Citation: *DH v Canada Employment Insurance Commission*, 2023 SST 1067

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. H.
Representative:	R. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (551748) dated November 3, 2022 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Videoconference
Hearing date:	May 3, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	May 15, 2023
File number:	GE-22-4035

Decision

[1] The appeal is dismissed.

[2] The Appellant has not shown just cause (in other words, a reason the law accepts) for leaving her job when she did. The Appellant did not have just cause because she had reasonable alternatives to leaving when she did. This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant left her job July 21, 2022 and applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. It decided that she voluntarily left (or chose to quit) her job without just cause, so it could not pay her benefits.

[4] The Appellant says that the air quality in the area she worked was poor from particulates emanating from powder coating processing and fumes from an industrial furnace. She says it caused her lung irritation and she was concerned about the possible negative effects it was having on her health. She decided to leave her employment. She says that she had just cause to do so because she had informed the employer of the air quality problems, but nothing was done.

[5] The Commission says that, instead of leaving when she did, the Appellant could have verified with a doctor that any health concerns she was experiencing were the result of exposure to workplace contaminants and provided a recommendation that she not continue working under those conditions. Further, it says she could have taken more steps with the employer to try to resolve the matter before leaving. It adds that she needed to seek other employment opportunities before electing to leave her employment.

[6] I must decide whether the Appellant has proven that she had no reasonable alternative to leaving her job when she did.

Issue

[7] Is the Appellant disqualified from receiving benefits because she voluntarily left her job without just cause?

[8] To answer this, I must first address the Appellant's voluntary leaving. I then must decide whether the Appellant had just cause for leaving.

Analysis

The parties agree that the Appellant voluntarily left

[9] I accept that the Appellant voluntarily left her job. The Appellant agrees that she sent her Employer an email on July 8, 2022, informing them that she was resigning and that her last day would be July 21, 2022. I see no evidence to contradict this, so I accept it as fact.

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

[10] The parties don't agree that the Appellant had just cause for voluntarily leaving her job when she did.

[11] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[1] Having a good reason for leaving a job isn't enough to prove just cause.

[12] 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 must consider all the circumstances.[2]

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

[13] It is up to the Appellant to prove that she had just cause. She must prove this on a balance of probabilities. This means that she must show that it is more likely than not that her only reasonable option was to quit.[3]

[14] When I decide whether the Appellant had just cause, I have to look at all of the circumstances that existed when the Appellant quit. The law sets out some of the circumstances I must look at.[4]

[15] After I decide which circumstances apply to the Appellant, she then has to show that she had no reasonable alternative to leaving at that time.[5]

The circumstances that existed when the Appellant quit

Working conditions that constitute a danger to health or safety

[16] I find that the Appellant has not shown that the working conditions constituted a danger to her health or safety at the time she decided to leave her employment.

[17] The Appellant submits that the working conditions at her employment constituted a danger to her health or safety. She submitted and testified that she works in the office of a manufacturer that applies powered coatings. At the time of her departure, she had been working there for 22 months.

[18] The Appellant says that even when she started working there, she knew there was an air quality problem. She initially accepted that the conditions but found that over time the poor air quality became an increasing problem for her. She said that she started feeling unwell daily and that she found the situation incredibly stressful. She decided that she could no longer tolerate the risk to her health and elected to leave.

[19] She outlined that the air was at times heavy with fumes from the oven used in the powder coating process. She says that by mid-day she would begin feeling light-headed

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[3] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.
[4] See section 29(c) of the Act.
[5] See section 29(c) of the Act.

and her lungs ached. She says that just before she left her job, she had been exercising and had difficulty breathing.

[20] She conveyed that when she would arrive to work in the morning, she would see a covering of dust and grit on the surfaces in the office. Wiping the surfaces revealed colour consistent with the powder coatings used.

[21] The Appellant supported her claim regarding the health risks associated with inhaling silica sand used in the powder coatings process with a “Safety Data Sheet.” She confirmed that she obtained these data sheets after conducting some online research.

[22] The Appellant disclosed that she is a cancer survivor. She expressed that the long-term effects of her battle with cancer affected her state of mind and that she fears a relapse. She was concerned that the environment at work could lead to negative health impacts and a return of the cancer.

