Citation: *MM v Canada Employment Insurance Commission*, 2024 SST 620

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. M.
Representative:	Tisha Alam
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated February 9, 2024 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	April 30, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	May 29, 2024
File number:	GE-24-644

Decision

[1] The appeal is allowed.

[2] The Appellant voluntarily left her employment on **March 29, 2021**[1]. But she has proven she had just cause for voluntarily leaving, so she is **not** disqualified from receiving regular employment insurance (EI) benefits.

[3] The Respondent (Commission) must rescind the disqualification it imposed on the Appellant's claim and remove the overpayment created by that disqualification.

Overview

[4] The Appellant was employed as a seamstress at X (the employer).

[5] She worked there until March 16, 2020, when the employer's factory closed temporarily during the Covid-19 pandemic. She applied for EI benefits on March 19, 2020 and received EI ERB[2]. When the EI ERB program ended, her claim was converted to regular EI benefits starting on September 27, 2020.

[6] The employer subsequently issued a new Record of Employment reporting the Appellant quit after her last paid day on March 16, 2020.

[7] The law says you will be disqualified from receiving EI benefits if you leave your employment voluntarily and don't have just cause for doing so[3]. It also says voluntarily leaving includes refusing to resume your employment when recalled to work[4]. So the Commission investigated why the Appellant stopped working.

[8] The Appellant said the employer called her about coming back to work, but she was unable to report to work because of childcare issues. Her children were attending

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[1] Not on January 31, 2021 (as the Commission originally decided).
[2] EI Emergency Response Benefits.
[3] Section 30 of the *Employment Insurance Act* (EI Act) sets out this rule.
[4] See section 29(b.1) of the EI Act.

school remotely (online) due to the Covid-19 pandemic and they couldn't be left alone at home.

[9] The Commission decided the Appellant voluntarily left her job without just cause and imposed a retroactive disqualification on her claim starting from January 31, 2021. This created an overpayment of EI benefits on her claim, which she was asked to repay[5].

[10] The Appellant asked the Commission to reconsider its decision, but it maintained the disqualification on her claim. She then appealed to the General Division of the Social Security Tribunal.

[11] The General Division decided her appeal couldn't move forward because it was filed late. The Appellant appealed that decision to the Tribunal's Appeal Division (the AD). The AD decided the General Division made errors when it decided the Appellant's appeal was late. It sent the appeal back to a different member of the General Division to reconsider the late appeal issue and decide the voluntary leave issue if satisfied the appeal should proceed.

[12] The appeal was assigned to me. I decided the Appellant's appeal wasn't late, so her appeal would proceed[6]. The hearing on the voluntary leave issue was held by videoconference on April 30, 2024.

[13] I have to decide if the Appellant voluntarily left her employment when she was recalled and did not report to work. Then I must consider whether she had just cause for voluntarily leaving when she did.

[14] The Appellant says she was supposed to resume her employment on March 29, 2021, so this is the date the disqualification would run from if she is, in fact, disqualified for voluntarily leaving without just cause. But she submits she had no reasonable

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[5] See the Notice of Debt at GD3-34. See also the November 15, 2022 reconsideration decision letter, which explains that the Commission changed the dates so that the Appellant was not entitled to EI benefits starting from January 31, 2021 instead of March 15, 2020.
[6] See RGD04.

alternative but to decline to report to work when recalled, so she shouldn't be disqualified at all.

[15] The Commission says the Appellant voluntarily left her job when she didn't report to work when recalled. It submits she had reasonable alternatives which she didn't pursue. This means she hasn't proven she had just cause for voluntarily leaving and, therefore, isn't entitled to EI benefits starting from January 31, 2021.

[16] I agree with the Appellant. These are the reasons for my decision.

Issues

[17] Did the Appellant voluntarily leave her job at X? If yes, when did the voluntary leaving occur?

[18] Did the Appellant have just cause for voluntarily leaving when she did?

Analysis

Issue 1: Did the Appellant voluntarily leave her job? If yes, when?

Short answer:

[19] The Appellant voluntarily left her job on March 29, 2021, which was when she was supposed to resume her employment after being recalled from lay off and did not report to work.

