



Citation: *EM v Canada Employment Insurance Commission*, 2021 SST 876

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: E. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (435454) dated October 4, 2021
(issued by Service Canada)

Canada Employment Insurance Commission
reconsideration decision (436041) dated October 4, 2021
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: October 28, 2021

Hearing participant: Appellant

Decision date: November 5, 2021

File number: GE-21-1873
GE-21-1885

Decision

[1] The Claimant, E. M., appealed two decisions made by the Commission. I have decided both of those appeals in this decision.

[2] The Claimant's appeal on voluntarily leaving his employment is allowed.¹ I agree with the Claimant.

[3] The Claimant has shown just cause (in other words, a reason the law accepts) for leaving his job when he did. The Claimant had just cause because he had no reasonable alternative to leaving. This means he is not disqualified from receiving Employment Insurance (EI) benefits.

[4] The Claimant's appeal on whether he was self-employed / not unemployed is allowed.² I agree with the Claimant.

[5] The Claimant was not working full work weeks from June 28, 2021 onward when he was selling insurance on a commission-only basis. This means that he is not disentitled from receiving EI benefits.

Overview

[6] The Claimant stopped working on March 28, 2020 when he was laid off due to a shortage of work. He then resigned from his employment on May 9, 2021. The Canada Employment Insurance Commission (Commission) looked at the Claimant's reasons for leaving. It decided that he voluntarily left (or chose to quit) his job without just cause, so it wasn't able to pay him benefits.

[7] I have to decide whether the Claimant has proven that he had no reasonable alternative to leaving his job.

¹ The appeal on voluntary leaving is numbered GE-21-1885

² The appeal on self-employment / not unemployed is numbered GE-21-1873

[8] The Commission says that, instead of leaving when he did, the Claimant could have secured other full time work as there was no urgency to quit. The Claimant had the option to stay employed with the employer until he found another job.

[9] The Claimant disagrees and says that he had just cause to leave his employment. His employer would not re-employ him in his former job and the jobs he was offered would pay him less or were too far away from his home.

[10] While he was not working, the Claimant enrolled in a program to get licensed to sell insurance. He was successful in his exams and was licensed on June 28, 2021. He began selling insurance on a commission-only basis.

[11] The Commission decided that the Claimant was working full work weeks from that date. As a result, the Commission decided that the Claimant couldn't receive EI benefits.

[12] The Claimant disagrees. He argues that he should receive EI benefits. He says that he was still unemployed even while selling insurance because he only worked at selling insurance in the evenings and on weekends. He was available for full-time work and was looking for other employment.

Matter I have to consider first

The Claimant's two appeals were joined

[13] The Commission made two decisions about the Claimant's EI benefits and issued a separate letter for each decision. Because of this, the Claimant's appeal was divided over two files. The issue of voluntary leaving was numbered GE-21-1885. The issue of self-employment / not unemployed was numbered GE-21-1873.

[14] I can hear two or more appeals at the same time if they involve a common question of law or fact arises in the appeals, but I can do that only if it would not be unfair to the people involved in the appeals.³

³ *Social Security Tribunal Regulations*, section 13, sets out this rule.

[15] I decided to hear the Claimant's appeal on both issues at the same time. I decided this because there were some similar questions of fact and because I thought it would be the fastest and most informal way of dealing with both appeals.⁴ I also thought that hearing both appeals at the same time would not be unfair to the parties, which are the Claimant and the Commission.

The employer is not an added party

[16] Sometimes the Tribunal sends the employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not ask to be an added party.

[17] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

The Commission made an error

[18] The Commission said that it made an error when it imposed the disqualification for voluntary leaving on the Claimant. It states that the disqualification was imposed March 22, 2020. The Commission stated the disqualification should have been imposed from May 9, 2021.

[19] The Commission said that it is committed to rescinding (cancelling) the disqualification that was imposed from March 22, 2020 to May 8, 2021, once it receives my decision.

