Citation: *OD v Canada Employment Insurance Commission*, 2022 SST 1735

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (467183) dated May 17, 2022 (issued by Service Canada)

Tribunal member:	Marc-André St-Jules
Type of hearing:	Teleconference
Hearing date:	November 22, 2022
Hearing participant:	Appellant
Decision date:	December 30, 2022
File number:	GE-22-2369

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant (who is the Appellant).

[2] The Claimant hasn't shown just cause (in other words, a reason the law accepts) for leaving his job when he did. The Claimant didn't have just cause because he had reasonable alternatives to leaving. This means he is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Claimant left his job January 25, 2022, and applied for EI benefits. 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.

[4] I must decide whether the Claimant has proven that he had no reasonable alternatives to leaving his job.

[5] The Commission says that the Claimant could have accepted the offer of a transfer to another job site. The Claimant worked at a hospital site as a night guard. His primary duties involved patient watch. The employer offered him a job at a food court in a local mall which the Claimant declined.

[6] The Claimant disagrees and states that the offer to work at a mall was not reasonable. He also argues that it was his right to refuse the alternate site. He sought out to work in hospitals as a security guard working strictly at night and he does not have to accept anything else.

Matter I have to consider first

I will accept documents sent in after the hearing

[7] It was agreed during the hearing that I would accept a document summarizing the Claimant's arguments. I agreed to accept them as they may be pertinent to the decision. They were sent in and considered in rendering this decision. They are coded as GD17 and GD19.

[8] The document coded GD18 is supplementary representations submitted by the Commission. In this document, they maintain their original position that the Claimant left his job without having exhausted all reasonable alternatives.

Issue

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

[10] To answer this, I must first address the Claimant's voluntary leaving. I then have to decide whether the Claimant had just cause for leaving.

Analysis

The parties do not agree that the Claimant voluntarily left

[11] I find that the Claimant voluntarily left his job. This is contrary to information taken from the Claimant's application for EI benefits.[1] When he applied, the Claimant answered shortage of work when asked why he was no longer working. During the hearing, the Claimant also explained why shortage of work applies to his situation. However, he also argued why he had no reasonable alternative to leaving and made arguments to support this.

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[1] See GD3 page 6.

[12] Providing background information will help provide context for my analysis of the reason for separation. The Claimant worked permanently in a hospital on patient watch at night. This involved guarding patients who needed constant supervision.

[13] The Claimant described two types of areas where he would be asked to work. The first area is in the “closed areas” where the Claimant argues there was little to no ventilation. The Claimant says that this area was too risky for him and he would refuse to work in the closed areas. The second area is the “open areas” with much better ventilation. The Claimant was agreeable to work in the open areas. The Claimant testified he had no issue working with COVID patients providing it was only in the open areas.

[14] The Claimant says that when he would show up to work, he would sometimes be assigned to the closed areas by the primary guard on site. The Claimant would refuse to work there. He would sometimes call head office and the dispatcher would overrule the primary guard assigning work areas and the Claimant would be assigned to an open site. If that was the case, he would remain and work his shift. This was not always successful and the only work the employer would be offering would be in the closed areas. As the Claimant refused the closed areas, he would leave which meant he would not be paid for the 12-hour shift.

[15] The Claimant is arguing there was a shortage of work because the employer was failing to provide him with sufficient work that he can safely do. The Claimant testified that the shortage of work was “artificially created” by the employer often assigning him to the closed areas.

[16] After such events, the Claimant would write to the employer requesting he be paid for the missed work and asking for the Primary guard and others, if applicable, be held accountable. The Claimant testified he never did get compensated for missed time and the others were never held accountable.

[17] After yet another incident, the Claimant wrote an email to the employer on January 26, 2022.[2] In this email, the Claimant wrote that he "humbly propose/demand" two things. The first is that he be compensated for 12 hours of work for another missed shift. The second proposal/demand is that he be placed on "…Temporary lay-off status (for shortage of work); and forward my ROE to the Employment insurance, in order to process unemployment benefit on my behalf..."

