Citation: *RW v Canada Employment Insurance Commission*, 2024 SST 257

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. W.
Representative:	L. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (559045) dated December 13, 2022 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	In person
Hearing date:	February 27, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	March 11, 2024
File number:	GE-23-3529

Decision

[1] R. W. is the Appellant. I am allowing her appeal.

[2] The Commission hasn't shown that the Appellant voluntarily chose not to return to her job after a period of approved leave. This means she is not disqualified from regular Employment Insurance (EI) benefits, for this reason.

Overview

[3] The Appellant was working at X when the global COVID-19 pandemic occurred. X continued to operate during the pandemic, but the Appellant's hours of work were reduced, and she had concerns for her health. So, she asked her employer for a leave of absence.

[4] The Appellant's last day worked at X was March 12, 2020. She didn't apply for EI benefits or the Emergency Response Benefits at that time.[1] Instead she lived off her savings until November 19, 2020, at which time she applied for regular EI benefits. She established a benefit period effective November 15, 2020.

[5] On February 1, 2021, the Commission received an amended Record of Employment (ROE) from X, which states the Appellant quit her job. The Commission looked at the reasons why the Appellant stopped working. The Commission decided she voluntarily left her job without just cause. So, the Commission imposed a retroactive disqualification as of November 15, 2020. This decision resulted in a $19,500 overpayment of EI benefits.

[6] The Appellant disagrees with the Commission. She appealed to the Social Security Tribunal (Tribunal). Her appeal was initially heard by my colleague in the Tribunal's General Division. He dismissed her appeal on June 5, 2023, finding that she

[1] In March 2020, the Government of Canada created two types of emergency benefits in response to the COVID-19 pandemic. CRA administers the first benefit called the Canada Emergency Response Benefit (CERB). The Commission administers the second benefit called the Employment Insurance Emergency Response Benefit (EI-ERB).

voluntarily left her job without just cause. The Appellant appealed that decision to the Tribunal's Appeal Division.

[7] The Appeal Division Member found that my colleague made errors of law. He also found that the Appellant took a voluntary leave in March 2020. As a result, the Appeal Division Member returned the matter to the General Division to determine the issues set out below.

Matters I must consider first

Late documents

[8] In the interest of justice, I have accepted the submissions received from the Appellant after the, February 27, 2024, hearing.[2]

[9] During the hearing the Appellant requested permission additional time to submit evidence. Specifically, she indicated that she wanted to look to see if she could retrieve telephone records from her previous telephone provider and/or evidence of her medical condition.

[10] To uphold the principles of natural justice and procedural fairness, I gave the Appellant leave to make final submissions by email, no later than March 5, 2024. No submissions were received by that deadline.

[11] However, the Appellant sent a statement by email to the Tribunal on March 10, 2024. In this statement she explained how she was no longer with the same telephone provider and couldn't obtain verification of phone calls made to her employer. She also said it was difficult to obtain an opinion of her medical health back in 2020. She had indicated similar statements during the hearing. So, if the Commission had attended the hearing, they would have had an opportunity to respond to those submissions.

[12] The Appellant also said that she received a T4 from X for earnings in 2021. She argued this was evidence that the employer really hadn't had her as "guit," in their

[2] Section 42 of the *Social Security Rules of Procedures* state that after considering any relevant factor, the Tribunal may give a party permission to file documents after the filing deadline.

records. Issuing a T4 for income paid in 2021 is not in itself evidence that the Appellant didn't quit her employment. Rather, it is evidence that the employer reconciled their payroll and or paid out monies owed to the Appellant in that year.

[13] After consideration of the foregoing, I find there would be no prejudice to either party if the late submissions were considered.

Issues

[14] What was the period of voluntary leave?

[15] Did the Appellant have just cause for taking a voluntary leave in March 2020? If the Appellant didn't have just cause, should her voluntary leave result in a disentitlement or a disqualification?

[16] If the Appellant had just cause for taking leave, or was only disentitled for taking a period of leave, did she fail to resume employment in June 2020 or later?

[17] If the Appellant failed to resume employment, did she have just cause for doing so?

Analysis

Period of voluntary leave

[18] As stated above, the Appeal Division Member found that the Appellant took a voluntary leave in March 2020. Her last day paid was March 12, 2020.

[19] To determine whether the Appellant is entitled to regular EI benefits I must first consider whether her leave meets the two criteria listed below. Then I will have to determine whether she had just cause for the period of leave.

i) The period of leave was authorized by the employer; and

ii) the claimant and the employer agreed as to the day on which the claimant would resume employment.[3]

[20] The law says that the parties do not need to specify a particular date of return. Rather, an agreement on the period or length of the leave, may be enough.[4]

[21] During the February 27, 2024, hearing, the Appellant explained in detail how she began working at X shortly after she graduated high school. About nine months later, in August 2019, she applied to attend university in a neighbouring city. She moved to that city in September 2019, but she didn't start attending classes until September 2020. She continued to live in the neighbouring city while driving the hour and half to work at X between September 2019, to March 12, 2020.

