



Citation: *BN v Canada Employment Insurance Commission*, 2024 SST 447

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

Decision

Appellant: B. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (541115) dated October 21, 2022 (issued by Service Canada)

Tribunal member: Barbara Hicks

Type of hearing: In person

Hearing date: August 25, 2023

Hearing participant: Appellant

Decision date: March 1, 2024

File number: GE-22-4009

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant hasn't shown just cause (in other words, a reason the law accepts) for leaving his job when he did. The Appellant didn't have just cause because he had reasonable alternatives to leaving. This means he is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant was laid off from his job as a pressman at a printing company on January 28, 2022, due to a shortage of work. The lay off was expected to last 12 weeks. The employer issued a lay off letter to the Appellant, which stated among other things, that he was expected to return to work on April 22, 2022, without further notice, or sooner, on two days' advance notice.¹

[4] The employer issued a Record of Employment ("ROE") and provided the reason for separation as "shortage of work."² At the time of the lay off, there were supply chain problems affecting printing supplies, especially paper, due to the COVID-19 pandemic.³

[5] On February 9, 2022, the Appellant applied for EI benefits.⁴ The Appellant's reason for separation on the application for benefits was "shortage of work."⁵

[6] The employer attempted to recall the Appellant back to work earlier than expected, near the end of March 2022, after securing a contract to print ballots for the provincial election. The employer says the Appellant never responded to the employer's

¹ See GD3-23.

² See GD3-16. I will refer to this as ROE#1.

³ See GD3-29.

⁴ See GD3-13.

⁵ See GD3-7.

mail or phone messages or returned to work. The employer wanted the Appellant back at work on April 5, 2022.⁶

[7] The employer considered that the Appellant quit his job and issued an amended ROE dated April 29, 2022, which indicated that the Appellant was “not returning.”⁷

[8] The Commission decided that the Appellant voluntarily left (or chose to quit) his job without just cause, so it couldn't pay him benefits. The Commission says that the Appellant should have remained in communication with the employer and returned to work at the earliest opportunity. Alternatively, he should have looked for a new job before abandoning this one.

[9] The Appellant admits he was not happy about the lay off. At that point in time, he was already only working 4 days per week, but the employer wanted all the employees to temporarily work one day less per week for 3 months. This would mean that the Appellant would only work 3 days per week. He felt that since he was already working a shorter week than the others, he shouldn't have to reduce his work week even more.

[10] He says he felt singled out because he was the only one who was laid off. However, the employer indicated that everyone else agreed to the reduced work week so there was no need to lay anyone else off.⁸

[11] He also says his employer wanted to get rid of him because he was making a high hourly rate of pay. The Appellant says the employer asked him to quit.⁹

[12] The Appellant makes two opposing arguments in this appeal.

[13] First, the Appellant denies that he abandoned his job. He testified that, despite what the lay off letter says, he wasn't expected to return to work until March 14, 2023, which is approximately when he did eventually return to work. The Appellant says that

⁶ See GD3-29.

⁷ See GD3-18 and GD3-19. I will refer to this as ROE#2.

⁸ See GD3-39.

⁹ See GD3-33.

any inconsistency about the recall date was a mistake or a misunderstanding by the employer. He wants to be paid benefits from the beginning of the lay off.

[14] The Appellant also says that he was constructively dismissed and, as soon as he was laid off, he retained a lawyer to commence a lawsuit against the employer.¹⁰ Both the Appellant and the employer confirmed to the Commission that the Appellant had initiated a lawsuit against the employer.

Matter I have to consider first

Post-hearing document

[15] At the hearing, the Appellant's main argument to support his position that he didn't abandon his job is that there was a misunderstanding with the employer about the recall date and that the Appellant returned on the recall date as expected.

[16] I found this argument impossible to reconcile considering the documentary evidence in the file.

[17] Other than his own testimony, the Appellant's only other evidence to support his position is an amended ROE dated March 14, 2023.¹¹ ROE#3 had been filed with the Tribunal by the Appellant's lawyer in the wrongful dismissal lawsuit. ROE#3 referred to a recall date of March 14, 2023 and, in the comment box, the employer wrote "We want to amend the ROE S31053959 because it was issued in error."

