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

Citation: *DL v Canada Employment Insurance Commission*, 2017 SSTGDEI 208
Tribunal File Number: GE-16-1374

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: November 7, 2016

DATE OF DECISION: March 7, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, D. L. and his representative, Mr. James Hildebrand from Huron Perth Community Legal Clinic attended the hearing. L. B. was a witness.

The Employer (Added Party), J. P. and his representative, Mr. Gregory F. Stewart from Donnelly and Murphy also attended the hearing. P. R. was a witness.

INTRODUCTION

[1] The Claimant was employed by two companies owned by the same owner. On September 19, 2014, the Claimant applied for employment insurance regular benefits after there was a separation of employment approximately 4 months prior on May 27, 2014.

[2] On October 24, 2014, the Commission disentitled the Claimant from receiving any benefits because it determined that he voluntarily left his employment without just. The Claimant requested that the Commission reconsider its decision on November 18, 2014 noting that he did not quit his employment but that he was dismissed. On February 13, 2015 however, the Commission maintained its decision.

[3] On March 13, 2015, the Claimant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). On August 26, 2015 however the Claimant's appeal was dismissed. The Claimant, in turn, appealed to the Appeal Division of the Tribunal. On April 5, 2016, the Appeal Division allowed the Claimant's appeal and ordered a new hearing before the General Division.

[4] The present hearing was held by in person because of (a) the complexity of the issue under appeal (b) the fact that more than one party will be in attendance (c) the fact that the appellant or other parties are represented and (d) at the request of the appellant.

ISSUE

[5] The Member must decide whether the Claimant should be disqualified from receiving any benefits because he voluntarily left his employment without just cause pursuant to section 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

[6] The Claimant applied for benefits on September 19, 2014 indicating on his application that he quit (GD3-7) but also stated that he did not quit, and provided reasons for why he was not at work on May 28, 2014. He explained that the owner, R. P. has three associated companies: X, X and X. He indicated that he did not quit because there were unresolved issues with the employer regarding (a) his safety (b) unsafe working conditions and (c) non-payment of overtime. He wanted the company to address the issues and expected the employer to call him to return to work when they were resolved (GD3-9 and GD3-10).

[7] Regarding his safety, the Claimant indicated that he was advised on May 24, 2014 that his personal property (a commercial hot dog cart) was sold without permission by the son (D. D.) of a trailer park resident (P. D.) located at X. On May 27, 2014, he advised the employers, R. P. and J. P. that they need to provide a safe work environment for him and that they should issue a no trespass notice for D. D. to stay off X property. On May 28, 2014, J. P. advised him that he was required to be at work but since his safety concern was not resolved, he advised the employer that he would go to the Labour Board. Fifteen minutes later, Jim left him a message stating "D. L., there is no work for you at the marina, therefore, you don't need to come to work." (GD3-10).

[8] Regarding the unsafe work conditions, the Claimant noted that also on May 24, 2014, on the way back from X, his colleague asked him to drive the company truck home because he was not sober. He and another colleague also smoked illegal drugs in the vehicle which was against company policy, putting him in a dangerous situation (GD3-10). The Claimant indicated that he advised J. P., while he was in X, but asked that he (J. P.) not do anything because he had to continue working with this person and feared repercussions/retaliation (GD3-11). To the Commission, the Claimant stated that he did not call the Labour Board about the regular illicit drugs use and drinking of alcohol on the job issues because he did not want to lose his job. He was aware of the drugs at work upon hire but he had to work. Others brought the issue to the employer, who in turn, created a form for everyone to sign and issued warnings but no one was dismissed (GD3-23 and GD3-24).

[9] Regarding the overtime issue, the Claimant indicated that it’s been an ongoing issue that he had previously brought up to the employer and which he will be taking to the Labour Board.

On many occasions, the employer would not combine the hours he worked for all three companies and pay overtime (GD3-10). The Claimant advised the Commission that he called the Labour Board two years prior regarding the wage/overtime issue but did not follow through (GD3-23). He would work 60 hours/week for the three companies; be paid 44 hours/week for one company and then be switched to other company to avoid paying overtime (GD3-28).

[10] The employer issued two Records of Employment (ROE), for Huron District Contracting and for X, indicating on both that the Claimant quit his employment (GD3-21 and GD3-22).

[11] To the Commission, the Claimant reiterated the same reasons and events as in his application. He confirmed that on May 28, 2014 prior to going to work he called his employer to advise that he had an appointment with the Crown Attorney however, the employer texted him to come into work. He responded asking if the trespass notice was given and the threatened Labour Board action. The employer then left him a message advising that there was no work at the marina so he does not have to come to work. The Claimant stated that he was waiting for the employer to let him know when to come back to work. He did not expect to be laid off as it was the beginning of the season (GD3-23). Later, the Claimant advised the Commission that he did not call his employer to see when he can return to work because he thought he was laid off (GD3-28). When asked by the Commission why he didn't take a leave of absence when the employer refused to issue a no trespass notice, the Claimant indicated he wasn't told to take a leave and stated "I consider this a leave" (GD3-32). The Claimant also confirmed that the employer offered for him to work with someone else but questioned what that would do. He confirmed that he did not go to the Labour Board (GD3-31). The Claimant stated that he did not contact the employer. He did not hear from the employer and only found out that he was dismissed two weeks later when he received an invoice for this boat storage without the employee discount and when his position was advertised on the internet. He had a friend enquire about his ROE (GD3-23, GD3-24, GD3-28, GD3-31 and GD3-32).

