



Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 392

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (0) dated December 8, 2021
(issued by Service Canada)

Tribunal member: Mark Leonard
Type of hearing: Videoconference
Hearing date: April 28, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: May 12, 2022
File number: GE-21-2484
GE-21-2506

Decision

[1] The appeal is dismissed. The Claimant (Appellant) voluntarily took two periods of leave from her employment without just cause. This means she is disentitled from receiving Employment Insurance benefits.

Overview

[2] The Claimant is a lead hand employee working in a post-secondary learning institution's cafeteria. Each spring the Claimant's employer lays off a portion of the staff. The Claimant is unionized and her collective agreement allows members with the most seniority to volunteer to be laid off before members with less seniority.

[3] The Claimant says that she was exercising the provisions of her collective agreement when she requested to be laid off in both 2017 and 2018. She says that she would have been laid off anyway regardless of whether she had volunteered.

[4] The Commission says that the Claimant took two periods of voluntarily leave from her employment in 2017 and 2018. It says that the Claimant did not have just cause for doing so and it determined it could not pay the Claimant Employment Insurance (EI) benefits.

Preliminary Matter I have to consider first

Joining of Appeals

[5] There are two appeals before the Tribunal for decision. Both arise from a similar set of facts that occurred in 2017 and 2018. In the interests of efficient handling of both appeals, I asked both the Claimant and the Respondent (Commission) if the appeals could be joined in order that they be heard together.

[6] Both agreed, so the appeals will be heard together and one decision will apply to both.

Issue

[7] Did the Claimant voluntarily take two periods of leave, one in both 2017 and 2018 respectively when she requested a lay-off from her employer?

[8] If yes, did the Claimant have just cause to take the periods of leave when she did?

Analysis

The law

[9] Claimants are disentitled from receiving EI benefits when they take a period of leave from their employment without just cause.¹ First, the Commission must prove that the Claimant voluntarily took the leave. Then the Claimant must establish that she has just cause for voluntarily taking the leave by showing that, given her circumstances, she had no reasonable alternative to leaving her employment when she did.²

Issue 1: Did the Claimant voluntarily take two periods of leave in 2017 and 2018 when she requested a lay-off from her employer?

[10] To determine if the Claimant voluntarily left their employment, I must determine if she had a choice to stay or leave. After careful examination of the circumstances, I find that the Claimant's decisions to request lay off in each of the years 2017 and 2018, were voluntary. She had a choice whether to stay or leave.³

[11] A voluntary leave of absence must meet criteria. The Claimant must have asked for the leave. The employer must authorize the leave, and both the Claimant and the employer must agree to a date of return to employment.⁴

[12] The Claimant's employer operates cafeterias on a post-secondary institution campus. Consistently each year, the employer lays off a portion of the staff over the summer semester when there are fewer students. It notifies the staff of the impending

¹ See Section 32(1) of the *Employment Insurance Act*.

² See (*Canada (A.G.) v. White*, 2011 FCA 190)

³ See (*Canada A.G.) v. Peace*, 2004 FCA 56)

⁴ See Section 32(1)(a and b)

lay-offs and requests that they identify if they wish to exercise their right to volunteer for lay off.

[13] The employees work under a collective agreement (CA) that provides for lay-offs based on seniority. Essentially, those with the least seniority will be laid off first. However, the same CA allows those with the most seniority to elect to be laid off first. Essentially, this means that if an employee with higher seniority chooses to be laid off, it would mean that someone with lower seniority, would likely remain working.

*Article 12.7 Where a lay-off not exceeding five (5) months must occur, 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.*

[14] The same CA conveys rights to employees with higher seniority to “bump” employees with lower seniority. Essentially, this means that if a higher seniority employee was identified for lay off and wished to continue working they could exercise their right to “bump” the lower seniority employee. The higher seniority employee would then perform the job occupied by the lower seniority employee. The lower seniority employee would then be subject to lay off or could exercise their right to bump someone else lower on the seniority list. One caveat is that the employee exercising their rights to bump another must be capable and qualified to do the lower seniority employees job.

