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

Citation: *JA v Canada Employment Insurance Commission and X*, 2020 SST 1110

Tribunal File Number: GE-20-1124

BETWEEN:

J. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: June 18, 2020

DATE OF DECISION: August 31, 2020

Canada

Decision

[1] The appeal is dismissed. I find the Claimant is disqualified from receiving benefits because he voluntarily left his employment and did not prove that he had just cause for voluntarily leaving.

Overview

[2] The Claimant worked as a senior project manager. His job ended after he decided not to return to the place of employment because he felt unsafe in the work environment. The Employer advised the Claimant that if he chose to work from home, it would consider that as him abandoning his job. The Claimant refused to attend the worksite if the company's Chief Executive Officer (CEO) was present, so the Employer deemed that he quit his job. The Claimant believes he was terminated, while the Employer submits that he quit by not attending work.

[3] The Claimant applied for employment insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) found he did not qualify for EI benefits because he voluntarily left his employment without just cause. The Claimant requested reconsideration, and the Commission modified its decision. While the result was still that the Claimant was disqualified from receiving EI benefits, the Commission found that he lost his job due to misconduct instead of voluntary leaving. The Claimant appealed to the Social Security Tribunal's (Tribunal) General division, where the appeal was dismissed. He then appealed to the Appeal Division and was denied leave to appeal. Finally, he appealed to the Federal Court of Canada, where the case was returned to the Appeal Division of the Tribunal for redetermination.

Preliminary Matters

[4] Upon return to the Appeal Division from the Federal Court, the Appeal Division issued a decision on April 6, 2020, allowing the appeal and sending the matter back to the General Division for a reconsideration by a new member. The General Division held a new hearing by teleconference on June 18, 2020.

[5] At the hearing, the parties discussed the submission of documents that were not initially included in the file. On June 18, 2020, the Employer submitted a nine page post-hearing document including a cover page and an email exchange. On the same date, the Claimant submitted a seven

page post-hearing document including a cover page and an email exchange. I accepted both of these documents as they are likely relevant to the issue under appeal and none of the parties objected to the post-hearing submissions. They are coded as RGD-8 and RGD-9 respectively.

Issues

[6] **Issue #1**: Is the Claimant disqualified from being paid benefits?

[7] **Issue #2:** Did the Claimant have just cause for leaving?

Analysis

[8] Sometimes it not obvious whether a claimant quit a job or whether the employer dismissed the claimant. The concepts of misconduct and voluntarily leaving without just cause are two distinct notions, but they are dealt with together in sections 29 and 30 of the *Employment Insurance Act.* The courts have found that this "is quite rational since they both refer to situations where the loss of employment is the result of the deliberate action or actions on the part of the employee—and they are sanctioned similarly by special disqualification."[1] This means that in cases where it is not clear if the claimant voluntarily left his employment or was dismissed for misconduct, I may consider both issues together and decide whether the claimant stopped working because of their own actions. The outcome is the same – if the claimant caused their unemployment through their own reckless actions, then they are disqualified from receiving EI benefits.[2]

[9] A claimant who voluntarily leaves, or quits, a job is disqualified from receiving EI benefits unless he can prove that he had just cause for quitting.[3]

[10] To prove that he had just cause, the Claimant must prove that he had no reasonable alternative but to quit, having regard to all the circumstances.[4] In other words, the Claimant must prove that leaving the employment was the only reasonable course of action available to him, given the circumstances.[5]

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[1] *Attorney General of Canada v. Easson*, A-1598-92 unnumbered paragraphs
[2] *Canada (Attorney General) v. Desson,* 2004 FCA 303 at paragraph 4
[3] *Employment Insurance Act,* section 30(1)
[4] *Employment Insurance Act,* section 29
[5] *Canada (Attorney General) v. Laughland,* 2003 FCA 129 at paragraph 9

[11] Similarly, the Commission also disqualifies claimants from receiving regular EI benefits if they have lost a job because of their own misconduct.[6] Misconduct means a deliberate action that the Claimant knew, or reasonably ought to have known, could result in their dismissal.[7]

[12] The law says that, in these situations, I am not bound by how the Commission decided it.[8] The disqualification can be based on either of the two reasons, as long as it is supported by the evidence.[9]

[13] In other words, while the Commission decided after reconsideration that the Claimant was dismissed for misconduct, I am able to look at evidence and decide whether it is, in fact, a case of voluntary leaving.

[14] While the issue—whether the Claimant is disqualified from receiving EI benefits—is the same, the questions of who has to prove what are different, depending on whether it is a case of voluntarily leaving without just cause or misconduct. So, I will first decide which kind of case it is.

Issue 1: Is the Claimant disqualified from being paid benefits?

[15] To determine this, I will first decide whether the Claimant voluntarily left his job or whether he was dismissed. If I decide that the Claimant voluntarily left, then I will look at whether he had just cause for doing so. On the other hand, if I decide that the Claimant was dismissed, then I will look at whether the reason for the dismissal is misconduct under the law.

[16] If the Claimant had a choice to stay or to leave his job, then he voluntarily left. I must determine whether the Claimant had a choice to stay or leave the employment.[10]

[17] The Claimant submits that he was terminated from his employment. The Employer submits the Claimant quit the employment when he refused to attend the worksite, which is reflected on

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[6] *Employment Insurance Act*, section 30(1)
[7] *Canada (Attorney General) v. Pearson*, 2006 FCA 199 at paragraphs 14 and 15
[8] *Canada (Attorney General) v. Desson*, 2004 FCA 303 at paragraph 4
[9] *Canada (Attorney General) v. Desson*, 2004 FCA 303 at paragraph 4
[10] *Canada (Attorney General) v. Peace*, 2004 FCA 56 at paragraph 15

the Record of Employment (ROE). At the hearing, the Claimant disputed that he quit his job. He believes he was fired and that his dismissal letter proves the Employer ended his employment.

[18] The Claimant applied for regular EI benefits on April 30, 2018. On the application form, he stated that he worked for the Employer from April 23, 2012, until April 3, 2018, and was dismissed because the Employer accused him of absenteeism. He stated that while he did not ask permission to be absent from work, he advised the Employer that he would be absent from the office via letters sent on February 26, 2018, and March 27, 2018, as well as in a telephone conversation on March 22, 2018.

[19] The Claimant explained on the application for EI benefits that he believed the Employer did not protect him from "intimidation, bullying and harassment," and said he informed the Employer that he would work from home and fulfill his duties to the best of his ability in a safe space. He said he was working from home when he received a termination letter stating he abandoned his job.

[20] On May 28, 2018, the Claimant told the Commission that he was harassed and bullied by the Employer's CEO. The specific incident that caused the Claimant to decide not to attend the workplace occurred at a meeting on Friday, February 23, 2018. The Claimant described this incident as a "meltdown" by the CEO and testified that the Employer shouted at him for approximately 30 minutes in front of other staff at the meeting and pounded his fist on the table. The Claimant stated he felt the situation was an incident of harassment and intimidation. The Claimant added that the CEO used "insults" and said "things like 'no effort is being illustrated'…he also said that he would find someone else to do [the job]." The Claimant stated that the CEO was pounding his fists on the table to "intimidate" the Claimant, and was losing his voice while "escalating his aggression."

[21] The Claimant told the Commission that the CEO had a "bad temper" and had shouted and pounded tables with his fists in the office on several occasions. He stated the behaviour had occurred for "some time and [the Claimant] tried at several occasions to address this directly with" the CEO. He also submitted that he tried to follow the Employer's Whistleblower Policy by contacting a third party ethics reporting service, but found the email to that agency did not work.

At the hearing, the CEO refuted the Claimant's evidence, stating he did not recall any conversations between the Claimant and himself about his temper.

