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

Citation: *RS v Canada Employment Insurance Commission*, 2020 SST 904

Tribunal File Number: GE-19-3947

BETWEEN:

R. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: January 24, 2020 (videoconference) and
April 29, 2020 (on the record)

DATE OF DECISION: May 7, 2020

Canada

DECISION

[1] The appeal is dismissed, with modification[1]. The Appellant has not shown just cause for voluntarily leaving her job because she had reasonable alternatives to quitting when she did. This means she is disqualified from receiving employment insurance benefits (EI benefits).

OVERVIEW

[2] The Appellant resigned from her employment at X on January 24, 2019. In her resignation E-mail, she said she was in constant pain due to tenosynovitis in her hands and could no longer perform the assembly work she had been doing. She gave the employer 2 weeks' notice, and left the employment after her last day of work on February 8, 2019.

[3] After she quit, she saw her doctor and obtained a medical certificate to support a claim for employment insurance sickness benefits (sickness benefits). She was paid 15 weeks of sickness benefits between February 17, 2019 and June 8, 2019.

[4] The Appellant applied to renew her claim for EI benefits effective August 5, 2019. For the reasons set out in my decision in her related appeal in Tribunal file GE-19-3945, she is disentitled to EI benefits from August 5, 2019 to September 18, 2019 because she did not provide the medical evidence requested by the Commission certifying that she was capable of returning to work until September 19, 2019. As a result, the Appellant's claim may only be renewed as of September 19, 2019.

[5] But the Commission also decided that the Appellant voluntarily left her employment at X without just cause, so it was unable to pay her regular EI benefits from the effective renewal date (which is now fixed at September 19, 2019 according to the decision in appeal file GE-19-3945).

[6] The Appellant asked the Commission to reconsider this decision. She stated that the employer did not accommodate her need for modified duties after January 17, 2019, so she had no reasonable alternative but to resign. The employer told the Commission that the Appellant chose to resign rather than apply for short-term disability benefits or provide the medical evidence necessary to support further workplace accommodations. The Commission maintained

[1] See "Conclusions" below.

the disqualification on her claim, and the Appellant appealed to the Social Security Tribunal (Tribunal).

[7] I must decide whether the Appellant has proven she had no reasonable alternative to leaving her job when she did.

[8] The Commission says the Appellant could have availed herself of paid medical leave offered by her employer through short-term disability benefits or a continuation of her WSIB benefits – until she was assessed by the surgeon specialist on July 23, 2019. Instead, she resigned on January 24, 2019 – 6 months before she was scheduled for a consultation with the specialist. The Commission also says she could have started looking for alternative work starting back in August 2018, when she was first advised by her doctor that she should not be doing work with repetitive strain. Instead, she took no steps to find a different job before voluntarily putting herself in a position of unemployment.

[9] The Appellant says she had no reasonable alternative to leaving when she did because of the pain she was experiencing and because of the lack of support from the employer.

[10] I find that the Appellant had reasonable alternatives to leaving her employment at X on February 8, 2019. Therefore, she is disqualified from receipt of EI benefits.

PRELIMINARY MATTERS

[11] The Appellant has 2 related appeals before the Tribunal: GE-19-3945 and GE-19-3947. They were joined and heard together by videoconference on January 24, 2020, but separate decisions are being rendered in each file. This is the decision in GE-19-3947.

[12] At the conclusion of the hearing on January 24, 2020, the Appellant's representative asked for an adjournment in both of her appeals to follow-up on an outstanding Access to Information (ATI) request that he believed would provide information relevant to her appeals. The Appellant's evidence and submissions were complete, but I agreed to place both appeal files in abeyance for 3 months to allow the Appellant's representative to follow-up on the outstanding ATI request. I advised I would revisit the status of the ATI request after 3 months and determine if a further adjournment was warranted.

[13] On April 16, 2020, the Appellant's representative sent an email to the Tribunal with the Appellant's "final response" to her appeals (GD16).

[14] I considered these materials on April 29, 2020 and determined that no further hearing was required in either of the Appellant's appeals. The hearing was, therefore, closed on April 29, 2020.

ISSUE

[15] I must decide whether the Appellant is disqualified from being paid EI benefits because she voluntarily left her job at X without just cause. To do this, I must first address the Appellant's voluntary leaving. I then have to decide whether she had just cause for leaving.

ANALYSIS

A) Did the Appellant voluntarily leave her job?

[16] The Appellant gave notice she was resigning from her employment at X in an E-mail she sent on January 24, 2019 (GD3-24).

[17] Her last day of work was February 8, 2019 (see Record of Employment at GD3-16).

[18] The parties agree that the Appellant quit (in other words, voluntarily left the job). I see no evidence to contradict this.

[19] The Appellant initiated the severance of her employment relationship with X by sending a resignation E-mail at a time when the employer still had work for her. I therefore find that she voluntarily left her job after her last day of work on February 8, 2019.

B) Did the Appellant have just cause for voluntarily leaving?

[20] The parties do not agree that the Appellant had just cause for voluntarily leaving the job when she did.