The law:

[20] The law says you're disqualified from receiving EI benefits if you leave your job voluntarily and don't have just cause for doing so[7]. And, as stated above, **quitting is not the only way** to voluntarily leave an employment.

[21] The law[8] says voluntarily leaving an employment ***also includes***:

[7] Section 30 of the EI Act.
[8] Specifically, section 29(b.1) of the EI Act.

(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.

The evidence:

[22] The Appellant gave her testimony at the hearing with the benefit of an interpreter provided by the Tribunal.

[23] The Appellant testified that:

- She started working at X in October 2019. She worked full-time "sewing". Her shifts were Mondays to Fridays, from 8am to 4:30pm.
- She has 2 kids. They were ages 4 and 9 when she started at X.
- Her kids were in Junior Kindergarten and Grade 4 respectively, at a school that was less than 1.5 km away from the factory where she worked.
- They attended school from 8:40am to 3:20pm, Mondays to Fridays.
- Her routine was to drop her kids off with her neighbours on her way to work. These neighbours had kids at the same school. They would take the kids to school and pick them up at the end of the day. Her kids would then stay with the neighbours until she picked him up on her way home from work.

- When the Covid-19 pandemic started in March 2020, the X factory closed temporarily. The employer said it would call the employees back to work when the factory re-opened but told everyone to apply for EI benefits in the meantime.

- At the same time, schools closed for in-person learning and switched to online classes. This was very hard on the kids, and it was difficult to manage their online learning. She had to be there to help them log in and to assist the youngest one with various learning exercises.

- The next time she heard from the employer was a year later, on or about March 15, 2021[9], when the employer telephoned her and verbally asked if she was ready to return to work.

- She wasn't given a written notice of recall or a return-to-work date. She was only asked if she was ready to come back.

- She answered, 'Yes', but told the employer her kids were still doing school online and were too young to be left alone. She said she would need time to make childcare arrangements for them and then she'd be able to return to work as before.

- The employer told her that X now had 3 shifts: 7am to 3:30pm, 9am to 5:30pm and 11am to 8pm – Mondays to Fridays.

- Previously there was only 1 shift, from 8am to 4:30pm, Mondays to Fridays.

- She asked if she could be scheduled exclusively for the 7am to 3:30pm shift. Her husband worked at a restaurant from 9am to 6pm, so he could drop the kids off at school on his way to work and she could pick them up when school was over because she worked "less than 5 minutes away".

[9] The Appellant testified that March break was to take place March 15-19, 2021 and she was called just before it started.

- But the employer said the 7am to 3:30pm shift “was full”.

- The employer told her she should make her childcare arrangements. The employer also said they’d let her know if there was an opening for her to work the 7am to 3:30pm shift she wanted.

- She was unable to make childcare arrangements[10].

- In September 2021, schools re-opened for in-person learning and her kids returned to school. She was very happy and hoped to be called for work soon.

- On **October 15, 2021**, the employer sent her a letter by registered mail[11]. It said that employees had to be vaccinated to work, and that they had until **October 18, 2021** to submit their “Vaccine Declaration” to their supervisor or HR[12].

- The Appellant received the letter on **October 20, 2021** and signed the Vaccine Declaration the same day[13]. Her husband’s friend e-mailed it to the employer for her.

- As far as she understood, she’d provided proof of vaccination as the employer requested and was waiting for another phone call about coming in for work.

- But there was no phone call.

- On November 10, 2021, the employer sent her a second letter, this time by standard letter mail[14]. It said she had 5 business days to provide the employer with an update on her return-to-work status or she would be terminated[15].

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[10] The Appellant testified in detail about her attempts to find childcare, but this testimony is most relevant to Issue 2 so it is set out there.
[11] See RGD6-5 for the registered mail receipt.
[12] The letter is at RGD6-6.
[13] See RGD6-18 to RGD6-19.
[14] See RGD6-3 for the postage receipt.
[15] The letter is at RGD6-4.

- She didn't receive this letter until after the deadline to reply had expired, so she assumed she'd been terminated.

- There is a union at X, but they never reached out to her at any point. She didn't know she had rights as a unionized employee under a collective agreement.

- She has a grade 12 education from Sri Lanka.

- She began looking for other work and, in January 2022, started a new job in a restaurant.

[24] I accept the Appellant's testimony as credible in its entirety.

