Citation: *JJ v Canada Employment Insurance Commission*, 2023 SST 1951

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (511455) dated June 27, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Teleconference
Hearing date:	August 11, 2023
Hearing participant:	Appellant
Decision date:	August 22, 2023
File number:	GE-23-536

Decision

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

[2] The Appellant has shown that he did not voluntarily quit his job. This means he isn't disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant worked for five days then his job ended. He renewed his claim for EI benefits on August 6, 2019. On the application, the Appellant said that he had not worked since he completed his last application for benefits. The Canada Employment Insurance Commission (Commission) paid him benefits. The Commission received a Record of Employment (ROE) from the employer in the job that ended on July 26, 2019. The Commission investigated and decided that the Appellant had voluntarily quit his job and he had reasonable alternatives to quitting. So it wasn't able to pay him benefits. This decision resulted in an overpayment of $10,087.00.

[4] I must decide whether the Commission has proven that the Appellant voluntarily quit his job. If the Commission proves that, then I must decide whether the Appellant has proven that he had no reasonable alternative to leaving his job.

[5] The Commission says that the Appellant's claim that he did not quit is not credible based on information from the employer, and on the Commission not believing the Appellant's explanation of the ending of his job. The Commission also said that the Appellant could have remained on the job until he found a new job.

[6] The Appellant disagrees and states that the employer fired him. He did not quit.

Matter I have to consider first

The appeal did not include all the issues raised by the Appellant

[7] The Commission's initial decision in this appeal dealt with three issues. First, voluntarily quitting without just cause. Second, a penalty. Third, a notice of violation.

[8] The Appellant requested reconsideration of all three issues. The Commission reconsidered all three issues. It gave two separate reconsideration decisions. One dealt with the voluntary quitting issue. That is the decision involved in this appeal. The Commission also gave a separate reconsideration decision on the penalty and notice of violation issues.

[9] In his notice of appeal, the Appellant did not enclose either of the reconsideration decision letters. The reasons for the appeal focused mainly on the voluntary quitting issue. The reasons did briefly mention the penalty. The Commission decided that it would only deal with the voluntary quitting issue for this appeal. The rationale was that the employer could have access to the appeal documents. The Commission did not want to include the penalty and notice of violation issues to protect the privacy of the Appellant. The Commission did not tell the Appellant about this limitation on the appeal until the Tribunal requested an investigation and report on the two issues missing from this appeal. The Commission said it was prepared to prepare documents and submissions on those two issues on the filing of a separate notice of appeal. At a case conference on August 8, 2023, with the Appellant and the Commission representative, we discussed whether to merge the other two issues into this appeal on the voluntary leave issue, or whether to proceed with two different appeals to the Tribunal. The Appellant chose to file a separate appeal on those two issues. As a result, this appeal continued on the voluntary leave issue only.

Issue

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

[11] To answer this, I must first address the Appellant's voluntary leaving. Then if the Appellant did voluntarily leave his job, I have to decide whether the Appellant had just cause for leaving.

Analysis

The parties disagree about whether the Appellant voluntarily left his job

[12] The Appellant has been consistent that he did not voluntarily leave his job. He says that he was fired. The Commission says that he did voluntarily quit his job, based on the ROE and on a brief discussion with the employer. The Commission also challenged the credibility of the Appellant's explanation about his job ending.

[13] The test for deciding whether an employee has voluntarily left his employment is this: did the employee have a choice to stay or to leave? If the employee chose to leave, he has quit.[1]

[14] It is up to the Commission to prove on a balance of probabilities that the employee did voluntarily leave his employment. This means that the Commission has to show that it is more likely than not that the employee did voluntarily leave his job.[2]

[15] I find that the Appellant did not voluntarily leave his job for the following reasons.

[16] On his August 6, 2019, renewal application for EI benefits the Appellant answered "no" to the question "Have you worked since you completed your last application for Employment Insurance benefits?" That answer was incorrect. The Appellant had completed his last application for EI benefits in March 2019. He had worked for the employer in this appeal from July 22 to 26, 2019. In his testimony, the Appellant said the correct answer to the question was "yes". He did not know why he had answered "no". He also testified that he had stated on that application that he had been fired. The partial copy of the application does not have any information about the reason for the employment ending.

[17] The Commission relied on the ROE which stated that the Appellant had quit. The employer provided no comments on the ROE. The Commission also relied on its only conversation with one of the employer's human resources staff. That was on

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[1] *Canada (Attorney General) v Peace*, 2004 FCA 56.
[2] *Canada (Attorney General) v White*, 2011 FCA 190.

February 19, 2020. That person stated that the Appellant was hired for the afternoon shift, worked five days, then the Appellant said he could not work the afternoon shift. The employer offered him the midnight shift. The Appellant declined and resigned. The Appellant had agreed to working the afternoon shift when he was hired. There was no other information from the employer.

[18] The Appellant testified that the information from the human resources person is inaccurate, with the exception of agreeing to the afternoon shift and working for five days. At the end of the fifth day, the employer told him that there was no more work, and the employer would call him when it had work for him. He did not request the midnight shift. He wanted to stay on the afternoon shift. He did not quit.

