Citation: *JO v Canada Employment Insurance Commission*, 2022 SST 1325

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. O.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (455312) dated February 10, 2022 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	In person
Hearing date:	May 24, 2022
Hearing participants:	Appellant
Decision date:	May 29, 2022
File number:	GE-22-856

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, J. O., a Job Coach in X, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance regular benefits from February 14, 2021 to March 20, 2021 because he stopped working by voluntarily taking leave from his job with X on February 14, 2021 without just cause within the meaning of the Employment Insurance Act. The Commission is of the opinion that taking a voluntarily leave was not his only reasonable alternative. The Appellant asserts that he didn't want to be exposed to Covid because of anxiety/stress related issues so he took a leave of absence, The Tribunal must decide if the Appellant should be denied benefits due to his having voluntarily taken a leave of absence from his employment without just cause as per sections 29, 30 and 32 of the Act.

Issues

[3] Issue # 1: Did the Appellant take a voluntarily leave of absence from his employment with X on February 14, 2021?

Issue #2: If so, was there just cause?

Analysis

[4] The relevant legislative provisions are reproduced at GD4.

[5] A claimant is disqualified from receiving EI benefits if the claimant voluntarily takes a leave of absence without just cause (Employment Insurance Act (Act), subsection 32(1)). Just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances (Act, paragraph 29(c)).

[6] Section 32 (1) of the Act stipulates that a claimant who, without just cause, voluntarily takes a period of leave from their employment authorised by their employer

for a mutually agreed-upon period of time, is not entitled to receive employment insurance benefits. Section 32(2) provides that the disentitlement lasts until that claimant resumes the employment; loses or quits the employment or; subsequent to commencing the period of leave, accumulates in other employment the number of insurable hours required to establish a new claim.

[7] The Respondent has the burden to prove the leave was voluntary and, once established, the burden shifts to the Appellant to demonstrate he had just cause for taking the leave. To establish he had just cause, the Appellant must demonstrate he had no reasonable alternative to taking the leave, having regard to all of the circumstances **(Canada (Attorney General) v. White, 2011 FCA 190; Canada (Attorney General) v. Imran, 2008 FCA 17**). The term “burden” is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is “more likely than not” the events occurred as described.

[8] The test for determining whether a claimant had "just cause" under section 29 of the EI Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to taking the leave from the employment **(White 2011 FCA 190; Macleod 2010 FCA 301; Imran 2008 FCA 17; Astronomo A-141-97**). A claimant who leaves his/her employment must show that he/she had no other alternative but to do so. **Tanguay (A-1458-84)**

Issue 1: Did the Appellant take a voluntarily leave from his employment with X on February 14, 2021?

[9] Yes.

[10] For the leave to be voluntary, it is the Appellant who must take the initiative in obtaining the leave.

[11] Both parties agree the Appellant took leave from this employment with X February 14, 2021.

[12] Therefore I find that the Appellant did in fact take a voluntarily leave from his employment with X on February 14, 2021.

Issue 2: If so, was there just cause?

[13] No.

[14] The Appellant here on December 30, 2021, indicated that he took a leave on February 14, 2021, with the approval of his employer because there were a couple of Covid infections at work and he was not comfortable at work under such circumstances. However there is no evidence before me that there was an agreed upon return to work date that would indicate a mutually agreed upon period of time as required by section 32 (1) of the Act.

[15] On February 7, 2022, the Appellant explained that there was a Covid outbreak in his area. The company did not close but he chose to take time off. He was worried about catching it and he was also caring for someone with a compromised immune system. When advised that he chose to take time off and to receive regular benefits, he would have to be without employment and available to seek and accept employment, he stated that this was the only type of benefit that was available on the system when he applied. He advised he would get a note from his doctor that he was off due to stress. (GD3-22)

[16] The Appellant assisted his client with janitorial duties “after hours” aat the worksite. Staff were gone home thus greatly reducing the possibility of coming I contact with the virus. He testified that, when off work for the five weeks, he went out to supermarkets, etc. as well as other places. These visits brought him into contact with more individuals than he would have encountered after hours at X Building.