[20] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal. Because the Commission's error did not prevent the Claimant from seeking reconsideration of the Commission's initial decision and later to appeal the

⁴ Section 3(1)(a) of the *Social Security Tribunal Regulations* requires that I conduct proceedings as informally and as quickly as the circumstances and the considerations of natural justice permit.

reconsideration decision, I find that the error does not cause the Claimant any prejudice or harm with respect to his ability to appeal to the Tribunal.

Issue ~ Voluntary Leaving

[21] Is the Claimant disqualified from receiving benefits because he voluntarily left his job without just cause?

[22] To answer this, I must first look at the Claimant's voluntary leaving. Then, I have to decide whether the Claimant had just cause for leaving.

Analysis

The parties agree that the Claimant voluntarily left

[23] I accept that the Claimant voluntarily left his job. The Claimant agrees that he resigned from his job on May 9, 2021. I see no evidence to contradict this.

The parties don't agree that the Claimant had just cause

[24] The parties, that is the Claimant and the Commission, don't agree that the Claimant had just cause for voluntarily leaving his job when he did.

[25] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.⁵ Having a good reason for leaving a job isn't enough to prove just cause.

[26] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that I have to consider all the circumstances.⁶

⁵ Section 30 of the *Employment Insurance Act* (EI Act) explains this.

⁶ See section 29(c) of the EI Act. See *Canada (Attorney General) v White*, 2011 FCA 190 (this is how I refer to the court cases that apply to the circumstances of this appeal)

[27] It is up to the Claimant to prove that he had just cause. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to quit.⁷

[28] When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when the Claimant quit. The law sets out some of the circumstances I have to look at.⁸

[29] After I decide which circumstances apply to the Claimant, he then has to show that he had no reasonable alternative to leaving his job at that time.⁹

The circumstances that existed when the Claimant quit

[30] The Claimant testified that he worked as a manager for a company that rented out furnished office space and furnished office suites on a daily or weekly basis. The company had offices and suites in a number of buildings. He was employed in a downtown location where the offices were spread out over two floors. His job was similar to that of a concierge or front desk manager in a hotel. He would greet the clients, ensure that the office was suitable for them and provide for their needs. At this location he was able to regularly work and be paid for overtime work. He also supervised two other employees.

[31] The Claimant was working in a building downtown that had two floors of offices available for rent. His company stopped operating due to the COVID-19 pandemic and he was laid off on March 23, 2020. He was told that he could come back to work in a few months.

[32] The Claimant's employer's Human Resources (HR) Director called him in the fall of 2020 and offered him work at a new location. This new location was 3.5 hours away from his former work location. The Claimant was hurt by this offer for two reasons. He was aware his former position in the downtown building had been given to someone

⁷ See *Canada (Attorney General) v White*, 2011 FCA 190

⁸ See section 29(c) of the EI Act.

⁹ See section 29(c) of the EI Act.

else and it wasn't feasible for him to commute to this new location. The Claimant asked about working at his old location. He was told that building was not yet opened. The Claimant declined this offer.

[33] At the end of February 2021 the Claimant was contacted by his employer's HR. This time he was offered a job as a receptionist. He asked if the HR Director was aware that he was being offered the receptionist job and was told yes. The Claimant declined this job because it was a demotion from his former job. It would be less hours of work at a lower pay rate.

[34] The Claimant was not told if there was any there problem with his work as a manager and could not understand why he was being demoted. The Claimant spoke to the HR Director about this job offer. The HR Director said they were just calling around to see if anyone wanted the job.

[35] In May 2021 the Claimant was contacted by the HR Director. He was offered a manager job in a location near to his original location. He had trained at this location and knew there were a lesser number of offices available for rent. The offices in this building were all on one floor. He would be working alone and would have to wait for another employee to relieve him for lunch. The Claimant was aware that his original location was operational and his old job was being done by someone else. In this job the hours of work were reduced by 3 hours a day.

[36] The Claimant saw the job at the smaller location as a demotion. He would not have any employees working for him, he believed with a lesser number of offices there would be less opportunity for overtime. He declined this offer for that reason and also because he was working towards his license to sell insurance and thought, at that time, he would be able to earn a living selling insurance.

