



Citation: *DC v Canada Employment Insurance Commission*, 2023 SST 1142

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

# **Decision**

**Appellant:** D. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (559195) dated January 3, 2023 (issued by Service Canada)

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**Tribunal member:** Gary Conrad

**Type of hearing:** Videoconference

**Hearing date:** May 23, 2023

**Hearing participant:** Appellant

**Decision date:** June 1, 2023

**File number:** GE-23-404

## **Decision**

[1] The appeal is dismissed.

[2] The Appellant has not shown just cause (in other words, a reason the law accepts) for leaving his job when he did. The Appellant 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 Appellant quit his job and applied for Employment Insurance (EI) benefits.

[4] He says he quit because his employer was refusing to pay him the overtime and commission he was owed. He says that he tried for months to get his employer to pay him the overtime and commission, but their final offer was tens of thousands of dollars less than he says he is owed.

[5] The Canada Employment Insurance Commission (Commission) decided that they could not pay the Appellant benefits because he did not have just cause for his voluntary leaving because he had reasonable alternatives to quitting.

[6] The Commission says it would have been reasonable for him to continue working while searching for and securing another job, to continue working while he tried to resolve the issue with his employer, and to contact the appropriate labour authorities.

[7] I have to decide whether the Appellant has proven that he had no reasonable alternative to leaving his job.

## **Issue**

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

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

## **Analysis**

### **The parties agree that the Appellant voluntarily left**

[10] I accept that the Appellant voluntarily left his job. The Appellant agrees that he made the decision to quit. I see no evidence to contradict this.

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

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

[12] The law says that the Appellant is disqualified from receiving benefits if he left his job voluntarily and didn't have just cause.<sup>1</sup> Having a good reason for leaving a job isn't enough to prove just cause.

[13] The law explains what it means by "just cause." The law says that the Appellant has just cause to leave if he had no reasonable alternative to quitting his job when he did.

[14] It is up to the Appellant to prove that he had just cause. 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.<sup>2</sup>

[15] 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 have to look at.<sup>3</sup>

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) explains this.

<sup>2</sup> See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.

<sup>3</sup> See section 29(c) of the Act.

[16] After I decide which circumstances apply to the Appellant, he then has to show that he had no reasonable alternative to leaving at that time.<sup>4</sup>

### **The circumstances that existed when the Appellant quit**

[17] The Appellant says that two of the circumstances set out in the law applies. Specifically, he says that there was significant modification to the terms and conditions of his salary<sup>5</sup> and his employer refused to pay him for all the overtime he did.<sup>6</sup>

### **Significant modification to the terms and conditions of his salary**

[18] The Appellant says that according to his employment contract he is owed 5% of the profits from the projects he does, and this is to be paid quarterly as a bonus. He says his employer has never paid him this bonus.

[19] The Appellant works as a project manager for a restoration services company. He is the first person who will show up at your house when the sewer backs up at 2 AM so he can assess the damage and bring in the crew necessary to start repairing said damage.

[20] He assesses all the work that needs to be done and comes up with a total cost for the job. He submits this invoice to the homeowner, who then signs off on it, and then he submits it to the insurance company, so they can sign off on it.

[21] The Appellant says that at the point the final invoice has been submitted it includes all costs, so his employer can be aware of how much money they should be making on each job, so his bonus can be calculated at this point.

[22] The Appellant says that his employer wanting to wait until the final invoice is actually paid by the insurance company and the entire project settled before calculating

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<sup>4</sup> See section 29(c) of the Act.

<sup>5</sup> See section 29(c)(vii) of the Act.

<sup>6</sup> See section 29(c)(viii) of the Act.

his bonus and paying it out is unreasonable, as it could take a year or more for everything to be paid.

[23] He says that instead, he should be paid based on the final invoice and an estimated profit margin, and if the actual project profit is less than the estimate when all is said and done, adjustments to his bonus can be made at a later date.

[24] According to the Appellant's estimates he says he is owed tens of thousands of dollars in unpaid commission.<sup>7</sup>

[25] He says he tried to speak to his employer about his bonus many times, but they kept stalling on paying it out to him. He says at one point they told him that his bonus would be \$8,124.84, but this was then changed to a final offer of \$264.54. The Appellant says that this is not even close to the amount he is owed.

[26] The Commission submits there was no change in the Appellant's salary as his employer was following the employment agreement.

[27] The Commission says the employment agreement states the Appellant will be paid 5% of project profits quarterly, not a percentage of the profits the Appellant estimated his employer would make, which is what the Appellant was asking for.

[28] I find there was no change in the terms or conditions of the Appellant's salary.

[29] The Appellant's employment agreement says that he will be paid a salary of \$85,000 a year.<sup>8</sup> He says he was paid this without issue,<sup>9</sup> so I find there was no change to his base salary.

[30] I find that the employer did not alter the amount offered to the Appellant as a bonus. They never offered him a bonus of \$8,124.84 as he suggests.

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<sup>7</sup> GD02-30

<sup>8</sup> GD02-21

<sup>9</sup> GD03-65

[31] The text message the Appellant shows to support his claim that he was offered \$8,124.84 is actually his employer saying that there were four jobs paid out in the second quarter for a total of \$8,124.84, but that costs had still not been subtracted from that amount. They never say this is his actual bonus amount.<sup>10</sup>

[32] Also, I find his employer was not refusing to pay him the 5% bonus, they were simply offering him an amount that he felt was not what he was actually owed.