[17] Regarding the statement that regular benefits were the only type available when he applied, I would refer him to GE3-3 where he, the Appellant here, chose regular benefits from a listing of seven different types of benefits available to applicants at the time of his application on February 19, 2021.

[18] The Appellant's employer confirmed that his leave was a personal choice as he was uncomfortable working.

[19] He testified that he decided he was better off staying home rather than going to work as he was fearful of the virus.

[20] He further testified that he "hit the wrong button" when he applied for regular benefits rather than sickness benefits.

[21] The Appellant, through his submissions and his testimony at his hearing, stated that he suffered "severe acute" stress which made the leave necessary, however he never sought medical advice regarding same prior to taking the leave.

[22] In this case the Appellant's doctor, over one year after the leave, opined the leave was reasonable but also states she never saw him as a patient regarding this issue before his leave.

[23] "Just cause" must be determined according to the test of whether a reasonable person would consider that he had no reasonable alternative to leaving his employment.

CUBs 75146B and 75719

[24] I find that the Appellant had reasonable alternatives available to him other than take leave of absence when he did. He could have remained employed and, as noted by the Commission, taken the necessary safety precautions.

[25] There was also the option of consulting with his physician prior to taking leave and possibly obtaining medical advice to take the leave.

[26] There was also the option of applying for sickness benefits which, if approved, has a different set of eligibility requirements regarding availability.

[27] I find that the Appellant made a personal choice to leave his employment when he did and although it may have been a good cause for him, it does not meet the standard of just cause required to allow benefits to be paid.

[28] His taking leave from his employment when he did not meet any of the allowable reasons outlined in section 29 (c) of the Act.

[29] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

[30] I find he had a reasonable alternatives to taking leave when he did and thus does not meet the test for having just cause pursuant sections 29 and 32 of the Act.

[31] At the hearing the Appellant disclosed that he has been notified that he has also incurred an overpayment regarding CERB payments which he cannot afford to repay.

[32] Regarding the Appellant's request that the overpayment be waived, this is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter. The Commissions decision regarding same is not appealable to the Tribunal. Only the Commission decision that caused the overpayment is subject to the reconsideration under section 112 of the Employment Insurance Act (the Act). The claimant's responsibility to repay an overpayment and the interest charged on an overpayment is not subject to reconsideration because these are not decisions of the Commission, and the claimant's liability is as a "debtor" as opposed to a "claimant". The claimant's recourse regarding these issues is to seek judicial review with the Federal Court of Canada.

[33] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off. It is the Commission who holds the authority to reduce or write-off an overpayment.

[34] **The Appellant must initiate the request to the Commission.**

[35] The Appellant requests that the overpayment be erased. I agree with the stated position of the Commission and I note that the law states that their decision regarding writing off an amount owed can't be appealed to the Social Security Tribunal. This

means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[36] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding her request to write off the overpayment, she needs to do so through the Federal Court of Canada.

[37] As a final matter, I cannot see any evidence in the file that the Commission advised the Appellant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause her financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. She may be able to make alternative repayment arrangements based on her individual financial circumstances

Conclusion

[38] Having given due and careful consideration to all the circumstances, I find that the Appellant has not proven on a balance of probabilities that he had no reasonable alternative to taking leave from his job when he did. The question is not whether it was reasonable for the Appellant to take leave from his employment, but rather whether taking such leave was the only reasonable course of action open to him (**Canada (Attorney General) v. Laughland, 2003 FCA 129).** I find he had reasonable alternatives to taking leave when he did and thus does not meet the test for having just cause pursuant sections 29 and 32 of the Act. The appeal is dismissed.

John Noonan

Member, General Division – Employment Insurance Section