[21] Section 30 of the *Employment Insurance Act* (EI Act) says that you are disqualified from receiving EI benefits if you left your job voluntarily and you did not have just cause for doing so.

[22] Having a good reason for leaving a job is not enough to prove just cause for purposes of receiving EI benefits.

[23] The law says that you have just cause to leave the employment if, considering all of the circumstances, you had no reasonable alternative to quitting when you did[2]. It is up to the Appellant to prove this. The Appellant has to show it is more likely than not that she had no reasonable alternative but to leave when she did. When I decide that question, I have to look at all of the circumstances that existed when the Appellant quit, including those set out in subsection 29(c) of the EI Act.

[24] At the appeal, the Appellant said that she left her employment at X because her medical condition made continuing in her job a danger to her health and safety[3]. She submits she had no reasonable alternative but to quit in the circumstances.

Issue 1: Was the Appellant's medical condition such that she had no reasonable alternative but to quit on February 8, 2020?

[25] To succeed on this ground, the Appellant must prove 2 things:

a) that her medical condition was such that continuing to perform her job was a danger her health and safety;
and

b) that she had no reasonable alternative but to leave the employment in the circumstances.

[26] It will not be enough to simply demonstrate that she was medically unable to continue doing the repetitive assembly work that was part of her job. She must also prove that she had no reasonable alternative but to leave the employment altogether.

[27] For the reasons set out below, I agree that the Appellant's medical condition had progressed to the point where it was not advisable for her to continue doing that repetitive

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[2] *Canada (Attorney General) v. White,* 2011 FCA 190
[3] Paragraph 29(c)(iv) of the *Employment Insurance Act*

assembly work. But I find that she had a number of reasonable alternatives to quitting when she did.

[28] The Appellant gave notice of her resignation by E-mail on January 24, 2019 (GD3-24), and her last day of work was February 8, 2019 (GD3-16).

[29] I must assess the Appellant's circumstances as they existed on the day she left the employment[4], namely **February 8, 2019**.

Evidence at February 8, 2019 about Appellant's Medical Condition

[30] The evidence related to the Appellant's medical condition **as of February 8, 2019** is:

a) Receipts for physiotherapy, massage therapy, orthotics, laser treatments and ultrasounds related to the Appellant's tenosynovitis between April 25, 2018 and June 24, 2018 (GD3-32 to GD3-40).

b) A letter dated May 17, 2018 from her family doctor asking X to provide modified duties with restrictions on certain repetitive work until June 17, 2018 (GD3-41).

c) A letter dated May 24, 2018 from WSIB regarding the registration of the Appellant's claim for WSIB benefits (GD3-42).

- The date of Injury/Illness is shown as April 25, 2018

d) A letter dated June 13, 2018 from her family doctor to WSIB recommending the Appellant continue to be off work due to her workplace injury (GD3-43).

e) Medical notes from treatment the Appellant received while travelling outside of Canada in July 2018 (GD3-44 to GD3-45).

f) The July 17, 2018 WSIB Return to Work Memo/Plan (GD3-46 to GD3-50).

- The Final Return to Work date is shown as August 27, 2018

[4] *Canada (Attorney General) v. Lamonde*, 2006 FCA 44

g) A letter dated August 4, 2018 from the Appellant to her WSIB case manager advising that she saw a plastic surgeon on July 30, 2018 and was told she should be able to resume her normal work – but the employer has asked for a note from her family doctor to resume normal duties (GD3-51).

- The appointment with her family doctor was on August 14, 2018.

h) The "Return to Regular Duties" form signed by the Appellant on August 16, 2018. It reads as follows:

> "X has received an updated Functional Abilities Form (FAF) dated August 14, 2018 which states that you are capable of returning to work with no restrictions.
>
> Effective immediately, it is expected that you will resume your regular duties, and rotate through all Assembly positions as you did prior to your injury.
>
> However, if you start to experience pain again, please report it to your supervisor immediately so we can review and adjust your tasks accordingly.
>
> Thank you for co-operating in your Return to Work plan." (GD3-66)

i) According to the Chronology (GD-30), the Appellant's family doctor referred her to a surgeon on October 16, 2018 "due to feeling of slight pain". She was given an appointment with the surgeon on July 23, 2019. She was still doing "regular work" and the employer was aware of her wrist pain.

j) An E-mail sent by the Appellant to the employer on January 9, 2019 advising she was experiencing pain in her wrist and asking for alternate work.

This E-mail is especially relevant because of its proximity in time to the Appellant's resignation E-mail on January 24, 2019. It reads as follows:

> "My pain in right hand started to emerge again. I took a steroid injection when I was in India to avoid surgery. This gave me temporary relief till a week ago. Doctor at that time also advised that the steroid injection is good only for 5 to 6 months and if the pain reoccurs, I need to go for surgery.