[18] The employer replied January 27, 2022.[3] The proposal/demand for a record of employment was not acknowledged by the employer. However, the employer agreed in the email stating there is definitely less and less non-COVID patient watch work but there is not less work. This same email offers the Claimant another posting in a food court mall working during the day at a higher hourly rate.[4]

[19] In response to the offer, the Claimant wrote another email on January 27, 2022.[5] In this email, the Claimant wrote that "I am not interested in your proposed offer, or any other potential offer." He concluded the email stating the employer is obligated by law to issue the record of employment and requested the employer to do so.

[20] The Claimant then applied for regular EI benefits on February 3, 2022, stating shortage of work.[6] The employer issued the record of employment dated February 9, 2022, with the coding K which is "Other."[7] The comment box is filled out "Employee requested." The record of employment was not issued showing a shortage of work.

[21] The Commission spoke to the employer in May 2022.[8] In this statement, the Commission told the employer it is considering the reason for separation as a resignation. The employer stated they also view this as a resignation as the Claimant was refusing to pick up shifts.

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[2] See GD3 page 29.
[3] See GD3 page 30.
[4] See GD3 page 30.
[5] See GD3 pages 32-33.
[6] See GD3 pages 3-14.
[7] The ROE is available at GD3 page 16. The codes for each of the reasons for separation are available at GD3 page 17.
[8] See GD3 page 39.

[22] On May 11, 2022, the employer reached out to the Claimant via email.[9] The employer asked what the Claimant's intentions were regarding his request for leave of absence made on January 25, 2022. The Claimant replied by email stating he disagreed about a leave of absence, never requested a leave of absence and if he had, there would be an official document with management approval on file.

[23] In response to the Claimant's email, the employer asked a follow-up question on May 12, 2022.[10] The Claimant was asked the following: "Can you please let me know what are your present intentions with [company name]? Do you still wish to work with us or would you like to send in your resignation?" The Claimant's reply to that was that he does not have definitive answers to the questions. He then added the following: "However, I suggest that you do what you have to; that which you deemed appropriate."[11]

[24] On June 16, 2022, the employer issued an amended record of employment.[12] The code reason for issuing the ROE was changed from "Other" to "Dismissal or suspension." The employer was not questioned regarding the amended record. The ROE was issued in June 2022 and this is after the Commission's final May 2022 reconsideration decision. Previous statements made by the employer to the Commission do provide a reason why this may be coded as "Dismissal or suspension." On February 4, 2022, the employer stated it was their policy to dismiss someone who has not picked up any shifts for three months.[13]

[25] The Commission argues it was a situation of voluntary leaving and not a shortage of work. The Commission is stating that refusing to work in a specific area is not a shortage of work. The work was there either at the hospital in open and closed areas. There was also an offer of work elsewhere.

[9] See GD13 pages 5-6.
[10] See GD13 page 4.
[11] See GD13 page 4.
[12] See GD3 page 43.
[13] See GD3 page 15.

[26] I do not agree with the Claimant's logic regarding shortage of work. I accept that there was a reduction in earnings. The Claimant provided emails demanding he be paid and made several references to the days missed. This reduction was a result of the Claimant leaving and not working the assigned shifts. The work was there but he refused to do it. His reasons for refusing and the harassment the Claimant alleges will be reviewed later.

[27] From my analysis I find the following:

- The Claimant did not request a leave of absence.
- The Claimant did not write a resignation letter.
- The Claimant made a proposal/demand to have a record of employment be issued with a shortage of work.
- The employer did not acknowledge the request for an ROE and offered another option.
- The Claimant repeated his request for the record of employment and says the employer must issue the record as it is required by law.
- The Claimant no longer attended work and applied for employment insurance stating shortage of work.

[28] In conclusion to this section, based on the evidence before me, I find that the Claimant initiated the separation by demanding the employer issue a record of employment and then applying for employment insurance and voluntarily left his job. His stopped picking up shifts.

