



Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 561

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

Decision

Appellant: K. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (544326) dated September 21, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: February 1, 2023

Hearing participant: Appellant

Decision date: February 20, 2023

File number: GE-22-3329

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.¹

[2] The Commission has not met its burden of proving the Claimant voluntarily left his employment. This means he is not disqualified from receiving Employment Insurance (EI) benefits because he did not voluntarily leave his employment. So, he may be entitled to EI benefits.²

Overview

[3] The Claimant was planning to emigrate from Canada in late 2021. He discussed his plans with his employer but did not specify a last day for his employment because it was uncertain when he could arrange flights and when he would be able to enter the other country due to COVID-19 border restrictions. After his employer hired a replacement for the Claimant, he told them he planned to remain at work for a period of time, take vacation and then an unpaid parental leave. The employer was unwilling to agree to this and sent the Claimant a Mutual Separation Offer that he rejected. Following this the employer ended the Claimant's employment saying he had resigned.

[4] The Canada Employment Insurance Commission (Commission) looked at the circumstances surrounding the end of the Claimant's employment. It decided he voluntarily left (or chose to quit) his job without just cause, so it wasn't able to pay him benefits.

[5] I must decide whether the Claimant voluntarily left his job and if so, did he have just cause for leaving his job.

[6] The Commission says the Claimant initiated the separation from his employment when he told his employer he was planning to resign. It says an employer can choose to shorten a notice period, but that does not alter the fact the Claimant chose to end his

¹ In this decision the Appellant is called the Claimant and the Respondent is called the Commission.

² The Claimant is also disputing his entitlement to EI parental benefits which the Commission has yet to reconsider but has said it will do so after this decision is released.

employment. It says the Claimant could have secured new employment in his new place of residence before voluntarily leaving his job.

[7] The Claimant disagrees and says he did not finalize his resignation and he did not set a date for his resignation. He tried to give the employer as much notice as possible, but when they started to pressure him to set a date, he said he would give two weeks' notice. He says the employer terminated his employment and has since issued a new Record of Employment stating he was terminated without cause.

Issue

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

[9] 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.

Matters I considered first

The employer is not an added party to the appeal

[10] Sometimes the Tribunal sends a claimant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[11] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

My jurisdiction is limited

[12] My jurisdiction, in other words my ability to make a ruling on an appeal, comes only after the Commission makes a decision on reconsideration that the Claimant then chooses to appeal. My jurisdiction is limited to reviewing the reconsideration decisions the Commission has actually made.

[13] This means I can only decide whether the Claimant is disqualified from receiving EI benefits because the Commission thinks he voluntarily left his job in October 2021.

[14] The Commission said it had not yet reconsidered the decision it made about the Claimant's entitlement to EI parental benefits and a reconsideration will be completed once this appeal is dealt with. If the Claimant is not satisfied with the Commission's reconsideration decision on the issue of EI parental benefits he may appeal to the Tribunal.

Analysis

The parties do not agree the Claimant voluntarily left his job

[15] The parties, that is the Claimant and the Commission, do not agree the Claimant left his job.

[16] The Commission says the Claimant resigned from his job. It says that when an employee submits a letter of resignation to their employer, the employer may decide to release them prior to the effective date in the notice. In these situations, the Commission says, the separation is still considered to be voluntary unless the employee is dismissed for misconduct. The Commission says although the Claimant states he never submitted a resignation letter with a specific date, he initiated the separation by notifying his employer of his intention to relocate and resign from employment. Because the Claimant initiated the separation, it is considered a voluntary leave from employment.

[17] The Claimant submits he did not resign from his employment. He says the law is well settled that a resignation must be clear and unequivocal and this is a case where there simply was no resignation.

[18] The Claimant testified he and his spouse were new parents in 2021. They discussed emigrating to his spouse's home country to be nearer to family. He said he wanted to give his employer as much notice as possible. At the time, the other country

had restrictions on who could enter that country due to COVID-19 and it was difficult to get flights.

[19] In May 2021 the Claimant had a discussion with the employer's head of human resources. The head of human resources summarized that conversation in an email dated May 20, 2021. She wrote:

I will set up a meeting with you, me and [Claimant's manager]

You to indicate which date works best for you and your family

From there, I will adjust the letter and get it to you

You will be asked to sign back the letter along with a resignation letter

Once we have that [Claimant's manager] and I will include you in the planning of announcing the transition/timing etc.