[22] The Monday, February 26, 2018,[11] letter from the Claimant to the CEO highlights that the third party reporting service did not work. As an alternative, the Claimant directed his letter to the CEO himself, and submitted that "the degrading environment in collaborating with you as of late is in breach of the Handbook's Standards of Conduct code and no longer acceptable."

[23] In the February 26, 2018, letter, the Claimant also states that he arranged a meeting with the CEO on January 19, 2018, to express his concerns but it did not result in change. At the hearing the Claimant explained that the January 2018, issue related to an email exchange that he felt was on the border of harassment. Following the February 23, 2018, meeting and being yelled at by the Employer, the Claimant decided he would "immediately continue [his] roles and responsibilities as Senior Project Manager…in the safety of my personal place of residence." The Claimant wrote that he would continue to work from home "until the situation has been investigated and resolved" pursuant to the Whistleblower Policy.

[24] In a telephone conversation on March 23, 2018, the CEO told the Claimant that if he was not at work on March 28, 2018, the Employer would deem that he abandoned his job. The Claimant responded that he could not be at the office if the CEO was there. The CEO responded that the Claimant was abandoning his job, which the Claimant refuted by saying the workplace was unsafe due to harassment and he was pursuing other claims against the Employer. The Claimant said, "as long as there is a threat of harassment I'm not going to say I will return there." The CEO responded in an email on March 27, 2018, offering to pay the Claimant six weeks of salary in accordance with his employment contract, since he had "no interest in coming back to work."

[25] On March 27, 2018, the Claimant again wrote to the CEO. The letter attempts to summarize the communication between the two parties, relating to the February 23, 2018, incident. It confirms the parties spoke on February 28, 2018, and that the CEO sent the Claimant an email on March 4, 2018, directing him to take 16 days of vacation carried over from 2017. The Claimant took the

[11] The letter is dated February 26, 2016, but referred to incidents in 2018 and was clearly misdated. The letter is located at page GD3-33 in the file. A copy with the date corrected by hand is located at GD3-65. I find the letter was intended to be dated as February 26, 2018.

time off work, but stated that it did nothing to ensure that when he returned to work he could "expect a safe work environment."

[26] The Claimant also recounted a conversation with the CEO on March 21, 2018. The Claimant writes that the conversation concluded with parties disagreeing on the definition of harassment, whether an apology was necessary, and whether the Claimant's workload was excessive, amongst other issues. The parties agreed that the company handbook and its regulations apply to the CEO as well as the employees. The Claimant also writes that the CEO suggested they "part company" but said it would be discussed at their next call.

[27] The letter states that on March 22, 2018, the Claimant and CEO spoke again. The Claimant writes that the CEO "expressed a willingness to apologize" but said that is not the same as actually apologizing. The Claimant submitted the CEO's "apology" contained the following problems:

- No admission of wrongdoing accompanied by an expression of regret was articulated;
- The Claimant asked the CEO to state his apology near the end of the conversation and the CEO said he had already provided it; and
- There was an "absolute refusal to provide a written apology" followed by the CEO asking why the Claimant had invited others to the February 23, 2018, meeting.

[28] In the March 27, 2018, letter, the Claimant stated that he proposed the following conditions which, if accepted, would work towards resolving the alleged harassment situation:

- An apology for the incident. The Claimant states that, "as there were other employees present during the incident, a written apology was requested which would also be communicated to the other witnessing parties";
- Adding another staff member to assist the Claimant with his "overwhelming workload and responsibilities"; and
- Commitment to regular/weekly progress meetings as previously conducted, and annual performance and salary reviews.

[29] The Claimant added that since he had doubts about whether the CEO would respect the Employer's harassment policy going forward, he wished "to receive in writing":

- An apology for the incident; and
- Confirmation that the CEO would comply with the company handbook and the obligations of employers generally to provide a safe workplace free from harassment, intimidation, and bullying.

[30] The Claimant writes that once he has these written assurances the parties could "move on to discussing issues relating to his return to the office," but says that until he has the assurances he requested he would continue to work from home.

[31] The Claimant also wrote, at the close of the March 27, 2018, letter, that he was not abandoning his job or resigning, but asserting his rights as an employee to be treated in a safe, respectful, and dignified manner.

[32] After the Claimant did not attend the work site on Monday, April 2, 2018, and Tuesday, April 3, 2018, the Employer sent a termination letter to the Claimant on April 3, 2018. The letter states that the Claimant's "deliberate failure to attend [the] business premises for the performance of your work will be regarded as job abandonment." The Employer issued an ROE on May 1, 2018, stating the Claimant quit his job. The Claimant told the Commission that he disputed the ROE, because he believed he was dismissed from the job.

[33] It is clear that the Claimant refused to return to his workplace when the CEO was present in the space, because he felt the CEO harassed him. It is also clear that the Claimant did not have permission to work exclusively from home. While the Claimant submits that he was a senior manager and had the flexibility to work from the location he chose, I find this is not supported by the evidence. The CEO testified that the Claimant's place of employment and general worksite for the duration of his employment was the company's head office. The Claimant did not dispute this, but said he worked from home sometimes. I have also reviewed the employment contract, which says the Claimant's job will be based at the Employer's head office and provides a specific address. I find the Claimant chose to work from home, even after warnings by the Employer that he would be considered as having abandoned his job. The Claimant submitted that he continued doing his job, to the best of his ability from home, so did not quit but was fired by the Employer for not attending the workplace.

[34] I disagree with the Claimant's interpretation. I find the Claimant voluntarily left his employment, because he had a choice to stay in or leave his employment and he chose not to attend his workplace and did not have permission to work from home. This means that he chose the option that the Employer told him would result in him being unemployed. Whether he had just cause for making that choice is a separate question, which I will address below. I find the evidence supports that the Claimant chose to leave a job that remained available to him because he refused to attend the workplace.

[35] Since I find that the Claimant voluntarily left his employment, I will now decide whether he had just cause for leaving his employment.

Issue 2: Did the Claimant have just cause for leaving?

[36] The law says that you are disqualified from receiving benefits if you did not have just cause for voluntarily leaving your job.[12] Having a good reason for leaving a job is not enough to prove just cause. The legal test to determine whether a claimant had just cause for leaving an employment is whether, considering all the circumstances, the claimant had no reasonable alternative to leaving.[13]

[37] Just cause is not the same as a good reason. The question is not whether it was reasonable for the Claimant to leave his employment, but whether leaving his employment was the only reasonable course of action open to him.[14] It is up to the Claimant to prove this.[15] The Claimant has to show that it is more likely than not that he had no reasonable alternatives but to leave when he did. In this case, the question is specifically whether the Claimant had just cause to refuse to return to his workplace, knowing this would be considered as job abandonment, and whether he had any reasonable alternatives to leaving.

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[12] *Employment Insurance Act*, section 30
[13] *Canada (Attorney General) v. White*, 2011 FCA 190 at paragraph 3; *Canada (Attorney General) v. Imran*, 2008 FCA 17 at paragraph 2
[14] *Canada (Attorney General) v. Imran*, 2008 FCA 17 at paragraph 10*; Canada (Attorney General) v. Laughland*, 2003 FCA 129 at paragraph 9
[15] *Canada (Attorney General) v. White*, 2011 FCA 190 at paragraph 3

[38] The *Employment Insurance Act* outlines a list of circumstances I must consider when deciding whether the Claimant had just cause for leaving his employment, but the list is not comprehensive: I must weigh all of the circumstances to determine whether he had just cause.[16]

[39] The Claimant stated to the Commission that the Employer has a corporate handbook which states harassment is unacceptable and provides a Whistleblower process to report incidents of harassment. He stated the information is supposed to be submitted online, but the link did not work so he instead submitted a letter dated February 26, 2018, outlining his concerns and gave it to the CEO's executive assistant.

[40] Following the February 26, 2018, letter the Claimant stated that the CEO met with him to discuss a way to move forward. The Claimant stated that after a month there were no changes in the CEO's attitude so he sent a second letter, this time by email on March 27, 2018. The Claimant stated in this letter that he would work from home until the employer was able to provide a safe environment for him to work. He also proposed some solutions, and requested an apology, weekly update meetings, and more support for him in doing his work.