[19] In a letter dated February 19, 2020, the Commission asked the Appellant to explain why he had left his job with the employer and why he failed to report this as required. The letter enclosed a form for the Appellant to use for his explanation and return to the Commission. In his testimony, the Appellant was not sure if he had received the letter and did not recognize the form. There is no completed form in the evidence.

[20] The Commission made its initial decision to disqualify the Appellant from receiving EI benefits for voluntarily leaving his job without just cause. The decision letter is dated February 16, 2022.

[21] In his request for reconsideration of that decision the Appellant stated that he had only worked 2-3 shifts and got fired for reasons he can't remember.

[22] The Commission had only one conversation with the Appellant. It focused mostly on the reasons for the Appellant's job ending. The Commission's notes on the conversation present the following confusing information on the circumstances of the end of the Appellant's employment.

a) It starts with the Appellant saying he did not quit. The employer did not call him back after a few days of work. When he went to the office a couple of weeks

later the employer told him that he did not work there anymore as he did not call for work.

b) Next, the Commission asked why the Appellant needed to call for work. He said that it was day-to-day, the employer having work on some days, but no work other days. The Commission asked why the Appellant did not call the employer if it was a requirement. He stated that the employer had to call him to work.

c) The Commission said the ROE showed the Appellant worked 50 hours in five days. That was evidence of continuous work, and not work on one day and no work on the other day. The Appellant said that on the sixth day he went to work but the employer told him that he did not work there anymore.

d) The Commission tells the Appellant of its conclusions based on his statement above: "…his statement is contradictory; initially he said that he was waiting for employer's call and after a couple of weeks he was told that he did not work there anymore. Now, after telling him about his work hours in 5 days he is saying that he was told on the 6th day that there was no work for him."

e) The Commission reviews the employer's statement about the afternoon and midnight shifts and the Appellant resigning. The Appellant says that the employer's statement is not correct. The Commission tells the Appellant "…the employer's statement is more concise and compact to his own statement."

[23] The Appellant testified in response to the statements in the Commission's notes, as follows.

a) That is partially correct. The Appellant did not call the employer, because at the end of the fifth day, the employer told him that there was little work for him the next week. The employer said it would call him when there was work. In the five days he did work, on three days he was busy doing his job duties, but on the other two days he was involved in make-work activities, such as sweeping. When he did go to the employer's premises two weeks later, he was not allowed into the building. The employer told him that there was no work for him. The

employer also said that he was no longer employed because he didn't show up for work. It was the employer's decision to end his job, not the Appellant's decision. He could not recall whether he told the Commission that he did not have the employer's phone number to contact them.

b) The Appellant's response has been covered in the previous paragraph.

c) This is incorrect. The ROE is wrong in stating that he worked 50 hours over five days. He worked eight-hour shifts, so he only worked 40 hours. His job was full-time and not through a temporary agency. The employer told him there was no work for him the next week, and it would call him to return to work. He had no idea where the reference to a sixth day, or the following day, came from. He was to work five days per week, Monday to Friday. At the end of the fifth day the employer told him there was no work the next week. He did not return on a sixth day to be told there was no work for him.

d) The references to a sixth and seventh day are wrong. The reference to waiting for the employer's call and contacting the employer a couple of weeks later are correct.

e) The Appellant was not sure how to respond to the claim that the employer's statement is more concise compared to the Appellant's statement.

[24] As the Commission stated in its Representations "The main consideration of this case falls on the credibility of the claimant and his statements." (GD4-2). The Commission sets out in that and the following six paragraphs its reasons for rejecting the Appellant's evidence. I will review those reasons in the following paragraphs.

[25] The first reason is that the Claimant did not disclose on his renewal application in August 2019 that he had worked for an employer after making his initial claim in March 2019. In his testimony, the Appellant said that he had worked for an employer between those dates. He did not know why he had answered "no". That stands as a challenge to the accuracy of his evidence.

[26] The second reason is the “inconsistent and contradictory answers” of the Appellant not supported by other evidence. These answers arose in his conversation with the Commission. The Commission says that the Appellant represents the employer as an employment agency offering only sporadic work, and that they would call him when there was work. Then he said that the employer said he was dismissed for not calling them for work. (GD4-3, paragraph 1).

[27] The claim that the Appellant misrepresents the employer as an employment agency does not stand up to scrutiny. First, it is based on one incident of the employer saying there was no work the next week, not on a pattern of work interruptions. The one incident is more consistent with a temporary lay-off from full-time employment than with a temp agency. The Representations ignore the Appellant’s statement in his Notice of Appeal that he worked full-time for the employer. He confirmed that statement in his testimony. The Representations also do not take into account the employer’s statement that the Appellant was hired for the afternoon shift. That statement tends to support the Appellant’s claim of full-time employment. The name of the employer is in the plastics industry, not in the temporary employment industry. The Appellant’s statement that the employer would call him when there was work is consistent with an employer recalling workers after a temporary lay-off. The Commission’s reliance on an employment agency may result from misreading the Notice of Appeal, at GD2-13, last sentence and GD2-15, first paragraph. The reference to being hired by an agency refers to a job the Appellant obtained in December 2019, after he worked for the employer involved in this appeal.