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

[29] The parties don't agree that the Claimant had just cause for voluntarily leaving his job when he did.

[30] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[14] Having a good reason for leaving a job isn't enough to prove just cause.

[31] 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 you have to consider all the circumstances.[15]

[32] It is up to the Claimant to prove that he had just cause.[16] 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.

[33] 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.[17]

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

The Circumstances that existed when the claimant quit

[35] The Claimant says that he was subject to harassment at work and forced to work in an unsafe work environment. I am also considering the medical condition the Claimant testified he faces.

– **Harassment**

[36] I find the Claimant was a victim of what could be considered harassment. The Claimant was consistent in his testimony under affirmation. The testimony was also consistent with statements provided by the Claimant to the Commission. Nothing on file suggests the Claimant's credibility is in doubt.

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[14] Section 30 of the *Employment Insurance Act* (Act) explains this.
[15] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.
[16] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.
[17] See section 29(c) of the Act.

[37] The Claimant has a long history with one of the "Primary" guards working with him at the hospital. They actually worked together at another hospital. The Claimant supplied an email dating back to 2016, referring to an incident in 2015 in support of issues with this co-worker.[18] The Commission did not question the employer on the harassment allegation. For this reason, I will rely on the Claimant's testimony, evidence and what the Commission provided but this does not include a statement from the employer regarding harassment.

[38] The Claimant says the issue dates back many years. The Claimant testified that these issues were brought up with management but they did not act on them.

[39] The Claimant says things got a lot worse in December 2021. There was an incident on December 22, 2021. The Primary guard called out the Claimant's name over the radio and accusing the Claimant of using his (Claimant's) cell phone. As per the Claimant, this was a false accusation. The Claimant testified that it was in fact the Primary guard using his own phone.

[40] As part of this same incident, the Claimant testified that another co-worker was sent by the Primary guard to stalk the Claimant. The Claimant says he got to his new post after meeting others in the control room. The person who was asked to stalk the Claimant was already there. This surprised the Claimant as this person had been in the control room when he was just there. This co-worker would consistently report back to the Primary guard via radio. This aggravated the Claimant's anxiety and gave him a terrible headache and he had to leave.

[41] Another example provided by the claimant also involves the primary guard. The Primary guard would refer to the Claimant by his last name which the Claimant did not like. The primary guard continued to do so even after being asked not to do so. The Claimant testified that the Primary guard would also vindictively assign the Claimant to the closed areas. There was work in both the open and closed areas but the primary guard would always assign him to the closed areas when they worked together. Head

[18] See GD6 page 4.

office would sometimes overrule this but not all the time. One such incident is described by the Claimant in his request for appeal.[19]

[42] The Claimant provided a calendar of the events to support the dates the various incidents occurred.[20] This shows shifts not worked because he had been assigned to the closed areas. It also shows the days he was sick. The Claimant was paid many sick days in January as the tension was high with his co-worker.

[43] Following the alleged harassment, the Claimant would send emails to management and the union. He would describe the scenario and demand that he be paid for the full shift he missed. He would also demand that the Primary Guard and co-worker, if applicable, be held accountable. The Claimant testified that none of the demands for payment were ever resolved in the Claimant's favour and the co-workers were never held accountable.

[44] Harassment is not defined in the EI Act, nor has it been interpreted by the courts. As a result, I will consult the definition that has been added to the Canada Labour Code.[21] The definition there is:

> ***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment…

[45] The Social Security Tribunal Appeal Division expanded on that definition and included the following key principles in their definition of harassment:[22]

- harassers can act alone or with others and do not have to be in supervisory or managerial positions; and

[19] See GD2 page 53.
[20] See GD10 page 23 and GD11.
[21] See Section 122(1) of the *Canada Labour Code* for definitions.
[22] N. D. v. Canada Employment Insurance Commission, 2019 SST 1262

- harassment can take many forms, including actions, conduct, comments, intimidation, and threats; and
- in some cases, a single incident will be enough to constitute harassment; and
- there is a focus on the alleged harasser, and whether that person knew or should reasonably have known that their behaviour would cause offence, embarrassment, humiliation, or other psychological or physical injury to the other person.