[41] The Claimant told the Commission that the CEO did not agree to his proposed solutions and said that if he continued to work from home he would be considered as having abandoned his job. The Claimant stated that it was not unusual for him to work from home and said he continued to work from home after he left the worksite in February 2018.

[42] On May 29, 2018, the Claimant provided further documentation to the Commission. He submitted an excerpt of the Employer's handbook, showing the Employer had a code of ethics and conduct which states "unprofessional conduct will not be tolerated and can result in disciplinary action."[17] The handbook also states that the Employer has a "zero tolerance policy for harassment and/or discrimination of any kind based on race, religion, age, gender, nationality, etc." and stipulates that failure to adhere to the policy will result in employees being "subject to disciplinary action such as probation or dismissal regardless of their position within the company." The policy directs employees who believe an incident of harassment has occurred to tell the offending party,

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[16] *Employment Insurance Act*, section 29(c)*; Canada (Attorney General) v. Lessard*, 2002 FCA 469 at paragraph 10
[17] GD3-28

or to report the incident to a member of the Employer's senior management team. The document states that, "the company will investigate all complaints of harassment and/or discrimination."[18]

[43] The Commission spoke with the CEO on May 31, 2018. The CEO stated that six to eight months prior to the Claimant's departure from his job, the CEO started to express that he was not pleased with the Claimant's work performance. He stated the company endured extra costs on a project because it was not completed on time, and when the new project was not moving ahead on schedule he, "once again expressed his displeasure" to the Claimant multiple times. The CEO stated that in the February 23, 2018, meeting the Claimant informed him that the project was behind schedule. The CEO stated that he was upset when he learned this information, and agrees that he yelled the Claimant's name and pounded his hand onto the desk while telling the Claimant that he needed to immediately get out to the project site and meet with the clients. The CEO stated this was the only incident that took place, but it was not the first time the Claimant had been spoken to about the project delays.

[44] The CEO stated that when he learned how the Claimant felt about the interaction, he apologized to him and told the other three staff who were present in the meeting that he was not supposed to yell and act the way he did in that meeting. He stated, however, that the Claimant was not "satisfied with his apology" and requested to have it in writing. The CEO also stated that while the Claimant wanted more staff to help him with his workload, the CEO did not believe more staff were needed. He stated that since the Claimant stopped attending work, he began working closely with his assistant and the project progressed very well without a replacement for the Claimant.

[45] The CEO stated he agreed with the Claimant, with respect to weekly progress update meetings, but was not pleased that the Claimant refused to attend work and testified that holding weekly progress meetings was not possible if the Claimant did not come to work. The CEO stated to the Commission that in six years of employment, the Claimant was never required to work from home and the CEO could not be sure whether the Claimant was doing all of the work he was required to do when he was at home. He stated, for example, that if they needed to review work

[18] GD3-29

plans or drawings, the Claimant would need to be present in the office to be part of that conversation.

[46] The Commission spoke to the Claimant on May 31, 2018, as well. He stated that the CEO was aggressive with him once, and stated this was the only incident that took place. He added that the aggressive behaviour was the CEO yelling the Claimant's name and pounding his fist on the table. The Claimant stated that the CEO displayed "willingness to apologize, but he didn't do it in writing." The file supports that the incident of alleged harassment occurred on February 23, 2018.[19] At the hearing, the Claimant explained that he met with the CEO in January 2018, to discuss issues relating to correspondence from the CEO to him, and said the CEO was "sharp" with him. In a statement of claim, the Claimant's counsel submitted that on January 19, 2018, the Claimant met with the CEO to address concerns about recent communications he received from the CEO, which were "unsettling" to the Claimant because they were "trending toward harassment and bullying."

[47] The Claimant also confirmed that the CEO warned him twice in telephone conversations in March 2018, that he would be terminated from his employment if he did not attend work. He added that he attended the workplace on March 29, 2018, because the CEO was not present in the office, but refused to work in the office from April 2, 2018, because the CEO was at the office, did not create a safe place for him, and because he felt "threatened."

[48] On June 4, 2018, the Commission issued a decision finding the Claimant was not entitled to receive regular EI benefits because he voluntarily left his employment on April 3, 2018, without just cause. On June 20, 2018, the Claimant made a request for reconsideration, submitting the Commission failed to investigate the alleged harassment, and make a decision based on the Digest of Benefit Entitlement Principles (Digest).

[49] On June 28, 2018, the Commission spoke to the Claimant. The Claimant said he did not have authorization to work from home, but had worked from home in the past and did not have to have permission. At the hearing, he stated he was a senior project manager and had flexibility in his working arrangements. The Claimant later submitted that in contrast to service roles, where

[19] The CEIC file notes the date as January 19, 2018, on page 3-41. I find this is a mistake, as the January 19, 2018, incident was a meeting relating to emails. The February 23, 2018, incident was the meeting where the alleged harassment occurred.

performance specifics such as the time and location are mandated, it is "generally understood …senior and general managers" can perform these tasks when and where needed. The Claimant stated he frequently travelled for work, and worked from home after hours on many occasions.

[50] At the hearing, the Claimant testified that he generally worked from the local office, but was required to be mobile and work from job sites or from home. He stated that the location he worked from was "never dictated" by the Employer prior to March 2018, and submitted that he was a senior manager so it was "understood" that he knew where he needed to be. He stated that prior to March 2018, he sometimes worked from home and did not need approval from anyone to do so.

[51] The CEO refuted this statement in a conversation with the Commission on July 5, 2018. He stated the Claimant had not, in six years, worked away from the office aside from minor travelling. The CEO clarified that the Claimant may travel occasionally for work, but was not a frequent traveler. He added that while he did not know if the Claimant worked from home in the evenings, it "would be unusual." At the hearing, the CEO stated that he verified the Employer's files and in the previous 72 months of the Claimant's employment he travelled for work 63 times, meaning it was less than once per month. Otherwise, the CEO stated, he worked from the office.

[52] The Claimant's job offer, dated April 5, 2012, states his job will be based at the Employer's head office and provides a specific address.[20] While the Claimant submits that he had flexibility to work from home, I find he was expected to work from a local office. While he was occasionally required to travel, I find the evidence does not support that he routinely worked from home or that his employment contract expected him to work from home.

[53] The Claimant also stated that he had warned the CEO in January 2018, that his behaviour was not acceptable and he was using tactics of intimidation and harassment. I find this statement contradicts his previous statement to the Commission that the February 23, 2018, incident was the only incident of alleged harassment.[21] Further, the statement of claim described the January 2018 exchange as "trending toward harassment and bullying." I find it is more likely than not that the

[20] GD3-66
[21] The Claimant confirmed on May 31, 2018, that the only incident of alleged harassment occurred February 23, 2018. This is recorded the file notes at page GD3-41.

only incident of alleged harassment is the incident on February 23, 2018, because more evidence supports that conclusion.

[54] At the hearing, the Claimant testified that he spoke with the CEO on January 19, 2018, in relation to "inappropriate comments" the CEO had made via email. He submitted that the CEO was "dismissive," did not acknowledge his poor management of the situation, and deflected the Claimant's concerns. The Claimant submits this is when the situation began to "degrade." When asked to provide specific examples of intimidation, bullying, and harassment, the Claimant stated that it started from January 19, 2018, when the CEO was dismissive of his concerns and did not acknowledge the issues and the "culture of fear." When again asked for specific examples, the Claimant generally referred to the culture and said that even though staff arguably had a better handle on requirements, restrictions, and barriers for certain projects, the CEO would not receive that information "with any sort of rational thought." He said the CEO was overbearing, dismissive, aggressive, and stern.

