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

Citation: *VD v Canada Employment Insurance Commission and X*, 2021 SST 197

Tribunal File Number: GE-21-40

BETWEEN:

**V. D.**

Appellant (Claimant)

and

**Canada Employment Insurance Commission**

Respondent (Commission)

and

**X**

Added Party (Employer)

# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: March 15, 2021

DATE OF DECISION: April 18, 2021

Canada

## DECISION

[1] The appeal is allowed. The Claimant has shown just cause because he had no reasonable alternatives to leaving his job when he did. This means he is not disqualified from receiving employment insurance benefits.

## OVERVIEW

[2] The Claimant left his job as a baker and applied for employment insurance (EI) benefits (GD3-3 to GD3-17). The Commission looked at the Claimant's reasons for leaving and initially decided that he voluntarily left his employment with just cause, so he was eligible for EI benefits (GD3-22). The Employer requested a reconsideration of that decision (GD3-23 to GD3-25).

[3] Following the Employer's request for reconsideration, the Commission changed their decision finding that the Claimant voluntarily left his employment without just cause, which meant that he was not entitled to EI benefits (GD3-46 to GD3-49).

[4] The Commission says that the Claimant could have kept his employment while he looked for other suitable work, instead of leaving his job(GD4-3). The Claimant disagrees because he took steps to find other employment before quitting. He also tried speaking with his employer about some of his concerns.

## PRELIMINARY MATTERS

### Written witness statements

[5] The Employer relied on four witness statements that had been previously emailed to the Commission (GD3-36; GD3-39; GD3-41; GD8-1). The Claimant submitted one written witness statement in advance of the hearing (RGD5-2).

[6] I have considered the witness statements submitted by the parties, but given them minimal weight because they were not sworn statements. I note that none of the witnesses attended the hearing to testify under oath. As a result, they could not be cross-examined by any of the parties.

**Documents sent after the hearing – "eating periods"**

[7] The Claimant testified that the Employer was breaking the law because he was not provided with a 30-minute eating period as required.

[8] I asked the Claimant to identify which law the Employer was breaching, but he did not have this information available at the hearing. I permitted him to submit this information after the hearing because it was relevant to his case.

[9] The Claimant wrote to the Tribunal and submitted a copy of subsection 20(1) of the *Employment Standards Act*. He relies on this section to support that the Employer was breaching the law when he was not provided with a 30-minute eating period during his work shifts (RGD06-01). A copy was sent to the Commission and the Employer.

**Documents sent after the hearing – unsolicited**

[10] Both the Employer and Claimant submitted unsolicited post-hearing documents after the hearing. This means they were unexpected and no requests were made in advance to submit them. In any event, I allowed the unsolicited documents because some parts were relevant. Therefore, they were added to the file and shared with all the parties (RGD07; RGD08).

[11] In the Employer's written statement, she provides information about a friendship and professional relationship she had with a former employee. This was the same former employee that had provided a witness statement in support of the Claimant (RGD07-2; RDG05-2).

[12] The Claimant responded to the Employer's submission disagreeing with her statements (RGD08). The Commission did not provide any further submissions in response to the above.

[13] After reviewing the additional submissions from the Employer and Claimant, I gave them minimal weight because I preferred their own testimony over the written witness statements they submitted. I note that the Employer and Claimant were able to testify about the events that happened and be cross-examined by each other at the hearing.

**Procedural history**

[14] This file was previously heard at the General Division level and a decision was rendered by another Member.[1] The Member added the Employer to the appeal determining that she had a direct interest (GD6; GD7).

[15] The appeal was dismissed at the General Division level. The Claimant appealed it to the Appeal Division level. The Appeal Division Member sent it back to the General Division for a new hearing with instructions because errors that occurred at the first hearing.[2]

[16] Prior to the new hearing, I invited the parties to submit any additional evidence in advance of the hearing (RGD01). As noted above, the Claimant submitted a written witness statement in advance of the hearing in response to my letter (RGD5-2).

**ISSUE**

[17] I must decide whether the Claimant is disqualified from being paid EI benefits because he voluntarily left his job without just cause. To do this, I must first address the Claimant's voluntary leaving. I then have to decide whether the Claimant had just cause for leaving.

**ANALYSIS**

**There is no dispute that the Claimant voluntarily left his job**

[18] I accept that the Claimant voluntarily left his job. The parties agree that the Claimant quit (in other words, voluntarily left the job) on February 25, 2020. This is consistent with the Claimant and Employer's testimony, as well as the record of employment in the file (GD3-11).

**The parties dispute that the Claimant had just cause for voluntarily leaving**

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

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[1] *VD v Canada Employment Insurance Commission and X*, 2020 SST 1111.
[2] *VD v Canada Employment Insurance Commission and X*, 2021 SST 1.

