



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *NO v Canada Employment Insurance Commission*, 2021 SST 356

Tribunal File Numbers: GE-20-1401 & GE-20-1402

BETWEEN:

N. O.

Claimant

and

Canada Employment Insurance Commission

Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: March 26, 2021

DATE OF DECISION: March 31, 2021

DECISION

[1] The appeal is dismissed with modification. The Claimant voluntarily left his job without just cause. The Claimant has not proven that he was available for work from August 13, 2019 to August 14, 2019.

OVERVIEW

[2] The Claimant had a knee injury. He applied for and received employment insurance (EI) sickness benefits. His doctor cleared him to return to work. After a medical assessment, the employer offered the Claimant a modified work placement other than his previous maintenance position. The Claimant accepted it. He returned to work, but did not work the full day. The Claimant felt that working in the new position stressed his knee. He did not return to his job. The Claimant applied to convert his sickness benefits to regular benefits.

[3] The Commission denied the Claimant's application for benefits. They determined that he voluntarily left his job without just cause. They also determined that he had not proven his availability for work from July 22, 2019 to August 14, 2019. They did so because they say he was not actively looking for work. The Claimant argued that he did not quit his job.

PRELIMINARY MATTERS

[4] The Claimant asked to have an in-person hearing. Because of the pandemic, in-person hearings are not possible at this time. At a pre-hearing conference, the Claimant agreed to have his hearing by teleconference.

[5] On the first scheduled date for the hearing, I inadvertently did not attend the teleconference. I adjourned for this reason. The Claimant was unable to attend the next two scheduled hearings. He had technical difficulty connecting to the teleconference. This is an exceptional circumstance to adjourn the hearing.¹ In the interest of natural justice, I adjourned the hearing.

¹ Subsection 11(2) of the *Social Security Tribunal Regulations*.

ISSUES

- [6] Did the Claimant voluntarily leave his job?
- [7] If so, did the Claimant have just cause to leave his job voluntarily?
- [8] Has the Claimant proven that he was available for work?

ANALYSIS

[9] Claimants cannot receive EI benefits if they voluntarily leave any job without just cause.² The Commission must prove that the Claimant voluntarily left his job. Then, the Claimant must show just cause for voluntarily leaving his job. He must show that he had no reasonable alternative to leaving his job.³

Did the Claimant voluntarily leave his job?

[10] I find that the Claimant voluntarily left his job.

[11] To determine if the Claimant voluntarily left his job, I must ask if he had a choice to stay or leave.⁴

[12] The Claimant testified that he injured his knee at work. He could not work as a result. He applied for and received sickness benefits. The Claimant accepted an offer to return to work with modified duties. His return to work date was July 15, 2019. The Claimant worked that day, but left because the work was bothering his knee. He told the Commission that he told his employer he would return to work once he got a doctor's note.

[13] The employer wrote to the Claimant by email and letter about his absence from work. All emails refer to the need for medical notes to support the Claimant's absences. Three refer to consequences if the unauthorized absences continue.

² Subsection 30(1) of the *Employment Insurance Act*.

³ *Green v. Canada (Attorney General)*, 2012 FCA 313; *Canada (Attorney General) v. White*, 2011 FCA 190.

⁴ *Canada (AG) v. Peace*, 2004 FCA 56.

[14] The employer wrote to the Claimant. The date of the letter is August 8, 2019. The employer wrote that the Claimant had not reported to work, did not call to inform of his absence, and did not provide a medical note. The employer told the Claimant that if he did not return to work on Monday, August 12, 2019, they would consider that the Claimant quit his job.

[15] The Claimant did not report to work as required by the employer. He first said that he got the employer's letter on Monday, August 12, 2019. He then said that he was away for the weekend and opened his mail Sunday night after returning. I asked the Claimant if he called the employer when he received the letter. He said would have called and left a message. I asked the Claimant if he went to his job after getting the letter. The Claimant said that he did not.

[16] I find that the Claimant knew what could happen if he did not report to work on August 12, 2019. The Claimant confirmed that he had opened the letter the night before. From this, I find that the Claimant could have returned to work as required, to speak with his employer in person at the very least. I find that the Claimant had a choice on that day to return to work or not. Because he did not, I find that he voluntarily left his job.

[17] The Claimant submitted a settlement agreement he signed with the employer. He testified that this shows that he did not quit. He argued that the employer would not have given him severance if he quit.

[18] The Commission submits that the settlement does not change the facts that led to the end of the Claimant's job. I agree with the Commission. I do not find that the agreement shows that the Claimant did not quit his job. Rather, I find that the employer and the Claimant agreed to settle their differences. I find that the Claimant voluntarily left his job.