[55] In an email exchange on January 18, 2018, the Claimant emailed the CEO, copying two other staff involved in the project. The email provides reasons why the Claimant was not involved in the budget for legal costs, and discusses issues with the closing date.[22] On the same day, the CEO responded to everyone copied on the email and stated:

> Put your shoulder to this project please to make it happen faster please. The [client] can meet to deal with this on its own I am sure if they know our expectations. Also never speak to lawyers on an open account even if you did not engage [law firm]. Get a budget from them. I expect you to manage all costs. That's a poor excuse.[23]

[56] The Claimant responded to this email on January 19, 2018, replying to only the CEO, stating the CEO's email accusing him of providing a "poor excuse is troubling" and asked that "in the future, if you have concerns about my performance I would appreciate having a discussion with you directly before involving peers." He also suggests that perhaps there should be an annual performance review. The CEO responded to the Claimant, asking if he was available in the afternoon to have a discussion.

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[22] RGD8-3
[23] RGD8-2

[57] The Claimant testified that the January 19, 2018, meeting was the beginning of the issues with the employment relationship. He stated the CEO was dismissive, did not acknowledge that he could have handled things better, and "deflected" the issue to urge the Claimant to proceed with his work. While the Claimant submits the CEO sent inappropriate comments via the January 18, 2018, email, I disagree. I have reviewed the relevant emails and find no evidence of harassment, bullying, or discrimination contained in the messages. I find the Employer's comments are a reflection of his assessment of the situation and how he felt he Claimant should be performing. The comments are not rude or bullying, and a reasonable person would read the comments as feedback. Further, I find the CEO would likely not have expected the comments to cause embarrassment, distress, or suffering to the Claimant.

[58] The Claimant also stated that he tried to speak with the CEO about issues relating to the project prior to the February 23, 2018, meeting but was ignored. Email records show the Claimant emailed the CEO on February 13, 2018, with an update on part of the project. He also asked the CEO to respond to questions about an approval for an expenditure.[24] The Claimant testified that the CEO responded within a day but did not address his questions,[25] which caused the Claimant to call the meeting of February 23, 2018, and include the other staff relevant to the project.

[59] The CEO testified that he was vacationing outside Canada from approximately February 13, 2018, until February 21, 2018, so was not as available as usual. He submitted that he did not recall any issues between himself and the Claimant between the January 2018, meeting, and the February 23, 2018, incident. He stated that he instructed the Claimant to go have meetings with stakeholders after the January 2018, meeting, and the Claimant did so. The CEO stated he remembered emailing the Claimant while on vacation, because the Claimant was involved in a car accident while driving home from a business meeting. He stated he thought the work that needed to be done was getting done, but he was not aware of the exact movement because he had been on vacation.

[60] The CEO stated that the Claimant organized the meeting on February 23, 2018. He added that he had just returned from vacation, and stated it very quickly became clear to him that the

[24] RGD9- 2 and RGD9-3
[25] RGD9-1

project was not moving as planned and the deadline would likely be missed. He stated he was surprised by the lack of movement, and admitted he yelled at the Claimant and said he "was not putting enough effort into it." He also admitted that he pounded his fists four or five times on the table. He stated that after the meeting, the Claimant agreed to travel to the stakeholder site and advance the project, which he did directly before the CEO ordered him to use his carried over vacation credits.

[61] The Claimant told the Commission that the February 2018, meeting lasted for an hour and when the Employer "lost it" he was shouting and "half of the office heard this." He stated that he requested a written apology from the CEO because there were other people who witnessed the behaviour, and should be informed that it would not be accepted. The Claimant recognized that the CEO said he had already spoken to the other staff present at the meeting, but said he had "no way of knowing what the Employer said to the others." He also stated that the CEO said he apologized to the Claimant, but the Claimant "asked [the CEO] to articulate" what he meant by the apology and the CEO "wouldn't say."

[62] The Claimant also told the Commission that the CEO recorded their conversation on March 23, 2018. He sent a facsimile to the Commission following the conversation of June 28, 2018, and referred to the recording as "illegal" because it was made without his knowledge or consent. He states the Employer's counsel provided a transcript of the conversation, which shows the CEO apologized to the Claimant numerous times for yelling at him, and for his actions in the meeting. The Claimant noted that the CEO did not specifically apologize for harassment and does not admit that harassment occurred, so no apology for the unacceptable behaviour has been made.

[63] The Claimant provided his notes of a March 21, 2018, call between himself and the CEO.[26] These notes are not a transcript. I have reviewed the notes and much of what is contained therein is reflected in the recording of the March 23, 2018, call. The CEO and Claimant disagree on whether the Claimant was harassed and the CEO refuses to apologize for harassment. The CEO asked the Claimant if he wanted to discuss "parting company" but did not know what that would look like, and agreed to come back to the Claimant with more information.

[26] GD11

[64] There is a transcript of the March 23, 2018, conversation in the file; however, it was prepared by one party and the other alleges information is missing.[27] There is another copy of a transcript included in a different section of the file, which appears to be taken from the transcript of the Claimant's first General Division hearing.[28] While I consider this a reliable document, I also listened to the audio file recording of the conversation and rely on the contents of that file as correct. The Claimant submitted to the Tribunal that the "secret recording" is an unreasonable collection of personal information in breach of the *Personal Information Protection Act*[29] and does not reflect the other conversations between the Claimant and CEO.

[65] In the March 23, 2018, recording, the CEO states that he does not agree that the Claimant needs further staffing assistance to do his job, but says he is prepared to provide more direction and monitoring to make sure the Claimant is maximizing the use of his time. He also states that he is open to weekly progress meetings. On the matter of an apology, the CEO notes that while the Claimant submits he was harassed, the CEO believes he was expressing direction about a work issue. The CEO says he raised his voice and that his behaviour could have been better, but he did not believe he harassed the Claimant. He initially stated that he was prepared to apologize for his behaviour, but reiterated that he did not believe his behaviour was harassment.

[66] After the CEO apologized for his behaviour, he asked the Claimant if he was prepared to return to work. The Claimant asked the CEO, "When you raised your voice you don't feel that was harassment—would you do it again?" The CEO responded that the Claimant had known him for six years and knew his demeanour. The CEO added that "things have been building" since the Claimant's performance on a previous project and the CEO felt that that was why he reached "this frustration level." The CEO testified that he learned in January 2018, that from September 2017, until January 2018, "virtually no meetings" had occurred and the Claimant had not advanced the project.

[67] The Claimant asked the CEO to confirm that he would not use the same level of behaviour towards him as was used in the February 23, 2018, meeting, and the CEO replied "that's what I'm

[27] The Claimant submitted to the Tribunal on September 18, 2018, that the audio recording transcript contained at least 44 omissions. This correspondence is located at GD9-2.
[28] AD3-3 to AD3-18
[29] Unspecified legislative reference

saying." The Claimant then states, "if you're committed to that, then just give the written apology." The CEO responds that he will not provide a written apology, and says, "I've given you an apology here…come on." The Claimant stated that the apology did not "show much sincerity" because the CEO refused to provide it in writing. Later in the call, the following exchange occurs:

> Claimant: You're sorry you behaved that way.
>
> CEO: That's what I told you. You know, I've done it about four times in this phone call.
>
> Claimant: I want you to say the words.
>
> CEO: …this is ridiculous, here… I put a lot of effort yesterday and today to try and get back on track and you're saying I'm not sincere.

[68] The CEO and Claimant have a fundamental disagreement about the apology, its format, and to whom it is owed. The CEO told the Claimant on March 23, 2018, that the issue is between the two of them. The Claimant stated that it is between them, as well as everyone else who was in the meeting room on February 23, 2018. The CEO noted that the Claimant called the meeting of February 23, 2018, and invited the other staff to attend. The CEO stated he does not understand why the Claimant invited the other staff to a meeting that could have been between the two of them and states he did not call the meeting and was not trying to embarrass the Claimant.