[12] The employer, J. P., stated to the Commission that the Claimant stopped coming to work and didn't call. He did not dismiss the Claimant because he had work for him. He called the Claimant for a meeting but he did not respond. After a few weeks of no contact, they issued the ROEs. The employer explained that the Claimant expected him to post a 'no trespass' sign because a family member of one of their best customers stole/did not pay for a personal item of the Claimant. The employer refused to get involved in personal matters. On the morning of

May 28, 2014, he texted the Claimant to come to work. He suggested that the Claimant work in another area or have someone else work with him however, the Claimant refused. Later, he asked that the Claimant come in to talk about it and left him a voice mail message but the Claimant did not respond. He stated that he is not aware of illegal activities or threats to the Claimant's safety otherwise, he would have taken action. The nature of their work can be dangerous so they provide ongoing training and safety equipment; they take it seriously and have to meet requirements. He confirmed that the Claimant can work 7 days/week but he was paid for the overtime (GD3-27, GD3-29 and GD3-30).

[13] On October 24, 2014, the Commission advised the Claimant that it was unable to pay him regular benefits because he voluntarily left his employment without just cause having not exhausted all reasonable alternatives (GD3-33).

[14] The Claimant requested that the Commission reconsider its decision noting that he did not quit but was wrongfully dismissed. He indicated that the employer issued fraudulent ROEs by indicating that he quit. The employer did so in retaliation after he advised the employer that he was going to the Labour Board regarding the unresolved issues i.e. the safety, excessive overtime and non-payment of overtime (GD3-36 to GD3-45). He feels that he was terminated when the employer indicated "not returning" on his ROE and left him a message stating that "no work at the Marina, so therefore do not return to work". He noted that if he was laid off, the employer would have issued an ROE that indicates "unknown" for when he was to return to work as it has done on previous occasions (GD3-41). In his amended submissions (GD3-223 to GD3-228), the Claimant indicates that this same voice mail message plus, the fact that he was not asked to return his keys, supports that he was laid off (GD3-225). He notes that other employees were not told that he had quit or that he had been dismissed. The employer advised them that he was laid off (GD3-226).

[15] The Claimant submitted documentary evidence to support statements put forth in his submissions including the boat storage invoice and job ad to show he didn't know he was dismissed until June 18, 2014 (GD3-46 to GD3-48), the employer's zero tolerance drug and alcohol policy (GD3-73) and the policy form that he signed (GD3-156), pay stubs and time sheets to show that he worked an unreasonable amount of overtime (GD3-79 to GD3-130, GD3-145 to GD3-219), he filed a claim with the Ministry of Labour on November 27, 2014 regarding

the overtime issues (GD3-229 to GD3-332) and other employees' documents and personal reference letters and documents (GD3-47 to GD3-221 and GD3-233 to GD3-246).

[16] The Claimant transcribed a telephone message from the employer of December 22, 2014 where the employer advises the Claimant that he received a call from the WSIB and that he told them the truth that "…you weren't laid off that we had to let you go because you weren't showing up for work, and for whatever reason …" (GD3-249 and GD6-7). Actual recording (RGD4a).

[17] A copy of text messages between the Claimant and the employer on May 28, 2014 start from 7:52 am and end 8:30 pm. At 7:52 am, the Claimant advised that he has a meeting and will be late. The employer however, insisted that the Claimant come to work before and after his meeting noting that he has planned the work day and needs him at work. At 11:09 am the employer requests a reply. At 1:12 pm the Claimant responds asking whether the employer can offer a safe work environment regarding D. D. At 1:26 the employer advised the Claimant they have work to do and offers to have someone work with him. At 1:28 the Claimant advised the employer he has to contact to the Labour Board and sees no reason why the employer cannot issue a no trespass notice. At 2:28 the employer tells the Claimant to get to work and that if he wants to talk, they will discuss his issue(s) when he gets there or by phone. At 8:30 pm the employer texts the Claimant to advise him that he left him a voice mail message as he did not answer the phone at 5:00 pm. He notes that he requires a phone call from the Claimant to discuss his behaviour before he feels comfortable having him back at work (GD3-253 to GD3-257).

[18] The Commission contacted the employer who stated that the employment ended because the Claimant stopped coming to work; he was scheduled to come in the rest of the week as of May 29, 2014. He couldn't confirm whether he told the Claimant not to come in but if he did, it would have been after the Claimant had already missed several shifts (GD3-250). The employer also stated that the Claimant was not fired in 2012 for going to the Labour Board. They only dismissed the Claimant once and that was when he refused to show up at work in 2014 (GD3-258).

[19] To the Commission the Claimant indicated that he was either terminated and/or laid off about 15 minutes after telling the employer he is going to the Labour Board when he received a

voicemail message from the employer saying “there is no work at the Marina so don’t come to work”. He confirmed that the timeline of events and text messages sent by the employer are accurate. (GD3-247 and GD3-259).

[20] On February 13, 2015, the Commission reviewed its reasons with the Claimant and maintained its initial decision and notified the parties (GD3-259 to GD3-264).

[21] The Claimant submitted a declaration from a R. C. that states he heard a voice mail message on or about May 28, 2014 from J. P. telling the Claimant that there was “no work at the marina so don’t return to work” (GD6-6).

Evidence at the Hearing

The Claimant’s Testimony

[22] The Claimant reiterated and confirmed the events that led up to and occurred on his last day of work May 28, 2014 referring to the texts between him and the employer (GD3-253 to GD3-257). The Claimant was asked whether there was a phone call from the employer after the 8:30 pm text from the employer. The Claimant testified that there was a phone call from the employer shortly after he notified him that he has no choice but to contact the Labour Board stating “There’s no work at the Marina D. L. Do not come to work”. The Claimant testified that he interpreted the last text message at 8:30 pm to mean that the employer was mad about him going to the Labour Board - that’s the behaviour he is referring to and that “before I feel comfortable having you back at work” meant that he has fired him. No other contact or letter from the employer since that day. First indication and confirmation that he had been dismissed was when he got the boat invoice. The Claimant testified that P. R. left him messages to pay his boat storage invoice only - no mention as to why he did not go to work. He did not call the employer to return to work because in his mind, he had been fired.