[23] About two weeks prior to the Appellant submitting her resignation, she noted a notable change in the air quality. She says that there was a smell of fumes in the air and that it caused her difficulty breathing. She says her lungs felt irritated and heavy. She would experience an irritated throat and was generally unwell. She says that the workers in the plant use protective equipment such as respirators to protect them but the no one in the office uses them. She stated that even the manager had a bad cough which she attributed to the poor air quality.

[24] The Appellant did submit that at times the air quality was not always poor and that some days were worse than others, particularly hot days. The Appellant submitted that she had spoken to her manager and the owner during casual conversations about the air quality, but the only solutions offered were to prop open the door leading outside and to use a fan.

[25] The Appellant confirmed that she never made a formal complaint regarding the air quality. In the Appellant’s submissions, she said that she told the manager that she was feeling dizzy on one occasion. However, in response to my question of whether she

ever told the Employer directly that she was feeling sick from the air quality, she admitted that she never told the Employer that the air quality was making her feel unwell. Nor did she seek an opinion from her doctor to determine if her symptoms could be reasonably linked to the work environment.

[26] Despite having a designated Health and Safety representative in the workplace, the Appellant did not consult with the representative to convey her concerns with the air quality.

[27] The Commission submits that when it contacted the Employer, the Employer said that the Appellant had raised some concerns with air quality but relayed that it had received no specific complaints about the air quality from her or other employees. The Employer offered that the Appellant said she was leaving due to air quality but later added that the primary reason she was leaving was that the workload was too much to handle.

[28] The Employer noted to the Commission that when an issue had occurred with the air quality it had fixed the problem immediately and there had been no further incidents. The manager stated that his cough was due to smoking and not the air quality.

[29] The Employer says that the Appellant had some difficulties in keeping up with the work and that it had taken steps to reassign some of her tasks because the Appellant was not one to request assistance.

[30] The Commission was aware of the Appellant's claims yet offered no additional evidence from the Employer regarding the air quality that would contradict the Appellant's claims except the Employer's statements that no one else had complained about air quality. There were no air quality test results submitted.

[31] However, likewise, there are no other complaints that corroborate the Appellant's assertions and no minutes of meetings where the air quality was formally discussed.

[32] Given the Appellant's heightened concerns because of her previous battle with cancer, I am satisfied that she experienced the symptoms she described and believed her health to be at risk. However, I am not persuaded that poor air quality was a daily occurrence nor that the level of exposure can be determined to be a danger to health or safety. That is why air quality tests are conducted, to establish the level of contamination and whether any detected levels are above established limits. A more emphatic statement from the Appellant to the Employer or consultation with the health and safety representative could have led to such tests and possibly confirmed the Appellant's fears.

[33] I am left to conclude that the Appellant did suggest at times to the employer that there were issues with the air quality. But the lack of a formal complaint specifically noting that she was experiencing symptoms that were causing her to feel ill, likely left the Employer with the impression that it had addressed the matter satisfactorily rather than conclude that it needed to initiate a comprehensive evaluation.

[34] The Appellant was able to specifically note the poor air quality as the reason for her departure in her resignation. It follows that she could also have formally informed the Employer about the air quality and her symptoms before she resigned to give the Employer the opportunity to properly address the situation.

[35] I am not convinced that the Appellant expressed her concerns to the Employer in a matter that would clearly convey the symptoms she was experiencing and her belief that they were caused by the air quality.

[36] Therefore, there is insufficient evidence to conclude that the environment opposed a danger to the Appellant's health and safety.

[37] The Commission contends that the Appellant left her job not because of her health concerns, but because the workload was too heavy. I discount the Commission's statements concerning the workload.

[38] There is insufficient evidence before me to conclude that the Appellant was having difficulties at work or that that employer was concerned that she was not meeting

expectations. Nor can I see any comments from the Appellant that support dissatisfaction with the workload.

[39] The Appellant may have stated that the workload was heavy and even expressed a desire to have a job that had fewer responsibilities, but that does not lead me to conclude that she was incapable of performing the functions of the job and that the workload was the real reason for leaving.

[40] I am satisfied that it was the Appellant's fears of negative health consequences posed by the air quality that ultimately led to her resignation. I must now turn my attention to whether the Appellant had reasonable alternatives to leaving when she did.

The Appellant had Reasonable Alternatives

[41] I find that the Appellant had reasonable alternatives to leaving when she did. This means that she has not proven that she had just cause to leave when she did.