[37] The law says that when deciding if a claimant has just cause to leave his job a circumstance to be considered is "significant changes in work duties."¹⁰

¹⁰ See Section 29(c)(ix) of the EI Act

[38] I find that the Claimant has shown that there was a significant change in his work duties with respect to the offer of the receptionist work and the offer of the job at the smaller work location. The Claimant had been employed as a manager, overseeing the operations of offices over two floors and supervising two employees. The receptionist job was less pay and would not involve him performing his management duties as he had in his original job. The job in the smaller location meant that he would be working on his own, and would not supervise any employees as he had before. This evidence tells me that the employer wanted to make significant changes to the Claimant's work duties had he accepted either position.

[39] The law says that when deciding if a claimant has just cause to leave his job a circumstance to be considered is "undue pressure by an employer on a claimant to leave his job."¹¹

[40] The Claimant testified that when he was hired he was shown the office spaces that he would be responsible for. The person who hired him said that the spaces were well suited to him. He said that he worked for the company without any issues. There was no demotions or discipline. The Claimant's employer reassigned his job to another employee and made him three offers of employment, as discussed above.

[41] In my opinion, the employer's actions of giving the Claimant's former location to another employee to manage and making job offers that were either unsuited to the Claimant due to the commuting distance or would be an effective demotion were a means to unduly pressure the Claimant into leaving his employment. That the pressure was subtle is not determinative of the matter. It is enough that the employer's actions had the effect of pressuring the Claimant to leave his employment.

[42] I recognize that at the same time as the Claimant decided to leave his employment he was studying for his license to sell insurance. But, getting the license was not the principal reason for leaving his job. The third offer of employment, combined with the fact that his former location was given to another employee to

¹¹ Section 29(c)(xii) of the EI Act

manage and the two earlier offers were not suitable, was enough to convince the Claimant that he could no longer work for his employer. As a result, I find that the Claimant has demonstrated that his employer put undue pressure on him to leave his employment.

The Claimant had no reasonable alternative

[43] It is not enough for a claimant to demonstrate that he meets one of the circumstances set out in law. To see if he had just cause for leaving his job, I must look at whether the Claimant had no reasonable alternatives to leaving his employment when he did.¹²

[44] The Commission says that it would have been reasonable for the Claimant to secure other full time work before quitting.

[45] The Claimant has an obligation to seek alternative employment before taking a unilateral decision to quit a job.¹³ He is not required to secure a job.

[46] The Claimant testified that when he began searching for work as soon as he was laid off. He looked daily at job search websites such as Indeed, LinkedIn and also Google. He set up notifications in Indeed and LinkedIn to get job alerts. He had a resume that he posted on Indeed. He applied for many jobs and would modify his cover letter to highlight his experience and skills to suit the job requirements. He applied for work at hotels, real estate management firms, information technology companies and in retail. The Claimant said that he spoke to family and friends about work opportunities. He wanted to be working in a job that paid a wage or salary. The Claimant testified that he continued his job search throughout the entire period of layoff, after he got his license to sell insurance and was successful getting a job two weeks prior to the hearing. This evidence tells me that the Claimant was seeking employment with another employer before leaving his job. As a result, I find that the Claimant exhausted

¹² *Canada (Attorney General) v White*, 2011 FCA 190; *Canada (Attorney General) v. Imran*, 2008 FCA 17

¹³ *Canada (Attorney General) v White*, 2011 FCA 190

this reasonable alternative prior to quitting his job. Accordingly, I find that the Claimant had no reasonable alternatives to quitting his job when he did.

[47] Considering the circumstances that existed when the Claimant quit, I find the Claimant had no reasonable alternative to leaving when he did, for the reasons set out above.

[48] This means the Claimant had just cause for leaving his job.

Issue ~ Self employment / not unemployed

[49] Was the Claimant's level of involvement in his self-employment so limited that he wasn't actually working full work weeks?

Analysis

[50] If you are involved in a business or self-employed, you may not be entitled to EI benefits.