> My surgeon appointment is in July 2019. I would appreciate if my work is rotated which is not the case right now. My concern is that the flare-up may get worse if I continue to do the same task for the entire day which was the main reason for the onsent of tenosynovitis. (due to repetitive work).
>
> I have already spoken to M. on my flare up and pain which seems to be more in right wrist and some in left. I am starting to worry again now. I will be seeing my family physician tomorrow to see if there can be any pain killer or interim relief I can avail until I see the surgeon or if my appointment with surgeon can be preponed.
>
> Help and please do the needful!" (GD3-53)

k) The employer gave her a week of modified work from January 10 to January 17, 2019 (GD3-30).

l) In the Offer of Modified Work Assignment signed by the Appellant on January 10, 2019 (GD13), the employer offered a list of modified duties and stated:

> "You have indicated that you have an appointment with your surgeon in July 2019, but would be seeing your doctor on January 10, 2019 to see if he can recommend any pain relief until you see the surgeon.
> In an effort to assist you and keep you actively at work, at this time, we are able to offer you the following modified work assignment."
>
> and
>
> A supervisor would "monitor your progress and meet with you weekly to adjust your duties and/or length of placement as required based on your ability and relevant medical information. If you have any difficulties performing the modified work please notify your supervisor immediately." (GD13-2)

m) According to the Appellant's "Chronology" (GD3-30), she did see her family doctor later on January 10, 2019.

n) The Appellant's resignation E-mail on January 24, 2019 (GD3-24), which contains statements by the Appellant regarding her condition. These are highly relevant because of their proximity to the date she left her employment on February 8, 2019. The Appellant provided the following information:

- The tenosynovitis had started bothering her other hand.
- With her job requiring "continuous repetitive work and using pressure on the wrists", she was "constantly in pain".
- She had contacted the surgeon "twice this month" to see if there were any cancellations or earlier appointments available, but could not be accommodated.
- She had left 2 voicemail messages for WSIB in the last two days "whether I should resign", but they hadn't called her back.
- Her productivity was "reducing", and her pain was affecting her work at X and her day-to-day household work.
- Until she gets "proper treatment" and recovers, she is "unsure" she will be able to perform the duties of her present position at X "with the same efficiency and without causing more damage to my current medical condition".
- Her family advised her that resignation was "the best decision given the situation at hand".

o) According to the Appellant's "Chronology" (GD3-31), on January 24, 2019 she was experiencing "extreme pain" and unable to drive or perform daily functions at home. She decided to resign after coming home from work "in tears" and discussing the situation with "my family and my kids".

[31] The Appellant sent her resignation E-mail at 11:21pm on the evening of January 24, 2019 (GD3-24).

[32] Ten minutes later, at 11:31pm, she sent an E-mail to WSIB. In this E-mail, the Appellant stated that she could not continue working "due to her workplace injury and demand at work", and asked if WSIB could help her to get an earlier appointment with the surgeon (GD3-54). She also enclosed a copy of her resignation E-mail.

[33] She worked until her last day on February 8, 2019.

[34] She applied for sickness benefits on March 6, 2019 (GD3-30). After she was asked for a medical certificate to support her claim, she arranged to see her family doctor (GD3-59).

[35] On March 14, 2019, she saw her family doctor and obtained a medical certificate stating she became unable to work due to her medical condition as of February 8, 2019 (GD3-18). The attached letter from her doctor is also dated March 14, 2019 and reads as follows:

> "The above named patient has bilateral de Quervain's tenosynovitis which is preventing her from working as she gets pain in her bilateral hands. She is waiting to see a surgeon (name redacted). Unfortunately, the wait time for that appointment has been long. She was referred on October 16, 2018 but won't be able to see him until July 23, 2019.
>
> She cannot work until AT LEAST July 23, 2019 and will be assessed with respect to her working ability after seeing the specialist." (GD3-19).

[36] On the basis of the March 14, 2019 medical certificate and letter from the Appellant's family doctor, she received 15 weeks of sickness benefits from February 17, 2019 and June 8, 2019 (see GE-19-3945).

[37] To receive sickness benefits, a claimant must provide a medical certificate certifying two (2) distinct things:

a) a) that the claimant is unable to work because of illness, injury or quarantine; ***and***

b) b) the probable duration of the illness, injury or quarantine.[5]

[38] The March 14, 2019 medical certificate and doctor's note were obtained 5 weeks after she quit. Both conveniently correspond to her last day of work – which was exactly 2 weeks after she gave notice of her resignation. The Appellant herself told the Commission that she went to see her doctor after quitting, and he completed the medical certificate indicating she couldn't work from February 8, 2019 because she told him that she left her job on that date (see Supplementary Record of Claim at GD3-20). In other words, it was back-dated to support the Appellant's application for sickness benefits starting as soon as possible after she left the employment.

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[5] Section 40 of the *Employment Insurance Regulations*

[39] The Commission accepted the March 14, 2019 medical notes from the Appellant's family doctor as sufficient to establish a claim for sickness benefits from February 8, 2019.

[40] But they do not prove that she had no reasonable alternatives but to quit her job on February 8, 2019.