[42] The Commission says that that Appellant could have consulted a doctor to obtain medical evidence of her condition and that she should no longer remain in the environment. Further, it suggests that the Appellant could have attempted to reach an agreement with the employer to correct any air quality issues and lastly, she could have looked for other employment before leaving.[6]

[43] The Appellant disagrees and explains that she does not need to show medical evidence when the risk to her health was self-evident. She also concluded that making further attempts to discuss the air quality issues with the Employer would be fruitless because that had not taken her concerns seriously when she expressed them. Lastly, she asserts that she did look for other employment before she left her job.

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[6] See CUB 38804 (Canadian Umpire Benefit)

Provide medical evidence

[44] I find that the Appellant did not seek medical evidence sufficient to conclude that the work environment was causing her health problems and that she should leave the environment (quit her job) when she did.

[45] The Commission submits that the burden is upon the Appellant to show that she had a legitimate health concern such that it required she leave her employment when she did. It says that the Appellant conveyed that she did not visit a doctor to obtain medical evidence of her health concern because she was afraid of what she might be told given her previous health concerns (cancer).

[46] The Commission asserts that the Appellant has not met the requirement to provide sufficient medical evidence to support leaving her employment when she did.[7]

[47] The Appellant disagrees and submits that she did not need to consult with a doctor to obtain the medical evidence. Further, that had she consulted a doctor, the doctor would surely have agreed that the working conditions posed a potential risk to her health.

[48] The Appellant supported her case with a recent Social Security Tribunal (SST) decision wherein the SST Member found that unsafe working conditions that lead to medical concerns combined with a negative workplace culture supported a finding that the Appellant had just cause to leave their employment.[8]

[49] In SST case *WA v. Canada Employment Insurance Commission, 2019 SST 937* the Member found that the appellant had consulted with a doctor on more than one occasion and the doctor provided a medical note. Clearly, the Member was convinced that the doctor's findings supported a conclusion that the appellant's circumstances constituted a danger to his health or safety.

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[7] See CUB 38804.
[8] See (*WA v. Canada Employment Insurance Commission, 2019 SST 93).*

[50] I differentiate the circumstances in that case from the present case in that the Appellant in this case did not seek a medical opinion. She did not go to her doctor and explain her symptoms such that the doctor could link her symptoms to the workplace environment.

[51] The Appellant presented three additional Canadian Umpire Benefit (CUBs) decisions in support of her claim that she did not need to visit a doctor to show that she had a legitimate health concern.[9]

[52] The Appellant's representative asserted that the Appellant did not need to see a doctor because it was obvious that the conditions posed a risk to her health and that if she had gone to a doctor, the doctor would have agreed with her. In two decisions, the issue was the presence of second-hand cigarette smoke in the workplace. In another, the issue was the capacity of an elderly person to meet the physical demands of a job. In all the cases, the decision maker took judicial notice of either its knowledge of second-hand smoke in a workplace or its observations of an appellant during the hearing.

[53] There is significant medical evidence from studies of second-hand smoke and case law from which the decision makers could draw conclusions without further confirmation in every instance. I am not convinced that a similar level of knowledge and investigative proof exists to form the same conclusion in the present case.

[54] The "Safety Data Sheet," notes that exposure to airborne concentrations above statutory or recommended exposure limits may lead to irritation of the nose, throat, and lungs. However, no tests were done in her specific area of the workplace to determine the levels of airborne concentrations or the presence of fumes in the Appellant's work location.

[55] Further, the Appellant's representative suggests that the quoted decisions constitute case law. I disagree. Neither CUB decisions, not SST decisions are case law. There can offer me guidance based on the findings of previous adjudications of similar

[9] See CUB 60013, CUB 59269, CUB 51925.

matters. However, I am not obligated to follow the findings and conclusions found in these individual decisions. I am obligated to consider and follow actual case law such as decisions from the Federal Court of Appeal.

[56] I find that the argument put forth that a doctor would have agreed with her decision to leave is supposition. The Appellant has not presented any evidence that would support a conclusion that a doctor would have agreed with her characterization of the workplace and conclusion that it was the cause of her health concerns or were sufficiently serious to warrant leaving her employment when she did.

Meet with the Employer and attempt to reach an agreement to accommodate her health concerns.