[20] On June 25, 2021 the Claimant emailed the head of human resources and his manager to recap their conversation about his intentions to relocate to another country. He wrote "I am intending to resign at the end of the year, however, we can plan towards my last day of active work on October 15th. My vacation and paternity leave will carry my employment until the end of the year. With this we aligned on a retention bonus of \$5,000. I will be confirming firm days when flights open up."

[21] On July 21, 2021 the Claimant's manager drafted an announcement for the Claimant's departure. The draft said the Claimant would be leaving on October 15, 2021. She asked the Claimant to review the draft. He replied to the manager, "Looks good. However, I am still confirming the exact date which will likely be closer to November 1st/15th. I told [head of human resources] I would confirm at least two weeks prior to last date." The manager replied, "Okay so I wonder if I word it something like "back end of October"?"

[22] The Claimant's manager issued the announcement company-wide on July 22, 2021 stating the Claimant "will be leaving [company] in the back end of October 2021." The announcement goes on to say, the Claimant "will continue in his current capacity

until the latter part of October, however I will look to backfill his role approximately a month prior to his relocation to enable a detailed transition and ensure business continuity.”

[23] The Claimant received a copy of the announcement by email. With the exception of changing “October 15th” to “back end of October” and “latter part of October” the announcement was the same as the draft the manager had shared with the Claimant.

[24] On July 23, 2021, the employer’s head of human resources sent the Claimant a letter. The letter starts with “I would like you to confirm back in writing to you the following:”

Your intention to leave [company] on a voluntary basis in October 2021.

[Company] will pay you \$5,000 (before tax) as a retention bonus to be paid on your final pay.

Written letter of reference from [company]

[25] The letter asks the Claimant to confirm his acceptance of these terms by July 30th, 2021. Underneath that statement and under the word “Concurrence” the Claimant signed his name on July 23, 2021.

[26] On September 21, 2021 the Claimant responded to an email from the head of human resources sent to him and his manager on September 8, 2021.³ The email subject was “Relocation.” The Claimant’s response notes he is just returning from vacation and notes his manager is off work. The Claimant wrote he had an update on the relocation. He wrote:

I communicated my intention to relocate in June which you [head of human resources] said that this would mean I would have to resign.

... I communicated well in advance so you could have time to plan for the transition.

³ The September 8, 2021 email from the head of human resources is not in evidence.

This communication has always been about my intention to resign and no firm resignation date was provided because of the pandemic as government rules on borders and transportation providers are ever changing.

The communication has not changed since the beginning of this discussion in June.

You are pressuring me to provide you a firm resignation date which is extremely difficult for the same reasons noted above

However, with some recent update in [country] policy I am comfortable with the risk and commit to a date

If you still plan to have the backfill transition with me for 4 weeks, you could have the backfill start Nov 15th, transition with me until December 17th, and then I will take my remaining 2 weeks of vacation and 5 weeks of paternity leave. Final active day would be Dec 17th and final day of employment is Feb 4th.

[27] The head of human resources replied to the email "Let's (sic) chat at 9:00."

[28] The head of human resources spoke to a Service Canada officer on September 13, 2022. She told the Officer the Claimant told the employer in March or April 2021 he was planning on moving overseas by the end of October 2021. They gave him a "stay" bonus and had a written agreement saying he was leaving by the end of October. The head of human resources said in September she heard the Claimant was maybe not planning to leave at the end of October, so she approached him about it. The Claimant told her the flights were the issue and not his visa. She checked on-line and flights were still going to the country. The head of human resources told the Officer when the employer spoke to the Claimant, he told them he was not leaving anymore at the end of October because of flights and he wanted to stay until March. The employer said they would pay him until the end of October but he was off the schedule as of October 19, 2021.

[29] The Claimant testified that at no time did he sign a resignation letter. He said the July 23, 2021 letter that he signed was "this is what you are planning to do." He explained that if he worked until December 31, 2021 he would receive a bonus known

as a Short Term Incentive Plan (STIP). In July 2021 he could not be sure how much the bonus would be so the \$5,000 was in lieu of the STIP.