[22] The Appellant said that when the global COVID-19 pandemic occurred, X remained open at reduced hours. Her hours were reduced as management was giving full-time employees priority for shifts to work. As her hours continued to be reduced during COVID, she said it was difficult to pay her bills and she was concerned about her health as she has a lung condition. So, she requested a leave of absence, which her employer approved.

[23] The Appellant testified that her employer didn't set a return-to-work date when she asked for the leave of absence. They had no return date in mind because no one knew how long COVID conditions and restrictions would be in effect. The Appellant asserted that the employer knew she was living in the neighbouring city, that she was planning on attending university, and she was looking for another job there. But they also knew she remained available to work prescheduled shifts.

[24] The Appellant explained how the employer posted their schedule on the wall, so if they changed her shifts from week to week she may not know when they were expecting her to work. This is because she lived so far away so she couldn't just pop in

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[3] See section 32(1) of the *Employment Insurance Act* (EI Act).
[4] In *Canada (Attorney General) v. Russell,* 2009 FCA 177, the Court determined that a leave of absence being granted for a period of one year was sufficient to meet the condition required by paragraph 32(1)(b) of the EI Act.

and look at the schedule. The employer also didn't call her in for last-minute shifts to cover employees who didn't show up for work because they knew it would take her over an hour to get there. So, she was available to work pre-scheduled shifts, to ensure she always made it to work as scheduled. She says she never missed any scheduled shifts.

[25] The Commission provided evidence of its September 14, 2021, conversation with the employer.[5] The employer confirmed the Appellant was on a period of leave from March 2020. The Commission documented that the employer said they tried to recall the Appellant in early June 2020, but she didn't return at that time. The employer said they never heard from the Appellant from June 2020 to March 13, 2021, so they considered that she quit and took her off the schedule permanently.

[26] The Commission also provided evidence of another September 14, 2021, conversation with the employer.[6] Again, the employer confirmed the Appellant went on a leave of absence in March 2020, due to COVID concerns. But this time the employer said that she "thinks" the Appellant expressed that she didn't want to return to work so they considered she quit.

[27] The Appellant disputes the employer's statements. She said that the employer never called her to return to work in June 2020. Rather, she recalls calling the employer twice, sometime around the time when the COVID restrictions were first being lifted. She says the fact that she didn't apply for benefits, in March 2020, is evidence that she considered herself to remain employed by X, but on a period of leave. When the employer failed to return her calls or offer her shifts, she applied for regular EI benefits on November 19, 2020.

[28] The Appellant readily admits that the employer knew she was living in another city, going to university, and looking for another job. So, she thinks it may be possible that the employer assumed she didn't want to return to work, but that isn't the case. She

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[5] See page GD3-25.
[6] See page GD3-20.

would have continued to drive the distance to work once the COVID restrictions were lifted if the employer gave her prescheduled shifts as they had done prior to COVID.

[29] As set out above, the Appeal Division Member found the Appellant was on a period of voluntary leave as of March 12, 2020. After consideration of the evidence before me, I find that the period of leave ended June 1, 2020. This is the date that the employer said they began recalling employees. This is also the approximate time that the Appellant agreed the COVID restrictions were starting to be lifted.

Has the Appellant shown she had just cause to be on an approved voluntary leave?

[30] Yes. I find the Appellant has shown she had just cause to be on approved leave.

[31] The law says that you are disentitled from receiving regular EI benefits if you voluntarily take a period of leave (leave of absence) without just cause. The disentitlement lasts until the Appellant loses or voluntarily leaves the employment.[7]

[32] In this case, I recognize that the Appellant didn't claim EI benefits during the period of her leave. This means there was no claim for benefits to impose a disentitlement during the period of leave from March 12, 2020, to June 1, 2020.

[33] As previously stated, the Appellant testified that she didn't apply for benefits in March 2020. That was because she thought she remained employed while on a leave of absence. Her claim for benefits didn't start until November 15, 2020, five months after her leave of absence ended.

[34] That said, when determining whether the Appellant has proven just cause for a period of leave, I must consider all the circumstances. I must also consider whether the Appellant chose to continue her absence from work, after the leave ended on June 1, 2020.[8] If the Appellant voluntarily chose not to return to work after the leave ended, without just cause, then she may be subject to a disqualification.

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[7] See section 32(1) of the EI Act.
[8] See sections 29 and 32 of the EI Act.

