



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. A. v Canada Employment Insurance Commission*, 2019 SST 620

Tribunal File Number: GE-19-2063

BETWEEN:

A. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: June 19, 2019

DATE OF DECISION: June 24, 2019

DECISION

[1] The appeal is dismissed. The Claimant is disqualified from receiving regular employment insurance benefits because he voluntarily left his employment when reasonable alternatives, other than leaving, were available to him in the circumstances.

OVERVIEW

[2] A. A. (the Claimant) worked as an on-call employee for X grocery stores. A little over a week after he started his job, the Claimant went to the hospital because he was feeling sick. He stayed home to rest after his doctor's appointment. He received a call from his employer asking him to come to work. He told his employer that he was not feeling well and was staying home. He did not respond to any further calls from his employer asking him to come to work. About ten days later, the employer sent a letter to the Claimant ending his employment because of the Claimant's failure to meet attendance expectations. The Claimant renewed an existing claim for employment insurance benefits and received benefits.

[3] Upon investigation, the Canada Employment Insurance Commission (Commission) disqualified the Claimant from receiving benefits because the Commission decided that the Claimant had voluntarily left his employment without just cause. This resulted in an overpayment of benefits. The Claimant has appealed this decision before the Social Security Tribunal.

ISSUES

Issue #1: How did the Claimant's employment end?

Issue #2: If the Claimant voluntarily left his employment, did he voluntarily leave with just cause because he had no reasonable alternative to leaving?

Issue #3: If the Claimant lost his employment, did his actions constitute misconduct?

ANALYSIS

[4] Although the concepts of “voluntarily leaving without just cause” and “dismissal for misconduct” are separate concepts under the Act, both result in a claimant being disqualified from employment insurance benefits. This is because in both situations, the claimant’s loss of employment is attributable to the claimant’s deliberate actions.¹ As such, the only loss of employment that is insured against, by the employment insurance regime, is an involuntary loss of employment.

[5] Claimants are disqualified from receiving benefits if they voluntarily leave their employment without just cause.² A claimant can establish just cause for voluntarily leaving if he can prove that having regard to all of the circumstances, the claimant had no reasonable alternative to leaving his employment.³ The Commission has the burden to prove that the leaving was voluntary. Then, the burden shifts to the Claimant who must prove that he had just cause for leaving.⁴

[6] Claimants are also disqualified from receiving benefits if they lose their job due to misconduct. Misconduct arises when a Claimant knew or ought to have known that his conduct impairs the performance of his duties and that as a result, dismissal was a real possibility.⁵

[7] The Commission disqualified the Claimant because he had voluntarily left his employment. The Claimant argues that he did not voluntarily leave his job, but was dismissed by his employer. I must therefore make a determination about how the Claimant’s employment ended.

Issue # 1: How did the Claimant’s employment end?

[8] I find that the Claimant voluntarily left his employment.

¹ *Canada (Attorney General) v Easson*, A-1598-92.

² Section 30 of the *Employment Insurance Act*.

³ Paragraph 29 (c) of the *Act*.

⁴ *Green v Canada (Attorney General)*, 2012 FCA 313.

⁵ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[9] The Claimant testified that he was providing manual labour as an on-call employee. In his on-call position, the Claimant could be asked to work at any of the three shift start times. The Claimant testified with difficulty about the circumstances around the end of his job because the events occurred almost two and a half years ago. He did however remember the following.

- Shortly after he started working as an on-call employee he felt ill.

- He went to the hospital at the beginning of February because of a bad headache and sinus congestion. He also consulted the doctor about his sore back. He stayed at the hospital for a few hours.

- He returned home to rest.

- He received a call from his employer to come to work. He told his employer that he was staying at home because he was not feeling well. He did not respond to the subsequent calls from his employer.

- About two and a half weeks later, the Claimant received a letter from his employer that said he did not meet the attendance standards of the company and his employment was terminated.

[10] The Claimant argues that he was dismissed and he did not voluntarily leave because his employer sent him a letter of termination. The Claimant also refers to the employer's record of employment that states that he was dismissed. The Claimant's witness stated that the Claimant has been truthful throughout the Commission's investigation. The witness referred to the Claimant's written statement dated August 22, 2017, where the Claimant stated to the Commission that he was dismissed from his employment.