[41] The March 14, 2019 medical evidence falls far short of being a recommendation that the Appellant should **quit her job** at any date, something she herself has acknowledged (GD3-20). At best, it confirmed that the Appellant was medically unable to perform the repetitive assembly work she was doing at X from February 8, 2019 until she was further assessed by the surgeon on July 23, 2019. This restriction did not require her to leave the employment on February 8, 2019. This could have been addressed by taking a medical leave of absence and applying for short-term disability benefits under the employer's group benefits plan or re-instituting her WSIB benefits claim until she was assessed by the surgeon on July 23, 2019.

[42] When the Commission first enquired about the reason for her separation from employment, the Appellant said she quit because she felt the employer was not helping her to apply for short-term disability or WSIB benefits and would not accommodate her (GD3-20).

[43] But the employer told the Commission (at GD3-21) that:

- On January 9, 2019, the Appellant sent HR an E-mail saying she had an appointment with a surgeon in July 2019.
- On January 10, 2019, an HR representative had a conversation with WSIB on the Appellant's behalf and was told it was up to the Appellant to initiate a reoccurrence file with WSIB in order to be compensated for her injury or to look into further benefits from WSIB.
- Also on January 10, 2019, the employer offered the Appellant a week of modified duties. They didn't have to do this because she did not provide any medical documentation to support modified work at that time, but they did so "as a gesture of good faith".

- If the Appellant had brought in a medical they may have been able to offer her other modified work beyond the January 17, 2019 date.
- No further medical certificate was provided by the Appellant.
- On January 24, 2019, the Appellant sent an E-mail advising she was resigning and would be leaving on February 8, 2019.

[44] When the Appellant was asked during the reconsideration process why she did not submit a doctor's note to extend the modified duties the employer offered between January 10 – 17, 2019, she answered that the employer was not happy to give the modified duties (GD3-59). But this seems contrary to the employer's actions. X acted to immediately modify the Appellant's duties upon being notified of the return of her wrist pain – and did so without the supporting medical documentation usually required for such accommodation.

[45] When the Commission asked the Appellant why she did not wait to hear from WSIB regarding re-opening her claim and instead sent them a copy of her resignation, she answered that she had tried to reach them many times before without a response (GD3-64). But the Appellant had successfully established a WSIB claim less than a year before, so she had gone through the bureaucratic process before. She also had an existing claim to reference and was capable of sending an E-mail or a letter directly to her WSIB case officer such as the one she sent on August 4, 2018 (see GD3-51). This would have been reasonable and appropriate given the information WSIB provided on January 10, 2019 about how it was the Appellant – not the employer – who needed to take the initative to re-activate a claim.

[46] When asked why she didn't apply for short-term disability through the employer, the Appellant told the Commission that the employer said she could not apply for short-term disability, that she would be denied (GD3-64). This seems contrary to what the Appellant wrote in her resignation E-mail where she says:

> "At one time, I did consider applying for extended leave of absence but considering the company's overall interest at the forefront, it is best that I resign." (GD3-24)

[47] The employer told the Commission (at GD3-63) that:

- X has a short-term disability plan.
- The Appellant did not apply for short-term disability benefits.
- The Appellant did not submit any medical documentation to support the modified duties provided to her in January, 2019.
- She would have needed this medical documentation to apply for short-term disability benefits as well.

[48] When the Commission maintained the disqualification on the Appellant's claim for voluntarily leaving her employment without just cause, she filed a Notice of Appeal with the Tribunal (GD2). After being provided with the Commission's response to her appeal (GD4), the Appellant filed a further written submission in support of her appeal (GD6). It said that she left 2 messages for the employer on January 30, 2019 asking if there were any other options she could "avail including STD or long-term leave without pay and return after her July 23 appointment with Surgeon" (GD6-4). But she did not receive a call back.

[49] She filed a further written submission in support of her appeal (GD8), in which she said the employer had a history of not responding to calls and voicemails on time, and that her requests for short-term disability or leave without pay until seeing her surgeon were not responded to.

[50] I note that the Appellant's statements in her supplementary appeal materials at GD6 and GD8 are not consistent with her prior statement to the Commission that the employer told her she could not apply for short-term disability, that she would be denied (see GD3-64).

[51] The Appellant and her spouse, R. H., testified at the hearing that:

- The Appellant suffered a workplace injury due to the repetitive "housing work" she was doing on the assembly line. The company accepted that she was injured due to work-

related tasks. Her WSIB claim was "accepted", and a return to work plan was later worked out.

- In July 2018, she received a steroid injection in her right wrist while travelling in India. This helped her "quite a lot".

- On July 23, 2018, she returned to work with "very little pain" after the steroid injection. But a lump appeared after the injection, so she saw a plastic surgeon. She had "very little pain" at this point. The plastic surgeon told her that a small amount of pain was "normal", but he told her to consult a surgeon if the pain increased.

- She continued to work until October 2018 when "a little bit of pain came back". Her family doctor said she should see the surgeon, but the first appointment she could get was 8 months down the road, in July 2019. All she could do was "wait and watch".