[46] Although I am not bound to follow these definitions, I find Canada Labour Code definition and the Appeal Division's additional key principles to be persuasive.

[47] Applying this definition and key principles to the Claimant's statements and evidence, I find that the Claimant was harassed within the meaning of section 29(c)(i) of the EI Act. This is because the primary guard's actions and comments could reasonably be expected to cause offence/humiliation/stress to the Claimant. The Commission spoke to the employer on several occasions and the harassment allegations issues were not questioned. There is nothing to refute the Claimant's testimony.

– **Working conditions that constitute a danger to health and safety**

[48] I find that the working conditions could be a danger to the Claimant's health.

[49] The Claimant testified that some of the COVID patient watches he was assigned to were in the closed areas. This is what the Claimant had issues with. The Claimant testified that his previous career was a microbiologist and he relied on his knowledge and training to determine that he could not work in the closed areas. The lack of ventilation put him at greater risk. The Claimant says that he suffers from high-blood pressure and can't take the risk of working in closed areas where the risk for COVID is greater.

[50] The Claimant testified that he knows about the ventilation system and that he is aware of the risk. The employer said the Claimant refused to work guarding COVID

patients. I found nowhere where the Commission asked the employer about the Claimant's statement regarding open or closed areas.

[51] I believe the Claimant when he says he had no issues working with COVID patients. He raised this issue with the union via email.[23]

[52] I accept that the Claimant had concerns working the closed areas. The Claimant was questioned during the hearing how he would know the ventilation would not be provided via the heating, ventilation and air condition units (HVAC). Claimant replied he knows the hospital having worked there a long time and understands the HVAC system. He relied on this and his knowledge of microbiology and the HVAC is not sufficient to compensate for the closed area lack of ventilation.

[53] I have to make a finding with the facts before me. I find the Claimant's previous career as a microbiologist and his knowledge of the hospital place him in good position to know about the safety of the various areas. I accept that some areas are riskier than others.

[54] The employer did tell the Commission that there is risk inherent with the job as "many" of their employees did get COVID.[24]

[55] The Claimant says it is his right to refuse to work in these areas. It is his freedom to choose. The Claimant says that his health led him to seek employment working as a guard working nights only on patient watch.

[56] The Claimant testified he did not discuss with his doctor regarding the issues at his work as he should not have to. He knows his limitations as was told in the past to avoid anything strenuous. In support of his medical issues, the Claimant supplied a list of his medications.[25] The Claimant says he suffers from high blood pressure and cannot do anything strenuous on the doctor's advice.

[23] See GD3 page 19.
[24] See GD3 page 39.
[25] See GD2 page 3. It is a list of 5 medications which the Claimant says supports his high blood pressure and his need to avoid strenuous activity.

[57] In conclusion to this section, based on the evidence before me and without an employer statement to the Commission addressing this specific issue, I believe the Claimant and that the working conditions in the closed sites constituted a danger to the health of the Claimant.

– **Claimant's health condition.**

[58] I agree the Claimant needed to take his health conditions under consideration. He says he has severe health considerations. There is nothing in the file to refute that.

[59] The Claimant has not supplied a medical note to support this is the only type of work he can do. He did supply the list of prescription medications he is taking and testified this is his proof of his underlying health condition.[26] The Claimant testified that he should not have to consult a doctor. He knows what the doctor advised him in the past. His doctor told him to avoid anything strenuous even around the house.

[60] I accept that the Claimant sought out work as a security guard working at night in hospital settings only. This has been his goal and it is the job he worked hard to find, apply and ultimately be hired for.

[61] I agree the Claimant has health issues. The medication he was prescribed support this. I agree the Claimant must take the health issues under consideration when working. There is nothing available to me to refute the Claimant's statements which are supported by his list of medications.