[20] The law says that you are disqualified from receiving EI benefits if you left your job voluntarily and you did not have just cause.[3] Having a good reason for leaving a job is not enough to prove just cause. You have just cause to leave if, considering all of the circumstances, you had no reasonable alternatives to quitting your job when you did.[4] It is up to the Claimant to prove this.[5] The Claimant has to show that it is more likely than not that he had no reasonable alternatives but to leave when he did.[6]

[21] When I decide that question, I have to look at all of the circumstances that existed when the Claimant quit. The circumstances I have to look at include some set by law.[7] After I decide which circumstances apply to the Claimant, he then has to show that there was no reasonable alternative to leaving at that time.[8]

**The circumstances that existed when the Claimant quit**

[22] The Claimant states that several circumstances set out in the Employment Insurance Act (EI Act) apply, specifically, the following:

a) Section 29(c)(i) of the *EI Act*: sexual or other harassment

b) Section 29(c)(iv) of the *EI Act*: working conditions that constitute a danger to health or safety

c) Section 29(c)(v) of the *EI Act*: obligation to care for a child or a member of the immediate family

d) Section 29(c)(x) of the *EI Act*: antagonism with a supervisor if the claimant is not primarily responsible for the antagonism

e) Section 29(c)(xi) of the *EI Act*: practices of an employer that are contrary to the law

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

**Section 29(c)(i) of the EI Act: sexual or other harassment**

[23] I find that the Claimant had just cause to leave his employment on the basis of harassment. The Employer admits to likely calling the Claimant a “wimp” and giving him a nickname “smudge”. She agrees that she yelled at the Claimant (and another employee) for a kitchen error that resulted in a financial loss of around $100.00 She agrees that she nitpicked the Claimant’s work because she wanted her baked goods to be exact and precise.

[24] The Employer admitted that she called the Claimant “smudge”. She said it was because he had a smudge of flour one day at work. She has nicknames for everyone at work. In her view, it a fun nickname and everyone joined in by calling him that name.

[25] The Employer agreed that she likely called the Claimant a “wimp” because he was cold when the bakery door was open to cool off the tarts. She said it sounded like something she might say as a joke.

[26] The Employer agreed that she nitpicked the Claimant and said that her motto was “her way or the highway”.

[27] The Employer agrees that on at least one occasion she acted like a bully to the Claimant and another employee. She was upset and yelled at them “this cannot happen again” due to four dozen broken tarts that amounted to a loss of around $100.00. The Employer agreed that the Claimant was allowed to take the broken tarts home for consumption, since they were going to be thrown in the garbage anyway.

[28] The Employer denies calling the Claimant dumb or a messy worker. She did agree that she may have said that the Claimant made a “dumb move” when a recipe was not followed correctly.

[29] I find more likely than not, that the Employer did refer to the Claimant as “dumb” and a “messy worker” as claimed. I note that she has admitted to similar conduct, so I believe the Claimant when he said that she called him those names.

[30] I find that the Employer's conduct towards the Claimant as described above was rude, degrading and offensive. The Claimant was negatively impacted by her comments and actions. It upset him.

[31] I was not persuaded by the Employer's explanation for justifying some of her comments. While she may take pride in her baked goods and expects her recipes to be followed precisely, it does not permit her treat the Claimant in the manner she did throughout his employment.

[32] I find it was more likely than not, that it was the Employer's conduct that led him to quit his employment. I was not persuaded that he quit his employment because a cancelled shift due to bad weather. While he admits that he was upset about the cancelled shift, it was her ongoing conduct that made him feel he had no choice but to quit his employment.

[33] I note that harassment is not defined the *Employment Insurance Act*. However, workplace harassment has been defined as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or workplace sexual harassment".[9]

[34] I find that the Claimant had just cause to leave his employment because of harassment. There were a series of harassing incidents that upset the Claimant. The Employer admits to most of the conduct. While she justifies her conduct, she ought to have known that it was unwelcome and offensive to the Claimant.

[35] I do not find that the Claimant could have spoken to her about his concerns, because she was not receptive to feedback. That was made clear when she told him and others that her motto was "her way or the highway". I also note that when he spoke to her about being cold, she called him a wimp. I find that she did not create a safe work environment for him to be able to speak to her about his legitimate concerns.

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[9] Section 1 of the Occupational *Health and Safety Act*, RSO 1990, c O.1.

**Section 29(c)(iv) of the EI Act: working conditions that constitute a danger to health or safety**

[36] I do not find that the working conditions at the bakery constituted a danger to the Claimant's health or safety. He lost weight because of stress of work, but he agreed that it never rose to a level requiring him to talk to a medical practitioner about his concerns. Therefore, he did not have just cause to leave his employment under this section.