[23] The Claimant confirmed that there has been an overtime issue over five years and explained that he was paid overtime only when he worked for one company.

[24] Regarding the safe workplace issue, the Claimant confirmed that he did not stop the truck, contact the employer or refuse to drive when his colleagues (supervisor and safety manager) were smoking pot in the car when he was driving; and when the employer called him

while he was driving, he did not say anything to the employer. He did not report the incident to the Ministry of Labour. The Claimant stated that he complained to these colleagues who were management.

[25] Regarding his safety with respect to D. D., the Claimant confirmed that he reported the incident to the police but they did not have sufficient grounds to lay a charge. The Claimant testified that he did not lay a private threatening charge yet (as of the hearing date) but he has made sure to avoid contact with him for the past two years even though they both live in X.

[26] The Claimant confirmed that he never did meet with the Crown Attorney on May 28, 2014 to discuss whether D. D.'s actions amounted to a criminal act.

[27] Regarding the texts, he testified that he expected the employer to issue a no trespass notice to protect his safety at his workplace. He confirmed that the employer offered to have him work with someone. He testified that the employer's offer was not acceptable because at any given time he may work at one marina and the other party at the other marina. The Claimant testified that he did not ask the employer what he meant by his offer that he would not be working on his own. He did not advise the employer or tell him that they could possibly be apart; did not explore the offer further. He stated that this was the normal case, they worked in pairs. The Claimant agreed that he had made up his mind that he would only be satisfied if the employer issued a no trespass notice against D. D.

[28] The Claimant confirmed that after he threatened to go to the Ministry of Labour, he was invited by the employer to go into work and discuss, but he did not. He confirmed that he did not call the employer. At 8:30 pm, the work day was over; he did not return employer's call or enquire the next day because he was fired. The Claimant stated that he did not make any enquiries from May 28, 2014 until June 15, 2014 (got invoice without employee notice) because in his mind, he had been fired on May 28, 2014. When he received his ROE indicating that he had "quit", he did not call his employer to enquire.

[29] The Claimant referred to a voicemail message that he he received stated "no work at the Marina, don't come to work". He testified that a witness heard that message (GD6-6), but does not have a transcript, and the witness has since passed away.

[30] The Claimant testified that the only messages he received from P. R. on his cell phone were regarding payment for the storage of his boat. He did not respond to those messages until August 26, 2014.

Witness for the Claimant, L. B.

[31] L. B. testified that she did the payroll for all three companies of the employers and is no longer employed there (2013 to 2015). She testified that if an employee worked overtime for one company they were paid overtime. If they worked an accumulation of hours on one timesheet for all three companies, they did not receive overtime. Office staff did not get paid for working over lunch but she did not report it to Ministry of Labour.

[32] L. B. testified that she did not have an intimate relationship with the Claimant.

[33] L. B. testified that there was a written drug/alcohol policy as at August 28, 2013. She confirmed that the owners were advised that employees were still abusing drugs and alcohol on the jobs. In December 2014, she wrote up a work refusal for an employee who left the job site specifically because of alcohol and drugs on the job site and a threat of violence against him. She confirmed this was not uncommon. L. B. testified that she did not witness drug/alcohol abuse personally.

The Employer's Testimony

[34] J. P. testified that the employer is three separate corporate entities and that the work at 'X' is heavy equipment work and the 'Marinas' are a tourism-based boating, trailer park business.

[35] J. P. testified that they had heard about drugs and alcohol use on the job, most recent was that of December 2015 that they interviewed and investigated but had no evidence.

[36] J. P. testified that on May 27, 2014 he spoke to the Claimant, D. P. and himself and the Claimant asked him to issue a no trespass notice against D. D. because of a personal matter. The Claimant did not ask for anything else to protect him. On May 28, 2014, was Wednesday when they cut all the grass so his texts at 8:17 were to advise the Claimant that he required and expected him at work to get the property ready and organize staff/work. There was no contact from the Claimant between 8:34 am and 11:09 am. The Claimant started sending messages at

responds at 1:12 pm. J. P. testified that at 1:26 he still wanted the Claimant to come to work. He testified that he wanted the Claimant to work with somebody so that he felt safe in case he ran into somebody. J. P. stated that B. D. (D. D.'s father) has a trailer at X across the river. The Claimant and the other employee (C.) were going to be working at the inlet marina which is a different property so he did not feel they'd be in the same area. The Claimant did not ask him what he meant that he would not be working on his own. J. P. testified that at 2:28 pm he wanted the Claimant at work as it was getting to be the end of the day so that they can talk and resolve any issues. At 2:30 pm he was giving the Claimant every opportunity to come in and talk. After 3:30 pm he called the Claimant and told him "there was no work for him, don't come into the Marina" he did not say "do not return", he said "do not come in" because at that point the Claimant was not in the frame of mind that day to work with equipment, near water and other people for the remaining 1.5 hours of work; work typically ends 5:00 pm or 6:00pm. At 8:30 pm he wanted to make sure that the Claimant was okay to return and work. J. P. testified that he was expecting and hoping the Claimant would return the next day. The Claimant did not acknowledge this message.

[37] He stated that they gave the Claimant a number of weeks to come back. He instructed P. R. to call him, he followed up with her to ensure that they did call him but the Claimant did not reply. That's why they issued the ROE 3 weeks later. When he had been away before in 2013 (during tornado), they waited and he returned. J. P. stated that he asked, and then required him to come in and talk before his next shift however the Claimant did not contact the employer or respond to them calling him. He considered that the Claimant quit and refused to come and talk.