[35] The law explains what it means by “just cause.” The law says you have just cause to leave if you had no reasonable alternative to leaving your job when you did. It says you have to consider all the circumstances at the time the claimant took a period of leave.[9]

[36] The facts on file show that during the early stages of the global COVID-19 pandemic (March 2020 to June 2020), the Appellant’s employer told her they were going to give the full-time employees priority to work, so her hours would be significantly reduced, causing a significant reduction to her wages. Her employer knew she was commuting a long distance for work, so the Appellant said they didn’t call her in for last-minute shifts. Her employer was offering the full-time staff priority for the pre-scheduled shifts.

[37] The Appellant also argued that continuing to work in such close quarters with other employees, during those early days of COVID-19, put her health at significant risk because she has a pre-existing lung condition. She argued that the government was telling everyone to stay home. So, she asked her employer for a leave of absence.

[38] Both reasons presented by the Appellant are conditions set out in the EI Act, which may prove just cause for taking a period of leave, if the Appellant had no reasonable alternative but to take the leave.[10]

[39] I agree with the Commission that there is insufficient evidence to prove that the Appellant’s health was at significant risk in March 2020. I gave the Appellant leave to submit medical evidence to support that she had a pre-existing lung condition that would have put her health at risk if she continued to work during COVID. But she failed to provide such evidence by the March 5, 2024, deadline. She argued in her March 10, 2024, submission, that it would be difficult to obtain an opinion of her medical health back in 2020 because she wasn’t hospitalized at that time.

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[9] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the EI Act.
[10] See section 29(c)(vii) and 29(c)(iv) of the EI Act.

[40] After consideration of all the Appellant's circumstances, and the totality of the evidence before me, I find the Appellant has shown just cause for taking a period of leave. I accept that she had no reasonable alternative to take a period of leave once her employer decided to offer the pre-scheduled hours to the full-time employees, ultimately reducing the Appellant's hours to the point that her wages would no longer cover her expenses to get to work. This was a significant modification to her employment respecting her wages or salary, for which she had no reasonable alternative but to take a period of leave.[11] So, she voluntarily took a period of leave, with just cause, from March 12, 2020, to June 1, 2020.

Did the Appellant fail to return to work in June 2020?

[41] I find the Commission has failed to show the Appellant voluntarily chose not to return to work after her period of leave ended on June 1, 2020.

[42] The law states that when determining whether a claimant voluntarily left their employment, the question to be asked is whether the claimant had a choice to stay employed or to leave.[12]

[43] The Commission relies on statements made by the employer as to whether they called the Appellant to return to work. The employer told the Commission that she "thinks" the Appellant quit because there were no layoffs at that time. But in another telephone call the employer said she didn't have all the required information regarding how the Appellant's employment ended.

[44] I agree with the Appeal Division Member when he states the Appellant was a part-time casual employee, so the employer had no reason to place her on an involuntary leave or lay her off. Nor was there a reason for the employer to ensure she was put on the schedule because as a part-time casual employee she wasn't

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[11] See section 29(c)(vii).
[12] See *Canada (Attorney General) v. Peace,* 2004 FCA 56.

guaranteed any hours of work. I also recognize that the employer issued a ROE on April 8, 2020, stating she was on a leave of absence.[13]

[45] The Appellant said the employer issued the amended ROE on February 1, 2021, stating she quit, without talking with her first. They never asked her to return to work. She didn't learn that her employer said she quit until after she received the Commission's October 1, 2021, letter, and the Notice of Debt. So, I find there is insufficient evidence to prove the employer spoke with the Appellant to ask her to return to work.

[46] I favour the Appellant's version of events over the Commission's version. This is because the Appellant's testimony was credible. She gave her answers in a straightforward and direct manner. Her answers to questions about her statements were consistent.

[47] The Appellant has firsthand knowledge of whether the employer recalled her to work and whether she contacted the employer to return to work. She consistently said that she made efforts to return to work once the COVID restrictions were lifted. She called the employer and left at least two messages for a supervisor. But no one called her back.

[48] The Appellant said that her employer knew she was living in the other city, she was going to university, and she couldn't be available for last-minute shifts given the length of her commute. She readily admits that her employer knew she was looking for other work that was closer to her new home. But she says she would have returned to work for X if they called her to work because any amount of income would be better than no income. She consistently said that she never refused to return to work, and she never told her employer that she quit.

[49] After careful consideration of the evidence before me, I find the Commission has failed to prove that the Appellant voluntarily chose not to return to work after a period of approved leave. Instead, the evidence supports that it is more likely than not that the

[13] See the ROE at page GD3-16.

employer took the Appellant off the schedule during the period of leave, and then considered that she quit without speaking with her first. Accordingly, the Appellant is not disqualified from receiving regular EI benefits.

Conclusion

[50] The appeal is allowed.

Linda Bell
Member, General Division – Employment Insurance Section