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

Citation: *JW v Canada Employment Insurance Commission*, 2020 SST 1067

Tribunal File Number: GE-20-1205

BETWEEN:

J. W.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: June 24, 2020

DATE OF DECISION: June 26, 2020

Canada

DECISION

[1] The appeal is allowed. The Claimant voluntarily left her employment with X, with just cause. This means she is not subject to a disqualification from regular Employment Insurance (EI) benefits for this reason.

OVERVIEW

[2] The Claimant made an application for regular EI benefits on September 25, 2019. She states in her application that she voluntarily left her employment with X and X. The Commission determined that the Claimant voluntarily left her employment with X, without just cause. They also determined that she had not acquired enough hours of insurable employment since leaving X, so she is disqualified from receiving regular benefits.

[3] The Claimant appeals to the Social Security Tribunal. She states she faced age-based discrimination and harassment from her supervisors.

ISSUES

[4] I must determine whether the Claimant is subject to a disqualification for leaving her employment with X. To do this I must determine whether the Claimant voluntarily left and whether she had just cause?

ANALYSIS

Voluntary Leaving

[5] There is no dispute that the Claimant voluntarily left her employment with X. The Claimant readily admits that she resigned from this employment and she provided her employer with a two-week written notice. I see no evidence to dispute this. Therefore, I find the Claimant voluntarily left her employment with X.

Just Cause

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

[7] The law says that you are disqualified from receiving regular benefits if you left your job voluntarily and you did not have just cause.[1] Having a good reason for leaving a job is not enough to prove just cause.

[8] The law says that you have just cause to leave if, considering all of the circumstances, you had no reasonable alternatives to quitting your job when you did.[2] It is up to the Claimant to prove this.[3] The Claimant has to show that it is more likely than not that she had no reasonable alternatives but to leave when she did. When I decide this question, I have to look at all of the circumstances that existed at the time the Claimant quit.

[9] The *Act* lists some circumstances that I have to consider when assessing if a claimant has proven just cause for leaving her employment. The mere presence of one of these circumstances does not prove just cause. As stated above, the Claimant must still prove she had no reasonable alternative but to voluntarily leave, when she did.[4]

[10] The Commission states the Claimant told them that she left her employment because she was getting irregular hours of work as an on-call employee, and she needed full-time hours. The Commission also states that the Claimant told them that there was nothing intolerable about her work conditions and she made a personal choice to leave her job so she could look for full-time work. The Claimant disputes this and states that those were not her words.

[11] When asked to explain all of her circumstances, the Claimant explained that she voluntarily left her employment for the following reasons:

a) She suffered age discrimination[5] because younger employees, who had slightly more seniority than she had, were permitted to transfer to other departments. There was one male employee who had the same seniority she did, who was transferred to the produce department.

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[1] This is set out at s 30 of the *Employment Insurance Act* (*Act*)
[2] *Canada (Attorney General) v White*, 2011 FCA 190, at para 3, and s 29(c) of the *Act*
[3] *Canada (Attorney General) v White*, 2011 FCA 190, at para 3
[4] Paragraph 29(c) of the *Act*
[5] Paragraph 29(c)(i) of the *Act*

b) The manager, assistant manager, and her supervisors harassed[6] her when they were dismissive, rude, condescending, chaotic, and reactive towards her in front of customers and other employees.

c) The assistant manager was dismissive, he took a military stance, and was antagonistic towards her[7].

d) After the employer changed the parking rules that required her to park her car in an unsafe location, they failed to provide her with an escort to her car when working the late shift. She states this created a danger to her safety.[8]

[12] I find that the last three circumstances listed above, when considered cumulatively, amount to just cause within the meaning of the *Act*. My reasons are set out below.

[13] I favoured the Claimant's detailed evidence of the circumstances that occurred leading up to her resignation, as presented during the hearing. I favoured the Claimant's evidence over the Commission's because the Claimant's explanations were forthright, consistent, and based on first-hand knowledge and experiences.

[14] I recognize that the Commission does not explain why they believe the employer's statements over the Claimant's, regarding whether she was issued a verbal or written warning. Nor is there evidence that the Commission requested copies of the employer's employee review documents that were referenced during their conversation. Further, I recognize that the Commission failed to attend the hearing, thus eliminating the Claimant's ability to cross-examine their evidence.

[15] I believe the Claimant when she states she was not aware of how much detail she needed to provide to the Commission when explaining her circumstances, as they directed those conversations. She states that this process was "all new" to her and her initial conversation(s) with the Commission were very brief. She says they did not ask her to explain everything. She says she thought it was self-explanatory. Further, I accept her statement that the Supplementary

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[6] Paragraph 29(c)(i) of the *Act*
[7] Paragraph 29(c)(x) of the *Act*
[8] Paragraph 29(c)(iv) of the *Act*

Records of Claim do not reflect her words. She asserts that the Commission recorded their own "beliefs," based on their interpretation of what she said.