Did the Claimant experience working conditions that constituted a danger to his health or safety?

[69] Claimants may have just cause for leaving an employment if they experienced working conditions that constituted a danger to their health or safety.[30]

[70] Courts have found that decision makers must consider whether the fact that a claimant voluntarily left their employment as a result of fears they had of dangerous conditions at their work

[30] *Employment Insurance Act*, section 29(c)(iv)

was the only reasonable alternative. A claimant is not considered to have just cause for leaving his employment because he feared there were dangerous working conditions without even discussing with the employer whether measures could be instituted to reduce this fear.[31]

[71] The Claimant testified that he chose to work from home because he did not believe his office was a safe environment. He added that he returned to the office for one day, on March 28, 2018, because he knew the CEO would not be there; however, he did not return the following Monday because the CEO had returned to work. He stated that for his own health and safety he told the CEO that he would work from home until his harassment claim was investigated.

[72] At the hearing, the Claimant argued that a danger to his health a safety meant more than his physical health, but also his mental health. He noted that he consulted with a psychologist, who found he "presented as traumatized by the experience of verbal and physical aggression…displayed by the CEO and the subsequent perceived injustice of termination and denial of EI."[32] The Claimant also testified that after the February 23, 2018, meeting he was "mentally broken down" by the "traumatic event."

[73] I have reviewed the medical report. The psychologist states she administered The Workplace Behaviour Inventory, which assesses behaviours known to be psychologically harmful, and representative of psychological harassment in the workplace. The Claimant endorsed 20 of the behaviours as being experienced in relation to the CEO in the 12 months prior to the assessment, and said he was "moderately bothered" by the situations. The psychologist also administered the Psychiatric Diagnostic Screening Questionnaire, and determined the Claimant's responses showed "elevation in the Post-Traumatic Stress Disorder scale."

[74] The psychologist states that the Claimant, "ruminates about the experiences and becomes distressed, has flashbacks…and [his] trust in people and systems has been breached." She states this is consistent with a "moral injury, which occurs when people witness or experience events that are an affront to the basic values such as dignity and justice." The psychologist adds that moral injury and psychological harassment can result in symptoms of Post-Traumatic Stress Disorder.

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[31] *Canada (Attorney General) v. Hernandez*, 2007 FCA 320 at paragraph 5
[32] RGD4-18, dated April 30, 2019.

[75] I note that while the Claimant was observed to have "elevation in the Post-Traumatic Stress Disorder scale," he was not diagnosed with Post-Traumatic Stress Disorder. The psychologist submits that the Claimant undertook an assessment that was representative of psychological harassment it the workplace and found the Claimant identified 20 behaviours on the inventory as being present in the CEO's actions over the previous year of work. The letter does not state how many inventory options were on the list, or whether the finding of 20 behaviours is consistent with the existence of psychological harassment.

[76] While the Claimant flagged a number of behaviours on the Workplace Behaviour Inventory as existing at his workplace, when speaking to the Commission and at the hearing he did not identify a repeated pattern of behaviour that would be likely to constitute a danger to his health or safety. Additionally, the psychologist's letter states the Claimant presents as traumatized by both the experience of February 23, 2018, when the CEO yelled at him and pounded the desk with his fists, and the subsequent "perceived injustice of termination and denial of EI."

[77] I find the Claimant has failed to prove that he experienced working conditions that constituted a danger to his health or safety. I agree that the meaning of this phrase includes both mental and physical health, but find the Claimant's job and work environment were not a danger to his mental or physical health. Counsel for the Employer asked how the Claimant could be afraid of the CEO, who is over 60 years old. The Claimant stated that when someone pounds their fists on the table, you do not know what else they may do. I find there is no evidence the CEO was violent or threatened physical violence to the Claimant. The evidence more strongly supports that the CEO was angry and lost his temper on this particular occasion, with the pounding of his fists on the table being an expressive gesture that he acknowledges he should not have done.

[78] With respect to mental health, the Claimant did not immediately see a doctor after the February 23, 2018, incident. Instead, he opted to work from home and dictated to the CEO that he would remain at home until the Employer could ensure workplace safety. His assessment that his workplace was mentally unsafe appears to stem from his perception that the February 23, 2018, incident was harassment. For reasons I will discuss below, I am not persuaded that the environment was unsafe or that harassment occurred.

[79] Given that the Claimant did not experience working conditions that constituted a danger to his health or safety, he does not have just cause for leaving his employment based on this circumstance.

Did the Claimant experience sexual or other harassment?

[80] Claimants may have just cause for leaving an employment if they were subjected to harassment in the workplace.[33]

[81] The Claimant pointed to Part I of the *Canada Labour Code* (CLC) for a definition of harassment. While the CLC is not binding on my decision, I note that "harassment and violence" are defined in that legislation as:

> 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.[34]

[82] The Claimant also submitted the definition from the Digest, which states harassment is:

> Generally defined as any improper behaviour by a person that is directed at and offensive to another person and which the first person knew or ought to have known would be unwelcome. Harassment may take the form of reprehensible comments, actions, or displays which humiliate, degrade, or embarrass another person.[35]

[83] The term "harassment" is not defined in either the *Employment Insurance Act* or by the courts in relation to the *Employment Insurance Act*. The Tribunal's Appeal Division considered the issue of workplace harassment and set out a series of "key principles" to guide me when determining whether a claimant has been harassed.[36] The principles are:

- harassers can act alone or with others, and do not have to be in supervisory or managerial positions;
- harassment can take many forms, including actions, conduct, comments, intimidation and threats;

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[33] *Employment Insurance Act*, section 29(c)(i)
[34] RGD4-111
[35] RGD4-130 and RGD4-131
[36] *ND v. Canada Employment Insurance Commission*, 2019 SST 1262 at paragraph 34

- sometimes, a single incident will be enough to constitute harassment; and
- 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.

[84] The Claimant writes in his March 27, 2018, letter that all employers are obligated to provide their employees with a safe working environment, free from harassment, intimidation, and bullying, which is reflected in the company handbook. The Claimant submitted that the CEO's refusal to provide a written apology for the breach of this obligation and refusal to commit to avoiding future breaches has created doubt as to whether the CEO intends to comply with these obligations in the future. The CEO's March 27, 2018, email stated the CEO is "not prepared to do what you are requesting." The CEO stated he had done what the Claimant requested, but felt the Claimant "changed [his] demands at the end" of their conversation. This appears to be in relation to the CEO stating he would not provide a written apology. The CEO stated in the March 23, 2018, telephone call that he agreed to not treat the Claimant the way he did in the February 23, 2018, meeting, but could not confirm he would never again raise his voice.

[85] On July 3, 2018, the Claimant sent a fax to the Commission. He submitted that the CEO harassed him on February 23, 2018, and the communication he had with the CEO between that date and April 2, 2018, was for the purpose of getting an assurance that the harassing and abusive conduct would not be repeated. He wrote that the CEO refused to provide an assurance that the conduct would not happen again, refused to have an impartial third party investigate the incident, and provided no offers of resolution, amongst other things.

[86] The Claimant wrote in his February 26, 2018, letter that he would immediately cease attending the office and continue working from home. The CEO stated that he warned the Claimant on March 21, 2018, and March 22, 2018, that if he did not come to work it would be considered job abandonment. The Claimant returned to work on March 28, 2018, because he knew the CEO was not present in the office, but again refused to attend on April 2, 2018, and April 3, 2018, because the CEO returned to work.

[87] One of the Claimant's arguments is that he was employed since April 2012, and over the course of six years had an exemplary record of good service. Due to this, a single absence on April

2, 2018, which he argues was justified in light of the harassment he suffered, did not create just cause for his termination.

[88] At the hearing, the Claimant submitted that requesting an apology was reasonable and would indicate that there was some remorse on the part of the CEO. He also stated that an apology would give some assurance that the CEO would not do the same thing again. He reiterated that he asked for a written apology because other people witnessed what happened and it was not acceptable behaviour, so it should be communicated to the witnessing parties as well.