[51] The law says that you can receive EI benefits for each week you are unemployed.¹⁴ A week of unemployment means any week you don't work a full work week.¹⁵

[52] Also, if you are self-employed the law assumes that you are working full work weeks.¹⁶ A person who works full weeks is not unemployed. So, you can't receive EI benefits.¹⁷

Exception if your involvement is limited

[53] There is an exception to this rule if your level of involvement in the business is limited.¹⁸

¹⁴ Section 9 of the EI Act sets out this rule.

¹⁵ See section 11 of the EI Act.

¹⁶ See section 30(1) of the *Employment Insurance Regulations* (EI Regulations).

¹⁷ See *Marlowe v Canada*, 2009 FCA 102.

¹⁸ See section 30(2) of the EI Regulations. It refers to a claimant being involved to "a minor extent" (in other words, their involvement is limited). Also see *Martens v Canada (Attorney General)*, 2008 FCA 240.

[54] The exception applies if the Claimant's level of involvement is so limited that a person wouldn't normally rely on that self-employment as their main means of earning a living.¹⁹

[55] The Claimant has to prove that his involvement was so limited that the exception applies.²⁰ The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his involvement is limited.

Six factors for deciding level of involvement

[56] To decide whether the exception applies, I have to consider the following six factors:²¹

- a) How much time did the Claimant spend on his self-employment?
- b) How much has the Claimant invested in his self-employment, and what are those investments (such as money, property, goods, and resources)?
- c) Financially, has the Claimant's self-employment been a success or failure?
- d) Was the Claimant's self-employment meant to be ongoing?
- e) What was the nature of the Claimant's self-employment?
- f) Did the Claimant intend to and want to find another job quickly?

– Time spent

[57] The Claimant's self-employment was selling insurance for homes, automobiles and other property. He was hired as a commission-only agent on June 28, 2021. He spent a few days at the office learning the computer system. He then spent weekday evenings after 6:30 p.m. and weekends making cold calls to get customers.

¹⁹ See section 30(2) of the Regulations and *Martens v Canada (Attorney General)*, 2008 FCA 240.

²⁰ See *Canada (Attorney General) v Falardeau*, A-396-85, and *Lemay v Canada Employment Insurance Commission*, A-662-97.

²¹ Section 30(3) of the EI Regulations sets out these six factors. This decision paraphrases those six factors for plain language.

[58] In my opinion this amount of time spent shows limited involvement because the Claimant's activities were limited to the weekday evenings for three to four hours an evening and to the weekends which is less than full-time.

– **Investment**

[59] The Claimant testified that he spent \$860 for the insurance course, the exam fee and his licence. He spent \$1,500 on a computer and printer that is used for his self-employment and for personal use. He has a car which is primarily for personal use and he sometimes uses to visit clients.

[60] In my opinion, the nature and amount of the Claimant's investments (such as money, property, goods, and resources) show limited involvement because the amounts spent to establish his self-employment are less than \$3,000. This investment represents a minimal investment for self-employment that was his sole source of income from June 28, 2021 to October 17, 2021.

– **Financial success or failure**

[61] The Claimant testified that from June 28, 2021 to October 17, 2021, he sold policies worth \$30,000 to \$35,000 in premiums. His commission on those policies was \$2,000. So far, he has received \$1,000 of his commission because there is a waiting period to see if clients cancel their insurance. This means that over a period of approximately three and one-half months the Claimant earned \$2,000 having invested approximately \$2,500 to get licensed and in computer hardware.

[62] In my opinion, the financial situation of the Claimant's self-employment shows limited involvement because he did not make a profit during the period of his self-employment.

– **Ongoing self-employment**

[63] The Claimant testified that he was started a new job on October 18, 2021, with an insurance brokerage firm. In this job he is paid a salary and a commission. He is

responsible for finding the right insurance product for a client and is not limited, as he was before, to selling one company's insurance products.

