Citation: *LM v Canada Employment Insurance Commission*, 2021 SST 968

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission

Decisions under appeal:	Canada Employment Insurance Commission reconsideration decision (319999) dated December 21, 2018 (issued by Service Canada) Canada Employment Insurance Commission reconsideration decision (324744) dated December 21, 2018 (issued by Service Canada)

Tribunal member:	Christianna Scott
Type of hearing:	Videoconference
Hearing date:	August 12, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	August 18, 2021
File numbers:	GE-20-1133 GE-20-1134

Decision

[1] The appeal is allowed. The Tribunal agrees with L. M. (the Claimant).

[2] I find that the Claimant voluntarily took a leave of absence from the workplace from April 17, 2017, until July 4, 2017, and from April 27, 2018, until July 6, 2018. However, having regard to all of the circumstances, I find that the Claimant had just cause to leave temporarily because she had no reasonable alternative to leaving. This means she isn't disentitled from receiving employment insurance (EI) benefits due to voluntarily leaving the workplace.

Preliminary Issues

[3] Two preliminary issues arose in this appeal. These issues are; (1) the joining of the appeals and (2) the breadth of my powers under the *Employment Insurance Act* (Act).

[4] First, the Commission requested that I join the appeals. The Claimant agreed with the Commission's request. Upon review of the file, I accepted to join the appeals so that they can be heard together and I can write one decision. I find that this is the best way to hear these appeals because they contain similar facts (just at different periods) and raise the same questions of law.

[5] Second, these appeals were heard under the regular appeal process even though the Claimant included in her notice of appeal allegations under the *Canadian Charter of Rights and Freedoms* (Charter). The Claimant filed two original appeals that another member of the Tribunal decided. The original member joined the two appeals and issued one decision dismissing the appeals. The Claimant disagreed with the decision and appealed the decision before the Appeal Division of the Tribunal. One of the grounds for appeal that the Claimant raised was that the General Division omitted to consider the arguments she made under the Charter. The Appeal Division allowed the appeals and sent the matters back to the General Division for reconsideration on all issues.

[6] I explained to the Claimant the steps that are required to make a constitutional challenge under the Charter. Although the Claimant pursued some of the steps and made written submissions in support of a Charter challenge, she later decided to withdraw her Charter challenge. So, the present appeals followed the regular appeal process and I have considered all of the Claimant's arguments, except those that related to her Charter challenge.

Overview

[7] Each spring the Claimant's employer lays off a portion of the workforce. The collective agreement in the workplace allows employees to elect to be laid-off in order of seniority when the lay-off is for a period of less than five months. The Claimant accepted to be laid-off temporarily by her employer in 2017 and 2018. She received regular EI benefits during these periods.

[8] The Commission investigated the Claimant's request for EI benefits in 2017 and 2018. The Commission decided that the Claimant voluntarily left the workplace on a leave of absence during the periods where she was laid off. So the Commission disentitled the Claimant from receiving benefits during those two periods. This resulted in an overpayment.

[9] The Claimant disagrees with the Commission's decisions. So, she appealed the decisions before the Social Security Tribunal of Canada (the Tribunal).

Analysis

Facts the parties agree upon

[10] The Claimant has worked for about 30 years in a college cafeteria. She is a unionized employee. She held the position of a Lead Hand. During the late spring and early summer, her employer reduces the number of cafeteria workers because there are fewer students on campus. The collective agreement allows for lay-offs in reverse order of seniority. However, when there are temporary lay-offs, the collective agreement allows senior employees to accept lay off before employees with less seniority (therefore lay-off in order of seniority).

[11] As with her usual practice, in 2017 the Claimant accepted to be laid-off between April 17, 2017, and July 4, 2017. In 2018, the Claimant accepted to be laid-off between April 27, 2018, and July 6, 2018.

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

[12] The Commission argues that the Claimant voluntarily took a leave of absence during the periods where she was laid-off. The Commission says that this leave of absence was without just cause because the Claimant was not required to leave her job but rather chose to be temporarily laid-off. The Commission argues that a reasonable alternative for the Claimant would have been to continue working.

[13] The Claimant argues that she did not voluntarily take a leave of absence from the workplace. She says that the employer was reducing the number of employees. She says that her collective agreement allows her to leave because of her seniority and therefore she had just cause to accept a temporary lay off.