[30] The Claimant said he did help draft a job description for his position but he did not participate in the recruitment of his replacement. He found out at some point a replacement had been hired. He said things started to escalate after this with him being pressured to give a firm date. The Claimant's replacement started to work in the first week of October 2021. The Claimant did the onboarding with his replacement.

[31] The Claimant testified his employer sent him a Mutual Separation Offer (Offer) on October 7, 2021. He told his employer he would not sign the Offer. He asked the employer why is the Offer here now? They replied to cover us and to confirm your resignation. The Claimant said he was not given a letter of termination. He was told on October 19, 2021 today is your last day, a courier will come to get the employer's equipment.

[32] The Claimant submitted he believed his request for paternity leave "kicked things into high gear" for the employer. He planned to take unpaid leave for 5 weeks and apply for EI parental benefits during that time. He said there was no policy for paternity leave but the employer would have to pay the premiums for the group insurance while he was on leave. The Claimant said he used the term "last active day" of work to mean that would be the last day he would be working and after that date he would be taking his unused vacation and then his unpaid paternity leave.

[33] The Claimant explained he has hired a lawyer to help him with the issues he was having with his EI benefits and also to help recover damages from the termination. He says the amended ROE, issued on January 5, 2023, came about because of discussions with his former employer. He notes the employer put in the comments section "Terminated without cause" and says this proves he did not quit his employment.

[34] To decide if the Claimant voluntarily left his employment, the question to be

asked is whether he had a choice to stay in or leave that employment.⁴

[35] The written record of the Claimant's dealings with his employer concerning the end of his employment are, in my opinion, ambiguous.

[36] The first email before me is dated May 20, 2021 from the head of human resources. The only reference to a date is one that "works best" for the Claimant and his family.

[37] Next there are emails on July 21, 2021 between the Claimant and his manager about the content of the company-wide announcement of his departure. His manager said he would be leaving October 15th. He went back with "I am still confirming the exact date which will likely be closer to November 1st / 15th. I told [head of human resources] I would confirm at least 2 weeks prior to last date." The announcement went out with "back end of October" and "latter part of October" as the time of the Claimant's departure.

[38] The next piece of correspondence in the appeal file is a letter from the head of human resources dated July 23, 2021 to the Claimant asking him to confirm "acceptance of these terms by July 30th, 2021." Among the "terms" were "your intention to leave [company] on a voluntary basis in October 2021." The Claimant confirmed his concurrence with his signature on July 23, 2021.

[39] On September 21, 2021 the Claimant emailed his employer to say if it still planned to have the backfill transition with him for 4 weeks, "you could have the backfill start Nov 15th, transition with me until Dec 17th, and then I will take my remaining 2 weeks of vacation and 5 weeks of paternity leave." He wrote his "final active day would be Dec 17th and final day of employment is Feb 4th."

[40] The next communication was the Mutual Separation Offer (Offer) sent to the Claimant by the employer on October 7, 2021. The Claimant rejected the Offer on

⁴ *Canada (Attorney General) v. Peace*, 2004 FCA 56.

October 13, 2021 and indicated he planned to continue working. His employment was terminated on October 19, 2021.

[41] The Claimant submits he did not submit a letter of resignation. He says the communications between him and his employer were around his intentions and his plans. He says his plans depended on flights and border policies. He said he used the term “last active day at work” to reflect he would be at work on that date but then taking vacation and unpaid parental leave prior to leaving the company. He says he did not set a date for his resignation.

[42] As part of the ongoing discussions with his former employer, the employer issued a revised ROE which states as the reason for issuing “Dismissal or Suspension” and states in the comments box “terminated without cause.”

[43] Although I am not bound by Canada Umpire Benefits decisions (CUBs) I find the reasoning with respect to confusion around the date of resignation and “conditional resignations” in the CUBs that follow to be persuasive when determining whether a claimant has voluntarily left their employment.

[44] In CUB 57766, the claimant gave his employer approximately two months’ notice of his intention to resign on September 1, 2000. On August 2, 2000 his employer asked him if he would agree to moving the termination date to August 8, 2000. He did so and an hour later the employer terminated his employment. The Board of Referees (BOR) found the claimant did not have just cause for leaving his employment.⁵ The Umpire in overturning the BOR’s dismissal of the claimant’s appeal said there are fact findings which must be made before the BOR can consider just cause. It said the BOR “did not make the fact findings necessary to a determination of whether his termination was conditional and whether those conditions were met or, alternately, whether, prior to the conditions being met, the employer terminated the employment of the claimant.”

