Social Security Tribunal of Canada   Tribunal de la sécurité sociale du Canada

Citation: *XW v Canada Employment Insurance Commission*, 2018 SST 1446
Tribunal File Number: GE-17-2817

BETWEEN:

X. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: February 12, 2018

DATE OF DECISION: March 9, 2018

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance regular benefits. The Respondent disqualified the Appellant from receiving benefits after finding he had voluntarily left his employment without just cause. The Appellant requested a reconsideration of this decision, and the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Tribunal must decide whether the Appellant is disqualified from benefits pursuant to section 30 of the *Employment Insurance Act* (Act) for voluntarily leaving his employment without just cause.

[3] The hearing was held by in-person for the following reasons:

a) The complexity of the issue under appeal.

b) The information in the file, including the need for additional information.

c) The request of the appellant.

d) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The Appellant attended the hearing.

[5] The Tribunal finds that the Appellant has proven that he had just cause for voluntarily leaving his employment. The reasons for this decision follow.

EVIDENCE

[6] The Appellant made an initial application for employment insurance regular benefits on May 26, 2017 (GD3-4 to GD3-18).

[7] A copy of his Record of Employment (ROE) issued on May 24, 2017 identifies that code *"E"* which represents *"quit"* (GD3-19 to GD3-20).

[8] The Respondent contacted the Appellant by telephone on June 19, 2017 to discuss the reason for separation (GD3-22). The Appellant stated the following:

a) He was employed as a permanent full-time *"X"*. In December 2016, his employer permitted him to work day shifts from 7am. He notes that he often worked 14-15 hours per day.

b) He quit his employment for health and safety reasons. His doctor had previously told him that working night shift was not good for him due to his health concerns. He did not see his doctor prior to quitting.

c) He notes that the employer told him that they no longer had the day shift available and that they wanted him to work in the company's yard and to change his shift to start at 3am.

d) He did not ask for a leave of absence, but he did ask for an alternate position. The employer stated that they did not have another position available for him.

e) He filed a complaint with the labour board because they issued his ROE with a quit code, when in fact they could no longer offer him the day shift job he had.

f) He started a new full-time job on June 5, 2017.

[9] The Respondent contacted the employer by telephone on June 20, 2017 to discuss the reason for separation (GD3-24). The employer stated the following:

a) There was mediation meeting held with the labour board on June 26, 2017.

b) The Appellant was involved in a couple of accidents. One accident occurred on "01/09/2017" and another on "06/04/2017" when he was doing deliveries and he damaged a customer's property.

c) The Appellant also bumped the truck a few times when coming into the company's yard, and failed to mention when it had happened. He also issues with following dispatch procedures.

d) They discussed their concerns with the Appellant, including his behaviour and driving habits. The considered offering him a defensive driving course if needed.

e) They wanted him to drive the truck in the yard where he would be under surveillance and monitored. The yard shifts start at 3am and it was the only type of job they could offer to him until it was determined his driving habits were safe.

f) The Appellant had worked early mornings in the past commencing between the hours of 5am to 8am and as per company needs.

g) The Appellant refused the yard work and early shift, so he quit his employment.

h) The Appellant would have been doing the same type of work driving a truck, from the loading dock to the yard and moving trucks as needed, as well driving them for maintenance to their mechanics.

[10] The Respondent contacted the Appellant by telephone on June 21, 2017 to further discuss the reason for separation (GD3-25). The Appellant stated that he had no new information to provide, except that his employer did not have work for him for ten days in January 2017 and that they failed to provide him with an ROE. The Respondent verbally advised the Appellant about the negative decision.

[11] On June 26, 2017, the Respondent determined the following (GD3-26): *"We are unable to pay you any Employment Insurance benefits from April 9, 2017 because you voluntarily left your employment with [employer name removed] on April 13, 2017 without just cause within the meaning of the Employment Insurance Act. We believe that voluntarily leaving your employment was not your only reasonable alternative".*

[12] An amended copy of the ROE issued on June 29, 2017 identifies code *"A"* which represents *"shortage of work / end of contract of season"* was submitted (GD3-27 to GD3-28).