[15] The Commission asserts that the Claimant took two periods of leave. The first was from April 17, 2017, to July 4, 2017. The second was from April 27, 2018, to July 6, 2018. The Commission argues that the test to determine if the Claimant voluntarily took leave is whether she had a choice to stay or leave. It says that the Claimant took a voluntary leave of absence when she requested the laid off. The Commission says that there was a date of departure and an anticipated return. The employer told the Commission that there was no obligation to take the leave. It was strictly the choice of the employee.

[16] The Commission asserts that the Claimant did not have to volunteer for lay off. It says that she holds the second to highest seniority among the lead hands. She could

have simply awaited a decision from the employer whether she would be laid off. Further, that when presented the real possibility of a lay-off, she could have exercised her right to “bump” another employee and remain working. Therefore, the Commission is of the opinion that the Claimant had a choice to stay or leave.

[17] The Claimant does not dispute that she chose to volunteer for lay off. She agreed that she notified the employer that she wished to exercise her option to be lay-off ahead of other employees with less seniority. She also agrees that she could have exercised her right to bump another employee and remained working but that there are good reasons that she did not.

[18] I find that the Claimant did voluntarily take two periods of leave, one in 2017 and one in 2018. It is clear from the evidence contained in her collective agreement and her testimony that she had a choice of whether to stay or leave. Further, the request for voluntary leave meets all the criteria to establish a leave of absence as detailed in the Act.

Issue 2: Did the Claimant have just cause to take voluntary leave periods when she did?

[19] The Claimant did not have just cause to take either leave of absence when she did. She had a reasonable alternative. She could have elected to stay and await her employer’s decision concerning whether she would be laid off. If she was selected for a lay-off, she could have exercised her CA rights, bumped another employee, and remained working.

[20] The law says that you are disqualified from receiving benefits if you take a leave of absence and you did not have just cause. Having a good reason for taking leave is not enough to prove just cause. The test to determine if the Claimant has just cause to take leave is, considering all of the circumstances, that she had no reasonable alternatives to taking the leave when she did. It is up to the Claimant to prove this.

[21] When I decide that question, I have to look at all of the circumstances that existed when the Claimant took the leave. The circumstances I have to look at include

some set by law. After I decide which circumstances apply to the Claimant, then I must consider whether the Claimant had no reasonable alternative to taking leave when she did.

[22] The Employment Insurance Act (Act) lays out 14 circumstances that can support just cause for leaving an employment or taking a leave of absence.

[23] The Claimant suggests through her testimony that the following circumstances specifically apply to her situation

- a) Adherence to the provisions of her collective agreement
- b) Significant modifications to terms and conditions respecting wages and salary⁵
- c) Significant change in work duties⁶

Collective Agreement (CA)

[24] The Claimant's main argument is that her CA contains provisions to allow an employee to volunteer for lay off. The Claimant asserts that she was only exercising her rights under the CA and it allowed her to volunteer for lay off. She argues that this agreement is law in and of itself and that by exercising her rights to request lay off, it establishes an obligation to pay her EI benefits.

[25] The Commission says that there is no conflict between the Claimant's collective agreement and the Act. It says that the Claimant is entitled to exercise her CA rights but that it does not create an obligation to pay EI benefits. It says that the Claimant must comply with the requirements of the Act. It asserts that the Claimant took voluntary leaves of absence when she requested a lay-off and that the Act provides for a disqualification from receiving benefits if the Claimant does not have just cause.

[26] Nowhere it the Claimant's CA does it say she will be entitled to EI benefits if she voluntarily accepts lay off. It has simply been the usual practice between the employer

⁵ See Section 29(c)(vii) of the *Employment Insurance Act*.

⁶ See Section 29(c)(ix) of the *Employment Insurance Act*.

and the employees resulting from the CA. The fact the Commission had never before questioned that practice, led the Claimant to believe that EI benefits would be paid regardless of whether she volunteered for lay off or was issued an involuntary lay off notice.

[27] I am not convinced that the provisions contained in the CA supersede that of the Act. I find that the mere exercising of the CA provision to elect voluntary lay off does not create an obligation upon the Commission to pay EI benefits. Nor does it support just cause for taking a leave of absence when the Claimant did. While two parties are generally free to negotiate, they cannot negotiate away both the requirements and protections enshrined in laws such as the *Employment Insurance Act*.