[25] She made an affirmation to tell the truth, and she was forthright and direct when she answered my questions. With the benefit of a comprehensive examination in chief by her legal representative and active adjudication during her testimony, the Appellant was able to provide important details about how the employer communicated with her about returning to work. Her statements made sense in the circumstances and were supported by the additional contemporaneous documents she filed prior to the hearing[16].

[26] I also cannot overstate the importance of the translation service provided by the interpreter at the hearing. This allowed the Appellant to ask for clarification of questions (when needed) and provide relevant responses. As the Appellant explained (when I asked why she didn't tell the Commission that the employer hadn't contacted her about returning to work until March 2021), she doesn't understand or communicate in English very well and is easily confused without someone to translate for her (as was the case when she was speaking with the Commission).

My findings:

[16] At RGD06.

[27] The evidence shows the Appellant didn't report to work after being recalled from lay off.

[28] The Appellant was laid off on March 16, 2020. The employer telephoned her a year later, on or about March 15, 2021, and asked her to come back to work. She said had to arrange for childcare before she could return to work. She tried to make suitable arrangements for the care of her 2 young children but was unable to do so. She never communicated a return-to-work date to the employer and did not report to work. In this way, she refused to resume her employment upon recall.

[29] I acknowledge the employer said it would contact the Appellant if a spot on the shift she wanted (7am to 3:30pm) subsequently became available. But this doesn't change the fact that when the Appellant was recalled on or about March 15, 2021, there were 2 other shifts available (9am to 5:30am and 11am to 8pm) and she didn't report to work.

[30] I therefore find the Appellant voluntarily left her employment at X by refusing to resume her employment when she was recalled to work after being laid off.

[31] I further find that her voluntary leaving occurred on **March 29, 2021** because that is when she would reasonably have been expected to report to work.

[32] In the November 10, 2021 termination letter, the employer states the Appellant had been absent since March 23, 2023[17].

[33] But I don't accept that she was supposed to resume her employment on March 23, 2023.

[34] The collective agreement provides that employees are allowed 5 working days to report for work after being notified of recall by registered mail or telegram[18]. I agree with Appellant's legal representative that there's no evidence the employer notified the

[17] At RGD6-4.
[18] See Article 11.06 of the Collective Agreement, as excerpted at RGD6-62.

Appellant of her recall by registered mail or telegram[19]. There was only a phone call on or about March 15, 2021. Nor is there any evidence the Appellant was given a specific return-to-work date or a deadline to report for work. If there was such a date, it's reasonable to expect the employer would have put it in writing.

[35] I find it far more likely that when the employer telephoned the Appellant on March 15, 2023 about coming back to work, she was given a couple of weeks to make the arrangements necessary for her to resume working.

[36] The collective agreement provides that employees are allowed to ask the employer to hold their job open for them upon being given notice of recall[20]. It was widely known schools had been closed during the pandemic. The Appellant told the employer her kids were at home attending school online and she would have to make childcare arrangements before she could return to work. In these circumstances, it's reasonable to conclude the employer would have agreed to hold the Appellant's job open for her beyond the standard 5-day deadline to report to work.

[37] I therefore agree with the Appellant's legal representative that the Appellant was expected to resume her employment on March 29, 2021, two weeks after the employer phoned her and advised that she was being recalled to work after the lay off.

[38] To summarize: I find the Appellant voluntarily left her employment on March 29, 2021 because that's when she was supposed to resume her employment after recall and didn't report to work.

Issue 2: Did the Appellant have just cause for voluntarily leaving her job?

Short answer:

[19] I note the Appellant is very good at keeping letters with the envelopes they came in. I believe the Appellant's testimony that the first time she heard from the employer after being laid off was by phone call on or about March 15, 2021.
[20] See Article 11.06 of the Collective Agreement, as excerpted at RGD6-62.

[39] Yes, she did. The Appellant has proven she had no reasonable alternative to voluntarily leaving her job on March 29, 2021 to care for her children.

The law:

[40] The law explains what is meant by "just cause". It says you have just cause for leaving if you had ***no reasonable alternative to leaving*** your job when you did.

[41] It is up to the Appellant to prove she had just cause[21]. This means she has to show it's more likely than not that her ***only*** reasonable option was to leave her employment when she did not report to work on March 29, 2021 after recall.