Issue 2: Did the Claimant have just cause to leave his job voluntarily?

[19] I do not find that the Claimant has shown that he had just cause to leave his job when he did.

[20] A claimant has just cause for voluntarily leaving a job if they had no reasonable alternative to leaving.⁵

[21] The Claimant signed an agreement with his employer in July 2019 to return to work on July 15, 2019, with modified duties. He testified that under the agreement, he was going to another job that was not good for his knee. He said that his union told him that he should cooperate with the employer.

[22] The Claimant had signed an earlier agreement in May 2019. This agreement was for him to return to his maintenance job with accommodation. The employer said that the Claimant did not return to work at that time. He said that they had an independent evaluation done. The evaluation identified what the Claimant could and could not do.

[23] The Claimant returned to work on July 15, 2019, as required. He testified that he thinks it may have been about noon that he told his employer that his knee was bothering him. He left work for the day. He did not return to his job after that.

Absences from work

[24] The Claimant told the Commission that he called the employer for the next two weeks. He told them he would go to see his doctor, and would return to work when he got the medical note.

[25] At the hearing, I asked the Claimant what he did to communicate with the employer after July 15, 2019. He said that he would call Human Resources (HR). He said that he had a medical note that would take him to the end of July 2019. When asked if he gave the note to his employer, the Claimant said his doctor's office sent it to his employer by fax. The Claimant said that he called his employer every day.

[26] The employer sent the Commission copies of daily activity logs. They recorded whether the Claimant worked or called to report his absences. The logs show that between July 17, 2019 and August 22, 2019, the Claimant call the employer on July 19, July 22, July 23, and July 25, to

⁵ Paragraph 29(c) of the *Employment Insurance Act*.

say he would not be at work. They also show that the employer called the Claimant on July 17, 2019 to tell him that they had no work to offer him.

[27] I asked the Claimant about the activity logs that the employer sent to the Claimant. He said that he called for a certain amount of time. He added that he got frustrated. The Claimant said that he is pretty sure he told the HR representative that he would not be calling in.

[28] As noted above, the employer sent the Claimant emails and a letter about his absences from work. Two of the emails stated that the employer required the Claimant to call in advance of his shift if he could not attend work. The date on the second email is July 24, 2019.

[29] I acknowledge that the Claimant was frustrated at having to call daily. However, I find that the Claimant could have continued to call his employer on a daily basis as instructed in the July 24, 2019 email. I find he should have done this so the employer would not consider that he abandoned his job.

Doctor's notes to support absences

[30] I asked the Claimant about an email response to his employer. In the email, he said that he would have doctor's notes for missed work on July 29, 2019. The Claimant testified that he sometimes had to wait three weeks to get a doctor's appointment. However, he testified earlier that he had a medical note that would take him to the end of July 2019.

[31] I give the email more weight than the Claimant's testimony about the doctor's note. I do so because I find it more likely that the Claimant could accurately reflect the status of a doctor's note much closer in time to the event than when he testified to it more than a year and a half later. In addition, the email response is consistent with the Claimant's testimony that he sometimes had to wait three weeks to get an appointment with his doctor. In another email response to his employer on July 29, 2019, the Claimant said that he had a note for his absences to July 30, 2019. I find that the Claimant had arranged for a doctor's appointment on July 29, 2019. For this reason, I find that he did not get the note before this date.

[32] The Claimant testified that he did not send the doctor's note, but trusted his doctor to send it. The employer told the Commission that they did not get a doctor's note to support the

Claimant's absences. The employer asked the Claimant for doctor's notes in the letter and emails they sent him. Again, the employer notified the Claimant that they might consider him to have abandoned his job if he did not do as asked. I find that because of this, the Claimant could have followed up with the employer to make sure they got his doctor's note. I find that he could have sent the note himself to protect his job.

[33] The Claimant testified that he got the employer's August 8, 2019 letter on Sunday night, August 11, 2019. The letter required him to be at work on August 12, 2019, or the employer would consider that he quit his job. The Claimant testified that he called the employer and said that he had a doctor's appointment on Thursday, August 15, 2019. He said that he went to the doctor and got a letter.

[34] The Claimant sent the Commission a medical certificate signed by his doctor. The Claimant signed the form on August 2, 2019. The Claimant's doctor completed the form, noting that the Claimant was "cleared for work" as of July 19, 2020.

[35] I asked the Claimant, since his job was at risk, if there was any reason why he would not personally give his employer the medical certificate, even on August 12, 2019. I pointed out to him that the employer said that they would have returned him to his old position if he had a doctor's note saying he could return to work without restrictions. The Claimant said that knowing what he knows now, he should have taken the note to the employer personally.