[38] He testified that he absolutely did not fire the Claimant because he called the Ministry of Labour.

[39] J. P. could not explain why a prior ROE (GD3-70) in 2011 and one of November 2013 the latter was issued several months later in June 2014 by the office as it is not their normal protocol.

[40] Mr. Hildebrant referred J. P. to a statement he had made to the Commission regarding the Claimant's employment. J. P. testified that he recalls that he was in the car (in June or July- he

would need to see the transcript) when he confirmed that the only time they let the Claimant go was when he failed to report to work.

[41] J. P. testified that the Claimant was not terminated but that he left because he did not show up for three weeks. When asked why the Claimant was not provided a letter, as another employee had been after 4 days of not showing up, J. P. stated that he managed the marina whereas the other employee worked for 'X' and could not explain.

[42] J. P. testified that in order for him to terminate someone for violating their drug and alcohol policy he would have to investigate and be provided with evidence other than just hearsay evidence depending on the situation. He stated that they have zero tolerance to drug and alcohol use at work.

[43] Regarding the issuance of the no trespass notice, the employer refused to do so because they had no issue with D. D. coming on to the property to visit his father or brother who are good customers. The issue was personal and had nothing to do with the employer.

[44] Regarding whether the Claimant did not come into work only on March 28, 2014, the employer confirmed that the Claimant knew that he was also scheduled to work on March 29 and 30, 2014 as he already stated he was only off Mondays and Tuesdays. He confirmed that the Claimant's regular schedule was to work for the marinas Wednesday to Sunday. When the Claimant did not show up for work, he asked P. R. to call him and because the Claimant has a tendency to ignore calls, he followed up with her again, left the door open and did not advertise for his position until later.

[45] J. P. testified that regular procedure for time off requires an employee to just let them know before their shift if they need time off; relatively flexible and usually allow the time off.

[46] J. P. confirmed and stated "I did not fire D. L.".

<u>Witness for the Employer, P. R.</u>

[47] P. R. testified that she is the office administrator. She testified that was asked by both D. P. and J. P. to reach out to the Claimant and ask him to come to work. She called him on both his home and cell phone approximately between June 6 and June 13, 2014 on 3 to 5 occasions. P. R. testified that it was common for her to be asked to call an employee if they did not show up for work. She did not keep a record.

[48] P. R. testified that the calls she made to the Claimant regarding his unpaid invoices for his boat were a separate matter altogether and at two different time periods (up to 2015). P. R. testified that she left him more than one message regarding his boat.

Post-hearing Evidence

[49] At the hearing, the Claimant advised that he had 3 recordings from P. R. that he wants to submit. The Employer's representative objected on the record to the submitting of this evidence as it has very little relevance noting that it is undisputed that P. R. called the Claimant repeatedly about payment for his boat storage. The recordings may not be all the calls he received by P. R. and is existing evidence that is only being submitted now. The Claimant was unable to provide this evidence to which her referred at the hearing and noted that he may have erred; the calls he received appeared to have been in 2015.

[50] On December 12, 2106, the Claimant submitted that the recording he had was the actual recording of the voice mail message of December 22, 2014, the transcript of which was requested and already provided (GD3-247 to GD3-249) to the Commission. The Claimant notes that he will not submit the transcripts of the 3 voice mail messages of P. R. so as not to create a prejudice given the employer's objection. It was confirmed that the 3 messages related to the boat storage (RGD4 and RGD4a).

[51] The Tribunal acknowledged receipt and provided the parties and opportunity to respond to this submission by January 6, 2017 (RGD5).

[52] On January 26, 2017, the Claimant sent the Tribunal a video clip of a January 2016 news story regarding widespread violations of the Employment Standards Act in Ontario (RGD6).

[53] No further submissions were provided by the parties up to the date of this decision.

SUBMISSIONS

[54] The Claimant submitted that …

a) he did not quit his employment; he was wrongfully dismissed for missing only one day and for reprisal because he stated he'd go to the Labour Board regarding unresolved issues he had with the employer;

b) he should be eligible for regular benefits from when he was advised by the employer in a voice mail message that "there was no work at the Marina, so do not return to work"; whether he was laid off or dismissed, the employer did not notify the Claimant of his employment status until he received his ROE in mid-July 2014 (GD3-228); he was dismissed on May 28, 2014 when the employer left that message;

c) he only wanted the employer to address unresolved issues namely, (1) the unsafe work conditions: the working conditions and the employer's refusal to enforce its drug and alcohol policy (2) the safety issue: the employer's refusal to ensure his safety by posting a No Trespass Notice on the property and (3) the employer's refusal to pay overtime which has been an ongoing issue;

d) he was not afforded the same treatment as other employees upon separation; employer did not attempt to contact him by written notification, no phone calls, warnings, suspensions or asked to sign voluntary termination agreements (GD3-225);

e) he did not consider the alternative(s) suggested by the Commission because he was fired he did not quit his employment however, in the alternative that he is found to have left his employment, he feels that he has exhausted all alternatives available to him. He had gone to the Labour Board in the past (2012) and the employer could have sent him the Huron District Contracting site job site out of town to satisfy the safety issue raised by the non-issuance of the no trespass notice" (GD3-228);

[55] The Commission submitted that…

a) the Claimant voluntarily left his employment on May 28, 2014 and was not dismissed or laid off; the Claimant was directed to go into work that day and asked to call the

employer thereafter but he failed to do either thus, initiating the act of severing his employment;

b) the Claimant sited several concerns (noted above) regarding his employment but ultimately voluntarily left when the employer failed to take the action that he wanted concerning a personal matter;

c) the Claimant was aware of the working conditions on hire and was exposed to them for at least 1.5 years; he failed to show that he was in immediate danger due to the working conditions or that his work situation was so intolerable that he had no alternative but to abandon his employment without first exploring any other alternatives;

d) the Claimant did not have just cause for leaving his employment on May 28, 2014 because he failed to exhaust all reasonable alternatives prior to leaving; he should have discussed his safety concerns regarding the work conditions and the issue regarding overtime with the employer and, failing any resolution, submit a complaint to the Labour Board; with respect to the last incident, the Claimant had the option of accepting the employer's offer to have someone work with him and if he still did not feel safe, he should have contacted the police regarding his personal safety concerns; work with him and remaining employed until he found a more suitable employment.