- In October 2018, the pain was increasing and she saw her family doctor again. He gave her a prescription for a topical pain reliever that she was "regularly" and "constantly" applying.

- She was "constantly communicating" with Human Resources (HR) at X about her situation. She used to go to HR and her manager and tell them about her pain and ask for alternative work. They'd give her 2-3 hours of different work and then she had to go back to the "housing work" that was causing the pain because they said they didn't have any other work. She was finding this type of work was very difficult because she could not press with her thumb.

- She would also ask if she could "go on leave without pay or disability", but was told she was "not allowed". She asked the employer "many times" and they told her she was "not eligible".

- In January 2019, she started to have "extreme pain". She couldn't even drive to work.

- On January 10, 2019, she told the employer about her "extreme pain" and said she was going to see her family doctor. They agreed to give her modified duties "without a

doctor's note" because of her "extreme pain". The modified duties started that same day, but they actually included some housing work – "which was the root cause of the problem".

> Note: The Appellant provided a document at the hearing entitled "Offer of Modified Work Assignment", which was signed by the Appellant on January 10, 2019. I admitted this as Exhibit "A" at the hearing. This document was coded GD13 and circulated to the Commission after the hearing. The Commission's submissions in response (GD15) were provided to the Appellant.

- She saw her family doctor later on January 10, 2019, and he agreed to try to get her an earlier appointment with the surgeon. He also told her that if she continued to do this type of work, the condition would get worse.

- The modified duties included "housing all in one" (see GD13-2), which was "high pressure work" and the Appellant "couldn't bear it".

- On January 21 and 23, 2019, she started calling WSIB and the surgeon because the pain was "unbearable" and she wanted an earlier appointment with the surgeon (see also GD6-2).

- The company was "not helping her" with short-term disability benefits or taking leave without pay "until she sees the surgeon", which was not until July.

- The pain was "unbearable", so she resigned for the "specific health reasons" set out in the E-mail (she referred to the E-mail at GD3-53).

[52] I asked the Appellant what she meant when she wrote in her resignation letter that she resigned on the advice of her family. She answered:

> "I was not getting any support from the company, I was just given modified work for one week only. After 17th January and thereafter I was given normal work and I was given housing every day. I called WSIB, and I called the doctors for an earlier appointment. But I wasn't getting support from anyone. I even suggested I would take short-term disability or leave without pay, and they said NO. And the doctor told me that if I

> continued, then my hand is going to get worse. I sat down with the family and discussed it. As an alternative to – instead of losing your hand, just let your work go."
>
> and
>
> "I had to leave this work because of my health. The company was not supportive. WSIB was not supportive. I couldn't get an earlier doctor's appointment. And the family doctor advised that my hand would get worse if I continued."

Reasonable Alternatives to Quitting

[53] I accept that the Appellant was medically unable to continue performing the repetitive assembly work required for her job at X as of February 8, 2019. But I do not accept that quitting her job was her only reasonable alternative ***at that time*****.**

[54] A reasonable alternative would have been for the Appellant to request a medical leave of absence while she waited to see the surgeon. She could have obtained the necessary supporting medical certificate from her family doctor, which would not have been problematic given the documentation he historically provided and, indeed, the letter he gave her on March 14, 2019.

[55] With a leave of absence until July 23, 2019, the Appellant would have been off work completely. This would have eliminated the need to continue asking for alternate work and/or accommodations – which she alleged the employer was not happy about. It also would have eliminated the repetitive strain movements she says were causing her pain, and thus her health and safety would not have been endangered by the risk of further aggravating her condition. In this way, she would have followed her doctor's advice to cease the repetitive strain movements and yet preserved her employment while awaiting the surgeon's assessment.

[56] The leave of absence did not have to be without pay. It was open to the Appellant to take ***paid*** medical leave by reactivating her WSIB claim and/or applying for short-term disability benefits through the employer's plan.

[57] I find that the Appellant's resignation was premature in the circumstances as they existed at **February 8, 2019**.

[58] Taking steps to ask for and arrange a medical leave of absence with pay through WSIB or short-term disability benefits was a reasonable alternative to voluntarily leaving her employment on February 8, 2019. The Appellant did not avail herself of this reasonable alternative and, therefore, has not proven she had no reasonable alternative but to leave the employment. As a result, the Appellant did not have just cause for voluntarily leaving her employment at X on February 8, 2019.

Exhaustion of Reasonable Alternatives

[59] The Appellant submits that the employer was not supportive of her efforts to take leave or go on short-term disability and that she exhausted this reasonable alternative.

[60] I do not agree.

[61] I have serious concerns about the Appellant's credibility on the issue of the employer's lack of support for a medical leave of absence and short-term disability benefits.

[62] I give significant weight to the Appellant's statement in her resignation E-mail on January 24, 2019:

> "At one time, I did consider applying for extended leave of absence but considering the company's overall interest at the forefront, it is best that I resign." (GD3-24)

This is direct and credible evidence that the Appellant thought about applying for leave but then decided against it. I prefer this statement to her subsequent statements about the employer standing in the way of a leave of absence or disability benefits because the resignation E-mail was created spontaneously and before any negative decisions were made on her claim. By contrast, the Appellant's written submissions at GD6 and GD8 were generated for the purpose of supporting her appeal and responding to the points in the Commission's representations at GD4.