[13] On June 30, 2017, the Appellant submitted a request for reconsideration and noted that the employer realized their error and agreed to change the reason for leaving his employment to layoff (GD3-29).

[14] The Respondent contacted the employer by telephone to discuss the request for reconsideration on July 26, 2017 (GD3-32). The employer stated the following:

a) There was a change in the nature of the work because the Appellant did not have a great driving record. For safety concerns, the company decided to place him as a shunt driver in the yard and not in public places so they could watch him.

b) The Appellant did not accept the new position, but quit and went to the labour board. He was asking for severance pay and a change to the code listed on the ROE. The client wanted to sue them further however the company agreed to settle and agreed to change the ROE to a layoff code.

c) He notes that drivers generally start at 6am and 7am, but shunt work started at 3am and 4am to move the trucks around prior to the drivers commencing work.

d) The Appellant told them that shunt work was a health and safety issue because he had issues driving at night. The employer noted that there are a lot of lights in the yard, so it should not have been an issue to see in the dark.

e) The Appellant quit the job before trying the position. He never brought up the medical issue and if so, they would have accommodated him.

f) There was warehouse work that the client could have done, but since he was a driver they did not want him doing something completely different. They wanted to give him something close to what he was doing, something safer and more controlled so that he could improve his driving before going back on the road.

[15] The employer submitted the following documents: *previous disciplinary warnings, the final discipline explaining the change to his duties, and the client's resignation letter* (GD3-34 to GD3-35).

[16] A disciplinary notice letter dated on April 13, 2017 which states that he is being disciplined for insubordination, failure to follow work policies and procedures and multiple accidents involving company property (GD3-36). The letter notes that an incident that occurred on April 5, 2017 which states that he was involved in an at-fault accident and damaged property/equipment. The letter also references a previous incident on January 9, 2017, which states that he was involved in an at-fault accident while backing up in a customer's location. The letter also states the following: *"Therefore, I have decided that for your safety, the safety of other co-workers and the safety of the general public you will be temporarily working in the yard as a shunt driver. During this period we will be monitoring your performance to ensure you are following safe practices. The purpose of this is to help you develop a plan for improving your driving habits and performance on the job. By working in the yard, we will be able to monitor you're driving, identify areas of concern, and provide further training to help minimize incident/ accident occurrences".* The letter was signed by the employer and not signed by the Appellant.

[17] A summary of the meeting minutes from April 13, 2017 taken by another manager who attended the meeting (GD3-37 to GD3-38).

a) The Appellant had previously damaged the company truck and customer property on January 9, 2017.

b) A manager asked the Appellant if he had been drinking on January 11, 2017 when he became suspicious after smelling alcohol.

c) The Appellant was also involved in another accident where he damages the lower front bumper of his truck on April 5, 2017.

d) During the morning of April 14, 2017, the Appellant approached one of the other managers in an aggressive manner and confronted to ask him why he thought was drinking. The Appellant then threatened to sue the manager for harassment.

e) There was a meeting scheduled with the Appellant at 1pm on April 14, 2017 to discuss his poor performance at work. The Appellant refused to sign the disciplinary notice provided to him.

f) The employer advised him that due to his unsafe driving habits and multiple accidents, he was told that he will be temporarily assigned to be a shunt driver in the yard in order to avoid him being on the roads. The shift would start at 3:00am and he would work in the yard supervised.

g) The Appellant was aggressive, defensive and immediately refused the new assignment or to commit to the new shift.

h) The Appellant then submitted a resignation letter advising that he will not work and that he intended to sue the company in court.

i) The employer notes that he was told he was not being suspended or terminated. They offered him additional training, but he decided to quit his job and walked out.

[18] A copy of the Appellant's resignation letter dated April 13, 2017 was submitted and states the following: *"I am forced to quit my job due to health and safety concerns*" (GD3-39).