[28] The last sentence in GD4-3, paragraph 1, is that the Appellant said that the employer dismissed him for not calling them for work. That statement was made in the conversation with the Commission discussing the Appellant’s request for reconsideration. That request clearly states that he “…got fired for reasons I can’t remember.” In the conversation, the Appellant said that he did not quit. The Appellant has been consistent in this matter that he was dismissed, he did not quit.

[29] The Commission continues with the issue of inconsistent and contradictory answers in the second paragraph of GD4-3. It says that the Appellant's explanation is not logical. He appears to be trying to represent some sort of miscommunication between himself and the employer. The reference to miscommunication comes from the Appellant's Notice of Appeal. Inconsistently, the Commission does not cite the Notice's mention of full-time employment when discussing an alleged misrepresentation by the Appellant of the employer as an employment agency. The Commission continues that if there was a miscommunication, the evidence represents that it was the Appellant's responsibility to contact the employer to check in, but he neglected to do so for several weeks. The Commission does not state what evidence supports that statement. The employer's evidence is that the Appellant quit. If that was true, he would have no obligation to check in. The Appellant's evidence is that the employer said it had no work for him the following week, and it would call him. If that was true, he would have no obligation to check in.

[30] The Commission continues in the third paragraph of GD4-3. The Commission states that, when confronted by the ROE evidence, the Appellant admitted to working consistently for five days, but the employer suddenly stopped offering work on the sixth day and dismissed him on the seventh day. The Commission concludes "No explanation is given for the incredibly contradictory statements, and when confronted with the employer's version of events, the claimant simply states it was not true." The Commission does not identify the "incredibly contradictory statements". I have dealt with inconsistencies above and have not found them to be compelling.

[31] In the fourth paragraph of GD4-3 the Commission refers to the Appellant now arguing that he was hired full-time. The issue of whether he was hired full-time or through a temporary agency has been dealt with above. The Commission did not ask him if he was working full-time for the employer, or through a temporary agency. It only raised this issue in its Representations.

[32] The Commission continues at GD4-3, paragraph 5 respecting the evidence from the employer. The Commission makes a number of claims in support of the contents of

the conversation with the employer. It says that the employer was contacted relatively shortly after the job ended and offered a clear and concise explanation of the reason for the job ending. The job ended on July 26, 2019. The conversation with the employer occurred on February 19, 2020. The ROE was issued on August 1, 2019, five days after the job ended. The Commission spoke to the proper contact listed on the ROE. The employer's statement is clear. Unfortunately, the Commission could not contact the employer later to obtain the employer's response to the Appellant's statements about what happened.

[33] At GD4-3, paragraph 6, the Commission argues that based on the evidence and the balance of probabilities, the employer's statement would be considered the more credible and reliable evidence. The Appellant's evidence is inconsistent and contradictory. Several of his explanations do not coincide with the ROE evidence, though the Commission does not identify which explanations do not coincide with what on the ROE. The ROE and the statement from the employer are not supported by other evidence.

[34] Finally, the Appellant did not make his renewal application until August 6, 2019. His last day worked was July 26, 2019. That 13-day delay is consistent with the Appellant's evidence of waiting about two weeks before contacting the employer, or thinking he worked there for two weeks (GD3-28 and GD2-13 respectively).

[35] Based on the above review, I cannot find that the Commission has proven on a balance of probabilities that the Appellant did voluntarily leave his employment. The Appellant did not disclose his employment on the renewal application. There are inconsistencies in his statements about the details of his employment and the ending of that employment. The passage of time from July-August 2019 to receiving the Commission's decision letter in February 2022, may account for inconsistencies relied on by the Commission. The Appellant has been consistent throughout that he did not quit his job.

[36] The Commission's case rests largely on the ROE and the single brief statement from the employer on February 19, 2020. That same day the Commission mailed the

Appellant its letter seeking clarification of employment information. The Appellant did not respond. There is no record of the Commission attempting to contact him before it made its decision on February 16, 2022, to disqualify him from receiving EI benefits. The Commission had one conversation with the Appellant on June 8, 2022.

[37] As discussed above in paragraphs [23] to [33] in reviewing the Commission's reasons for discounting the Appellant's evidence, I have not been persuaded that the reasons succeed. A number of the reasons do not stand up to scrutiny. For example, saying that the Appellant represents the employer as an employment agency, rather than having a full-time job with the employer. Or with respect to miscommunication between the Appellant and the employer, and the Appellant having an obligation to contact the employer.

[38] Overall, I prefer the affirmed testimony of the Appellant over the brief statement from the employer.

Just cause

[39] Having found that the Appellant did not voluntarily leave his job, the issue of just cause for leaving does not arise. I will therefore not deal with it.

Conclusion

[40] I find that the Appellant isn't disqualified from receiving benefits.

[41] This means that the appeal is allowed.

Paul Dusome
Member, General Division – Employment Insurance Section