[63] I also give significant weight to the employer's unequivocal statement to the Commission that the Appellant did not apply for short-term disability benefits. This is supported by the Appellant's statement in her resignation E-mail. And it makes no sense that the Appellant would refer in her resignation to having considered applying for leave and decided against it – if, in

fact, the employer had already told her that she did not qualify (as she told the Commission and testified at the hearing).

[64] The Appellant's credibility on the issue of the employer's alleged lack of support is further undermined by her failure to obtain a medical certificate or doctor's note when she saw her family doctor on January 10, 2019.

[65] During the reconsideration process (see GD3-64), the Appellant reported that she received a steroid injection in July 2018 and this allowed her to return to work. The pain returned on January 9, 2019 and it was so severe she could not continue to work. She told the Commission that she consulted with her doctor, but he did not provide her with a note to quit or that modified duties were recommended.

[66] Why didn't she ask for such a note? She was with her family doctor on January 10, 2019 at a time when she was in "extreme pain". He told her then that if she continued to do the same repetitive work, her condition would get worse. She would have known from the Offer of Modified Work Assignment she signed earlier that day that, in the absence of an updated doctor's note, the employer could only offer 1 week of modified duties. She also would have known from her WSIB claim and prior requests for accommodation that she would need a doctor's note to extend the January 10, 2017 Offer of Modified Work and to remove the "housing" tasks from the list of modified duties. Her family doctor was the one who provided the medical certificate to establish her WSIB claim in May 2018, and the employer specifically asked for a note from him to support her return to regular duties in August 2018. It is not credible to me that the employer would have suddenly required a medical certificate from the surgeon when the Appellant's family doctor was capable of certifying that she was medically unable to work and his word had previously been acceptable to both WSIB and the employer.

[67] A note from her family doctor on January 10, 2019 – such as the one she obtained from him on March 14, 2019 stating she was unable to work from February 8, 2019 to July 23, 2019, is all that would have been necessary for the Appellant to seek medical leave when her pain returned and re-activate her WSIB claim or apply for short-term disability benefits. She did not need anything from the surgeon to do any of these things.

[68] From her prior experience with her WSIB claim, and even the employer's temporary offer of modified duties, the Appellant would have been aware that applications related to workplace accommodations, WSIB benefits and disability benefits require current medical documentation to get the process started. Failing to obtain an updated doctor's note from her family doctor on January 10, 2019 casts doubt on whether the Appellant had any interest in a leave of absence or applying for WSIB or short-term disability benefits while she waited to be see the surgeon. The conduct is more in line with her statement in her resignation E-mail that she considered applying for extended leave of absence, but decided instead to resign.

[69] The Appellant's statements that X was not helpful with respect to WSIB or disability benefits are not borne out by the employer's conduct. One (1) day after the Appellant sent the E-mail alerting the employer that her pain had returned, the HR representative was on the phone with WSIB on the Appellant's behalf and found out what was required to reactivate the Appellant's claim. The fact that the answer from WSIB was that it was up to the Appellant – and not the employer – to continue the process in the event of a re-occurrence does not mean the employer was unsupportive. To the contrary, the employer was responsive and helpful, and it was up to the Appellant to take the next steps.

[70] I also note the employer's immediate offer of the week of modified duties starting on January 10, 2019. The employer reacted one (1) day after the Appellant alerted them that her pain had returned – and did so without the usual medical documentation required for such accommodation. Again, the employer was responsive and helpful, and it was up to the Appellant to take the next steps.

[71] What did the Appellant do? According to her resignation E-mail, she considered applying for extended leave, but decided it was best to resign.

[72] The Appellant testified at the hearing that her final decision to resign was made after discussions with her family on January 24, 2019. It therefore seems highly unlikely that she would have changed her mind a week later and contacted the employer on January 30, 2019 about short-term disability benefits and the possibility of returning to work after July 23, 2019, as she stated in GD6. It is more likely that this contact related to a dispute about her final paycheque, as she testified that she had to contact the employer on January 30, 2019 about an

unpaid day off. But even if she had made the enquiries she alleges, it was incumbent on her to do more than merely leave a voicemail message. She continued to work at X until February 8, 2019, so there was ample opportunity to send a follow-up E-mail to her resignation E-mail, advising that she wished to pursue a claim for short-term disability benefits and, presumably, withdrawing her resignation – since disability benefits would only be available to employees – not people who have quit.

[73] I find that the Appellant did not exhaust the reasonable alternative of taking a medical leave of absence because she did not obtain an updated medical certificate from her family doctor when she saw him on January 10, 2019 to rely on to request a medical leave of absence when her pain returned and became "extreme". This is especially the case since her family doctor subsequently certified that she was unable to work from that date until at least the date she was scheduled to see the surgeon in July 2019.