[33] The Appellant may have assumed that he would be getting paid 5% of the profit that he estimated each project would earn, but his employment agreement doesn't say that. In fact, there is almost nothing in the employment agreement to explain how the 5% bonus is calculated.

[34] However, what the employment agreement does say is that the bonus is 5% of project profit, not estimated profit or projected profit.<sup>11</sup>

[35] I note the Appellant has even said that the profit margin he used for his estimates to determine how much he felt he was owed as a bonus was an average **he** chose, as he says some jobs have higher profit margins and some have lower.<sup>12</sup>

[36] I find this shows that what the Appellant believes he is owed is simply his opinion on what the project will earn. It does not reflect the true project profit, especially when the profit margin is a number of his own creation. So, the fact his employer does not agree with the Appellant's guesstimate of how much the projects will make, and refuses to base his bonus on it, does not represent a significant change in the terms of his salary.

[37] I further find that the fact his bonus was late, since it was not paid at the end of June 2022, the end of a quarter, does not represent a significant change in his salary.

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<sup>10</sup> GD02-40

<sup>11</sup> GD02-21

<sup>12</sup> GD02-3

His employer was still offering to pay it, so he still would have received the bonus as his contract specified.

### **Unpaid overtime**

[38] The Appellant says that his employer owes him thousands of dollars of unpaid overtime<sup>13</sup> because, according to Employment Standards in his province, salaried employees are owed overtime.

[39] The Appellant says that while he was allowed to leave work approximately four hours early every second Friday, that does not even remotely match the amount of overtime he worked and in no way means he should not be paid overtime.

[40] The Commission says the Appellant worked additional hours on-call in order to earn more commissions or remuneration and help the company toward its goals, and in exchange for at least some workday attendance flexibility, and was not subject to excessive overtime.

[41] I note the Appellant's complaint is not based on too much overtime, rather that he is not being paid for all the overtime he did.

[42] I further note that while the Appellant has said he is entitled to overtime according to the provincial *Employment Standards Code*, that is not what I am deciding here. What I am looking at is whether his employer refused to pay for overtime work,<sup>14</sup> not whether he should be paid overtime or how much overtime he should be paid.

[43] I find, that on a balance of probabilities, the Appellant has not proven that his employer is refusing to pay him overtime.

[44] I note that his employer told the Commission at one point that they were looking at paying the Appellant overtime as a bonus and later stated that according to labour standards they do not have to compensate him for overtime, but were willing to pay him

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<sup>13</sup> GD02-25

<sup>14</sup> See section 29(c)(viii) of the Act.

extra hours worked on projects.<sup>15</sup> I find this shows that his employer was not refusing to pay him overtime, as the issue of whether the Appellant would be paid overtime was not a settled matter and discussions were still ongoing.

[45] Further, I find the Appellant's testimony that his employer offered him a final payment amount at the August meeting where he quit, shows that his employer had not refused to pay him overtime, but instead had offered him less than he felt he was owed.

[46] However, even if the Appellant's employer had completely refused to pay him overtime, he would still have had reasonable alternatives to quitting as outlined below.

### **Reasonable alternatives**

[47] I find that the Appellant had reasonable alternatives to leaving at the time he did; he could have continued working until he secured another job, and he could have continued working while speaking to the relevant labour authorities if he thought he was owed overtime and his employer would not pay it, or if he felt the terms of his employment contract were not being honored.

[48] I find that it would have been reasonable for him to continue working until he had actually secured a different job, even with the disputes over bonuses and overtime for the following reasons:

[49] The Appellant said that he was applying for work before he quit, and even got an interview the week he quit work. He says that this interview was one of the reasons he quit, as he felt it went really well and he thought he would get a job very soon after he left.

[50] It turns out he did not immediately get a job, as there was another interview and many hoops to jump through, but he did eventually get hired on, showing that it would have been reasonable for him to secure another job before quitting.

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<sup>15</sup> GD03-62



[51] Further, he could still make a claim with his employer, or relevant labour authorities, for any bonus or overtime he felt he was owed during the period he was working prior to quitting after securing a different job.

[52] I find the Appellant had the reasonable alternative to quitting, if he felt that his employment contract was not being followed and that labour law regarding overtime was not being followed, to speak to the relevant authorities, such as Employment Standards, to get clarification on these issues and/or to file a complaint.

[53] This is a reasonable alternative as the Appellant and his employer disagreed on how the bonus section of his employment contract should be implemented and whether he is owed overtime. Instead of both sides assuming how things should work, the labour authorities could give a definitive answer on these subjects, whether through guidance or by investigating a complaint. This would allow the Appellant to be clear on if there actually was something wrong with the way his employer was handling his overtime and the employment agreement, rather than just assuming his employer was doing something wrong and quitting.

[54] So, considering all the circumstances that existed at the time the Appellant quit, I find that, on a balance of probabilities, he had reasonable alternatives to quitting. This means he did not have just cause, so he is disqualified from employment insurance benefits.

## **Conclusion**

[55] The appeal is dismissed.

[56] I find the Appellant did not have just cause for his voluntary leaving. This means he is disqualified from receiving benefits.

Gary Conrad  
Member, General Division – Employment Insurance Section