[18] I raised my concern at the hearing about the abundance of contradictory evidence in the file that appears to indicate that the employer expected the Appellant to return to work on April 22, 2022.

[19] There is also evidence that the employer would have preferred that he returned to work even earlier, on April 5, 2022, after they landed a large contract and needed as many employees on hand as they could get. Aside from the employer's comment on

¹⁰ See GD2-5, GD3-25, GD3-27 and GD3-30.

¹¹ See GD9-5. I will refer to this as ROE#3.

ROE#3, there is nothing in the file to support the position that the employer made an error or even what the error was.

[20] The Appellant indicated at the hearing that that it was all a mistake or a misunderstanding and that he could get a letter from his employer, or an affidavit perhaps, addressing the contradictory evidence. The Appellant requested 3 weeks to be able to get such a document, which I allowed. Therefore, the deadline to submit the document was September 15, 2023.

[21] I told the Appellant that, once he submitted the document, I would decide if it was relevant and, if so, give the Commission an opportunity to respond to it.

[22] The Appellant contacted the Tribunal on September 8, to request a bit more clarity about what the employer needed to address.

[23] On the same date, I wrote a detailed letter to the Appellant identifying the issues that troubled me.¹² The issues included:

- Confirmation that the Appellant had returned to work and the date he returned.
- An explanation by the employer about the significant change in the recall date (nearly a year later) on ROE#3.
- An explanation by the employer about what the stated “error” was in the ROEs. What was the nature of the error and when did the employer realize the error?
- An explanation by the employer about the prior inconsistent statements about their efforts to recall the employee to help with the election ballot work.¹³

[24] On September 15, 2023, the Appellant contacted the Tribunal again and requested a 2-week extension of time to submit the document.

¹² See GD15.

¹³ See GD-15.

[25] On September 18, 2023, the Appellant submitted a document to the Tribunal.¹⁴ It was a letter dated September 13, 2023, from the employer's accounting manager. The letter confirmed that the first ROE was issued in error and says they corrected the "Reason for Issuing" code from "E" which is "quit" to code "A" which is "layoff/shortage of work." The letter confirmed that the Appellant was recalled back to work on March 1, 2023, and that he returned to work on March 6, 2023. The letter did not address any of the other items that I identified in my letter.

[26] I accepted the late document. The Tribunal provided a copy of it to the Commission and allowed the Commission a reasonable opportunity to respond. It did not respond.

Issue

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

[28] To answer this, I must first address the Appellant's voluntary leaving. I then must decide whether the Appellant had just cause for leaving.

Analysis

Did the Appellant voluntarily leave his job?

[29] Yes. I find that the Appellant voluntarily left his job, for reasons that follow.

[30] The Appellant says that he didn't quit his job. He says he was laid off due to a shortage of work and returned to work when the lay off was over.

[31] This conflicts with his own evidence that he was fired. He says that he was wrongfully dismissed and promptly retained a lawyer to sue his former employer for wrongful dismissal.

¹⁴ See GD17.

[32] The Appellant's positions don't make sense because they contradict each other. You don't sue your employer for wrongful dismissal if you believe that you are on layoff.

[33] To recap, the employer issued an ROE on February 4, 2022 indicating there was a "shortage of work." It then issued amended ROE#2 on April 29, 2022 indicating that the employee had "quit." Finally, it issued another amended ROE#3 on March 14, 2023 indicating that it was amending ROE#2 because it was issued in error. It doesn't explain what the error was. It includes a fresh "Expected Date of Recall" as March 14, 2023.

[34] An ROE is just one piece of evidence that can be used to determine the cause of the separation from work. When there are multiple ROEs and a variety of reasons for issuing them, I have to consider them all and determine what weight to give them, if any.

[35] Upon review of the evidence, I find the Appellant was separated from his employment because he failed to return to work when recalled.

