[TRANSLATION]

Citation: *SL v Canada Employment Insurance Commission*, 2021 SST 324

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. L.
Respondent:	Canada Employment Insurance Commission
Added Party:	

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (417212) dated March 22, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	May 26, 2021
Hearing participant:	Appellant
Decision date:	June 11, 2021
File number:	GE-21-695

Canada

Decision

[1] The appeal is allowed. I find that the Appellant did not voluntarily leave his job, but rather the employer let him go.[1] Although he was let go, the Appellant did not lose his job because of misconduct under the *Employment Insurance Act* (Act).[2] This means that his disqualification from receiving Employment Insurance (EI) regular benefits from January 20, 2019, is not justified.

Overview

[2] From January 2009 to January 24, 2019, the Appellant worked as a purchaser of mechanical parts for the employer X (employer), a construction and excavation company. The employer says that it let the Appellant go because he had refused to go back to working full-time even though it had asked him to.

[3] On December 18, 2018, before his employment ended, the Appellant had stopped working for the employer for medical reasons. On December 21, 2018, he made an initial claim for benefits (sickness benefits). A benefit period was established effective December 23, 2018. On January 21, 2019, the Appellant resumed working for the employer three days a week, as he had done since June 2018. His last day worked was January 24, 2019.

[4] On March 17, 2020, following an investigation, the Canada Employment Insurance Commission (Commission) determined that the Appellant was not entitled to EI regular benefits from January 20, 2019, because he had voluntarily stopped working for the employer without good cause under the Act.[3]

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[1] See sections 29 and 30 of the *Employment Insurance Act* (Act).
[2] See sections 29 and 30 of the Act.
[3] In its representations, the Commission indicated that no notice of decision had been sent to the Appellant—GD4-1. The Commission explained that the initial decision had been made and had taken effect on March 17, 2020, following an investigation. It said that a notice of debt had been issued to the Appellant on March 21, 2020. The Commission explained that, since the notice of decision had not been issued, it considered the date of the notice of debt to be the date the Appellant was informed of the decision affecting him. It specified that this was why the date of March 21, 2020, had been used in the notice sent to the Appellant, dated March 22, 2021—GD7-1 and GD7-2.

[5] On March 22, 2021, following a request for reconsideration, the Commission informed the Appellant that it was upholding its March 21, 2020, decision[4] about the fact that he had voluntarily left his job.[5]

[6] The Appellant argues that he did not voluntarily leave his job; he was let go. He explains that he had an agreement with the employer to work three days a week or about 30 hours weekly, starting in early June 2018. When he returned to work on January 21, 2019, after he had stopped working for medical reasons from December 18, 2018, to January 19, 2019, inclusive, the employer asked him to work full-time, that is, five days a week or 40 hours weekly; otherwise, it would not be keeping him on. He argues that the employer decided to change his working conditions. The Appellant did not agree to go back to working full-time. On April 26, 2021, the Appellant challenged the Commission's reconsideration decision before the Tribunal. That decision is now being appealed to the Tribunal.

Issues

[7] In this case, I must decide whether the Appellant had just cause for voluntarily leaving his job.[6]

[8] To decide this, I must answer the following questions:

- Does the Appellant's termination of employment amount to voluntary leaving?
- If so, did the Appellant have no reasonable alternative to voluntarily leaving?
- If he did not voluntarily leave, did the Appellant lose his job because of misconduct? In other words, was his alleged act conscious, deliberate, and intentional, such that he knew or should have known that it could lead to the loss of his job?

[4] See GD7-1 and GD7-2.
[5] See GD2-6, GD3-30, and GD3-31.
[6] See sections 29 and 30 of the Act.

Analysis

[9] The Act says that you are disqualified from receiving benefits if you left your job voluntarily and you did not have just cause. Having good cause (in other words, a good reason) for leaving a job is not enough to prove just cause.

[10] Federal Court of Appeal (Court) decisions indicate that the test for determining just cause is whether, considering all the circumstances, the claimant had no reasonable alternative to leaving their job.[7]

[11] It is up to the claimant to prove that they had just cause.[8] They have to prove this on a balance of probabilities. This means that they have to show that it is more likely than not that their only reasonable option was to quit. When I decide whether a claimant had just cause, I have to look at all of the circumstances that existed when they quit.

