Joseph's. After the team meetings in November, "a whole battery of different tests" (an EKG, cognitive testing, MRI and the like) was scheduled for her son in December 2018.

- There were multiple appointments scheduled for her son in December 2018, sometimes twice a week – on Mondays and Thursdays.

- When X offered her the contract extension to December 31, 2018, she said Yes.

- But a couple of days later, after she thought about it, she decided it would be better if she just ended the job. Her son had these medical appointments in Hamilton in December and she had no way to get him to the appointments unless she drove him.

- The Appellant stated: “I was only verbally asked to stay until December 31st and I probably would have, had not there been all these appointments with my son”.
- She didn’t want the employer to know her “personal business”, so she never mentioned anything to X about her son.
- She also thought her “legal obligation” under her employment contract with X was over as of November 21, 2018 – as per the written job offer she received from them. The fact that she stayed on to November 30, 2018 when asked “verbally” to extend her employment to the end of the year didn’t change her belief that she had already fulfilled her contract obligations. This is why she didn’t tell anyone at X her reasons for leaving the employment prior to December 31, 2018.
- She did not consider asking the employer for time off to take her son to his upcoming appointments because “it was a little bit personal”. She knew that her employment with X was coming to an end shortly “anyway” and she did not want to “divulge” her personal situation with her son’s mental health.
- She also never told the Commission anything about her son because she had never had anyone in her family with mental health issues before. It was “all new” to her, she was trying to absorb it herself, and she “didn’t want to go down that path and explain that was the real underlying cause of why I didn’t stay for the last few weeks”.
- Although her son was not “legally” a child at age 21/22 years old, he is a member of the Appellant’s immediate family. He was living with the Appellant full-time and continues to do so.

[30] Because the Appellant did not raise the situation with her son until the hearing of her appeal, the Commission was not able to canvas this concern with the employer or address this as a ground for voluntarily leaving her employment in its response to the Appellant’s appeal (GD4). At the conclusion of the hearing, the Tribunal asked the Appellant to provide a written statement setting out all of the details regarding why she had to leave her job on November 30, 2018

because of her obligation to care for her son. The Appellant agreed to do so, and provided the letter at GD6.

[31] In her letter, the Appellant stated that she "felt obligated to ensure" that her son attended his medical appointments in December, as they were "extremely important" (GD6-2). The Appellant further stated that she had no alternative but to drive him to these appointments, as there was no one else available to do so. The Appellant also stated that the Appellant had EEG testing on November 26, 2018 and then 4 medical appointments in December 2018 as follows:

- (Monday) December 3, 2018 at 10am to 11:30am
- (Thursday) December 6, 2018 at 4:45 pm
- (Tuesday) December 11, 2018 at 10 to 11:30am
- (Thursday) December 13, 2018 at 10am to 12:15pm.

[32] The Appellant submitted that, although the Commission argues she should have remained in her job until December 31, 2018, "the perspective immediately changes" as a parent when the issue involves a child's health (GD6-3).

[33] The Commission's submissions in response to the Appellant's letter are at GD8.

[34] The Appellant filed a further letter at GD9 in response to the Commission's submissions. In this letter, the Appellant explained that her work week at X was Tuesday – Saturday and that she scheduled personal appointments on Mondays to avoid taking time off. She also stated that when the medical team advised there would be a number of appointments in December, she had no knowledge of the exact number. The Appellant stated:

> "I felt an obligation to ensure that none of those appointments was missed, as it could hinder the teams' systematic approach." (GD9-2).

[35] A parent will have just cause for leaving an employment to look after a child if they prove that no other reasonable alternative exists. The Appellant has the onus of proving, on a balance of probabilities that, in all of the circumstances, she had no reasonable alternative other

than to leave her employment at X on November 30, 2018 in order to discharge her parental responsibilities to care for her child (*Yeo 2011 FCA 26*).

[36] The Tribunal finds the Appellant has not satisfied that onus.

[37] The Tribunal sympathizes with the Appellant's concern about her son's mental health. The Tribunal also acknowledges the Appellant's legitimate desire to ensure he attended the medical appointments that were being arranged for him in December 2018. While the Appellant does not need to be responsible for the full-time care of her son in order to show just cause, she must prove that her on-going assistance with his personal care was required to the extent that she could not perform her job at the same time. There is no evidence before the Tribunal that the Appellant was required to provide on-going personal care for her adult son such that she could not have continued to work until December 31, 2018.

[38] The evidence, in fact, points to the Appellant having made a personal decision to quit her job a month early in order to be readily available to drive her son to his medical appointments.

[39] A decision to quit a job for strictly personal reasons, such as wanting to assist a family member who is experiencing health issues (as described by the Appellant), may well be good cause for leaving the employment. However, **good cause** is not the same as **"just cause"** (*Laughland 203 FCA 129*); and it is possible for a claimant to have **good cause** for leaving their employment, but not **"just cause"** within the meaning of section 29 of the EI Act (*Vairumuthu 2009 FCA 277*). Additionally, leaving one's employment for the purpose of dealing with a personal situation (be it the nature of the work, the work schedule, the pay or other lifestyle factors) does not constitute just cause within the meaning of the EI Act (*Langevin 2001 FCA 163, Astronomo, supra, Tremblay A-50-94; Martel A-169-92, Graham 2001 FCA 311; Lapointe 2009 FCA 147*; and *Langlois 2008 FCA 18*).