[56] The Employer submitted that …

a) the Claimant quit his employment when he did not return to work despite the employer asking him to come in and offer to have him work with someone else; the Claimant not only did not report to work on May 28, 2014 but every subsequent day since then; he also ignored the employer's attempts to contact him in the days thereafter; there was work at the employer given the season;

b) the text messages show that he called after the work day had started, did not ask to be off work even though he knew from the day before that the employer was not going to issue the no trespass notice and the employer expected him to come to work and that there was work to do; even if the Claimant interpreted the employer's message at 5:00 pm of "don't come in" at the end of the work day to mean that he was fired, the employer's message at 8:30 pm requiring him to call makes it very clear he was not fired;

c) the Claimant had several alternatives to quitting including obtaining a peace bond himself and/or meeting with the Crown attorney which he still has not done; regarding the unsafe workplace and overtime issues, he could have gone to the Ministry of Labour which he has done since he left; regarding the drugs and alcohol use in the workplace, the Claimant could have complained to the employer (he admitted the employer called him while he was driving) as per their zero tolerance policy and/or refused to drive; the Claimant was given every opportunity to discuss his concerns but chose not to come back to work.

ANALYSIS

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

[58] Sections 29 and 30 of the EI Act stipulate that a claimant who voluntarily leaves his/her employment is disqualified from receiving any benefits unless he/she can establish 'just cause' for leaving.

[59] The Member recognizes that it has been a well-established principle that just cause exists where, having regard to all the circumstances, the Claimant was left with no reasonable alternative to leaving pursuant to subsection 29(c) of the EI Act (Patel A-274-09, Bell A-450-95, Landry A-1210-92, Astronomo A-141-97, Tanguay A-1458-84).

[60] The Member however must first consider that it is incumbent of the Commission to show that the Claimant left his employment voluntarily. The onus of proof then shifts to the Claimant to show that he left his employment for just cause (White A-381-10, Patel A-274-09).

Did the Claimant voluntarily leave his employment?

[61] From the outset of the claim, the employer and the Claimant have held opposing positions regarding the reason for separation. On the one hand, the employer advised the Commission that the Claimant voluntarily left his employment when he did not report to work on May 28, 2014 and for several days/weeks thereafter without any contact or response to the employer's messages. On the other hand, the Claimant submitted that he was dismissed (or laid off) when the employer said to him "there was no work at the Marina, so do not return to work"

after he advised the employer he was going to the Labour Board. Given the opposing positions, the Member considered section 30 of the EI Act and case law for similar circumstances.

[62] The Member considered that section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by his/her employer by reason of one's own misconduct or voluntarily leaves his/her employment without just cause. In this case, as in the jurisprudence, the issue is whether a disqualification under subsection 30(1) of the Act is warranted, based on either of the two grounds for disqualification stated in this subsection, as long as it is supported by the evidence (Easson A-1598-92, Eppel A-3-95). Further, the Member notes that in both instances (a) the loss of employment is the result of the action(s) of the claimant and (b) the initial onus is on the employer and/or the Commission to show that the claimant lost his/her employment due to one's own misconduct or that he/she voluntarily left one's employment.

[63] In this particular case, the Member finds that for the reasons to follow, the Commission and the employer met the onus placed upon them to demonstrate that, based on a balance of probabilities; the Claimant voluntarily left his employment on May 28, 2014 and was not dismissed or laid off.

[64] First, the Member agrees with the Commission and finds that the evidence shows that it was the Claimant that initiated the separation from employment when he did not report/return to work on May 28, 2014 and for his subsequent scheduled shifts thereafter. It is undisputed evidence that given the time of year (beginning of the recreational boating season) the employer had work for the Claimant (GD3-23 and GD3-27). It is also undisputed that the evidence shows he did not contact or return to work beyond May 28, 2014 (GD3-23, GD3-24, GD3-27 to GD3-32). The Claimant confirmed at the hearing that he did not contact the employer after he received the employer's last text message at 8:30 pm to call him. The Claimant did not refute the employer's testimony that he knew that he was scheduled to work the rest of the week (he was off Mondays and Tuesdays and worked Wednesday to Sunday). The Member also finds therefore, that the Claimant did not miss only one day of work.

[65] Second, although from the outset the Claimant indicated that he did not quit his employment (GD3-9 and GD3-10); he was inconsistent as to <u>why</u> and <u>when</u> there was a separation of employment. Initially, before the Commission rendered it decision, the Claimant

repeatedly indicated to the Commission that he thought he was laid off and still employed until he received the invoice for his boat, received his ROE and saw his job advertised in June two weeks later (GD3-10, GD3-23 and GD3-247). When he applied for benefits, he indicated that he wanted the company to address his issues and expected that the employer call him to return to work when they were resolved (GD3-9 and GD3-10). To the Commission he also stated that he did not look for work prior to quitting because "I felt that I was still employed." (GD3-23). In another discussion he stated that the employer left him a message advising him that there was no work at the marina and that he does not have to come to work. He didn't call to see when he can return to work because "I thought I was laid off" (GD3-28). When asked why he didn't take a leave of absence until he got his personal issues in order, he stated "I consider this a leave" (GD3-32).