Someone would be laid off anyway

[28] The Claimant suggests that, all things being equal, if someone is going to be laid off anyway, why not her? The Claimant told the Commission that by volunteering for lay off, it allowed junior employees who would not be able to get EI the opportunity to work. (GD3-44)

[29] She suggested that since her CA allows her to select a voluntary lay off and because someone was going to be laid off anyway, then it is reasonable for her to choose the option and should be entitled to receive EI benefits.

[30] I disagree. As I noted above, the Claimant was within her rights to exercise the provisions of her CA. But the issue here is the effect it has when she does so. In practice, it was not assured that all things were equal when she volunteered for lay off. Only an objective review of the EI Act provisions as they apply to each specific individual at the time can result in a proper determination of eligibility to receive benefits.

[31] The Claimant accepted the voluntary lay off with the firm expectation she would receive benefits. She had good reason to believe this because she had done so in previous years without incident. But this practice frustrates the proper application of the Act. Only those genuinely unemployed should receive benefits. Furthermore, those that claim must meet the minimum requirements to qualify. The Claimant was confident that

she qualified. But did all of the employees with less seniority also qualify? We cannot know because the natural progression of the lay-off was interrupted by the Claimant's decision. The Claimant's action pre-empted the natural course of the lay-off that would have identified those employees with the least seniority to receive lay off notices first.

[32] Had she elected to stay, someone else with less seniority would have been selected for lay off and received their notice. Only at that time and in the specific circumstances faced by that employee, can a proper determination of eligibility for EI benefits be made.

[33] If that employee qualified for benefits. So be it. But what if they did not qualify because they had insufficient hours or other disentitlement/disqualification? Further, what if the amount of benefits owed to other employees should be less than what the Claimant would have received?

[34] By allowing the Claimant to volunteer for lay off, it pre-empts the lay-off process and grants EI benefits to the Claimant that might not otherwise have been payable to another claimant.

[35] The employer and the Claimant are free to interpret their agreement as they see fit, as far as it affects them. They do not enjoy the same freedom when their interpretation affects the rights of third parties.⁷ In this case, it places the burden of her decision on the third party contributors to the EI plan.

[36] I find that the argument that someone would have been laid off anyway does not support a finding of just cause for the Claimant to take leave (voluntary lay off) when she did.

⁷ See (*Hamel* FCA #A-1028-91) and CUB 20198.

The Claimant would be laid off anyway

[37] The Claimant asserts that regardless of whether or not she volunteered for lay off, she would have been laid off anyway.

[38] She asserted that all employees get lay off notices because even a reduction of one hour from the regular schedule (not summer) is deemed a lay-off.

[39] The Claimant explained that the lay-off process is coordinated. Essentially, as the student population diminishes staff are issued lay off notices in waves. By voluntarily accepting lay off, she was in the first wave of lay-offs. However, regardless of whether she would have volunteered, eventually she would have received a lay-off notice because everyone receives reduced hours and even a one-hour reduction in scheduled hours is considered a lay-off under her CA. She says that the impact of a lay-off would have been that she worked reduced hours and at a reduced wage.

[40] There are three groups within the work unit, lead hands, cooks and general help. Lead hands give direction to the cooks and general help. There is a list of all employees ranked by seniority from highest to lowest irrespective of the role performed. The Claimant is second on this list. In 2017 and 2018 there were five lead hands, five cooks and 38 general help on the seniority list.

[41] The Claimant says that if she had not volunteered for lay off and exercised her bumping rights she would have been placed on the schedule as a lead hand with reduced hours. She asserts that this would have resulted in a reduction in her wages. She explained that she is the lead hand for the cashiers. Her role is to supervise the cashiers (general help group) as well as other cash handling duties.

[42] The Claimant testified that during the summer there is often only one lead hand responsible for all activities in the Main Campus. She added that there is already one lead hand that must work throughout the summer because she is the only lead hand that has the required training to work in a specialized area. She says that this other lead hand is the only employee who is never issued a lay-off notice and works all summer. She says that this means that she would not have been eligible to work as a lead hand.

Her only other option would have had to bump an employee in the general help category to remain working.