[74] She also could have obtained an updated note from her family doctor and submitted it to WSIB and the employer's disability benefits provider to start the process of applying for WSIB or short-term disability benefits while on medical leave. There is no evidence she ever contacted the disability provider, and the only thing she submitted to WSIB was a copy of her resignation on January 24, 2019. It is not up to the employer make the applications for these benefits. The fact that the Appellant didn't even bother to get the very first item that would have been required to pursue any form of paid medical leave upon the return of her "extreme pain" is evidence of her lack of interest in preserving her employment with X. And the fact that she resigned a mere two (2) days after leaving voicemail messages for WSIB is similarly indicative of her lack of interest in pursuing paid medical leave or the reactivation of her claim. Pursuing such claims reasonably requires more time and effort than that.

[75] The Appellant did not exhaust any of these reasonable alternatives and, therefore, has not proven she was left with no reasonable alternative but to quit. As a result, the Appellant did not have just cause for voluntarily leaving her employment at X on February 8, 2019.

[76] The Appellant also submits that her family doctor "agrees" she "had to find other work".

[77] She relies on 2 letters written by her family doctor after she quit:

a) a letter dated September 19, 2019 (GD2-15), in which the Appellant's family doctor confirms her tenosynovitis diagnosis and states:

> "This is a chronic condition. She has had this condition for over a year, and is unlikely to receive complete resolution in the future unless she avoids jobs which require repetitive use of the wrist. Therefore, she is unable to work occupations which require repetitive use of the hand/wrists for the same task." (GD2-15)

b) a letter dated October 8, 2019 (GD3-60), in which her family doctor stated she was not suited to work in a position with repetitive strain and stated that "it made medical sense/I agree medically with her quitting" her job at X.

[78] She also provided two decisions[6] (GD12) as authority that the Appellant was "the best judge" of her medical situation and did not need to see her doctor to determine hat she had no choice but to quit. These cases are distinguishable from the Appellant's circumstances because the Appellant had the ability to access paid medical leave and she had a pending appointment with a specialist at which she was to be re-assessed. She had everything she needed to protect her employment until at least July 23, 2019, but she wasn't interested in doing so. Her decision to leave the employment on February 8, 2019 was precipitous in the circumstances.

[79] I give little weight to the letters from the Appellant's family doctor purporting to agree – 9 months after-the-fact – with the Appellant's decision to quit. They are not relevant to the issue on this appeal because I must decide if the Appellant's circumstances – as they existed at February 8, 2019, were such that she had no reasonable alternative but to leave her employment. The closest contemporaneous statement from the same doctor is the letter dated March 14, 2019, in which he stated that she could not work until at least July 23, 2019 and that she would be "assessed with respect to her working ability after seeing the specialist" (GD3-19). As discussed above, this is not evidence that her family doctor felt she needed to quit her job as of February 8, 2019.

[80] Towards the end of her testimony, the Appellant stated that her family doctor had been telling her since August 2018 that she "needed to stop doing this work". If this were so, how

[6] Re: *Brisebois, A-510-96* and *G.A. v. C.E.I.C., 2016 SSTAD#I 251*

could the family doctor have issued the Functional Abilities Form dated August 14, 2018 stating the Appellant was capable of returning to work with no restrictions (this is referred to in GD3-66 and the Appellant testified that it was done by her family doctor).

[81] There is a difference between being medically incapable of performing a particular task at work and having no reasonable alternative but to leave the employment altogether. The question is not – was the Appellant prevented from doing her job at X because of her condition? The question is whether she had any reasonable alternatives to quitting her job on February 8, 2019?

[82] In her Request for Reconsideration, the Appellant stated that the pain was unbearable for her and there were no other reasonable steps she could take because the employer was "clearly unhappy with my repeatedly requesting alternate work" (GD3-29), WSIB did not follow up with employer or me, and her surgeon's appointment was not until July 2019. A reasonable alternative to quitting would have been to take a medical leave of absence and apply for WSIB or short-term disability benefits under the employer's plan. The Appellant would not have needed to keep asking for accommodations because she would have been off work. She would have preserved her employment in the event of a successful outcome with the surgeon. The fact that the treatment she received in July 2019 did not ultimately fix the problem is not relevant to her circumstances as at February 8, 2019. As for WSIB, it takes more than a couple of phone calls to get things going. And she would have known from her prior claim that she'd need to obtain a current medical certificate from her family doctor to reinstate her WSIB benefits. She didn't bother to get one.

[83] The Appellant failed to exhaust the reasonable alternatives available to her and, therefore, has not proven she was left with no reasonable alternative but to quit her job. As a result, the Appellant did not have just cause for voluntarily leaving her employment at X on February 8, 2019.

Issue 2: Did the Appellant's personal reasons for resigning mean she had no reasonable alternative but to quit on February 8, 2020?

[84] The Appellant testified that she did not quit because she wanted to, but because she "really had a problem". If she had continued to work, she doesn't know "what would have happened".