[57] I find that the Appellant did not express her health concerns sufficiently to be considered having attempted to reach an agreement to accommodate her.

[58] The Commission submits that the Appellant did mention the air quality issue to the Employer and that the Employer agreed there was an issue but that it had the deficiency corrected. It says that the Appellant did not file a formal complaint about the air quality, nor did she consult with the health and safety representative in the workplace. It noted that the Appellant did not seek a transfer to another position.

[59] It submits that the Appellant didn’t exhaust all reasonable alternatives to try and correct the environmental conditions.

[60] The Appellant disagrees. She submits that she did speak with her manager and reported that she was feeling dizzy and attributed it to the air quality. She says that the Employer suggested that she prop open the door which she says was not an adequate solution.

[61] The Appellant admits that she did not file a formal complaint to the Employer about the air quality. She says that she did not think it would have resulted in any action by the Employer if she had done so. The Appellant suggested that the same manager was also experiencing health issues due to the air quality because he had a cough.

However, the manager told the Commission that his cough was due to smoking and not the air quality.

[62] The Appellant added that she had also spoken to the owner of the business about the air on one specific occasion, but the owner only suggested that she use a fan.

[63] The Appellant admitted that she never told the Employer that she believed that the air quality was making her sick. She also stated that she did not file a formal complain because she feared possible reprisals if she did so and recounted an incident wherein, she witnessed an employee berated by the Employer just prior to their termination.

[64] The Appellant admitted that there is a health and safety representative but that she did not know the person. She says that she did not consult with the representative because she believed it would just result in the representative raising the matter with management, which she claimed she had already done.

[65] Based on the Appellant's own admission that she never told the employer that the air quality was making her feel sick, it cannot be concluded that she truly attempted to inform the Employer of her health concerns and try to resolve the issue. By her own description of events, these occasions when she expressed a concern to the management, seem to be more consistent with comments in passing that may not have impressed upon the management the level of her concerns such that they would be prompted to investigate further.

[66] The Appellant submitted that she did not seek a transfer because it was a small employer and there was no where she could have gone that was not near the industrial processing. I agree that that the possibility for a transfer did not exist and so cannot be considered a reasonable alternative.

[67] I am satisfied that it would have been reasonable for the Appellant to raise her concerns to the management in a more emphatic way to impress upon them she was concerned about her health stemming from the air quality. A discussion about a problem involves more than merely expressing a comment to a manager during a break.

[68] Not doing so left the employer thinking that it had addressed the issues when it made suggestions to the Appellant to remedy the air quality during certain incidents. It did not allow the Employer to know the full extent of the health concerns the Appellant claims she was experiencing.

[69] Further, the very reason that a business will have a health and safety representative, is to create a formal process by which employees can speak with a knowledgeable employee in the workplace who can then bring the matter up to the management and initiate formal discussions. Such formal discussions are intended to share critical information that can lead to investigations and resolutions to health and safety problems.

[70] The Appellant suggested that it would not have made any difference if she had because it would only have resulted in raising the issue with the management who would not have done anything. Again, such a conclusion is supposition. There is no way to know what may have come out of formal discussions. Even if true and the Employer did nothing after such consultation, it would have at least further supported a decision by the Appellant to leave.

[71] The Appellant suggested that such activities are only successful in unionized environments and would not have been taken seriously in the non-unionized environment of her Employer. She suggests that she may well have been subject to reprisal from the employer despite legislative requirements.

[72] I must disagree. The mere fact that the Employer has a health and safety representative acknowledges that it is aware of its responsibilities to maintain a healthy and safe workplace. Employers are aware of their liability, for ignoring health and safety concerns. To suggest the Employer would simply ignore the issue or effect reprisals against someone who complained is speculative at best. The only way to know is to engage in a process in good faith with the intention of finding a resolution.

[73] Again, even if the employer did ignore the health and safety representative or had taken reprisals against the Appellant, it would have only strengthened her decision to leave after having exercised these options.

[74] I find that it would have been an especially useful and a reasonable alternative for the Appellant to have consulted with the health and safety representative to further explore the air quality issue and remedies prior to deciding to leave her employment.

[75] I find myself persuaded by a CUB decision and more importantly the Federal Court of Appeal decision that overturned it.