[43] She detailed that she is not qualified to bump down to some general help jobs such as a cook because she is not qualified to perform those jobs. She did confirm that she could bump down to a cashier job because she is capable of performing that function. She says that during the summer there is only need for one cashier.

[44] Moreover, she says that if she bumped down to a general help cashier job, she would only likely receive four hours of work per day and at a wage \$3.00 less than she earns as a lead hand. In addition, she says she would have had to travel 70 kilometres each day for only four hours of work. She says that she did not want to do that because it was not worth it and that no one wanted to be in that situation. She asserts that nobody does and that is why the majority of employees with seniority take the voluntary lay off.

[45] Therefore, the Claimant is of the opinion that she would have been laid off anyway and that is one reason that she volunteered to go in the first wave. But even if she had stayed, she would have bumped to a job with lower-level duties, hours and wages. She says that she has just cause for taking the voluntary lay off because based on the reduction in hours and wages that she would have experienced, to stay was not a reasonable alternative.

[46] The Commission submitted statements from the employer. It confirmed that the Claimant has the second-highest seniority in her role as a lead hand. The employer selected various weeks from the summers of 2017 and 2018 and provided details of whether the Claimant could have worked or not. It submits that;

- a) the Claimant had the second-highest seniority as a lead hand
- b) the Claimant would have retained her lead hand status and there would have been no reduction in pay
- c) many weeks over the summer lead hands with lower seniority worked

- d) that the Claimant could have worked those weeks had she stayed
- e) there were weeks when another lead hand with higher seniority worked and so the Claimant would not have worked as a lead hand, however, she could have bumped and chosen to work in lower classification for less pay but was not obligated to do so.
- f) The difference in pay between a lead hand and general help was \$1.55 per hour.

[47] The Commission submitted evidence from the employer that supports the claim that the Claimant would have been laid off regardless of whether she volunteered.⁸ The employer representative said that everyone gets a lay-off notice because any change to the schedule even if it is only a one-hour reduction, constitutes a lay-off under the collective agreement.

[48] However, the same employer representative provided details to the Commission concerning the impact on the Claimant had she elected to stay and not volunteer for lay off.

[49] The Commission asserts that the employer information shows that the Claimant could have worked the majority of the summer in her lead hand role. It says that she anticipated potential reduction in hours and wages and elected to voluntarily be laid off. In doing so, it says that she rejected the mere possibility of working fewer hours in favour of working no hours.

[50] I am convinced that if the Claimant had elected to stay, eventually, she would have received a lay-off notice. However, upon receiving that notice there were two possible outcomes. One, the Claimant would have been off the schedule until recalled to work or she would have been on the schedule as a lead hand or in another role.

[51] I prefer the evidence of the Commission wherein the employer stated that the Claimant would have been on the schedule to work as a lead hand because it says that other lead hands with lower seniority than the Claimant worked during those summer

⁸ See RGDN02-3 and 4

weeks. The employer detailed that many weeks the Claimant would have been working as a lead hand with no reduction in her hourly wage.

[52] From the employer's statements, I am convinced that the Claimant could have worked a significant amount as a lead hand because she had the second-highest seniority within the work unit. In addition, if lead hand work was unavailable, she could have bumped anyone with less seniority as long as the Claimant could do the work.

[53] There was only one other employee with more seniority who worked as a lead hand. The employer did identify some weeks that the Claimant would not have been able to work as a lead hand because the one lead hand with greater seniority to her, worked those weeks. It also confirmed that during those weeks the Claimant had the option to bump a general help employee and perform that job, but was not obligated to do so.

[54] Given the information of the employer, I am convinced that there is no significant modification of terms and conditions respecting salary or wages. The claimant would have worked the vast majority of the time as a lead hand with no impact on her wage rate. Nor was there significant changes to her work duties. She is the lead hand for the cashiers. She knows the cashier's role and is qualified to perform it. In fact, her CA expressly provides for precisely the possibility of her bumping down to that role.

[55] The Claimant speculated that if she was laid off, she would not have been able to work as a lead hand and there would have been significant changes to her duties, hours and wages. But she could not know for certain when she would be laid off, for how long, or what her duties and wages would have been in any given week.