[89] At the hearing, counsel for the Employer asked the Claimant whether there were any incidents of harassment or bullying between the January 2018, meeting and the February 23, 2018, incident. The Claimant stated that it was a "degrading situation," but said there was no negative conduct "to the extent" that he experienced on February 23, 2018. Counsel stated there was "none at all" in relation to harassment or bullying conduct, and the Claimant stated "no, there wasn't." The Claimant also agreed that the Employer's CEO was expressing displeasure about his performance as project manager on a specific project in the February 23, 2018, meeting, but stated it was done in an "unacceptable manner."

[90] The Claimant also testified that the previous project was also a high pressure situation, but the CEO did not behave in the same way. The Claimant stated the CEO did not "resort to harassment and bullying and intimidation and aggression for the project" to get done, in contrast to the project related to the February 23, 2018, meeting. The Claimant testified that the yelling and aggression of the February 23, 2018, meeting was not representative of his usual interactions with the CEO.

[91] The Claimant told the Commission that the CEO "didn't apologize." I find the Employer's CEO did apologize to the Claimant for the way he treated him at the February 23, 2018, meeting. The Claimant made multiple submissions about the type of apology he wanted, what form it should take, and the contents he would accept as supporting legitimate apology. The Claimant testified that he wanted an acknowledgement that what the CEO did was wrong, and he wanted confirmation that the CEO would follow the corporate handbook policies going forward. The Claimant submitted that the CEO refused to agree to do that.

[92] I disagree with the Claimant's submission. I find the CEO offered multiple verbal apologies. He stated that he was sorry for his behaviour, but did not believe it was harassment. I find that qualification does not remove the fact that the CEO apologized to the Claimant for the way he acted at the meeting of February 23, 2018. The CEO also stated he would not use the same level of behaviour towards the Claimant going forward.

[93] Counsel for the Employer agreed that the Employer's policy states it will "investigate all complaints of harassment or discrimination," but the company's structure expected that the CEO himself would be the investigator of any complaints. Counsel for the Employer stated that it was not contemplated that this situation could occur. The CEO testified that he did not believe the company's harassment or Whistleblower policies had been violated. He stated the issue between himself and the Claimant stemmed from the Claimant's job performance. He added that he was delivering a message on the "performance, or lack thereof." The CEO confirmed to the Commission that there is no human resources department within the company, and that the CEO is the highest authority.[37]

[94] The audio recording of March 23, 2018, supports that the CEO made an apology and committed to not treating the Claimant the same way in the future. While he does not commit to never raising his voice again, I find the CEO's statements that he is willing to apologize and his apologies, and promise not treat the Claimant in the same way in the future satisfy the request for an apology. I understand that the Claimant did not believe the response satisfactory, but I disagree that a written apology was required to make the act more credible, or sincere. While the existence of an apology is not determinative of whether or not harassment occurred, I find it supports the good faith efforts of the Employer.

[95] The Claimant stated that he wanted a written apology. I find a written apology is not more sincere or authentic than a verbal apology, so the Claimant's submission that the CEO did not apologize to him because he did not apologize in the manner the Claimant wanted to be of little weight in establishing whether the Claimant experienced harassment in the workplace.

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[37] GD3-62

[96] The Claimant often referred to the Digest as a source of his definition for harassment. I note that the Digest is an interpretive guide that is entitled to consideration and can be an important factor in the interpretation of statues,[38] but it is not the law. I have considered the Digest's statements as they relate to this case, but I find the document is not a pronouncement of the law but an interpretation crafted by an agency.

[97] Similarly, while the Employer has an internal handbook and policy that the Claimant alleges was violated, my focus is on whether the Claimant was harassed at work, and if he was, whether he proved he had just cause for leaving due to that harassment. In situations of harassment, persons are generally fully justified in taking leave or leaving their employment if it is their only reasonable alternative.

[98] I find the Claimant has failed to prove he was subjected to harassment in the workplace. The single incident of the CEO yelling and hitting his fists on the table, and expressing anger and frustration directly at the Claimant, does not rise to the standard of harassment. While harassment can exist in a single incident, I find this incident is insufficient to meet the standard. The Claimant's relationship with the CEO started to deteriorate in January 2018, when the CEO expressed that he was not pleased with the Claimant's work performance. In February 2018, it degraded further when the CEO yelled at the Claimant in a meeting which was organized by the Claimant and which included other staff he invited. While the Claimant appears to have been embarrassed by this, I find the CEO could not have known nor ought he to have known that the Claimant would be humiliated, hurt, or embarrassed by this. In his view, he was expressing his concerns about the Claimant's performance in reference to a specific project, though he now admits he could have reacted differently.

[99] The Claimant submits the CEO breached the Employer's policy because he did not order an investigation of the Claimant's harassment complaint. I find the Employer did not recognize the Claimant's February 26, 2018, letter as a harassment complaint. While the letter requests an investigation under the auspices of the Whistleblower Policy, the CEO was the de facto investigator and also the addressee of the letter. He testified that he spoke to the Claimant, directed him to take vacation, and had multiple conversations to support the Claimant's return to work, but

[38] *Attorney General of Canada v. Greey*, 2009 FCA 296 at paragraph 28

did not investigate anything because he did not believe the interaction on February 23, 2018, was harassment. Whether the Employer violated its own policy is not before me and is not determinative of the issue. I note, however, that I agree that the single incident in question was not harassment. There is no evidence that the CEO belittled or bullied the Claimant, or that there was aggression or an escalating personal conflict. The Claimant worked for the CEO for over five years without issue. The Claimant had the reasonable alternative of remaining employed and attending the work site instead of demanding to work solely for home. While he did not accept the CEO's apology, he had the option of returning to work and determining if things were better and the relationship improved, but he decided not to do so.

[100] Considering the key principles outlined by the Appeal Division,[39] I find that the Claimant was not harassed within the meaning of section 29(c)(i) of the *Employment Insurance Act.* I find the single incident of February 23, 2018, was not sufficient to qualify as harassment. I find the CEO was angry because he perceived that the Claimant was not performing the tasks of his job to a satisfactory degree. He was particularly unhappy because he had addressed a similar issue with the Claimant on a previous project. The CEO admitted that he was angry, lost his temper, and should not have acted the way he did. I find it is more likely than not that the CEO, being the alleged harasser, could not reasonably have known that his behaviour would cause offence, embarrassment, humiliation, or other psychological or physical injury to the Claimant because his actions were related to the Claimant's performance. While his comments may have been harsh in tone, they were not personal attacks but expressions of frustration related to the perception that the Claimant was not doing all aspects of his job.

[101] The Claimant has focused on the form and content of the CEO's apology. At the end of the hearing, he stated that the CEO said he was sorry that they disagreed but was not sorry about his actions. He added, "when I asked him to articulate what he was sorry for,…everyone knows what an apology is." He added that the CEO "minimized what he had done" and "never acknowledged the magnitude…of violence and bullying."

[102] The CEO recognizes that he should not have yelled at the Claimant and pounded his fist on the table at the February 23, 2018, meeting; however, he submits that the issue was about

[39] *ND v. Canada Employment Insurance Commission*, 2019 SST 1262 at paragraph 34

performance and getting a task accomplished by a specific deadline. The evidence supports that the CEO and Claimant worked together for more than five years without incident and there was no history of harassment.

[103] The Claimant stated that he tried to reconcile with the CEO, as evidenced by the March 23, 2018, call, but "it clearly falls apart and there is no admission." I have already found that the CEO apologized to the Claimant. The CEO did not admit harassment and has been clear that he did not believe harassment occurred. The Claimant also testified that because the CEO refused to provide a written apology, he was not "accepting of what he had done."