[19] A copy of the *"incident and near miss form"* dated on April 6, 2017 prepared by the Appellant identifies there was paint scraped off the front bumper for an unknown reason and notes that he did not notice it during the pre-trip (GD3-40 to GD3-43). He also stated that there is an old crack in the bumper which has nothing to do him, since he only received the truck two days prior. Lastly, he stated that most of the equipment has similar paint damage and that he did not realize it was an issue. The incident and near miss form was signed by the Appellant.

[20] A copy of the *"official reprimand"* dated on January 9, 2017 which states that the Appellant was an unsafe driver because he backed up into a customer's wall (GD3-44). The official reprimand was signed by the Appellant.

[21] A copy of the "*incident and near miss form*" dated on January 9, 2017 prepared by the Appellant identifies that the road conditions were snowy and icy (GD3-45 to GD3-48). The Appellant noted that while parking on his blindside, due to obstructed vision and darkness, he dislocated a wall electrical junction and doorframe which was loose by the side of the trailer. Photos of the damage were submitted (GD3-49 to GD3-54).

[22] On July 28, 2017, the Respondent sent the Appellant a letter to acknowledge his request for reconsideration (GD3-55).

[23] The Respondent contacted the Appellant by telephone on August 2, 2017 to discuss his request for reconsideration (GD3-57 to GD3-58). The Appellant stated that he could not do the job for medical reasons and that he felt he was forced to quit. He noted that he worked nights for this employer before and they switched him to day shift because they knew he had issues working at night. He further stated that no doctor would say it is healthy for someone to work at night.

[24] During the same call, the Respondent verbally advised the Appellant that the initial decision was maintained because he did not have just cause for quitting his employment (GD3-57 to GD3-58). The Respondent notes that he could have tried the new position before quitting; he could have requested an accommodation for medical issues and could have requested a transfer, which were all reasonable alternatives.

[25] On August 3, 2017, the Respondent determined the following: *"Issue: Voluntary Leaving. We regret to inform you that we have not changed our decision regarding this issue. The decision, as communicated to you on June 21, 2017, is therefore maintained"* (GD3-59 to GD3-60).

[26] The Appellant filed his appeal with the Tribunal on August 23, 2017 (GD2-1 to GD2-10). The Appellant stated the following: *1) the reconsideration decision was based on wrong facts; 2) no sufficient and responsible investigation was conducted by anyone. The decision was based on one 5 minutes phone call; 3) it did not allow the time for me to contact my family doctor to get an appointment to apply for doctor note. The first decision was made one day before the court hearing with no interest in finding out what the hearing result is. The reconsideration decision refused to accept the court settlement result as layoff.*

[27] The Appellant further states in his notice of appeal that he initially started working the overnight driving shift, but that he felt very sleepy and unable to concentrate (GD2-4). He states that he fell asleep while driving because he has liver problems with a Type A infection. He spoke to his supervisors and they offered him the day shift after one month. He notes that he is

employed as an X and that working in the yard could mean any duties from janitor, to running errands or operating a forklift, for which he has no training or experience. Lastly, he states that his employer provided him with no opportunity to see his doctor for advice because he was told to start the next morning or risk being fired. As a result, he was forced to quit under the threat of being fired.

[28] A copy of a medical letter from his physician dated on August 21, 2017 indicates that he is unable to drive nightshift from August 21, 2017 to September 21, 2017 for medical reasons, which are pending reassessment (GD2-5).

[29] The Appellant also submitted a brief a summary of the events that occurred (GD2-8).