Age Discrimination

[16] With respect to the Claimant's assertion that she suffered age discrimination, I find that there is insufficient evidence to prove this circumstance. There is no evidence that the Claimant raised her concerns about age discrimination with her employer. Rather, she states the employer gave the younger staff preferential treatment.

[17] The Claimant states that the employer transferred the younger employees to other departments but they refused her requests for a transfer. This said, she readily admits that the majority of those employees had more seniority than she had. Further, she confirmed that the male from her training class had requested his transfer within the first day or two at training. She states that she waited several weeks after she completed her training and had been working as a cashier, before requesting her transfer. The Claimant readily admits that, to apply for the position with the contractor who operated the wine department, she would have to quit her job with X, which she did not want to do. She further confirmed that the younger female who secured the position in the wine department did just that, she quit her position with X and then the wine contractor hired her.

Antagonism and Harassment

[18] The law provides that just cause will exist where there is antagonism with a supervisor, if the claimant is not primarily responsible for the antagonism, and the claimant had no reasonable alternative but to leave.[9] Further, just cause will exist if the Claimant was the subject of harassment and the claimant had no reasonable alternative but to leave.[10]

[19] I am not bound by previous Canadian Umpire Board (CUB) decisions. However, I am persuaded by, CUB 36792, which defines antagonism as a form of hostility or attitude, which in

[9] Paragraph 29(c)(x)
[10] Paragraph 29(c)(i)

most cases cannot be detected or determined by what may have occurred in one incident or in one dispute.

[20] Harassment is not defined in the *Act.* Although I am not bound by decisions rendered by the Social Security Tribunal Appeal Division (the AD), I am persuaded by the AD's analogy of the definition found in the Digest of Benefit Entitlement Principles[11] and the following definition, that will soon be added to the *Canada Labour Code*:[12]

> ***Harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment…

[21] The AD found that the two definitions referenced above, share the following key principles:[13]

a) harassers can act alone or with others and do not have to be in supervisory or managerial positions;

b) harassment can take many forms, including actions, conduct, comments, intimidation, and threats;

c) in some cases, a single incident will be enough to constitute harassment; and

d) there is a focus on the alleged harasser, and whether that person knew or should reasonably have known that their behaviour would cause offence, embarrassment, humiliation, or other psychological or physical injury to the other person.

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[11] Section 6.5.2 of the Digest of Benefit Entitlement Principles
[12] Bill C-65, an *Act* to amend the *Canada Labour Code* (harassment and violence), *The Parliamentary Employment and Staff Relations Act* and *The Budget Implementation Act,* 2017, No. 1, 1st Sess, 42nd Parl, 2018, cl 0.1 (assented to 25 October 2018), SC 2018, c22.
[13] N.D. v *Canada Employment Insurance Commission,* AD-19-285

[22] I recognize that the Canada Labour Code does not govern the Claimant's employment at X. Rather, this employment falls under WorkSafe BC. The definition of harassment is listed on the WorkSafe BC website, as follows:

> A worker is bullied and harassed when someone takes an action that he or she knew or reasonably ought to have known would cause that worker to be humiliated or intimidated. When an employer or supervisor takes reasonable action to manage and direct workers, it is not bullying and harassment.

[23] When I apply all of the key principles, as listed above, I find that the Claimant has shown that she was the subject of antagonism and harassment, as it relates to proving just cause under the *Act.*

[24] There is no dispute that the Claimant told the Commission that after five weeks of employment, her employer issued her a verbal and written warning stating that she had five days to improve her speed or she would be fired.

[25] The Commission presented evidence that they spoke with the employer about the verbal and written warnings, during which the employer said there was no verbal or written warning issued to the Claimant. The employer states they simply completed a "check in report" at "week 1, week 2, week 3…. 30 days, 60 days, 90 days," as they do with all new employees. The employer also states they felt the Claimant resigned because she did not realize it was such a "high paced environment." As set out above, the Commission does not provide an explanation why they believed the employer's version of events.

[26] The Claimant disputes the Commission's evidence and states that her weekly check-ins were verbal and she was not required to initial or sign any documents. She consistently states that the manager and assistant manager called her into a meeting and issued her a verbal and written warning. She says that these warnings stated that she had five days to improve her speed or she could be dismissed. She states that she was required to sign the written warning. The Claimant states that when she requested that a union representative be present at that meeting and asked for a copy of the written warning the employer denied both requests.