[104] The Claimant testified that in the March 23, 2018, recording of the phone call between himself and the CEO, he was "never allowed to finish" and said the CEO's "voice is dominant and aggressive and not letting me explain thing to him and he is not listening to the facts of the matter." I have listened to the recording and, objectively, do not agree with the Claimant's submission.

[105] I find the recording is a conversation between two parties who do not agree on a situation, but neither party is being aggressive, nor is the CEO frequently cutting the Claimant's comments short.

[106] Given that the Claimant did not experience sexual or other harassment, he does not have just cause for leaving his employment based on this circumstance.

Did the Claimant experience antagonism with a supervisor if the Claimant was not primarily responsible for the antagonism?

[107] Claimants may have just cause for leaving an employment if they experienced antagonism with a supervisor for which they were not primarily responsible.[40] Antagonism is a form of hostility or attitude that generally cannot be detected or determined by what occurred in one incident or in one dispute. Where antagonism exists, it is more likely that a pattern of behaviour will emerge over a period of time from which antagonistic relations may be detected.[41]

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[40] *Employment Insurance Act*, section 29(c)(x)

[41] Canadian Umpire Benefits (CUB) 36792. I am not bound by CUB decisions, but have provided this description as I am persuaded it is a suitable test to determine whether an antagonistic relationship exists

[108] At the hearing, the Claimant submitted that it is clear from the file and testimony at the hearing, and previous hearings, that he displayed no hostility to the CEO.

[109] The Claimant submitted to the Commission that his case was similar to a previous Tribunal case,[42] where the employee was found not responsible for the termination of the employment because there was antagonism with a supervisor for which the Claimant was not primarily responsible. He submitted that in that case, the event that led to the employment ending was a single meeting in which the claimant was verbally attacked and had been provided no prior warning that the meeting would be used for that purpose. The employee did not return to the employment, and was treated by the employer as having abandoned her job. The Tribunal found the employee was justified in the circumstances.

[110] Previous decisions of this Tribunal are not binding on my decision. However, they can be persuasive to my decision. I find the case the Claimant pointed to can be distinguished from his situation. The case related to a person who left the employment due to illness, which is not the Claimant's situation. Additionally, the Claimant himself organized the meeting of February 23, 2018, so it was not a situation where the Employer organized a meeting with the intention of verbally attacking the Claimant.

[111] The Claimant worked for the Employer for over 5 years, with no record of antagonism between them. The Claimant stated that his first issue with the Employer began in January 2018, when he was concerned about the way the CEO wrote to him in an email. There does not appear to be another issue until February 23, 2018, when the CEO yelled at the Claimant in a meeting and banged his fists on a table. The CEO stated that he had issues with the Claimant's performance, which caused him to lose his temper in the February 23, 2018, meeting.

[112] I find the Claimant's performance was the issue that caused the isolated incident of February 23, 2018, described above. While the Claimant disputed that his performance was lacking, the CEO stated on numerous occasions that this was the cause of the February 23, 2018, anger and related shouting in the meeting. Given that both the CEO and Claimant are stating their opinions, I find the CEO's opinion of why he lost his temper is more credible than the Claimant's

[42] *H.K. v. Canada Employment Insurance Commission*, 2015 CanLII 107572

because the CEO has first hand knowledge of why he lost his temper on February 23, 2018. I find the CEO displayed no history of being rude or disrespectful towards the Claimant, and that the incident in question was unique.

[113] There is no pattern of behaviour present to suggest antagonism existed between the Claimant and his Employer, or that the meeting on February 23, 2018, was antagonistic. I find it more likely that the CEO conveyed his displeasure with the Claimant's work in a harsh manner which, as found above, does not rise to the level of antagonism. This is not a finding of whether the Claimant's work was actually lacking, but a determination of whether the Claimant experienced antagonism from the CEO at the February 23, 2018, meeting. This finding also means I do not have to assess whether the Claimant was the cause of the antagonism, because I find it did not exist.

[114] Given that the Claimant did not experience antagonism with a supervisor for which he was not primarily responsible, he does not have just cause for leaving his employment based on this circumstance

Did the Employer conduct practices that were contrary to law?

[115] Claimants may have just cause for leaving an employment if the Employer conducted practices that were contrary to law.[43]

[116] This section of the *Employment Insurance Act* relates to cases where the employer requires the claimant to performs acts which are illegal or contrary to business ethics.

[117] At the hearing, the Claimant submitted that the Employer violated its own policies. Amongst other alleged breaches, he stated that the Employer was required to investigate his complaint of harassment and failed to do so.[44] He added that the harassment and Whistleblower policies may have been Employer policies, but they were derived from provincial *Occupational*

[43] *Employment Insurance Act*, section 29(c)(xi)
[44] GD3-29 – the Employer's internal policies state, "…the company will investigate all complaints of harassment and/or discrimination."

Health and Safety (OHS) legislation, which he believes supports his position that the Employer violated OHS policy.

[118] The Claimant referred to provincial OHS legislation in support of his arguments. While I do not have jurisdiction to apply provincial OHS legislation, I note that Alberta OHS met with the Employer's CEO on January 24, 2019, nearly a year after the Claimant left the employment, to discuss workplace violence plans, policies, and procedures, workplace harassment plans, policies, and procedures, safety programs, an emergency response plan, and hazard assessments for the worksite.[45] The result was an OHS order that directed the Employer to establish a violence prevention policy and procedure that meets provincial legislation, to follow when or if harassment is identified. While the Employer was found to be non-compliant with aspects of OHS legislation a year after the Claimant left, I find this is not evidence that the Employer expected the Claimant to perform acts which are illegal or contrary to business ethics.

[119] The Claimant also stated that his Employer secretly recorded their telephone call on March 23, 2018. He submits this is a privacy violation because he was not aware of the recording. I find this issue is irrelevant to the Claimant's leaving, because the recording was done in the context of conversations about the Claimant's possible return to work, at a time when he had already decided to work from home. His decision to work from home, and voluntarily leave his employment, could not have been related to the Employer's decision to record a conversation that occurred after he started working from home.

[120] The Claimant also submitted that he was encouraged to "use language in the way of coercion" to have clients make decisions favourable to the Employer. He pointed to an email exchange between himself and an Employer contact. The Claimant submitted that the contact, the Director of Operations for another entity, sent him an email where she "basically talked about how there was a demand to circumvent processes." I have reviewed the email, and the contact states that she may not be able to help in a current project, and adds that her, "job was to get [CEO] to tow the line on development processes ☺."[46]

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[45] RGD4-11
[46] RGD4-16

[121] I do not agree with the Claimant's characterization of this email. While the Claimant submits it is evidence that the CEO tried to avoid processes, or laws, to complete projects, the email just states the contact's role in development processes. Stating that she worked with the CEO to ensure compliance does not mean that the CEO was trying to violate a law. Further, the tone of the email is lighthearted and friendly, and the contact included a smiley face after the "tow the line" comment, which suggests it was playful or tongue-in-cheek. I find the evidence does not support that the Employer expected the Claimant to conduct acts which are illegal or contrary to business ethics.

[122] I find the Claimant has failed to prove, on a balance of probabilities, that he left his employment due to the Employer conducting practices that were contrary to the law because the evidence does not support that the Employer was conducting illegal practices.

[123] As I am relying on the contents of the audio recording, I will address the Claimant's submissions about its legality. The Claimant submits that the recording was an unreasonable collection of personal information in breach of privacy legislation, but refers only to the *Personal Information Protection Act* and does not clarify which law he is using. I presume he is referring to Alberta legislation Chapter P-6.5, subsection 11(1), which states an organization may collect personal information only for purposes that are reasonable. Whether the CEO's collection of the information was reasonable is not within my jurisdiction; however, I note that the recording was not illegal. The *Criminal Code of Canada*[47] generally prohibits the recording of private communications, but an exception exists where one of the parties in the communication consents to its recording. Therefore, because the CEO was a party to the telephone call on March 23, 2018, he was allowed to record the call without notification to the other party.