[76] In Cub 66996, the appellant accepted a job in a plant where silica dust was present. The appellant became aware that the long-term effects of the dust could cause cancer. He believed that the conditions posed a risk to his health. He left his job without consulting a physician or clearly expressing his concerns to the employer.

[77] The Board found in his favour that the environment presented a risk to his health or safety. On appeal the Umpire also found in his favour noting that the appellant had a legitimate concern.

[78] However, the Federal Court of Appeal overturned the decisions of the Board and Umpire. The court noted that the appellant had left his job without discussing the working conditions with the Employer and therefore had missed a reasonable alternative available to possibly correct the working conditions to alleviate his concerns and maintain his employment.[10]

Seek other employment before leaving

[79] I find that the Appellant did not conduct a sincere job search prior to leaving her employment when she did.

[10] See (*Canada (A.G). v. Hernandez*, 2007 FCA 320)

[80] The Commission submits that the Appellant started looking for other work only one week prior to making her decision to leave and resigning. It suggests that this was not a long enough period in which to find other employment prior to leaving her job.

[81] The Appellant says that she did attempt to find other work before she left. She says that she applied to several jobs and had one interview. She admitted that she had only started her search one week before leaving her employment.

[82] The Appellant submits that while it is the general rule that one must seek other employment before leaving a job, it is not the case where there are intolerable working conditions that constitute a danger to health and safety.

[83] The Appellant stated that she had concerns from the very beginning of her employment and had experienced the poor air quality issues for upwards of 22 months. She says that in the two weeks just prior to her resignation the air quality deteriorated remarkably causing her to have concerning health symptoms.

[84] I agree with the Appellant's statement that intolerable working conditions may negate the need to attempt to find alternate employment. However, the Appellant must show that the working conditions were intolerable.

[85] The Appellant only sought other employment one week before she resigned.

[86] One week is insufficient time to expect to find other employment. A sincere attempt to find other employment would have required a longer period in which to prepare a resume, seek employment opportunities, send applications, await responses, attend interviews, evaluate job offers, and secure a new employment.

[87] She suggests that the working conditions became intolerable and that she had no choice but to leave when she did. However, the Appellant had been experiencing concerns with the air quality during the entire period of her employment of 22 months yet had not sought other employment earlier.

[88] Further, the Appellant did not leave immediately when she experienced her worsening symptoms. She tendered a resignation July 8, 2022, giving the Employer two weeks' notice of her intention to leave, and a willingness to train her replacement.

[89] In her submissions and during the hearing, the Appellant expressed serious concerns about the air quality and the symptoms it caused as well as the effects of long-term exposure. But at the very time when she says that the air quality was at its worst, she did not tell the employer about the serious nature of her symptoms such as having difficulty breathing. She did not ask the employer for sick leave or seek any another form of leave to remove herself from the environment immediately.

[90] The Appellant's willingness to remain in the office for an additional two weeks suggests that her decision to leave was not the result of intolerable working conditions, but that of undesirable working conditions.

[91] I find that the Appellant has not persuaded me that the conditions were so intolerable that she needed to leave immediately. I am satisfied that the Appellant could have either started to search for other employment sooner, or stayed longer, in order to make a serious attempt to find alternate employment before she decided to leave. She could also have requested leave to remove herself from the environment while she sought other employment.

The Appellant had not demonstrated that she had just cause for leaving her employment

[92] Considering the circumstances that existed when the Appellant quit, the Appellant had reasonable alternatives to leaving when she did, for the reasons set out above. This means that she did not have just cause for leaving her employment when she did.

[93] A foundational premise of the EI program is that you cannot voluntarily to leave your employment and place the financial burden of that decision on the rest of the plan's

contributors. That is why the legislation, and the case law, demands that a claimant have just cause for leaving their employment.

[94] To the Appellant, the circumstances may have presented a particularly good reason to voluntarily leave when she did. She was genuinely concerned about protecting her health. But a good reason to leave is different from just cause to leave. To establish just cause, it must be shown that she had no reasonable alternative to leaving when she did. The Appellant had options (alternatives) that may have resulted in a change to the working environment such that it negated her desire to leave and maintained her employment.

Conclusion

[95] I find that the Appellant has not demonstrated that she had just cause to leave her employment when she did.

[96] This means that the appeal is dismissed, and the Appellant remains disqualified from receiving EI benefits.

Mark Leonard
Member, General Division – Employment Insurance Section