[36] My findings are based on the following evidence:

- The original ROE and ROE#2 were issued contemporaneously with when events occurred. ROE#3 was issued long after the separation from employment. For this reason, I prefer the first two ROEs over ROE#3, and give them more weight.
- There is ample evidence from the employer that they tried to reach the Appellant in different ways to recall him back to work in March 2022.¹⁵ The Appellant didn't respond to the communication and didn't return to work. I find the employer's efforts to recall the Appellant back to work at that time to be consistent with what the lay off letter said.
- The lay off letter contained the following: "*IF work circumstances change at X, you MAY be called to come back earlier with 2 days' notice. IF you do not receive this*

¹⁵ See GD3-21.

call, your call back date will remain as stated above [being April 22, 2022] and again you will be expected to return to work without any further contact.”¹⁶

- The employer told the Commission on August 8, 2022, that the Appellant never returned to work on the expected return date of April 22, 2022, which date the Appellant knew about because it was contained in the lay off letter (which had been hand-delivered to him on January 27, 2022).¹⁷
- The Appellant testified and admitted in his materials that he had blocked his employer’s phone numbers so they wouldn’t be able to reach him.¹⁸
- The Appellant also told his employers on October 19, 2021, not to call or text him again.”¹⁹

[37] The fact that the employer was trying to recall the Appellant back to work is consistent with their original statement that the Appellant had only been laid off, not terminated.

[38] The Appellant’s argument that he was on a one-year-long lay off lacks credibility and is simply not supported by most of the documents in the appeal record.

[39] The employer’s story about what happened remained consistent during the Commission’s investigation. Furthermore, the fact that the employer issued ROE#2 shortly after the time when the Appellant should have returned to work is consistent with their statements that they had tried to recall him back to work.

[40] Pursuant to section 29(b.1)(ii) of the *Employment Insurance Act* (Act), voluntarily leaving your employment includes the refusal to resume employment when the employment is supposed to be resumed. In such cases, the voluntary leaving happens when the employment is supposed to be resumed.

¹⁶ See GD3-23.

¹⁷ See GD3-21.

¹⁸ See GD3-33.

¹⁹ See GD3-34.

[41] I find that the Appellant should have returned to work on April 5, 2022 when he was recalled. The disqualification should begin then. The Appellant could have resumed his employment then, but he didn't.

Did the Appellant have just cause for leaving?

[42] The Appellant has not advanced any arguments that he had just cause for leaving when he did. Rather, his position is that he was either dismissed or on lay off the whole time and returned at the end of the lay off period.

[43] The Commission says he had no just cause for leaving because he had reasonable alternatives. The Appellant could have returned to work when he was recalled or found another job before abandoning this one.

[44] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.²⁰ Having a good reason for leaving a job isn't enough to prove just cause.

[45] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you must consider all the circumstances.²¹

[46] It is up to the Appellant to prove that he had just cause.²² He must prove this on a balance of probabilities. This means that he must show that it is more likely than not that his only reasonable option was to quit. When I decide whether the Appellant had just cause, I must look at all the circumstances that existed when the Appellant quit.

[47] The Appellant says that he didn't voluntarily leave his job and that he was either on lay off or constructively dismissed. He hired a lawyer to pursue a constructive dismissal or wrongful dismissal lawsuit against the employer. Although I don't know the outcome of that lawsuit, it may be that the Appellant obtained relief in that forum.

²⁰ Section 30 of the *Employment Insurance Act* (Act) explains this.

²¹ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.

²² See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.

[48] I need not be concerned with that because constructive dismissal has no place in the Act. Whether a claimant has left their employment voluntarily and is entitled to benefits under the Act and whether the claimant has been constructively dismissed and is entitled to sue their employer are two different issues. The role of the Tribunal is to determine the former.²³

[49] The Commission says that the Appellant didn't have just cause, because he had reasonable alternatives to leaving when he did. Specifically, it says that the Appellant could have returned to work when he was recalled or found a new job before leaving this one.

[50] I find that the Appellant ignored the recall date of April 22, 2022, that was contained in his lay off letter.

[51] I further find that he intentionally made himself unavailable to be recalled earlier, on April 5, 2022, because he had blocked communication with his employer or ignored communication from his employer.

[52] The Appellant had reasonable alternatives. He should have maintained communication with the employer and returned to work when recalled or found another job if he didn't plan to return to this one.

Conclusion

[53] I find that the Appellant is disqualified from receiving benefits.

[54] This means that the appeal is dismissed.

Barbara Hicks
Member, General Division – Employment Insurance Section

²³ See *Canada v. Sulaiman*, A-737-93; *Canada v. Peace*, 2004 FCA 56.