[36] The Claimant said that he is sure the employer got the August 9, 2019 medical certificate, but they are just saying they did not. I find the Claimant's statement to be self-serving. The employer's letters dated August 8, 2019 and August 13, 2019, refer to the Claimant not reporting to work or providing medical documentation. This is consistent with the emails they sent to the Claimant before he left his job. I find that the employer was trying to get the Claimant to meet their requirements so he could keep his job. As stated already, I find that he could have personally taken the medical note to his employer and discussed his work assignment.

Return to work once medically cleared

[37] The August 9, 2019 medical certificate cleared the Claimant for work. The note does not identify any restrictions. However, the Claimant did not return to work. I find that he could

have done so to show his employer that medically, he could return to his old job. I find that the Claimant could have done so even if he did not get the employer's August 8, 2019 letter requiring him to report to work on August 12, 2019.

Was the employer trying to get rid of the Claimant?

[38] The Claimant said that by assigning him work in the production area, the employer was trying to get rid of him. He said that he wanted to return to his old maintenance job.

[39] The employer told the Commission that they did not assign the Claimant to his old job because of restrictions identified in a medical evaluation. They sent a copy to the Commission. The author notes they spoke to the Claimant's doctor. It appears that the employer gave the author a description of duties for the Claimant's old job. The author said that the Claimant should be able to perform some of the duties, but listed some restrictions.

[40] In a letter to the Claimant's doctor, the employer referred to the medical evaluation that lists restrictions that they needed to consider for the Claimant's return to work. In an email, the Claimant told the employer that the assigned work in the production area stressed his knee. He said that he was willing to do modified work in the maintenance area. The employer responded by explaining why duties in production would be less stressful on his knee than the duties in maintenance.

[41] Again, the employer told the Commission that if the Claimant had given them a note that said he no longer had restrictions, they would have returned him to his old job. I asked the Claimant if he had any comment to make about this. He said that he was surprised to hear this. He said that he got a note from his doctor the week his job ended saying that he could do maintenance. There is a doctor's note dated August 17, 2019 confirming this.

[42] I do not find from the Claimant's testimony that his employer wanted to get rid of him. I find that the employer followed the recommendations in the medical assessment to assign the Claimant modified work that he could do. The Claimant accepted the assignment. He now says he should not have done so. However, I am satisfied that the assignment was not permanent. I am satisfied that the employer would have assigned the Claimant to the maintenance area once his doctor medically cleared him.

[43] The Claimant said that the employer had replaced him in his old job. However, the employer said that he had to have someone in the position so could continue to operate. I find it reasonable that the employer would have someone else take up the Claimant's duties while he could not perform them.

[44] I find that the Claimant has not shown that he had just cause to leave his job when he did. I find that he had alternatives to leaving. These include letting his employer know in advance of absences, providing doctor's notes to support the absences, and letting his employer know that his doctor cleared him for work without restrictions and reporting on August 12, 2019 as required. Because of this, he is disqualified from receiving EI benefits.

Issue 3: Did the Claimant prove his availability for work?

[45] A claimant is not entitled to be paid benefits for a working day for which the claimant does not prove that he or she was capable of and available for work.⁶ A claimant is not entitled to be paid benefits for a working day for which the claimant does not prove that he or she was capable of and available for work.⁷

[46] In order to prove availability, a claimant must have a desire to return to the labour market as soon as suitable employment is offered, must express that desire through efforts to find suitable employment, and must not set personal conditions that might unduly limit their chances of returning to the labour market.⁸

[47] When the Commission interviewed the Claimant, he told them that he had been available and looking for work since August 15, 2019. For this reason, the Commission determined that he had not proven his availability for work from July 22, 2019 to August 14, 2019.

[48] The Claimant testified that the reason he said he was not available is that he was still employed with his former employer. At the end of the hearing, he confirmed that he had said no, he had not looked for work before August 15, 2019.

⁶ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁷ Paragraph 18(1)(a) of the *Employment Insurance Act*.

⁸ *Faucher v. Canada (Commission)*, A-56-96

[49] Given the Claimant's admission, I find that he was not available for work up to August 14, 2019. However, because his employer considered that he quit on August 12, 2019, I find that the Claimant has not proven his availability from August 13, 2019 to August 14, 2019. I find that a disentitlement should be imposed for this period.

CONCLUSION

[50] The appeal is dismissed with modification. For clarity, on the issue of voluntary leaving, the appeal is dismissed. On the issue of availability, the appeal is dismissed with modification.

Audrey Mitchell

Member, General Division - Employment Insurance Section

HEARD ON:	March 26, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. O., Claimant