[42] When I decide whether she had just cause, I have to look at all of the circumstances that existed at the time she left her job[22].

[43] The law says you will have just cause for voluntarily leaving your employment if there was "an obligation to care for a child" **and** you had no reasonable alternative to leaving[23].

[44] It's a 2-part test: there needs to be an obligation **and** no reasonable alternative to leaving. So even if the Appellant had an obligation to care for her 2 children, she must still demonstrate she had no reasonable alternative to leaving when she did not report to work on March 29, 2021.

[45] In other words, she can't just make the choice to stay home and collect EI benefits[24].

The evidence:

[46] The Appellant testified that:

- She lives with her husband, their 2 kids, her mother, and her mother-in-law.

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[21] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.
[22] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the EI Act.
[23] Section 29(c)(v) of the EI Act.
[24] See CUBs 71653, 74592, and *Canada (Attorney General) v. Yeo*, 2011 FCA 26.

- Her mother is **74** years old, and her mother-in-law is **89** years old.
- Her mother is unable to use a computer and couldn't help the kids with the technology for online school.
- Her mother-in-law needs a personal support worker for her care. During the pandemic, her mother often had to help with her mother-in-law's care.
- Neither of these two women were capable of caring for the kids while they were at home attending school online.
- When the employer phoned her on or about March 15, 2021 and asked her about coming back to work, she said she would have to find childcare before she could return to work.
- She contacted the neighbours who had previously allowed her to drop off her kids before school and picked them up after school and kept them until she could pick them up[25]. She asked if they would be willing to re-start this arrangement, but they said, "No, because of Covid."
- Even with her limited English language skills, she reached out to other parents whose kids were in classes with her kids. She asked if they could keep her kids at their place before and/or after school, but they were also afraid of getting Covid and said No.
- She phoned the school and asked if she could send her kids to school. But the school said her kids were in school online and couldn't switch. They also said there was no one at school to supervise her kids while they participated online.
- She makes minimum wage and couldn't afford to hire a babysitter or to put her kids in daycare.

[25] See the Appellant's testimony at paragraph 23 above.

- Her husband is the primary breadwinner in the family. He works at a restaurant in Newmarket. They live in Scarborough. He leaves around 8am to start work at 9am, and often doesn't get home until 7:30pm. The only shift at the restaurant is 9am to close, so there was no other shift her husband could have worked.

- She tried her very best but was unable to find anyone who could look after the kids if she returned to work.

- Her only choice was to remain at home and care for the kids herself.

- She didn't phone the employer back because she didn't have childcare and was unable to work without it.

- She didn't make a personal choice to stay home with her kids. She was required to do so because she had no other options. She was fully vaccinated and wanted to work. Only her childcare obligations prevented her from returning to work when recalled.

- In September 2021, her kids went back to school in person. She hoped the employer would phone her to say the 7am to 3:30pm shift had an opening, because now she could take it[26].

- Instead, she was terminated – even though she was vaccinated and sent in proof to the employer when they asked for it.

- But she needs and wants to work, so after she realized she'd been terminated, she immediately started working in a restaurant.

[47] For the reasons set out in paragraphs 25 and 26 above, I accept the Appellant's testimony as credible in its entirety.

[48] With the benefit of simple, direct questions by her legal representative, active adjudication during her testimony, and an interpreter at the hearing, the Appellant was

[26] The Appellant explained how this would have worked in her testimony at paragraph 23 above.

able to provide important details about the efforts she made to find childcare after she was recalled to work. Her statements were sincere, made sense in the circumstances, and consistent with what she'd told the Commission previously[27].

My findings:

[49] I find the Appellant has proven she had an obligation to care for her kids instead of reporting to work after recall. This was **not** a personal choice.

[50] I am satisfied that the Appellant's presence was required at home to care for her kids. There were many unprecedented challenges when schools closed for in-person learning and classes went online during the Covid-19 pandemic. These included navigating technology and internet connections and maintaining attention and productivity during online classes. These challenges were especially difficult for parents and caregivers of young students – and the Appellant's children were very young at the time (ages 4 and 9). There was no one else residing at the home who could reasonably have been expected to manage and care for the 2 young children while they were attending school online. And none of the crucial supports the Appellant previously relied on for childcare outside of school hours (such as neighbours and other parents) were available to her.