[27] The Claimant explained in detail how she found the work environment "chaotic" and "toxic." She agreed that it was a fast-paced environment but asserted that this was not the issue. She argued that the situation "was intolerable" and states that her decision to resign had very little to do with the "time factor." Rather, she states the training was in adequate, and the employer denied all of her requests for additional training, and a transfer to another store or department. She states the manager, assistant manager and supervisors were dismissive to her and gave preferential treatment to younger employees.

[28] The Claimant spoke in-depth of the behaviour she encountered from one assistant manager. She states that he would often be "unresponsive." She explained that he would simply turn and walk away from her instead of responding to her questions or concerns. She says he was not pleased with her and he would often stand in front of her cash lane with his arms crossed, in a "military stance." She states he stood there and watched her for lengthy periods, upwards of an hour. She confirmed that he would monitor other cashiers but he was watching her for longer periods than anyone else, even after she handed in her resignation.

[29] The Claimant explained that the store was having problems with criminal activities in their parking lot so they hired a security company to manage the parking areas. They handed out placards (parking permits) and instructed employees to park their cars in the back of the building. She says she raised concerns with a manager about safety issues with having to walk to her car alone, after working the late shift. She states that the employer told her she would have an escort to her car if needed. Then, when she had to walk to her car three times without an escort, she tried to raise her concerns with him again. She states that the assistant manager yelled at her in front of customers and other staff saying, "if it's a problem for you then you can park in front of …. Insurance." She says, she felt that "this was a deal breaker," because she felt embarrassed after he yelled at her in front of everyone.

[30] I found the Claimant's explanation of events to be probable. Specifically, that the employer called her into a meeting and gave her a verbal and written warning that if, she did not increase her work speed she could be dismissed. I am also satisfied that the Claimant requested union representation and a copy of that warning but the employer denied her requests. I find that

the employer actions to be antagonistic along with their threat of dismissal constitutes harassment, as defined above.

[31] Further, I accept that the assistant manager's dismissive behaviours and yelling at the claimant in front of customers and staff constitutes antagonistic behaviour where the Claimant is not primarily responsible for the antagonism. Overall, I find that the employers' behaviours were not reasonable and they knew or ought to have known that such behaviours would offend and embarrass the Claimant and result in her resignation.

Danger to Health or Safety

[32] With respect to the health and safety issues raised by the Claimant, I accept she had safety concerns when having to walk to her car alone in the dark, after working a late shift. She raised the issue with her employer who simply yelled at her that she could park her car in front of the insurance company. I believe the Claimant when she states that her safety concerns would not be eliminated even if she parked her car in front of the insurance company, because she would still be walking alone, after dark, in an area where there was criminal activity.

No Reasonable Alterative

[33] Having found that the employer was antagonistic and harassing, along with the presence of safety issues relating to parking, I must now determine whether the Claimant had just cause to leave when she did. Claimants do not need to establish that their working conditions were so intolerable that they had no choice but to quit immediately.[14] Instead, the question is whether, having regard to all the circumstances, they had no reasonable alternative to leaving their job when they did.

[34] The Commission submits that the Claimant had reasonable alternatives to quitting so she left without just cause. They state the Claimant should have continued to work while she continued her search for full-time work. They also state that the Claimant should have taken the

[14] *Chaoui v Canada (Attorney General)*, 2005 FCA 66 at para 7; *SW v Canada Employment Insurance Commission*, 2017 SSTADEI 437, 2017 CanLII 97203 at paras 47–57.

employer's feedback under advisement and make efforts to improve, while she sought out other employment, until such time she improved or they dismissed her. As set out above, the Commission provides no explanation as to why they favoured the employer's statements over the Claimant's evidence.

[35] In consideration of the cumulative effect of all the circumstances, along with the fact that the Claimant consistently raised her concerns to various managers and requested transfers, I find that the Claimant had just cause for leaving her job when she did. I believe the Claimant when she states she felt she had to provide two weeks' notice to end her employment out of courtesy and it was just "good manners" to do so. It is not a reasonable alternative to insist that the Claimant continue to endure this antagonism and harassment, or having to put her safety at risk, before resigning with notice, or securing another job. Therefore, I find the Claimant had no reasonable alternative but to leave when she did. This means she had just cause to leave her employment with X.

CONCLUSION

[36] The appeal is allowed. The Claimant voluntarily left her job with just cause. This means she is not disqualified from receiving regular EI benefits for leaving her job with X.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	June 24, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. W., Appellant (Claimant) Odette Dempsey-Caputo, Legal Representative for the Appellant (Claimant)