[66] After the Commission rendered its initial decision, the Claimant submitted that he was either laid off or dismissed when the employer left a voicemail message that there was "no work at the Marina so therefore do not return to work" (GD3-41, GD3-225 and GD3-228). He submitted that unlike another employee that was dismissed, the Claimant continued to be in possession of keys that were provided to him which strengthens his argument that he was laid off by virtue of the said voice mail message from the employer (GD3-225). He also questioned why this time (as they had done in the past) the employer did not indicate on the ROE that he was laid off with by indicating 'unknown' as the expected date of recall (GD3-41, GD3-225). He noted that the employer did not advise other employees that he had quit or been dismissed but that he was laid off (GD3-226).

[67] The Member therefore finds that the Claimant's initial, and adamant position regarding the reason for separation, was that he was laid off and that he remained employed expecting the employer to call him to discuss the unresolved issue(s). He submitted that the employer did not notify him of his employment status until he received his ROE in mid-July (GD3-228). This is contrary to the Claimant's present position before the Tribunal that in his mind (he knew) he was dismissed on May 28, 2014. The Claimant testified that he was dismissed on May 28, 2014 when the employer left him the same, said voice mail message "there was no work at the Marina, so do not return to work". He testified that he interpreted this employer's voice mail message and the employer's final text at 8:30 pm. stating that he wants to discuss the Claimant's behaviour "before I feel comfortable having you back at work" to mean that he was fired. The

Claimant testified that he did not call the employer or return to work because in his mind, he had been fired. The Member finds that the Claimant was also inconsistent as to when he knew he was terminated (or laid off). On the one hand, the Claimant testified he was dismissed on May 28, 2014 when employer told him he had no work at the marina. On the other hand, he submitted, and provided evidence that the first indication he had that he was no longer an employee was when he received the invoice on June 18, 2014, his job was posted June 28, 2014 (GD3-45 to GD3-48) and he received his ROE in mid-July (GD3-228).

[68] Thirdly, the Member considered the evidence by both the employer and the Claimant in support of their positions. The Member found that for the reasons to follow, more weight must be attributed on the consistent, supported evidence of the employer and the undisputed text messages between the parties on the day of separation, than on the much later voice mail message of the employer to the Claimant and statement to the Commission (GD3-249 or RGD4a and GD3-258).

[69] The Member considered the employer's position that the Claimant voluntarily left his employment on May 28, 2014 when he refused to come to work, did not return the employer's calls and made not further contact thereafter. The Member noted that the employer consistently stated to the Commission, and testified at the hearing, that he did not dismiss the Claimant; that they called him for meetings but he did not respond so they eventually (after 3 weeks) issued the ROE indicating that he quit (GD3-25, GD3-29 and GD3-30). The witness, P. R., supported his position by testifying that she called the Claimant 3 to 5 times to ask him to come to work. The employer's position is also supported by the undisputed text messages between the employer and the Claimant on the last day of work. The Member agrees with the Commission that this evidence shows that the employer repeatedly asked the Claimant to come to work and that they can talk when he goes in. The last text at 8:30 pm from the employer indicates that the employer left the Claimant a message at 5:00 pm to which he did not respond and that he requires a phone call from the Claimant to discuss his behaviour before he feels comfortable having him back at work (GD3-253 to GD3-257). The employer testified that he was expecting and hoping the Claimant would return the next day but the Claimant did not acknowledge this message. The Member disagrees with the Claimant that this last text message indicates that the Claimant was dismissed.

[70] The Member also considered the Claimant's position before the Tribunal that he was dismissed from his employment. The Claimant testified that he did not quit his employment and that he was dismissed when the employer called him on May 28, 2014 shortly after he threatened to call the Labour Board stating "There's no work at the Marina D. L. Do not come to work". The Member noted that the Claimant's interpretation of this voice mail message was rebutted by the employer's testimony that he did indeed call the Claimant near the end of the work day stating "there was no work for him, don't come into the Marina" he did not say "do not return", he said "do not come in". The Member noted that the employer's explanation was plausible given the events of the day and especially since he then followed-up at 8:30 pm with a text to the Claimant advising him to call the employer just in case he did not hear the message (GD3-257). The Claimant does not dispute the sequence of events. The Member finds therefore, that the employer's voice mail message to the Claimant does not confirm that the employer dismissed the Claimant.

[71] The Member also considered the Claimant's submission that the employer stated to the Commission, on February 11, 2015, that the Claimant was not fired in 2012 for going to the Labour Board and that they only dismissed the Claimant once and that was when he refused to show up at work in 2014 (GD3-258). Further, the Member considered that the Claimant also provided the recording and transcript of a message from the employer on December 22, 2014, where he informs that he received a call from either the WSIB or the Commission and that he told them the truth that "…you weren't laid off that we had to let you go because you weren't showing up for work, and for whatever reason" (GD3-249, GD6-7 and RGD4a).

[72] The Member understands that it is the Claimant's position that this latter evidence proves that he was dismissed. The Member however, placed little weight to this evidence because (a) the employer made these statements several months after the separation and (b) after he had already repeatedly confirmed with the Commission, at the time of separation, that the Claimant had quit his employment when he stopped showing up for work - which, by the way, this evidence also confirms. Further, at the hearing, when the employer was asked about his statement to the Commission, he stated that he recalls being in the car and stated that he would have to see the transcript when he confirmed they let the Claimant go when he failed to report to work. The Member placed more weight on the consistent, supported evidence of the employer at the time of the separation, the initial spontaneous responses of both parties to the Commission

before it rendered its initial decision and in particular, the undisputed text messages between the parties on the day of separation.