[85] R. H. testified that the Appellant continued working at X for "as long as she could" because he had lost his job and she wanted to support the family. By January 2019, the pain became "unbearable" and quitting was "the only choice" left for her.

[86] I have already found that the Appellant had reasonable alternatives to leaving her employment at X on February 8, 2019. She could have requested a medical leave of absence and applied for WSIB or short-term disability benefits while on medical leave. She could also have used her paid leave to start looking for different, non-repetitive strain forms of work. She has not proven that she exhausted her reasonable alternatives because her efforts to ask for a leave of absence, and apply for WSIB and short-term disability benefits, fell far short of what would have been required to arrange these things, let alone get the process started. Rather, as stated in her resignation: "At one time", she "did consider applying for extended leave of absence", but her family advised her that resigning was "the best decision" (GD3-24).

[87] The Appellant made a personal decision, in consultation with her family, that resigning from X was her "best" choice. As stated in her resignation E-mail, she was "not intending to find other work elsewhere" until she got her tenosynovitis "sorted out" (GD3-24).

[88] I acknowledge the Appellant's believe that she had good reasons for leaving her job when she did, and that doing so was the right thing for her. I also acknowledge that a decision to leave a job for personal reasons, such as wanting to rest an injury while awaiting assessment by a specialist, as described by the Appellant , may well be good cause for leaving an employment. But, the Federal Court of Appeal has clearly held that **good cause** for quitting a job is ***not*** the same as the statutory requirement for **"just cause"**, and that 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[7]. To have **"just cause"**, the Appellant must prove she had no reasonable alternative but to leave her job when she did. She has not done so

[7] *Laughland*, 203 FCA 129, *Vairumuthu*, 2009 FCA 277

[89] I find that the Appellant made a personal decision to leave her employment with X on February 8, 2019. While she clearly wished to concentrate on her recovery, she cannot expect those who contribute to the employment insurance fund to bear the costs of her unilateral decision to quit her job in an attempt to do so.

[90] A reasonable alternative to quitting would have been to request a medical leave of absence and apply to re-activate her WSIB claim or receive short-term disability benefits under the employer's group benefits plan. The Appellant did not avail herself of or exhaust her efforts in regard to this reasonable alternative and, therefore, has not proven she was left with no reasonable alternative but to leave her employment at X on February 8, 20919.

[91] As a result, I find the Appellant did not have just cause for voluntarily leaving her job at X on February 8, 2019.

Issue 3: Since the Appellant could have applied for paid medical leave through her employer's short-term disability benefits plan, is her claim subject to allocation?

[92] There is no dispute that short-term disability benefits available to X's employees through the employer's group benefits plan.

[93] There is also no dispute that the Appellant could have applied for short-term disability benefits when she became medically unable to perform her job as of February 8, 2019.

[94] She did not do so. She applied for employment insurance sickness benefits instead.

[95] If the Appellant was eligible to receive short-term disability benefits through her employer's plan and failed to make an application for those benefits, the money she would have been entitled to upon making such an application could constitute earnings pursuant to paragraph 35(2) of the *Employment Insurance Regulations* (EI Regulations). This is because disability benefits are usually paid to compensate for lost wages when a claimant is unable to work due to illness.

[96] If so, these earnings must be allocated to the weeks when the Appellant was unable to work due to illness[8].

[97] I have found that a reasonable alternative to quitting would have been for the Appellant to seek a medical leave of absence and apply for short-term disability benefits through X's group benefits plan. I have also found she did not avail herself of or exhaust her efforts with respect to this reasonable alternative. The question now becomes whether the employer was the first payor and whether the Appellant was required to apply for the employer's wage loss insurance before she could be paid sickness benefits.

[98] The Commission must now consider if the amount the Appellant would have been entitled to receive under the employer's group benefit plan constitutes earnings and, if so, whether there should be an allocation against her claim for sickness benefits.

CONCLUSIONS

[99] The Appellant had reasonable alternatives to leaving her job at X on February 2, 2019. She did not avail herself of or exhaust her efforts with respect to these reasonable alternatives. Therefore, she has not proven she had just cause for voluntarily leaving her employment.

[100] As a result, the Appellant is disqualified from receiving EI benefits.

[101] The effective date of the disqualification is modified from August 5, 2019 to September 19, 2019 in accordance with the disentitlement decision in the Appellant's related appeal file GE-19-3745.

[102] One of the reasonable alternatives the Appellant had was to apply for short-term disability benefits under the employer's group benefits plan. She did not avail herself of or exhaust this reasonable alternative and, instead, applied for employment insurance sickness benefits. The Commission must now consider the application of sections 35 and 36 of the EI Regulations and determine if there should be an allocation against her claim.

[103] The appeal is dismissed with modification.

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[8] Subsection 36(12) of the *Employment Insurance Regulations*

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	January 24, 2020 (Videoconference) and April 29, 2020 (On the Record)
METHOD OF PROCEEDING:	Videoconference and On the Record
APPEARANCES:	R. S., Appellant R. H., Representative for the Appellant