What I have to decide

[14] The law says that when a claimant voluntarily takes a leave of absence from their employment without just cause, the claimant will be *disentitled* from receiving EI benefits.[1] This means that for a certain period, a claimant cannot receive benefits.[2] The law sets out criteria for the leave and the responsibility rests with the Commission to prove that the claimant voluntarily took the leave and is therefore disentitled.

[15] If the Commission proves the voluntary nature of the leave, a claimant must then show that they had just cause to take the leave of absence. A claimant must prove this on the balance of probabilities. Having a good reason for taking a leave of absence is not enough to prove just cause.[3] The law says that a claimant has just cause to leave

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[1] Section 32 of the *Employment Insurance Act* (Act).
[2] I note that *disentitlement* is different from *disqualification*. If the claimant voluntarily leaves any employment without just cause, the claimant will be *disqualified* from receiving benefits (sections 29 and 30 of the Act). In these situations, claimants are precluded from receiving benefits as all insurable hours prior to the voluntary departure are not considered for employment insurance purposes.
[3] *Tanguay v Canada (Unemployment Insurance Commission),* A-1458-84)

only if the Claimant shows that they had no “reasonable alternatives” to taking the leave when they did.[4]

[16] I must decide the following questions:

- Did the Claimant voluntarily take a leave of absence from her job?
- If yes, did the Claimant have just cause to voluntarily take a leave of absence?

Issue 1: Did the Claimant voluntarily take a leave of absence from her?

[17] Yes, I find that the Claimant voluntarily took a leave of absence from her job.

[18] The Commission argues that the Claimant voluntarily took a leave of absence from the workplace. The Commission says that the Claimant accepted to leave the workplace for a determined period of time. Despite the overall context of a reduction in the workforce, the Commission says that he Claimant voluntarily took the leave because she accepted to leave the workplace even though she could have exercised her seniority.

[19] The Claimant disagrees. The Claimant says that in the spring of every year, the employer reduces the workforce. In 2017 and 2018, the employer distributed a document to employees which allowed them to exercise their seniority rights in accordance with the collective agreement. The Claimant says that she completed the forms and accepted to be laid-off as per her collective agreement. She argues that she did not voluntarily take a leave since the employer was laying off and the employer initiated the work reduction.

[20] First, I find that the Commission has proven that the Claimant’s departure was voluntary.

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[4] *Canada (Attorney General) v. White*, 2011 FCA 190; *Canada (Attorney General) v. Racine*, A-694-96.

[21] When I consider whether the Claimant voluntarily left, I must decide who initiated the absence from the workplace. The underlying question therefore becomes, did the Claimant have the choice to stay or go.

[22] I find that pursuant to the collective agreement, the Claimant had the option to stay or go. The collective agreement states that in the case of temporary lay-offs for a period of less than five months, “employees may elect to be laid-off in order of seniority and failing sufficient numbers, employees shall be laid-off in reverse order of seniority.”[5]

[23] So, even though the employer was reducing the workforce, the Claimant nevertheless, at that stage of the staff reductions, had the choice to accept the lay-off or not. The information from the employer states clearly that the Claimant requested an early lay off.[6] She could have exercised her seniority and then forced the employer to proceed with laying off other employees through reserve order of seniority. I therefore find that the collective agreement and the Claimant’s explanation of the lay-off process support the voluntary nature of her departure. Even though the overall context was that of workplace reduction, the Claimant in essence “raised her hand” and accepted to leave the workplace.

[24] Whenever a claimant requests a lay-off from their employer, for example when a claimant voluntarily opts to be laid-off to allow younger employees to continue working or even as per a clause in the union agreement, when a claimant accepts to leave his employment for what she terms "inverse seniority" , this nevertheless constitutes voluntarily leaving employment.

[25] As such, I do not accept the Claimant argument that her departure was not voluntary because of the context of the lay-offs. The argument that one employee had to be laid-off in any event does not change the voluntary nature of the separation.

[26] Second, I find that the circumstances meet the requirements in the Act for a leave of absence. Leaves of absences under the Act only occur when the period of

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[5] See article 12.07 of the applicable collective agreement (GE-20-1133 – GD3-22).
[6] See GD3-16 in appeal GE-20-1134.

leave was authorized by the employer and the claimant and the employer agree upon which day the Claimant would resume employment.[7]

[27] The documents signed by the claimant in 2017 and 2018 show the date when the lay-offs became effective and the date when the Claimant would resume her schedule pending an earlier recall date.[8] The documents also contain the signature of the employer representative. In my view her temporary absences from the workplace met the criteria for a leave of absence under the Act.