[56] Her speculation is not sufficient to conclude that she had just cause to accept voluntary lay off when she did because, until she exercised her rights to stay, there was no way to know just how much impact a future lay off would have on her. Speculation cannot form a solid foundation to conclude she would have been laid off to the extent her duties, hours and wages would have been significantly affected.

I am satisfied that had the Claimant not elected to voluntarily accept lay off, she would have worked a significant amount over the summer period in both 2017 and 2018, as lead hand. Her high seniority all but guaranteed her regular employment throughout those periods if she chose to exercise her right to work under the CA.

[57] For the limited number of weeks that she may have been unable to work as lead hand she could have bumped a lower seniority person and accepted that job-level work. I am convinced it would have been for a limited number of hours over the summer period and would not have significantly affected her negatively.

[58] I am also convinced that the duties of the lead hand over the cashiers and that of a cashier are sufficiently related that they cannot be characterized as *significantly* different. I would consider it reasonable for the Claimant to accept the lesser job duties she was qualified to perform and remain working rather than conclude that the duties were so significantly different that they precluded her from staying. I find that the possibility of some reduced hours and wages did not render her employment as so intolerable as to make it impossible for her to continue working and justify taking leave when she did.

[59] Now I must consider whether the Claimant had reasonable alternatives to leaving when she did.

Did the Claimant have any reasonable alternative to volunteering for lay off when she did?

[60] I find that the Claimant did have reasonable alternatives to taking a voluntary leave of absence when she did. I have already explained my finding that when she requested voluntary lay off, it was the equivalent of taking voluntary leave of absence in each of the years 2017 and 2018.

[61] The Claimant says that she had no reasonable alternative because if she had bumped she would have had to accept a job with fewer hours and lower pay. I have also explained above that I am not satisfied that the circumstances faced by the

Claimant if she had not volunteered for lay off would have been so intolerable as to make it impossible for her to continue working.

[62] She had a reasonable alternative to taking leave when she did. She could have elected not to accept voluntary lay off and remained at work. Based on my findings above, she would have worked in her lead hand role for the most part. Even if she had elected to bump another employee and accepting work as a cashier, she still would have likely worked a good deal more than most given her seniority.

[63] I noted that this idea of exercising seniority to volunteer for lay off is predicated on a belief that it is desirable to not work during the summer. Those with the most seniority prefer being off the schedule rather than on it. Whether that is for personal reasons or other circumstances, the fact remains that they choose to place themselves in a state of unemployment.

[64] The EI Act does not allow for this. EI benefits are intended to compensate claimants whose employment is involuntarily terminated.⁹ They cannot be used to provide compensation to employees who simply desire periods away from the workplace because it is preferable to working or simply convenient.

Other concerns raised by the Claimant

[65] The Claimant expressed her concern that she was the only employee “targeted” by the Commission and asked to repay benefits. The Claimant says that the practice of requesting voluntary leave continues and others have not been disqualified from receiving benefits. She says that it is not fair and that the Commission should address all instances where someone has volunteered for lay off, not just her.

[66] This is not a matter I have jurisdiction to consider or remedy. I do empathize with the Claimant on this issue. Once the Commission was made aware of this practice, there was an obligation to ensure it investigated all similar instances and ensure

⁹ See (*Caron v. Canada (C.E.I.C.)*, 1 S.C.R. 48)

consistent application of law. Anything less leaves the potential for continued abuse and diminishes confidence in the EI program.

[67] The Claimant also expressed that there should be no debt because the two-year time limit to recover a debt as established by the Ontario Statute of Limitations has run out. The Commission started its investigation within the time limits permitted by law.¹⁰ Once started, all appeal proceedings that develop afterwards stops the 72-month limitation on recovery of debt.¹¹ The Claimant cannot rely upon the Ontario Statute of Limitations to cancel the debt.

Conclusion

[68] The Claimant does not have just cause for taking two periods of leave from her employment in the form of a voluntary lay off. She did not exhaust all reasonable alternatives to taking leave when she did. This means that she is not entitled to EI benefits during those leave of absence periods.

[69] The Claimant's appeal is dismissed.

Mark Leonard
Member, General Division – Employment Insurance Section

¹⁰ See Section 47(3) of the *Employment Insurance Act*.

¹¹ See Section 47(4) of the *Employment Insurance Act*.