Issue 1: Does the Appellant's termination of employment amount to voluntary leaving?

[12] I find that, in this case, the termination of the Appellant's employment does not amount to voluntary leaving under the Act.

[13] I find that the Appellant did not choose to voluntarily leave his job; rather, the employer let him go, on January 24, 2019.

[14] The Court tells us that, in a case of voluntary leaving, it must first be determined whether the person had the choice to stay at their job.[9]

[15] The Court also tells us that it is up to the Commission to prove that the claimant voluntarily left.[10]

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[7] The Federal Court of Appeal (Court) established or reiterated this principle in the following decisions: *White*, 2011 FCA 190; *Macleod*, 2010 FCA 301; *Imran*, 2008 FCA 17; *Peace*, 2004 FCA 56; *Laughland*, 2003 FCA 129; *Astronomo*, A-141-97; and *Landry*, A-1210-92.
[8] The Court established this principle in *White*, 2011 FCA 190 at para 3.
[9] The Court established this principle in *Peace*, 2004 FCA 56.
[10] The Court reiterated this principle in *Green*, 2012 FCA 313.

[16] The evidence the Commission obtained from the employer indicates the following:

a) In March 2018, the Appellant met with the employer to ask to reduce his hours starting in the spring of 2018. Given his age, the Appellant wanted to go into pre-retirement by reducing his work week. The Appellant wanted to continue working, but part-time.

b) On May 15, 2018, the Appellant met with the employer again to reduce his hours.

c) It was agreed with the Appellant that, starting June 4, 2018, he would work three days a week and sometimes four, when there were employees on holiday.

d) Starting December 19, 2018, the Appellant was off work for a few weeks for medical reasons. He returned to work on January 21, 2019.

e) On January 23, 2019, the employer met with the Appellant to explain to him that the company had been growing in recent months and that, from then on, he would have to work full-time. The employer explained to him that it had accommodated him in recent months but that it could no longer allow him to work three days a week. The Appellant's position required working five days a week.

f) The Appellant refused to go back to working full-time or five days a week.

g) The employer decided to let the Appellant go. Another person was hired full-time to fill the Appellant's position.

h) On the Record of Employment it issued, the employer indicated "dismissal" as the reason for termination of employment, given that the Appellant did not want to continue working under the new conditions in place, that is, working full-time.

i) The Appellant's last day worked was January 24, 2019. On separation, the employer gave him notice and vacation pay.

j) The Appellant could have worked full-time during the period from June 4, 2018, to January 24, 2019. He could have continued doing so after January 24, 2019.[11]

[17] The Record of Employment the employer issued on June 5, 2019, indicates that the Appellant was dismissed (code M – dismissal).[12]

[18] The Appellant's testimony and statements to the Commission indicate the following:

a) The Appellant argues that he was let go on January 24, 2019.[13] Although one of his statements to the Commission indicates that he voluntarily left his job,[14] this was not the case. The Appellant points out that, on the Record of Employment it issued, the employer indicated that it had dismissed him.[15]

b) The Appellant had worked full-time, that is, 40 hours a week, since the start of his job in January 2009. He wanted to reduce his work week to three days. The Appellant was finding it hard to work full-time, given his age, and was interested in pre-retirement.[16]

c) In January 2018, the Appellant met with the employer (the head of human resources) to ask to reduce his hours so that he could work three days a week starting in May 2018 or June 2018. The Appellant explained to the employer that, if it did not agree to this, he would leave his job.

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[11] See GD3-15 and GD3-16.
[12] See GD3-13 and GD3-14.
[13] See GD2-10 and GD3-23.
[14] See GD3-29.
[15] See GD3-23 and GD3-27.
[16] See GD3-18 and GD3-19.

d) In March 2018, the Appellant met with the head of human resources again and repeated his January 2018 request to reduce his hours. At this meeting, the employer told him it had taken steps to hire someone to cover the hours he would not be working anymore. The Appellant's request to reduce his hours did not take effect at that time.[17]

e) In early June 2018, there was another meeting between the Appellant and the employer (the head of human resources and the machine shop manager—the Appellant's supervisor). It was after this meeting that the reduction in the Appellant's hours started to apply. So, the Appellant had a reduced work schedule of three days a week—Monday to Wednesday, inclusive—starting in early June 2018.[18]

f) The agreement between the employer and the Appellant to reduce his hours was verbal. When it was reached, no specific length was discussed for this agreement. The employer hired another person to work the hours the Appellant would not be working anymore. To the Appellant, this agreement was like a pre-retirement agreement. It would be easier for him to work three days a week than five.