⁵ Boards of Referees heard and decided appeals of the Commission’s decisions before the Social Security Tribunal was created.

[45] In CUB 13930, the claimant submitted a letter of resignation subject to certain conditions. His employer did not meet the conditions but accepted the resignation and told the claimant to remove himself from the premises. The umpire said:

In my view a conditional resignation is not a resignation which can be accepted unless, at the same time, the claimant's conditions are accepted as well. The corporation was not entitled to accept the claimant's resignation and reject the conditions. ... While the claimant's conditional letter of resignation may have initiated the events which resulted in his loss of employment, it cannot be said, under the circumstances of his case, that he voluntarily left his employment.

[46] There is no question the Claimant told his employer he was intending to leave his job. In his first email on June 25, 2021 to his employer recapping their discussion, he stated he was "intending to resign at the end of the year, however we can plan towards "my last day of active work on October 15th. My vacation and paternity leave will carry my employment until the end of the year." I take "end of the year" to mean December 31, 2021. In my opinion, this is a conditional resignation in that the Claimant expresses an intention to resign provided that his vacation and his paternity leave would continue the employment relationship to December 31, 2021.

[47] By July 21, 2021 he indicated to his manager, but not to the head of human resources, he was "still confirming the exact date which will likely be closer to November 1st / 15th. I told [head of human resources] I would confirm at least two weeks in advance." Again, in my opinion, this is a conditional resignation because the Claimant has said he plans to confirm the date when he gives two weeks' notice.

[48] In my opinion, the letter the Claimant signed on July 23, 2021 is not a letter of resignation. The letter asks the Claimant to confirm his "intention to leave [company] on a voluntary basis in October 2021." The lack of a specific date for the end of the Claimant's employment with no reference to the Claimant being granted vacation or parental leave tells me the employer and the Claimant did not have a firm view of when the Claimant would stop working. There is no evidence of the Claimant submitting a resignation and no evidence the employer accepted a resignation from the Claimant.

[49] In my view, the Claimant's email of September 21, 2021 is also a conditional resignation. This is because he wrote if the employer still planned to have the backfill transition with him for 4 weeks, "you could have the backfill start Nov 15th, transition with me until Dec 17th, and then I will take my remaining 2 weeks of vacation and 5 weeks of paternity leave." He wrote his "final active day would be Dec 17th and final day of employment is Feb 4th [2022]."

[50] The Claimant's employer responded with an Offer on October 7, 2021. On October 13, 2021 he told his employer he would not sign the Offer. He asked the employer why is the Offer here now? They replied "to cover us and to confirm your resignation." This evidence tells me that while employer believed the Claimant had resigned from his employment, it did not actually have a resignation from the Claimant and it did not have a firm date for that resignation.

[51] The Claimant's employment was terminated by the employer on October 19, 2021. The Claimant's employer amended the ROE it issued to the Claimant. It changed the reason for issuing from Quit to Dismissal or Suspension and in the comments section wrote the Claimant was terminated without cause. I note the ROE is just one piece of evidence that can be used to determine if a claimant voluntarily left their employment. In this case, I am placing greater weight on the ROE because it is consistent with the Claimant's statements his employer approached him on October 19, 2021 and told him it was his last of work.

[52] The evidence of the communications around the Claimant's resignation plans tells me that he submitted a conditional resignation. The Offer tells me the employer was, as late as October 8, 2021, aware the Claimant had not set a firm date for his resignation. The later amendment to the ROE tells me the Claimant's employer was not willing to accept the conditions he proposed concerning taking vacation and parental leave which would give effect to his resignation and instead, chose to terminate the Claimant's employment on October 19, 2021. As a result, I find that, on a balance of probabilities, the Claimant did not have the choice to remain in or to leave his job.

Accordingly, the Commission has not met its burden of proving the Claimant voluntarily left his job.

[53] Having determined that the Claimant did not voluntarily leave his employment, I do not need to address whether the Claimant had just cause to do so.

Conclusion

[54] I find the Commission has not met its burden of proving the Claimant voluntarily left his job.

[55] The appeal is allowed

Raelene R. Thomas
Member, General Division – Employment Insurance Section