**Section 29(c)(v) of the EI Act: obligation to care for a child or a member of the immediate family**

[37] I do not find that the Claimant had an obligation to care for a child or a member of the immediate family. First, he admits that he did not leave his employment for this reason. Second, the evidence shows that the Employer provided him with a flexible work schedule that allowed him to attend to his children's needs or appointment whenever it was possible. In fact, the Employer allowed the Claimant to start work in the morning so that he could be home for the children when they arrived from school. Therefore, the Claimant did not have just cause to leave his employment for this reason.

**Section 29(c)(x) of the EI Act: antagonism with a supervisor if the claimant is not primarily responsible for the antagonism**

[38] I find that the Claimant had just cause to leave his employment on the basis of antagonism with a supervisor, for which he was not primarily responsible.

[39] I note that the Commission accepted that the Claimant had an antagonistic relationship with his employer in their submissions (GD4-3).

[40] The Employer expressed concerns about the Claimant using her home bathroom when he first arrived at work in the morning. It awoke her and her dogs. She says that he could defected at home before he came to work. The Claimant worked in a residential home, but the bakery was located in the basement. She noted that there was no bathroom in the basement. This meant that employees had to use the upstairs bathroom on the main level of the home.

[41] The Claimant said that her large breed dogs would confront him, which made him uncomfortable. He explained that he often held his urge to use the bathroom in order to avoid the conflict with the Employer.

[42] I was not persuaded by the Employer's explanation that he ought to have defecated at home before work. That is completely unreasonable. She operated a business from her own home and should have known that employees would need to use the bathroom anytime during the workday.

[43] I find that the Claimant and the Employer had an antagonistic relationship and that he had just cause to leave his employment under this section. I do not find that he was responsible for the antagonism. While the Claimant tried to avoid the conflict and hold his urge to use the bathroom, when he did use the bathroom he was faced with barking dogs and it awoke her. The Employer's expectation that he defecate at home before work was unreasonable.

**Section 29(c)(xi) of the EI Act: practices of an employer that are contrary to the law**

[44] I do not find that the Employer was breaching the *Employment Standards Act* about the thirty-minute lunch break. The Claimant decided to take two paid fifteen-minute breaks during his shift. This benefited him since he could get home sooner to his children. He could have opted to an extra 30 minutes and had an unpaid lunch break. There was no evidence that the Employer ever deprived him of a break, or rushed him during his breaks. If he wanted a 30 minute unpaid break, then the Employer would have agreed to that. Therefore, the Claimant did not have just cause to leave his employment for this reason.

**Summer employment for his daughters**

[45] The parties dispute whether the Claimant's twin daughters were going to be hired for the upcoming March break and/or summer employment.

[46] The Claimant says that the Employer was not going to hire his twin daughters. He was told it would not work out because they would be starting later in the morning. He noted that the Employer said she would hire the manager's niece instead.

[47] The Employer says that the plan was to hire the Claimant's twin girls and the manager's niece. Since his daughters were only 14 years old, he would have had drive them out there, but there would be nothing for them to-do until around 10am. She noted that when he quit, she told him that she would not be hiring daughters.

[48] I find it more likely than not, that the Employer was going to hire his twin daughters for the March break and/or summer. While they had not sorted out the details about the start time, it is clear that when he quit, she was not going to hire them anymore, and that was agreeable to the Claimant. There was no evidence to suggest that the Claimant still wanted his daughters to work there, even after he quit, particularly since it was a negative experience.

**There were no reasonable alternatives**

[49] Considering all of the circumstances that existed at the time that the Claimant voluntarily left, the Claimant had no reasonable alternative to leaving when he did. This means the Claimant did have just cause for leaving his job due to harassment and antagonism with the supervisor, for which he was not primarily responsible.

[50] I do not find it was a reasonable for the Claimant to have tried to speak to his Employer about his concerns because of the harassment and antagonism he was experiencing. He worked at her home bakery, which meant that he was not able to escalate his concerns to anyone else in the organization. While he did try to express some concerns during the course of his employment, she would nitpick, call him names and did not create a work environment that would have been receptive to feedback. Therefore, I find that this was not a reasonable alternative for the Claimant.

[51] I find that the Claimant did explore other job opportunities before quitting his job. He looked for other jobs and had several interviews (GD3-20). Around January 2020, he spoke to his friend G. in an effort to find a new job. Around the same time that he quit his job, he had applied at Lowe's and was in the process of being hired (GD3-30). Therefore, I find that this was a reasonable alternative that the Claimant exhausted prior to quitting his employment.

**CONCLUSION**

[52] I find that the Claimant is not disqualified from receiving EI benefits. This means the appeal is allowed.

Solange Losier

Member, General Division - Employment Insurance Section

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| HEARD ON: | March 15, 2021 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | V. D., Appellant (Claimant)<br><br>A. W., Added Party (Employer) |