g) From early June 2018 to December 18, 2018, the Appellant worked under the terms of this agreement, that is, three days a week or four, on occasion, depending on the employer's needs.[19]

h) The Appellant was off work for medical reasons during the period from December 19, 2018, to January 19, 2019.[20]

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[17] See GD3-18 and GD3-19.
[18] See GD3-18 and GD3-19.
[19] See GD3-18 and GD3-19.
[20] See the medical certificates, dated December 20, 2018, and January 1, 2019, showing that the Appellant was off work for the period from December 19, 2018, to January 19, 2019—GD3-25 and GD3-26.

i) On January 21, 2019, the Appellant returned to work. He asked to meet with the employer on January 23, 2019.

j) On January 23, 2019, a meeting took place between the employer and the Appellant. The Appellant, the head of human resources, the machine shop manager, and the boss of the company were there. The employer asked the Appellant to go back to working full-time. The Appellant explained to the employer that he did not want to work five days a week but that he was prepared to work three days a week. The employer [translation] “gave [him] an ultimatum” and told him that, if he wanted to continue working, he would have to do so five days a week. The employer explained to him that it did not need him for three days a week and that it would not be keeping him on. Additionally, it told him that if he did not agree to work five days a week, it was over, and that January 24, 2019, would be his last day of work. The Appellant could not say anything because the employer had made its decision. The Appellant turned down the request. The employer did not give him a letter to tell him that he was being let go. It issued a Record of Employment indicating that the termination of his employment was a dismissal.[21]

k) The Appellant argues that it was the employer who decided to change his working conditions.[22]

l) The Appellant had always been prepared to continue working three days a week. His intentions were clear on this point. He told the employer as much, but the employer did not agree to his request. The Appellant points out that the boss was aware that he wanted to work three days a week, since he had spoken with him about it several times. He explains that, even though he had worked full-time for the employer for many years, he liked his work schedule of three days a week and wanted to continue working it.[23]

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[21] See GD2-10, GD3-18, GD3-19, and GD3-23.
[22] See GD3-29.
[23] See GD3-29.

m) The Appellant says he found the termination of his employment disappointing after nine years with the employer when it told him that he had to go back to working five days a week; otherwise, it was over. According to the Appellant, the employer [translation] “compensated” him by paying him a sum of money (for example, pay in lieu of notice and vacation pay or “4%”), but that was not what he wanted.[24]

[19] The Commission, in turn, explains that it is unclear whether the Appellant’s termination of employment is the result of voluntary leaving or a dismissal. According to the Commission, the facts clearly show that the Appellant’s employment ended because of his refusal to return to full-time hours. The Commission argues that the Appellant lost his job because of a decision he made. The Commission says there is no prejudice to the Appellant in considering the case from the perspective of voluntary leaving or dismissal.[25]

[20] The Commission argues that what the Appellant did amounts to voluntary leaving, since he chose to refuse to go back to working full-time. It explains that the Appellant knew that refusing would lead to the termination of his employment because the employer had warned him as much.[26]

[21] The Commission submits that, to the Appellant, agreeing to work full-time was therefore an alternative to an anticipated loss of employment. It argues that, under section 29(b.1)(i) of the Act, the Appellant’s refusal to agree to this option to stay at his job amounts to voluntary leaving.[27]

[22] In this case, I find that the Appellant’s situation cannot fall under voluntary leaving when he stopped working on January 24, 2019.

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[24] See GD3-18 and GD3-19.
[25] See GD4-3.
[26] See GD3-29 and GD2-10.
[27] See GD4-3.

[23] I find that the Appellant did not have the option of staying on under the conditions that existed before his return to work on January 21, 2019. As a result of the working conditions established by mutual agreement between the employer and the Appellant, the Appellant had worked three days a week or 30 hours weekly since early June 2018.