[51] The Commission says the Appellant had 3 reasonable alternatives to voluntarily leaving her job. It says she could have asked the employer for a leave of absence or a shift outside of school hours. It also says she could have asked others in the home to provide childcare.

[52] I find the Appellant has proven she exhausted all 3 of these reasonable alternatives prior to declining to resume her employment after being recalled to work.

[53] The evidence shows that, upon recall, the employer switched from operating with 1 shift to operating with 3 different shifts. But each of the 3 shifts required the Appellant

[27] See GD3-27 and GD3-32.

to work part or all of the school day. So there was no shift outside of school hours for the Appellant to ask for.

[54] The evidence also shows that the employer effectively granted the Appellant an unpaid leave of absence. She wasn't terminated until November 2021, approximately 9 months ***after*** she was supposed to resume her employment in March 2021[28]. There is evidence the employer viewed the employment relationship as continuing because it went to the trouble of asking the Appellant to declare her vaccination status in October 2021[29] and to update her return-to-work status in November 2021[30]. So the Appellant's employment was preserved because she was effectively on an unpaid leave of absence when she didn't report for work after recall[31].

[55] Finally, the evidence shows there was no one else in the home who could have provided childcare while the Appellant was at work. I am satisfied that neither the Appellant's mother nor her mother-in-law was capable of caring for the children, especially while they were attending school remotely (online). The evidence also shows that, upon being recalled, the Appellant investigated several options for childcare outside the home. It's unfortunate she was unable to make any arrangements, but not surprising given that schools were closed for in-person learning at the time. Her efforts to find childcare were hindered by circumstances beyond her control.

[56] I can think of no other reasonable alternatives the Appellant could have pursued.

[57] I therefore find the Appellant has met the onus on her to prove she had an obligation to care for her 2 children **and** no reasonable alternative but to leave her job on March 29, 2021 to fulfil that obligation.

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[28] The termination letter actually refers to a provision in the Collective Agreement allowing the employer to grant unpaid leave of absence (see RGD6-4).
[29] See RGD6-5 and RGD6-6.
[30] See RGD6-4.
[31] I note that taking a leave of absence on March 29, 2021 instead of voluntarily leaving her employment on March 29, 2021 wouldn't have made any difference for the Appellant for purposes of EI benefits. This is because the law says you will be disqualified from receiving EI benefits if you leave ***or take a voluntary leave of absence*** from your employment without just cause (see section 32 of the EI Act).

[58] This means she has proven she had just cause for voluntarily leaving her employment at X on March 29, 2021, when she was supposed to resume her employment and did not report to work.

Issue 3: What does this mean for the Appellant?

[59] The Commission imposed an indefinite disqualification on the Appellant's claim starting from January 31, 2021 because it said she voluntarily left her employment at that time without just cause.

[60] But the Appellant has proven she was still laid off due to a shortage of work on January 31, 2021.

[61] The evidence shows she was recalled from lay off on or about March 15, 2021 and reasonably expected to report to work on March 29, 201. Since she did **not** report to work on March 29, 2021, this is the date the law considers her to have voluntarily left her employment – not January 31, 2021.

[62] The Appellant has also proven she had just cause for voluntarily leaving her employment at X on March 29, 2021.

[63] The evidence shows she had no reasonable alternative but to leave her employment at that time because she had an obligation to care for her children. This means she is **not** disqualified from EI benefits for voluntarily leaving without just cause.

[64] So the Commission must rescind the disqualification it imposed on the Appellant's claim as of January 31, 2021.

[65] It must also remove the overpayment created by that disqualification.

Conclusion

[66] The Appellant voluntarily left her employment at X on March 29, 2021, when she was supposed to resume her employment after recall and didn't report to work.

[67] But she has proven she had just cause for voluntarily leaving when she did. This means she is **not** disqualified from receiving regular EI benefits.

[68] The Commission must rescind the disqualification it imposed on her claim as of January 31, 2021. It must also remove the overpayment created by that disqualification.

[69] The appeal is allowed.

Teresa M. Day
Member, General Division – Employment Insurance Section