[64] The Claimant said he is able to continue selling insurance on a part-time basis outside of the hours he spends working for the insurance brokerage firm. The Claimant retains his licence to sell insurance whether he is working for an insurance brokerage firm or as an exclusive agent. He said that he wanted a position that provided salary and commission and was able to get that kind of position within three and half months of starting to sell insurance.

[65] In my opinion, this shows limited involvement because the Claimant sought out and obtained salaried employment selling insurance.

– **Nature of the Claimant's self-employment**

[66] The Claimant's self-employment was selling insurance on a commission basis. The Claimant had been previously employed managing the leasing of furnished offices and office suites. He was convinced by a friend that good money could be made selling insurance and it would be easy to get a salaried position selling insurance once he got his licence. He had to complete a course and write an exam to get his licence.

[67] In my opinion the Claimant's prior expertise and skills show limited involvement because those management skills are unrelated to the selling of insurance and the knowledge required to sell insurance would not have been acquired in his former job.

– **Intention and willingness to find another job quickly**

[68] The Claimant testified that he started to look for work after he was laid off in March 2020. He would look on job websites every morning. He applied for jobs in the hotel, real estate, retail, and information technology sectors. He said he has 396 pages of emails in a folder on his computer related to applications he has made. The Claimant continued his job search after he got his insurance licence and after he started selling insurance. He would spend his mornings looking for work and then his evenings and weekends doing cold calls. It was always his primary intention to find a job.

[69] The Claimant explained that he would not have to stop selling insurance to work full time. He testified he would be able to accept a full-time job and work up to 40 hours a week while he continued to sell insurance. He was able to do this because his licence to sell insurance did not require that he sell insurance full time and his sales involved cold calls in the evenings and on weekends.

[70] The Claimant was successful finding a salaried plus commission position working for an insurance broker. He did not want to work for commission only as he could not rely on that kind of position for an income that he could live on.

[71] In my opinion, the Claimant's job search efforts shows limited involvement because he continued his job search after he started selling insurance, and once it became apparent to him that he could not live on commission income alone he sought out and was successful getting a salary plus commission job with an insurance broker.

So, was the Claimant's level of involvement limited enough?

[72] I find the Claimant's level of involvement was so limited that the exception applies. A person wouldn't normally rely on this self-employment as a main means of earning a living.

[73] I have considered all six factors mentioned above. The factors about the time spent after regular hours, the minimal amount invested, the lack of financial success, the Claimant's ongoing job search and his willingness to accept another job all suggest that his involvement in his self-employment was so limited as to be minor in extent.

[74] Two factors are especially important. Case law says that how much time you spend on the work and whether you intend to or want to find another job quickly are important factors to consider.²²

[75] With all of this in mind, I find the exception applies to the Claimant's self-employment.

²² See *Charbonneau v Canada (Attorney General)*, 2004 FCA 61.

[76] The Claimant wasn't working full work weeks. This means that the Claimant may receive benefits because there were weeks where he was unemployed.

Other Matters

[77] The Commission's initial decision and reconsideration decision that the Claimant was disentitled from receiving EI benefits because he was self employed were made before the Claimant got his new job.

[78] My decision is limited to the time that the Claimant spent as a self employed person selling insurance on a commission-only basis and prior to the Claimant getting a salary plus commission position with an insurance brokerage firm on October 18, 2021. In his new job he is able to sell insurance products from any company based on the needs of his client. He conducts "indoor sales" to 5:00 p.m. each day for the broker and can continue to sell insurance as an independent agent after hours.

[79] The Claimant's change in circumstances, of working full time and earning both a salary and commission in his new job, will have to be reported on any claim reports beginning October 28, 2021, assuming that his benefit period has not ended. Those claim reports will have to be evaluated by the Commission to determine his eligibility for benefits given his new circumstances.

Conclusion

[80] I find that the Claimant has shown that he had just cause for leaving his job when he did. He is not disqualified from receiving benefits.

[81] I find that the Claimant's involvement in his self-employment was limited enough that the exception applies. He wasn't working full work weeks when he was selling insurance on a commission-only basis, so he was unemployed.

[82] This means that the appeals are allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section