Appellant's Testimony

[30] The Appellant testified to the following:

a) He was employed as an X, which requires a special license.

b) He started his employment on October 6, 2016 and his last day of work was on April 13, 2017.

c) He initially started working as a truck driver from 10pm to 7am. He would do a daily pick-up in Toronto and then drive to Montreal.

d) He worked this late shift for approximately one month, but started feeling very sleepy during the night. He stated that he would have to stop and pull over the truck to have a 3-4 hour nap during every shift to prevent him from falling asleep and getting into an accident. As a result, he said that he often returned to work with the truck around 11am, instead of 7am. Sometimes, he would drink a whole bottle of tabasco to help him stay awake. He generally felt ill and very tired during the night shift.

e) He spoke to his employer and told him that the work was not suitable for him. He advised him employer that he fatigued easily, it was not good for his health due to a medical issue and it was not safe. At this point, he states he had not yet received his Type A liver infection diagnosis, but was experiencing ongoing negative symptoms related to his liver

and had talk to his doctor about his liver issues. He states that he only found out the test results in June 2017 after he left his employment. He notes that his physician resides in Windsor, but that he had visited a walk-in clinic in Toronto.

f) His employer agreed to accommodate him due to his tiredness and switched him to the dayshift doing local deliveries in the city. His new shift ran from 6am until around 5pm and he states that he felt much better working the day shift.

g) He does not dispute that he had an accident and damage a customer's property on January 9, 2017, but explains that it was accidental.

h) He states that he did not have work for ten days in January 2017 during the accident investigation and that his employer failed to provide him with an ROE when requested. He refers to the text message he sent to the employer on January 12, 2017.

i) He disputes that he caused the paint scratch on the bumper to the company vehicle on April 5, 2017. He states that is the reason he did not sign the disciplinary notice. He stated that the scratch on the bumper was minimal and notes that there was no picture submitted by the employer which would prove that the minimal damage.

j) He stated that on April 12, 2017, his employer asked him if he was drinking, which offended him because he was employed as a driver and felt that they were trying to damage his professional reputation. He told his employer that he was not drinking. The following morning, on April 13, 2017 he reminded his employer to not say that again or he would sue them for harassment.

k) On the same date, April 13, 2017, at around 1pm, the employer and human resources called him into a meeting. His employer asked him to switch to the 3am shift, which he initially agreed to do for a few days, until he realized the shift change was not temporary. His employer told him that it was a permanent shift change.

l) His employer provided him with no notice, but told him that the new shift would start the following day and that he would get in trouble if he did not comply. He was also told that there were no other jobs available for him.

m) His employer told him that the new role would be doing “yard work” which he interpreted as a variety of activities including yard work, running errands and driving to other yards, etc.

n) He further notes that even if he was a shunt driver and driving a truck in the yard, he would have been expected to drive company trucks to other company owned yards and would have needed to access municipal roads without driving supervision.

o) He did not want to leave his employment, but felt pressured to submit his resignation because his employer wanted a commitment that he would be at work the following morning at 3am. He states that he did not have time to see his physician before the shift change implementation on the following day.

p) He disputes that he was not able to work the nightshift temporarily because he had already tried working nightshift for this employer. He notes that his employer accommodated him for his medical and sleeping issues by providing him with the dayshift, even though he was not yet officially diagnosed with a serious liver disease.

q) He states that a transfer to another job was not possible because the employer told him that there were no other jobs available. He notes that he was willing to do any other job, except late night driving.

r) He made a complaint to the Ministry of Labour which was resolved in mediation. The employer amended the ROE to reflect that he was laid off since there was no dayshift work available for him and because he was not provided with any notice about the morning shift.

SUBMISSIONS

[31] The Appellant submitted the following:

a) He was forced to quit his employment because his employer changed his work duties and he was told there were no other jobs for him.

b) The changes in work duties were significant and working the 3am early shift was a permanent change that would have negatively impacted his health issues for which he was previously accommodated by his employer.

c) There were no safety issues with his driving, except for one accident that resulted in some damage on January 9, 2017.

[32] The Respondent submitted the following:

a) The Appellant voluntarily left his employment on April 13, 2017 without just cause.

b) The Appellant did not attempt to work the new shift; did not apprise his employer of his health issues and did not request a work transfer, which were all reasonable alternatives available to him.

ANALYSIS

[33] The relevant legislative provisions are reproduced in the Annex to this decision.

[34] The Tribunal must decide whether the Appellant should be disqualified from receiving benefits, pursuant to section 30 of the Act, because he voluntarily left his employment without just cause.