[28] So, I find that the Commission has proven that the Claimant voluntarily took a leave of absence.

[29] I must now look at whether the Claimant had no reasonable alternative to leaving her job when she did.

The Claimant had no reasonable alternative to taking the leave of absence

[30] I find that the Claimant had no reasonable alternative to leaving when she did because having regard to all of the circumstances, leaving was the only reasonable alternative.

[31] The Commission says that the Claimant had reasonable alternatives available to her at the time she took her leave of absence. The Commission says that the Claimant could have exercised her seniority and stayed in the workplace.

[32] The Claimant disagrees. She says that she had no reasonable alternative but to leave. She says that she was simply exercising her collective agreement rights, as she had for many years. She says that as a Lead Hand she would have been laid-off even if she had stayed because there simply was no work within her classification. She says that in the lower classification, she would have been doing a very different job at reduced hours and reduced pay.

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[7] See article 32 of the Act.
[8] See document GD3-23 in appeal GE-20-1133 and GD3- 22 to 24 in appeal GE-20-1134.

[33] I accept the Claimant's statement that in 2017 and 2018 she nevertheless would have been laid-off within her classification. The Claimant explained that she was one of four Lead Hands. Because of the reduction in students, only the specialized food kiosks remained open in the cafeteria. The Claimant explained that she was not qualified to work in the specialized kiosks. She therefore could not have worked during the spring/early summer period.[9] She also explained that the employee with more seniority to her was qualified and therefore she remained in the role while the Claimant and the other Lead Hands were laid off.

[34] Moreover, the Claimant explained that she could have exercised her seniority to remain working in the general help classification (which is a lower classification within the union). However, she explained that this would correspond to a considerable drop in her salary, hours of work as well as an important reduction in her responsibilities.

[35] I accept that Claimant's statement that she knew in early spring 2017 and 2018 that she would be forcibly laid-off from within her classification even if she did not accept to be laid-off. The situation had repeated itself year after year. The Claimant's explanation about how lay-offs occurred within her classification was confirmed by the lay-off provisions in the collective agreement.[10] Moreover, the seniority list submitted by the employer confirms the Claimant's explanation about her seniority level within her classification as well as her position within the overall seniority list.[11] The list shows that within her classification the four employees have been in place from at least 2006, therefore confirming the sequence of lay-offs.

[36] Also, I do not believe that it was a reasonable alternative for the Claimant to accept a position within the lower classification. This would result in a significant reduction in her level of responsibility,[12] the tasks she performed and compensation. The Claimant explained that the only lower classification that she could perform was a job of general help. The hours she would perform would be significantly reduced, she

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[9] I note that at article 12.01 of the collective agreement the Claimant can only bump if she has the skills to perform the work in her classification or the lower classification.
[10] See GD3-18 to 21 in appeal GE-20-1134.
[11] See GD3-21 in appeal GE-20-1134.
[12] See Section 29(c) (ix) of the Act.

would not have a leadership role and would be subject to a 13 percent reduction in her hourly rate.

[37] So, having reviewed all of the circumstances that existed when the Claimant left the workplace, particularly :

- the knowledge that she would have been forcibly laid-off from her classification if she hadn’t accepted the advance offer of lay-offs; and
- the fact that the alternate position was in a lower classification with a significant change to her role, responsibilities, hours of work and salary;

I find that the Claimant had no reasonable alternative to leaving when she did.

[38] This means the Claimant had just cause for taking a leave of absence from her job.

[39] Last, the Claimant raised allegations of harassment from the Commission. She referred to ongoing correspondence she received, overlapping notices of debt and confusion around further claims. I do not have the power to force the Commission to communicate with the Claimant. Nor do I have the power to look at the circumstances around the other EI claims made by the Claimant. However, I strongly encourage the Commission to do a comprehensive review with the Claimant of her EI claims so that she can understand fully her situation.

Conclusion

[40] So, I find that the Claimant isn't disentitled from receiving benefits because I find that she had just cause to voluntarily take leaves of absences in 2017 and 2018.

[41] This means that the appeal is allowed.

Christianna Scott

Member, General Division – Employment Insurance Section