[11] I am not bound by the employer's characterization of the end of the employment relationship. The Claimant testified that when he returned home after his visit to the hospital he answered one of the calls from his employer and told his employer that he was not feeling well and was staying home. However, the Claimant testified that he did not give any details to his employer on how long he thought that he would be unavailable for work and did not provide a doctor's note to support his absence. The Claimant testified that besides the one call where he

responded to say that he was unavailable to go to work, he had no contact with his employer. Moreover, when I questioned that Claimant about why he did not contact his employer, the Claimant stated that he did not want to work because the job involved heavy lifting. He testified that due to his back problems, he thought that it would be best to rest his back and look for other work.

[12] When analysing the circumstances around how the employment relationship ended, it is important to consider who initiated the end of the relationship. Even though the employer issued a letter of termination, I find that it is the Claimant who decide to leave his position and not return to work. I come to this conclusion even though the Claimant was in an on-call position. The Claimant testified that he was called numerous times in the days following his initial absence but did not answer the phone. The Claimant also testified that even though he was on call, he was working about forty hours a week and that it was a busy period for the employer. The Claimant's witness confirmed that the Claimant received several calls from his employer. The record of employment confirms that the Claimant was working approximately 40 hours a week. I find that the Claimant's non-responsiveness towards his employer's attempts to ask him to work, particularly during a busy period where he was working full-time hours shows that the Claimant had decided to leave his employment. Accordingly, I find that the Claimant had a choice to stay or leave his employment and decided to voluntarily leave his employment.⁶ I find that the employment letter simply formalized the end of the employment relationship that was ultimately initiated by the Claimant.

[13] As such, I find that the Commission has proven on the balance of probabilities that the Claimant voluntarily left his employment.

Issue # 2: Did the Claimant voluntarily leave with just cause because he had no reasonable alternative to leaving?

[14] I find that the Claimant did not have just cause to leave his employment because he did not exhaust all of the reasonable alternatives available to him.

⁶ *Canada (Attorney General) v Peace*, 2004 FCA 56.

[15] The law sets out a list of circumstances to consider when determining whether there is just cause.⁷ However, when a claimant's circumstances do not fall into one of the circumstances listed in the law, a claimant can nevertheless prove just cause by showing that having regard to all of the circumstances, he had no reasonable alternative to leaving.⁸ The Claimant's circumstances do not fall squarely within the reasons listed in the law. Therefore, all of the Claimant's circumstances must be assessed and weighed to determine whether he had just cause for leaving.

[16] The Claimant testified that he decided that he should rest because his back was hurting. To corroborate his testimony, the Claimant provided copies of medical records showing that he went to the hospital because he was not feeling well. I accept the Claimant's testimony that he was unwell and that because of his overall health, he felt that he had good reasons not to go back to work or contact his employer. However, there is a distinction between the concepts of "good reasons" and "just cause" for voluntarily leaving.⁹ It is not sufficient for the Claimant to demonstrate that he acted for a good reason when he left the workplace. He must demonstrate that, after considering all of the circumstances, he had no reasonable alternative to leaving his employment.

[17] I find that the Claimant could have asked the hospital for a medical certificate and provided the certificate to his employer, if he was not well enough to go to work. I also find that the Claimant could, at the very least, have contacted his employer to explain his situation and get information about what the employer's expectations were around attendance at work.

[18] As such, I find that the Claimant has not proven that he had just cause to voluntarily leave his employment because leaving his job was not the only reasonable alternative in the circumstances.

Issue # 3: Did the Claimant's actions constitute misconduct?

[19] Given my conclusions on issues # 1 and # 2, I will not respond to this issue.

⁷ Paragraph 29 (c) of the *Act*.

⁸ *Canada (Attorney General) v Patel*, 2010 FCA 95; *White v Canada (Attorney General)*, 2011 FCA 190.

⁹ *Tanguay v Canada (Unemployment Insurance Commission)*, A- 1458-84.

CONCLUSION

[20] The appeal is dismissed.

Christianna Scott

Member, General Division - Employment Insurance Section

HEARD ON:	June 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. A., Appellant Giovanna Delucacalce, Representative for the Appellant