[24] In my view, the Appellant was prepared to resume or continue in his employment under the conditions put in place in June 2018, with the employer's agreement.[28]

[25] I point out that the employer and the Appellant both acknowledge that the Appellant's termination of employment was a dismissal.

[26] I find that the Commission has not met its burden of proving that it was voluntary leaving.

Issue 2: Did the Appellant have no reasonable alternative to voluntarily leaving?

[27] In this case, given my finding that the Appellant did not voluntarily leave his job, but rather the employer let him go, there is no need to consider whether he had no reasonable alternative to voluntarily leaving.

[28] I must now decide whether the Appellant's alleged act of refusing to go back to working full-time is misconduct under the Act.

[29] The Appellant acknowledges that, after the period he was off work, he refused to go back to working [full-] time, as requested by the employer. He argues that he wanted to continue working for the employer, but three days a week, as had been the case since June 2018.

[28] See sections 29(b.1)(ii) and 29(b.1)(iii) of the Act.

Issue 3: Did the Appellant lose his job because of misconduct? In other words, was his alleged act conscious, deliberate, and intentional, such that he knew or should have known that it could lead to the loss of his job?

[30] I find that, when he refused to go back to working five days a week, as requested by the employer, the Appellant was not setting himself up to deliberately lose his job. What he did does not amount to misconduct under the Act.

[31] The Act does not define the term "misconduct." Court decisions set out the characteristics that describe the notion of misconduct.

[32] In one of its decisions, the Court said that, to be misconduct, "the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."[29]

[33] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.[30] Misconduct also includes conduct that is so reckless that it "approach[es] wilfulness,"[31] meaning that it is almost wilful. For their behaviour to be misconduct under the Act, the claimant does not have to have wrongful intent; in other words, they do not have to mean to be doing something wrong.[32]

[34] There is misconduct if the claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being let go because of that.[33]

[35] To determine whether the misconduct could result in dismissal, there must be a link between the claimant's misconduct and the loss of their job. The misconduct must

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[29] The Court established this principle in *Tucker*, A-381-85.
[30] The Court established this principle in *Mishibinijima*, 2007 FCA 36.
[31] The Court established this principle in *McKay-Eden*, A-402-96.
[32] The Court established this principle in *Secours*, A-352-94.
[33] The Court established this principle in *Mishibinijima*, 2007 FCA 36.

therefore constitute a breach of an express or implied duty resulting from the contract of employment.[34]

[36] The Commission has to prove that the claimant lost their job because of misconduct. The Commission has to prove this on a balance of probabilities.[35] This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.[36]

[37] On the issue of misconduct, the Commission argues as follows:

a) The Appellant's refusal to work full-time is misconduct under the Act.[37]

b) The act was wilful on the Appellant's part, since he chose to turn down the employer's request, even though he knew this would lead to the termination of his employment. The Appellant turned down the request despite being aware that refusing would lead to his dismissal.[38]

c) The Appellant's refusal to work full-time, when the employer required that he do so for operational reasons, is a breach of his duties toward the employer. An "employer-employee" relationship implies that the employee works based on the company's needs, and these needs may fluctuate over time. An employee cannot turn down a reasonable request from the employer unless they have good cause for turning it down. The Appellant has not shown that he had good cause for refusing to work full-time, since nothing was preventing him from doing so.[39]

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[34] The Court established this principle in *Lemire*, 2010 FCA 314.
[35] The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.
[36] The Court established this principle in *Bartone*, A-369-88.
[37] See GD4-6.
[38] See GD4-5 and GD4-6.
[39] See GD4-5 and GD4-6.

d) As the Appellant might have expected, he was let go for refusing to work full-time.[40]

e) There is a causal relationship between what the Appellant did and his dismissal, since he was let go because of his refusal.[41]

f) Given the fact that the Appellant acted wilfully, that his act constituted a breach of his duties toward the employer, and that this led to the termination of his employment, his refusal to work full-time amounts to misconduct under the Act.[42]

g) The Appellant should be disqualified from receiving benefits from the week his employment ended.[43]

[38] I find that the Appellant's explanations about his alleged act of refusing to go back to working full-time, or five days a week, show that he did not breach an express or implied fundamental duty resulting from the contract of employment.

[39] The evidence on file shows that, under the terms of his agreement with the employer, the Appellant had worked three days a week or 30 hours weekly since early June 2018.