The Claimant had reasonable alternatives

[62] I find he did have reasonable alternatives and my analysis will show this.

[63] The Commission says that the Claimant could have accepted the job to work in a mall rather than quitting.

[64] I would add to this reasonable alternative. I find that a discussion with his employer to discuss all other options possible would be a reasonable alternative. I also

[26] See GD2 page 3. It is a list of medications with the Claimant there as the patient's name.

find that a discussion with his doctor to discuss the benefits of reduced stress (harassment) versus the risk of accepting the mall job. The doctor may very well have sided with the Claimant on this. If the doctor would not recommend the mall job, then this raises the reasonable alternative of a leave of absence.

[65] I agree that the Claimant may have certain rights to a specific job posting with this employer. The Claimant supplied a document supporting this was his “permanent position”.[27] The Commission questioned the employer on this matter.[28] The employer answered that there is no guarantee and that they move employees around “all the time”. The employer also stated they would not force an employee to work where he or she would not want to work.

[66] I find the Claimant honestly believed this night-time, patient watch position in a hospital was rightfully his. Claimant says it is his right to choose where he wants to work. I agree. It is his right. This, however, does not extend to the EI Act. The EI act does not guarantee a person a certain job. To receive employment insurance, an individual must prove they have exhausted all reasonable alternatives.

[67] The employer offered the Claimant a day job in a mall “until things calm down at the [hospital name] please let us know”. The Claimant replied stating, “I am not interested in your proposed offer, or any other potential offer”.

[68] Claimant refused outright to discuss any other offers. During the hearing, the Claimant was asked if he requested a transfer to at another hospital in the same city where the employer also provides security. The Claimant testified that he should not have to ask. The reason is that that the employer knew he had issues with working with the Primary guard and would or should have offered something.

[69] I have an issue with the fact that he feels the employer should have offered another hospital location had there been one. The Claimant himself replied to the employer that he was not interested in “any other potential offer.” The burden is on the

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[27] See GD3 page 34.
[28] See GD3 page 39.

Claimant to prove he had no reasonable alternatives. The EI Act does not place the burden on the employer to prove just cause. In addition, the Claimant can't expect an employer to offer alternatives after stating he was not interested in any.

[70] I find that having a discussion with his doctor would have been another reasonable alternative. With the Claimant's health issues, there are some jobs that may not be feasible for the Claimant. The doctor may have suggested another job. The doctor may have suggested a different job which involved some walking such as the mall may be acceptable given the benefit of reduced stress caused by the harassment.

[71] A discussion with his doctor may have resulted in the Claimant justifiably refusing the mall work offer. This, however, may have led to a discussion of a leave of absence. The Claimant says he did not ask his doctor regarding a medical leave as his health issues are long term. Leave of absence, however, is a reasonable alternative.

[72] During the hearing the Claimant would shut down any questions regarding alternatives such as speaking to his doctor or to the employer. He was adamant this position was rightfully his and he has the freedom to choose. Unfortunately for the Claimant, whatever rights he may have had through the collective agreement does not extend to the EI Act.

[73] I find that the Claimant has not exhausted all reasonable alternatives. I agree that the Claimant may have certain rights to retain his job doing night patient watch. His seniority and collective bargaining agreement may give him these rights. I also agree that a person can refuse to perform certain tasks they see as unsafe.

[74] Where I disagree with the Claimant is regarding the employment insurance act. The law says a person must exhaust all reasonable alternatives prior to voluntarily leaving their job. The EI Act does not guarantee a certain job to an individual. A person requesting benefits must prove he had no reasonable alternative to leaving.

[75] I understand the Claimant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't

rewrite the law or add new things to the law to make an outcome that seems fairer for the Claimant.[29]

Conclusion

[76] I find that the Claimant is disqualified from receiving benefits.

[77] This means that the appeal is dismissed.

Marc-André St-Jules

Member, General Division – Employment Insurance Section

[29] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.