[124] Given that the Employer was not conducting practices that were contrary to the law, the Claimant does not have just cause for leaving his employment based on this circumstance.

Did the Claimant experience undue pressure by the employer to leave his employment?

[47] R.S.C., 1985, c. C-46, paragraph 184(2)(a) says the general prohibition against intercepting, which includes recording, a private telephone call does not apply if the originator of the call or the intended recipient of the call consents to the recording.

[125] Claimants may have just cause for leaving an employment if they experienced undue pressure by the employer to leave their employment.[48]

[126] The Claimant submitted that he experienced three instances of undue pressure by the Employer to leave his employment. The Claimant said the first incident was the incident at the February 23, 2018, meeting when the CEO yelled at him. He referred to the Digest, and stated the CEO made the employment atmosphere intolerable. I find this was not undue pressure by the Employer on the Claimant to leave his job, because the Employer's CEO was expressing frustration with the Claimant's performance in a business meeting. While the meeting was tense, and the CEO was angry and admits to having lost his temper, I find the goal of his frustration was not to have the Claimant leave the job, but to have him perform tasks in a certain way. This is supported by the CEO's efforts to have the Claimant return to work after the February 23, 2018, incident.

[127] The Claimant stated the second instance of undue pressure occurred when the CEO forced him to take vacation. He submitted that this action may also have been illegal, but he felt it fit under the category of undue pressure because the CEO yelled at him for not making progress on a file, then ordered him to take 16 days off work, which would ensure the project did not progress.

[128] In an email dated March 18, 2018, which appears to be in error as the email should state March 4, 2018, the CEO instructs the Claimant to take his 2017 vacation carryover and advise him of any matters that may need attention in his absence.[49]

[129] The CEO stated he directed the Claimant to take his leftover vacation from 2017 because it rolled over into 2018 and the company generally does not allow this and wants the vacation to be used up by the first quarter of the rollover year. The CEO stated the direction to use his leftover vacation was unrelated to the February 23, 2018, incident.[50] I find the Employer did not put undue pressure on the Claimant to leave his job by directing him to take vacation. I find it is standard business practice for companies to limit vacation rollover, and the evidence supports that the Employer wanted the Claimant to use his 16 extra days of vacation.

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[48] *Employment Insurance Act*, section 29(c)(xiii)
[49] RGD6-9
[50] GD3-62

[130] The Claimant stated at the hearing that he was forced to take vacation. While no party provided legislation to support whether the Employer dictating when an employee may take vacation is allowed, I note that in general employers are allowed to determine when employees take vacation. Sometimes, that ability is subject to certain conditions, such as minimum notice. As no reference was made to the specific laws surrounding this point and it is outside the purview of the legislation I am empowered to consider, I make no finding as to whether the Employer was or was not permitted to direct the Claimant to take his vacation. Further, even if I did make a finding on this point, I do not believe it would be a relevant consideration to the issue of the appeal. The Claimant stated in the March 27, 2018, letter that the vacation "served as a welcomed break." This suggests being told to take his vacation was not a factor which impacted the Claimant leaving the employment.

[131] The Claimant stated the third incident related to his Last Pass online password management system. He stated he was not able to access his Last Pass account when he came back from his 16 days of vacation in March 2018, which was the account containing the passwords he needed to work. The Claimant emailed his passwords to the Employer on March 5, 2018, and on March 28, 2018, emailed to say he could not gain access and it appeared the password to access Last Pass was changed 28 minutes after he sent the information to the Employer. The Claimant was alerted to the change because the software email him a notice of the change.[51] He submitted that this proved the Employer intended to terminate him, and was a blatant obstruction of his ability to fulfill his duties.

[132] I find the Employer's changing of the Last Pass password system and not returning the password to the Claimant is not evidence of undue pressure on the Claimant to leave his employment. The Claimant was off work for 16 days and in discussions with the CEO to return. The discussions, from all evidence in the file, did not appear to go particularly well or result in any agreement. The Claimant told the CEO he would not attend work if the CEO was present, and the CEO told the Claimant that he would be deemed to have abandoned his job. The Claimant agreed to attend work on a single day, when the CEO was not present, and refused to attend the work site after that. It is not unreasonable that the Employer would not provide its passwords when the

[51] Copies of these emails are included at GD11

Claimant had expressed his intention to potentially abandon the job. Additionally, as the Claimant only returned to work for one day, it is not unreasonable that the Employer would not have gotten around to sending him the updated password even if it planned to, as he was only present for one day of work.

[133] I find the Claimant did not experience undue pressure by the employer to leave his employment because the individual examples provided by the Claimant do not show that the Employer pressured the Claimant to leave his job.

[134] Given that the Claimant did not experience undue pressure by the employer to leave his employment, he does not have just cause for leaving his employment based on this circumstance.

Any other reasonable circumstances that are prescribed?

[135] Any other reasonable circumstances that are prescribed are an enumerated circumstance to consider when determining whether a claimant had just cause for leaving his employment.[52] This specifically refers to circumstances enumerated in the *Employment Insurance Regulations*, which state other reasonable circumstances include those in which a claimant has an obligation to accompany to another residence a person with whom the claimant has been cohabiting in a conjugal relationship for a period of less than one year and where the claimant and that person has had a child during that period or has adopted a child during that period, the claimant or that person is expecting the birth of a child, or a child has been placed with the claimant or that person during that period for the purpose of adoption, and circumstances in which a claimant has an obligation to care for a member of their immediate family.[53]

[136] As these circumstances do not relate to the Claimant's situation, I find the Claimant did not have just cause to leaving his employment based on other reasonable circumstances that are prescribed.

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[52] *Employment Insurance Act*, subsection 29(c)(xiv)
[53] within the meaning of subsection 55(2) of the *Employment Insurance Regulations*

[137] I did consider, however, that the Claimant likely meant to state that he had other factors which be believed provide just cause for leaving his employment, which did not fall into the *Employment Insurance Act's* specific exceptions.

[138] The Claimant stated the Employer did not know whether he was or was not working when he said he was working from home. I find whether the Claimant was or was not capable of, or was actually, working from home is not relevant to the outcome of this decision. This is because the Employer's refusal to agree to the Claimant's demand to work from home is not the issue before me. The issue before me is whether the Claimant had just cause for leaving his job. While the Claimant disputes that he voluntarily left, I have already decided that he voluntarily left his job because he made the choice to leave by not going to work when he was aware that he would be deemed to have abandoned his job if he did not attend.

Reasonable Alternatives

[139] A Claimant will only have just cause for leaving his employment if considering all of the circumstances, he had no reasonable alternatives to leaving when he did.

[140] Considering all of the circumstances above, I find the Claimant had reasonable alternatives to leaving his job. The Claimant could have accepted the CEO's apology for his conduct at the February 23, 2018, meeting, and his agreement to have weekly meetings and returned to work. He could have looked for a new job prior to leaving his employment. He could also have seen a doctor after the February 23, 2018, meeting and requested medical leave if he felt his treatment at work was overwhelming him. He could also have requested a leave of absence from the Employer instead of unilaterally demanding to work from home. All of these are reasonable alternatives to leaving one's employment. The Claimant did none of these things.

[141] I find the Claimant had reasonable alternatives to leaving his employment when he did. At the time he left, I find he did not have just cause for leaving based on any enumerated[54] or other circumstances, and considering all the circumstances together did not have just cause for leaving because reasonable alternatives existed to leaving his job.

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[54] *Employment Insurance Act*, subsection 29(c)

Conclusion

[142] The appeal is dismissed. I find the Claimant is disqualified from being paid regular EI benefits. He voluntarily left his employment, and did not prove that he had just cause for doing so because he had reasonable alternatives to leaving his job when he did.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	June 18, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A., Appellant Canada Employment Insurance Commission, Respondent X, Added Party Grant Stapon, Representative for the Added Party