[40] I point out that the evidence on file shows that the reduction in the Appellant's hours to three days a week is a condition that was established by mutual agreement with the employer. The Appellant complied with this condition and wanted to continue working under the agreement with the employer.

[41] I also point out that the employer's statements show that it had agreed with the Appellant that he would work three days a week starting June 4, 2018.[44]

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[40] See GD4-6.
[41] See GD4-5.
[42] See GD4-5.
[43] See GD4-6.
[44] See GD3-15 and GD3-16.

[42] The fact that the Appellant did not want to go back to working full-time does not amount to a breach of his duties toward the employer. I accept that the Appellant was prepared to continue carrying them out, as he had done since June 2018, in accordance with the agreement with the employer, and as he had resumed doing on January 21, 2019, when he returned to work after his time off for medical reasons.

[43] I accept the Appellant's argument that it was the employer who decided to change his working conditions.[45]

[44] I find that, in requiring the Appellant to go back to working-full time, the employer was unilaterally changing his working conditions. With this in mind, I am of the view that this requirement is more a matter of labour relations than misconduct under the Act. There was a disagreement when the employer wanted to change the Appellant's working conditions.

[45] I do not accept the Commission's argument that the Appellant has not shown that he had good cause for refusing to work full-time, since nothing was preventing him from doing so, and that the employer's request was reasonable.[46]

[46] In my view, when he returned to work on January 21, 2019, the Appellant could reasonably believe that he would be able to continue working under the conditions established with the employer more than seven months earlier and that the employer would continue honouring these conditions.

[47] In addition, I do not accept the Commission's argument that an "employer-employee" relationship implies that the employee works based on the company's needs and that these needs may fluctuate over time.[47]

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[45] See GD3-29.
[46] See GD4-5.
[47] See GD4-5.

[48] I find that, from the outset, the Appellant did not have to go back to working full-time, as requested by the employer, to meet the company's needs.[48]

[49] The Appellant's uncontradicted testimony indicates that, when the agreement to reduce his hours took effect in June 2018, the employer had hired another person to work the hours the Appellant would not be working anymore. The Appellant's testimony also indicates that the employer had started taking steps to that end in March 2018.

[50] In addition, I point out that the employer's statements indicate that it hired another person full-time to fill the Appellant's position after he was let go.[49]

[51] I find that the Appellant's alleged act does not show that he wilfully disregarded the effects it would have on his work.

[52] I find that, objectively, the Appellant could not have expected to be let go for wanting to stick to the agreement he had with the employer—dating back several months before his dismissal—that he would work three days a week.

[53] I find that what the Appellant allegedly did does not constitute a conscious, deliberate, or intentional act that can fall under misconduct under the Act.

[54] I find that, in this case, the Commission has not met its burden of showing whether the Appellant's alleged act amounts to misconduct.

[55] The Court tells us that the Commission has to prove the existence of evidence showing a claimant's misconduct.[50]

[56] I find that the Commission's evidence is inadequate and not detailed enough to find, on a balance of probabilities, that the Appellant lost his job because of misconduct.

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[48] See GD4-5.
[49] See GD3-15 and GD3-16.
[50] The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

[57] I find that the Commission's evidence does not show that the Appellant did not comply with the work agreement he entered into with the employer in June 2018.

[58] So, I do not accept the Commission's argument that the Appellant's refusal to work full-time is a "breach of his duties" toward the employer.[51]

[59] The Court also tells us that it must be established that the claimant was let go because of misconduct.[52]

[60] The Appellant was not let go because of an act he committed wilfully and deliberately.

[61] The reason for the Appellant's dismissal is not misconduct under the Act.

Conclusion

[62] I find that the Appellant did not voluntarily leave his job. The employer let him go.

[63] Although the Appellant lost his job, the cause of the loss of his job is not misconduct under the Act.

[64] This means that the Commission's decision to disqualify the Appellant from receiving EI regular benefits from January 20, 2019, is not justified.

[65] The appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section

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[51] See GD4-5 and GD4-6.
[52] The Court established or reiterated this principle in the following decisions: *Cartier*, 2001 FCA 274; *MacDonald*, A-152-96; and *Namaro*, A-834-82.