[73] The Member's consideration is supported by case law that states that: "An abundant and uniform case law has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision." (CUB 25154). The Federal Court has since confirmed the same that the Tribunal must not overlook a claimant's initial and spontaneous statements, as this can raise significant credibility issues (Bellefleur 2008 FCA 13).

[74] Finally, the fact that the Claimant did not give any form of notice to the employer is not evidence that he did not quit. In turn, the fact that the employer did not afford him the same treatment as other employees upon separation by providing him with written notification, phone calls, warnings, and suspensions or ask that he sign voluntary termination agreements does not prove he was dismissed. The Member notes that the employer's treatment of other employees (GD3-225 and GD3-226) is irrelevant as it is the actions of the Claimant that are under consideration and not that of the employer; the conduct of the employer is not a relevant consideration under section 30 of the EI Act (Paradis, 2016 FC 1282).

[75] The Member finds therefore, that for all these reasons, the Commission and the employer have met the onus placed upon them to demonstrate that, on a balance of probabilities, the Claimant voluntarily leaving his employment when he did not return to work on May 28, 2014 or any day thereafter.

Did the Claimant have no alternative but to leave his employment?

[76] Since the Claimant was found to have voluntarily left his employment, the onus of proof now shifts to the Claimant to show that he left his employment for just cause (White A-381-10, Patel A-274-09). In this case, the Member finds that the Claimant did not meet the onus of demonstrating that he was left with no reasonable alternative to leaving his employment when he did pursuant to paragraph 29(c) of the EI Act.

[77] The Claimant submitted that the reasons that he did not return to his employment was because of unresolved issues regarding (1) the unsafe working conditions and the employer's refusal to enforce its drug and alcohol policy (2) the ongoing issue of the employer's refusal to pay overtime and (3) the safety issue on the last day of employment regarding the employer's refusal to post a No Trespass Notice on the property.

[78] The Commission submitted that although the Claimant sited safety concerns regarding his working conditions and issues regarding the payment of overtime, he left his employment on May 28, 2014 because the employer failed to take the action he wanted regarding a personal matter i.e. the employer refused to post a no trespass notice against D. D. The Commission submits that the Claimant was aware of his working conditions when he was hired and exposed to them during his tenure of 5 years. The Claimant failed to show that he was in immediate danger due to the working conditions or that his work situation was so intolerable that he had no alternative but to abandon his employment without first exploring any other alternatives. Both the Commission and the employer submitted that the Claimant had several alternatives to leaving.

[79] The Member first considered that according to subsection 29(c) of the EI Act just cause exists if the claimant had no reasonable alternative to leaving, having regard to all the circumstances, including those listed in that subsection. Given the reasons the Claimant provided for not returning to work, the Member considered whether the Claimant had just cause for leaving his employment pursuant to paragraphs 29(c)(iv) - working conditions that constitute a danger to health or safety and 29(c)(viii) - excessive overtime work or refusal to pay for overtime work.

[80] The Member notes however, that only the facts that existed at the time the claimant left the employment must be considered when determining if one of the exceptions apply (Lamonde 2006 FCA 44). Further, it is not enough to simply show that one (or more) of the circumstance listed in paragraph 29(c) existed at the time that the Claimant left his employment. In order for the Claimant to show just cause for leaving his employment according to paragraph 29(c) of the EI Act, he must show that, given the circumstances, he had no reasonable alternative to leaving.

[81] In this case, the Claimant submitted that he was working in unsafe conditions. In support of his position he cited events that occurred in prior years on the job (GD3-226 and GD3-227).

The employer agrees that the nature of some of their work is dangerous; they do marine contracting and are required to provide survival suits, life jackets, ongoing training and to follow regulations (GD3-29). The Claimant further indicated that the he was exposed to a dangerous situation on May 24, 2014 (four days prior to leaving) while driving back from a worksite whilst two colleagues (both managers) smoked pot in the truck. The Claimant submitted that the use of illicit drugs at his place of employment was commonplace and that the employer was aware of the situation but refused to address the concern by enforcing its own policy. The witness, L. B. confirmed the Claimant's position although she had not witness illicit drug/alcohol use herself. She testified that as of August 28, 2013 there was a written drug/alcohol policy and that in December 2014 she wrote up a work refusal for an employee who refused to work for this reason. The employer testified that he was aware of drugs and alcohol use on the job but in order to terminate someone for violating their zero tolerance policy, they would have to investigate and obtain evidence. Regarding the incident on May 28, 2014, the Claimant testified that he did not stop the truck, contact the employer or refuse to drive and when the employer called him while he was driving, he did not say anything to the employer. The Claimant did not bring up the incident to the employer noting that he complained to the same colleagues at the time who were management. The Claimant testified that he did not report the incident to the Ministry of Labour.

[82] The Member finds that the Claimant has not provided evidence to show that he was working in unsafe conditions that required him to leave on May 28, 2014. Further, he has not shown that the employer refused to enforce its drug and alcohol policy as he claims because he did not make the employer aware of the incident. The Member finds that stating that he complained; to the management who, at the time, were the ones violating the policy, is not a fulfillment, but a deferral, of his responsibility to report an unsafe incident to the employer. Further, the incident in the truck occurred on May 24, 2014 and the Claimant returned to work thereafter on May 27, 2014 without advising the employer of the said incident. Even on the day of the occurrence, the Claimant did not take immediate measures to mitigate the dangerous situation such as refusing to drive (work), immediately advising the employer when he called and/or formally submitting a complaint to the employer thereafter. The Member therefore finds that the Claimant has not demonstrated that he was in any immediate danger on May 28, 2014 either because of his work conditions (he was to be cutting grass on the day he left) or because of illicit drug use at the workplace. The Member finds that since there was no urgency to leave for

these reasons, the Claimant had some reasonable alternatives to leaving including advising the employer of the policy violation so that an investigation can ensue and safe measure be taken. If the Claimant felt that the general working conditions were unsafe, again could discuss these with the employer and alternatively the Ministry of Labour. The Member finds that the Claimant did not consider or exercise any of these alternatives before quitting.