[35] Subsection 30(1) of the Act imposes a disqualification from receiving benefits on claimants who voluntarily leave their employment without just cause. The purpose of the Act is to provide employment insurance benefits to individuals who have been involuntarily separated from employment and are without work (*Canada Employment and Immigration Commission v. Gagnon,* A-1059-84).

[36] The first issue that must be determined is whether the Appellant voluntarily left his employment.

[37] The Respondent submits that the burden of proof for voluntary leave cases rests with the Appellant. The Tribunal notes that the onus is on the Respondent first to prove that the Appellant left his employment voluntarily (*Green v. Attorney General of Canada* 2012 FCA 313).

[38] At paragraph 15, Justice Sexton explained in *Attorney General of Canada* v. *Peace*, 2004 FCA 56, that, "*Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?*"

[39] The Respondent submits that the Appellant voluntarily left his employment on April 13, 2017. The Respondent relies on the first ROE which identifies that the Appellant quit his employment and his last day of work was April 13, 2017 (GD3-19). The Respondent submits that the Appellant resigned from his employment because he did not want to temporarily work the 3am shift so that the employer could monitor his driving habits.

[40] The employer stated that they did not force the Appellant to quit his job (GD3-24). The employer stated that due to safety concerns, they decided to place him as a shunt driver in the yard so they could monitor him and that the shift started at 3am to 4am (GD3-32).

[41] The Appellant testified that he did not quit his employment voluntarily on April 13, 2017. The Appellant stated that he felt pressured to submit his resignation letter because his employer made significant changes to his work duties and was told that he would be working the 3am shift the following day. He notes that the employer was seeking a commitment from him to be at work the following day, or he would get into trouble.

[42] The Tribunal notes that the Appellant had initially agreed to work the 3am shift when he thought it was temporary in nature, however when he was told it was a permanent shift change, he decided to quit his employment on the same date. The Tribunal notes that the Appellant testified he often worked various shifts, including early morning shifts as needed by his employer, however his normal and regular shift commenced at 6am.

[43] The Tribunal finds that the Appellant voluntarily left his employment on April 13, 2017, because he chose to prepare and submit his resignation letter to his employer. While he states that he felt pressured to quit by his employer, the Tribunal finds that the Appellant had a choice to stay or leave his employment on that date. Further, the Tribunal notes that there was insufficient evidence to show that the employer forced the Appellant to quit his employment on that date. In this case, the Appellant made a choice to resign from his employment on April 13,

2017 for which he states that he good reason to do so, for health and safety concerns. Therefore, the Tribunal finds that the Appellant voluntarily left his employment on April 13, 2017.

[44] The Tribunal acknowledges that there was a subsequent mediation between the parties relating to a labour dispute, which resulted in an amended ROE reflecting a layoff code instead of a quit code (GD3-27). However, the Tribunal is not bound by subsequent agreements or negotiations between the parties.

[45] The second issue to determine is whether the Appellant had “just cause” for voluntarily leaving his employment.

[46] Once the Respondent has proven that the Appellant left his employment voluntarily, the onus shifts to the Appellant to show that he had just cause for doing so (*Tanguay* v. *Unemployment Insurance Commission,* A-1458-84).

[47] The test to determine whether a claimant had “just cause” under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, he had no reasonable alternative to leaving the employment. (*Canada (Attorney General)* v. *White,* FCA 190; *Canada (Attorney General)* v. *MacLeod,* 2010 FCA 301).

[48] Section 29(c) of the Act provides that just cause for voluntarily leaving an employment exists if the Appellant had no reasonable alternative to leaving, having regard to all the circumstances. This section provides a non-exhaustive list of circumstances which might justify voluntarily leaving an employment.

[49] The Tribunal considered subsections 29(c)(iv) which refers to working conditions that constitute a danger to health or safety and 29(c)(ix) which refers to a significant change in work duties.