[40] The Tribunal finds the Appellant's reason for leaving her employment at X on November 30, 2018 was a personal decision she made in order to be readily available to take her son to his medical appointments. Tribunal accepts that the Appellant had good reasons for wanting to do so. However, these are strictly personal reasons and do not provide the Appellant with just cause for voluntarily leaving employment within the meaning section 29 of the EI Act.

[41] The Tribunal further finds that the Appellant had a reasonable alternative to quitting before her contract extension was up, namely speaking with the employer in order to arrange her work schedule so she could take her son to his appointments as they came up. Given the Appellant's excellent attendance record during her employment at X (only 2 days off in a year of working there – GD9-2) and the fact that, by her own admission, she didn't even know how much time she would need to take off until she after the appointments actually began, it is reasonable to think she could have continued working and asked for time off as needed. This is especially the case given that the first week's appointment turned out to be on a Monday – which was a day the Appellant had off anyway; and the second week's appointment was at 4:45pm, which should not have required a full day off. Furthermore, while the Appellant may have wanted to protect her family's privacy, it would not have been necessary for her to provide personal details about her son's situation in order to ask her employer for time off.

[42] The Appellant did not avail herself of this reasonable alternative.

[43] The Tribunal therefore finds the Appellant has not met the onus on her to prove that she had an obligation to care for her son within the meaning of paragraph 29(c)(v) of the EI Act such that she had no reasonable alternative but to quit her job on November 30, 2018. As a result, the Tribunal finds that the Appellant did not prove she had just cause for leaving her job at X on November 30, 2018 – prior to the expiry of her contract extension - because of an obligation to care for a child or immediate family member.

Issue 3: Can the Appellant receive EI benefits starting from December 31, 2018, the date her contract of employment would have ended if she had not left early?

[44] Under the contract extension the Appellant agreed to, her last day of work at X was supposed to be December 31, 2018.

[45] She did not work until December 31, 2018. She left her job after her last day of work on November 30, 2018, four (4) weeks prior to the expiry of her contract extension.

[46] The Appellant submits it was "inevitable" that she was not going to be working at X anymore, and that the contract extension they offered her was "for their purposes" and not hers. She continued working for a couple of weeks beyond what her original contract required, but she

changed her mind about staying on until December 31, 2018. The Appellant is 58 years old, with 2 children at home, and an elderly father. She should receive EI benefits as of December 31, 2018 because her job was ending on December 31, 2018 anyway.

[47] Having failed to prove she had no reasonable alternative but to leave her job on November 30, 2018 (see analysis under Issues 1 and 2 above), the Appellant has failed to discharge the onus on her to prove just cause for voluntarily leaving her employment prior to the expiry of her contract extension. As a result, she is disqualified from receipt of EI benefits pursuant to section 30 of the EI Act.

[48] The EI Act does provide some relief where a claimant voluntarily leaves their job within three (3) weeks of the expiration of the term of the employment. Under subsection 33(2) of the EI Act, if a claimant quits within 3 weeks of the end of their employment term (be it under a contract or contract extension), the disqualification for voluntarily leaving without just cause only lasts until the expiration of the term of the employment. In order words, if the Appellant had quit her job without just cause within 3 weeks of December 31, 2018, she would only have been disqualified from EI benefits for the period between the time she left her job and the end of the contract extension, and would have been eligible for EI benefits as of December 31, 2018.

[49] However, the Tribunal finds the Appellant does not qualify for this remedy because she left her job on November 30, 2018, which was more than 3 weeks before the December 31, 2018 expiry of her contract extension. As a result, the disqualification prescribed by section 30 of the EI Act is operative and the Appellant is disqualified from receipt of EI benefits effective December 2, 2018.

[50] While the Tribunal can well appreciate the Appellant's disappointment at not receiving EI benefits at this time, the EI Act does not allow any discretion with respect to the three (3) week window in which to remedy a disqualification for leaving prior to the expiry of a term of employment. The Tribunal has no discretion to vary the clear wording in section 33 of the EI Act, and does not have jurisdiction to grant the Appellant's request that she receive EI benefits because the end of her employment with X was "inevitable". The Federal Court of Appeal confirmed the obligation to strictly apply provisions such as this one in its decision in *Attorney General (Canada) v. Levesque, 2001 FCA 304*, wherein the court considered the situation of a

claimant who was short only one (1) hour of insurable employment required to qualify for EI benefits and held that the EI Act and Regulations do not allow any discretion to remove this defect from the claim. The Tribunal is further supported in its analysis by the Supreme Court of Canada's statement in *Granger v. Canada (CEIC), [1989] 1 S.C.R.141*, that a judge is bound by the law and cannot refuse to apply it, even on grounds of equity.

CONCLUSION

[51] The Tribunal finds the Appellant did not prove that she was left with no reasonable alternative but to leave her employment at X on November 30, 2018. The Tribunal therefore finds the Appellant did not prove that she had just cause for voluntarily leaving her employment and is, accordingly, disqualified from receipt of EI benefits pursuant to section 30 of the EI Act.

[52] The Tribunal further finds that the Appellant's disqualification cannot be terminated as of December 31, 2018 – the expiration of her contract extension, because the Appellant did not leave her job within three (3) weeks of the end of the term of her employment and, therefore, does not qualify for the remedy in section 33 of the EI Act.

[53] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	April 12, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. M., Appellant J. R., Representative for the Appellant