[83] Similarly, the Claimant did not show that the employment situation was so intolerable with respect to his concern regarding the non-payment of overtime that he had to leave on May 28, 2014 because he had no alternative but to do so. The evidence shows that this issue was ongoing over several years and does not show that there was a final incident in this regard at the time that he left on May 28, 2014. The Member acknowledges that the Claimant had concerns about the lawfulness of the way he was paid, or not paid, overtime when he worked for more than one company of the employer. The Member also noted that the Claimant's witness, L. B. confirmed how the hours were allocated depending on when, and for whom the Claimant worked in any particular week. The evidence shows however, that neither she nor the Claimant reported the issue to the Ministry of Labour. The Member finds that the Claimant did not have to leave immediately and put himself in an unemployment situation in order to address this concern. A reasonable alternative would be to discuss and/or formally request that the employer address/respond to the issue, if not to his satisfaction, the Claimant could have submitted a complaint to the Labour Board. The evidence shows that the Claimant filed a claim with the Ministry of Labour after he left his employment on November 27, 2014 (GD3-229).

[84] The Member agrees with the Commission that the incident that caused the separation of employment occurred on May 27 and 28, 2014 when the employer refused to post a no trespass notice against D. D. The Claimant submitted that he felt threatened by D. D. because he had a criminal record and an associate of his had uttered threats to him regarding a private matter (sold/stole his property). The Claimant testified at the hearing however, that although he informed the police of the theft, they indicated that they did not have sufficient evidence to lay charges. The Claimant testified that he did not lay private threatening charged against D. D. but simply avoided contact with him over the past two years despite living in the same town. The Claimant also confirmed that he did not (yet) meet with the Crown Attorney regarding this matter as he intended. The employer testified that D. D.'s father has a trailer at X across the river from the where the Claimant and the other employee were going to be working; the X is a

different property so the employer did not feel that the Claimant would be in the same area. The employer offered to have someone work with the Claimant if he felt threatened in any way. The Member acknowledges and understands that the Claimant may have legitimate reason to feel threatened by D. D. The Member finds however that the Claimant did not feel threatened enough by D. D. to lay threat charges with the police, or request that a peace bond or restraining order be issued. Instead, the Claimant expected that the employer address his concern, and submitted that it was workplace safety issue that can only be resolved by the employer posting of a no trespass notice. The Member finds that given the evidence, and the Claimant's own response to the alleged threat outside of work, there did not appear to be an immediate or real threat to the Claimant at the workplace. The Member finds therefore that not returning to work on May 28, 2014 and remaining off work thereafter, was not the only reasonable option or solution to his concern.

[85] The Member finds that in the absence of showing that he was in immediate danger or that his work situation was so intolerable that he had no alternative but to leave his job, he is expected to consider reasonable options including discussing solutions with his employer.

[86] The Member considered that it has been well established in case law that a claimant's dissatisfaction with one's work conditions, does not generally constitute just cause under the EI Act, unless they are so intolerable that the claimant had no other choice but to leave (CUB 74765). Otherwise, the Claimant is expected to take steps to remedy the situation (CUB 75263 and CUB 80908).

[87] In this case, the Claimant agreed at the hearing that he had made up his mind that he would only be satisfied if the employer issued a no trespass notice against D. D. The Member finds however, that this was not the only reasonable solution. The Member finds that even if the Claimant did not feel that the option of working with someone on May 28, 2014 was not reasonable/safe, he still had the very reasonable option of discussing his reasons with the employer. He testified that he did not call the employer to state why he did not feel safe working with someone else. The Claimant was invited by the employer on the last day, to call him to discuss his concerns. P. R. testified that she left him message both at home and on his cell, after he left, asking that he call and/or return to work. The Claimant confirmed that he did not call the employer. Further, in his submissions the Claimant indicated that he could have worked at another job site (GD3-226 and GD3-228) and the employer had suggested the same to the

Commission (GD3-27) which obviously was another reasonable option to leaving. Additionally, the Member finds that if the parties were unable to resolve this (and the other issues) together, there were other reasonable options such as remaining employed, but on an approved leave, while the Claimant considered his position and/or pursued assistance from the Labour Board. The Member finds therefore, that given the circumstances, the Claimant had several reasonable options to quitting.

[88] The Member's findings are supported by case law where the obligation, in most cases, is on the Claimant to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (White 2011 FCA 190; Murugaiah 2008 FCA 10; Hernandez 2007 FCA 320; Campeau 2006 FCA 376).

[89] Although the Member understands that the Claimant felt that he had good reason to leave his employment when he did. The Federal Court of Appeal however, has clearly held that good cause is not the same as just cause. The question is not whether it was reasonable for the claimant to leave their employment, but rather whether leaving the employment was the only reasonable course of action open to them, having regard to all the circumstances (Laughland 2003 FCA 129). The Federal Court has found that the words "just cause" in section 29 of the EI Act is not synonymous with "reason" or "motive". It is not sufficient for the claimants to prove that they were quite reasonable in leaving their employment. Reasonableness may be "good cause", but it is not necessarily "just cause" (Tanguay A-1458-84).

[90] The Member finds that, having regard to all the circumstances, the Claimant has not shown just cause for voluntarily leaving his employment on May 28, 2014, and as a result is disqualified from any benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[91] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Section 29 of the EI Act stipulates that 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.

Subsection 30(1) of the EI Act stipulates that 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.

Subsection 30(2) of the EI Act stipulates 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.