29(c)(iv) working conditions that constitute a danger to health or safety

[50] The Respondent submits that there was no danger to the Appellant’s health and safety or how his health was adversely affected by the work environment.

[51] The employer noted that they were not aware of his health and medical condition and if they had been aware, they would have accommodated him.

[52] The Appellant testified that working in the yard or as a shunt driver at 3am would have had significant negative impacts on his health such as exhaustion. He said that his previous experience working nightshift was only for approximately one month, but that he was always feeling tired and sleepy while driving. He says that his symptoms were intensified at that time because he had an undiagnosed and untreated liver condition. He spoke to his employer about it his fatigue and that was the reason his employer accommodated him by letting him work the dayshift doing local work.

[53] The Appellant also noted that he had been suffering symptoms from his liver infection for several months, but that he did not obtain his official diagnosis until after he left his employment in June 2017. He states that his employer knew about his symptoms, but not the particulars about his medical condition because he was not yet diagnosed.

[54] The Tribunal notes the Appellant provided a letter from his physician dated on August 21, 2017 (GD2-5). The letter states that *"he cannot drive in the night shift from August 21, 2017 to September 21, 2017 for medical reasons, pending reassessment".* The Tribunal finds that this letter was dated several months after he left his employment and provides no details or diagnosis. As a result, the letter has been given minimal weight.

[55] The Tribunal notes that the Appellant did not submit any medical letters or other supporting medical documentation to demonstrate that his medical diagnosis and/or that working conditions were a danger to his health or safety while he was employed. While the Tribunal notes that his testimony was credible and consistent with his statements to the Respondent about his medical condition, the Tribunal cannot reasonably find that the working conditions, specifically working night shift constituted a danger to his health or safety.

[56] The Tribunal notes that his resignation letter simply indicates that he has to resign due to ``*health and safety concerns*`` without any further details. The Tribunal finds that it is simply not sufficient to say that you have health or safety concerns, or that ``*it is not good or safe for his health*`` and then fail to explain precisely what makes it a health and safety concern.

[57] The Federal Court of Appeal has stated that it is not just cause where there are dangerous working conditions without discussing with employer whether measures could be instituted to reduce this fear (which would have been a reasonable alternative) (*Canada* (*Attorney General*) v. *Hernandez*, 2007 FCA 320).

[58] In this case, the Tribunal finds that a reasonable alternative would have been to discuss with his employer his specific health and safety concerns during the meeting, and to see a physician immediately after work to discuss his medical concerns. As a result, the Tribunal is not satisfied that a general statement made by the Appellant that it is not safe or healthy to work at night was not sufficient to establish that his working conditions constituted a danger to his health and safety. Therefore, the Tribunal finds that the Appellant did not have just cause to leave his employment pursuant to 29(c)(iv) working conditions that constitute a danger to health or safety.

29(c)(ix) which refers to a significant change in work duties

[59] The Respondent submits that there was no significant change in work duties. The Respondent notes that the employer made a reasonable request for the Appellant to perform the temporary work as a shunt driver in the yard, particularly since he had worked night shift hours in the past.

[60] The employer noted that they temporarily placed him as a shunt driver to monitor his driving in the yard, due to his driving habits and that the shift started around 3am to 4am. The employer stated that the Appellant did not accept the new role, quit and went to the labour board (GD3-32).

[61] The Appellant testified that he was told he would be doing “yard work” permanently and that his shift would commence the following day at 3am. He states that he did not have time to see his physician prior to the shift change. He further notes that he had no yard work training and would have had to wake up around 1am in order to commence his 3am shift, which would have disrupted his sleep schedule and negatively impacted his health. He also notes that even if he was shunt driving in the yard, his employer would have required him to access other locally owned company, which meant he would also be driving on municipal roads unsupervised.

[62] The Appellant also disputed that he had a poor driving habits because there was only one incident in January 2017, where he damaged a customer`s property and he states it was accidental. In relation to the second alleged incident, he stated that he did not cause the minor damage on the vehicle because it was there two days prior. He noted that the employer provided no proof of the minimal damage, unlike the first incident where the employer submitted several photos of the damage.

[63] The Appellant noted that his employer accommodated him after he told them about his health and sleeping issues while working the nightshift. The Appellant stated that when he initially started working, he was responsible to do the nightshift run to Montreal and back to Toronto, but this lasted only one month. During his shifts, he would often get tired and pull the truck over to sleep for a few hours or drink tabasco to stay awake. This often resulted in him returning back to work late at approximately 11am, instead of his scheduled return time of 7am.

[64] Within his first month of employment, he spoke to his employer about his tiredness, difficulty working nightshift and the requirement to take rest periods. His employer agreed to accommodate him by permitting him to commence work at 6am. He continued to work the dayshift for several months, with the occasional night shift if last minute coverage was needed by the employer.

[65] The Tribunal notes that the Appellant did not advise his employer about his suspected liver condition and medical problems, which he states was not diagnosed until after he left his employment. Given that the Appellant was not aware of his medical condition during his employment, the Tribunal accepts that the employer was also not aware of the Appellant`s medical condition or diagnosis.

[66] However, the Tribunal finds that the employer more likely than not, knew that the Appellant was tired and had difficulty working nightshift because they had already accommodated him for several months by scheduling him for local dayshift truck runs.

[67] The Tribunal also finds that the change in role and duties, from an X to a shunt driver or yard work, would have amounted to a significant change in his work duties. Whether he was working as a shunt driver in the yard, or doing yard work, this was not what he was hired to -do and there was no history of doing either job while during his employment term.

[68] The Tribunal notes that the employer had already accommodated the Appellant`s request by allowing him to work the dayshift due to his difficulty working nightshift and needing additional periods of rest, which may or may not have been attributed to his subsequent medical diagnosis.

[69] The Appellant said that the shift change would have required him to wake at 1am to attend work at 3am and to go to sleep around 4-5pm. This was not possible for the Appellant given that he had adapted to his dayshift schedule for several months. Further, the employer provided no notice to the Appellant to prepare for the shift change and new role, but simply told him that his new scheduled shift would commence the following day for an undetermined period.

[70] The Tribunal finds that the Appellant`s testimony and statements to the Respondent support a finding that there was a significant change of work duties. As a result, the Tribunal accepts that the shift change from 6am to 3am was a significant change to his work duties, as well as the change from his role as an X to shunt driver/yard work. Therefore, the Tribunal finds that the Appellant had just cause to leave his employment, pursuant to subsection 29(c)(ix) of the Act.

Reasonable Alternatives

[71] The Respondent submits that there were reasonable alternatives available to the Appellant such as, *attempting to try to work the night shift and seeing his physician; requesting an accommodation from his employer due to his diagnosis and requesting a transfer to another department*.

[72] The Tribunal finds that the reasonable alternatives noted above are not reasonable given the Appellant`s circumstances because he did not have a medical diagnosis while he was employed. Further, he had already previously attempted to work a nightshift for one month and subsequently received an accommodation from his employer to work dayshift, even though he

did not have a specific medical diagnosis. Lastly, the Appellant testified that he asked his employer if he could work in the warehouse instead, but the employer told him there were no positions available. This was supported by the employer`s statement to the Respondent where they indicated that they wanted to keep him in a similar position, so he was only offered shunt driving.

CONCLUSION

[73] Having regard to all the circumstances, the Tribunal finds that the Appellant had just cause to leave his employment because there was a significant change in his work duties, specifically to his role and his hours of work. The Tribunal finds that while there were alternatives available to the Appellant, neither alternative was reasonable, even on a trial basis given the Appellant`s particular circumstances. Therefore, the Tribunal finds that the Appellant did not have any reasonable alternatives, but to voluntarily leave his employment, pursuant to subsection 29(c)(ix) which refers to a significant change in work duties.

[74] For these reasons, the Tribunal finds that the Appellant has demonstrated that he had just cause for voluntarily leaving his employment.

[75] The appeal is allowed.

Solange Losier

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) 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, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.