Citation: *9257-9499 Quebec Inc. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 54

Appeal #: GE-13-2032

BETWEEN:

9257-9499 Quebec Inc.

Appellant
Employer

and

Canada Employment Insurance Commission

Respondent

and

S. C.

Employee

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Alyssa Yufe
HEARING DATE:	June 10, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

The Appellant employer was the only person in attendance. The Tribunal was satisfied that the Employee had received the Notice of Hearing and it proceeded in the absence of the Employee pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* SOR/2013-60.

DECISION

[1] The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal") finds that the Employee voluntarily departed his employment without "just cause" as that term is understood in accordance with the Act and the jurisprudence. The employer's appeal is, accordingly allowed.

INTRODUCTION

[2] The Employee filed an initial claim for benefits on July 25, 2012 (Exhibit GD3- 4). The Employee's claim was effective July 8, 2012 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on August 17, 2012 to approve the Employee's claim because it considered that the Employee voluntarily departed from his employment with just cause (GD3-30 to 31).

[4] The Appellant filed an appeal to the Board of Referees on September 14, 2012.

[5] On January 29, 2013, a panel of the Board of Referees determined that the Employee voluntarily left his job with just cause pursuant to sections 29 and 30 of the Act (GD2-21 to 23).

[6] The Appellant appealed that decision to the Office of the Umpire on January 31, 2013 on the basis that the Board of Referees rendered a decision in the Appellant's absence and that the Appellant was unable to attend because he had problems with traffic and his car (GD2-26).

[7] The appeal was then transferred to the appeal division of the Social Security Tribunal pursuant to section 266 to 268 of the *Jobs, Growth and Long-Term Prosperity Act* of 2012.

[8] The appeal division of the Social Security Tribunal held that there should be a new hearing before the Tribunal (General Division) in accordance with the principles of natural justice. (GD-2-4)

History of the file at the Tribunal (General Division)

[9] The Tribunal sent the parties the Notice of Hearing dated February 7, 2014.

[10] The Employee did not attend the hearing on February 25, 2014. On March 6, 2014, an adjournment was granted and a new Notice of Hearing for a hearing on April 29, 2014, was sent to all of the parties directly since it was clear to the Tribunal that the Employee's representative did not inform the Employee of the outcome of the Appeal Division's decision or the Notice of Hearing and may have ceased representing.

[11] On April 11, 2014, a letter from the Employee's former representative was sent to the Tribunal advising that it was no longer representing the Appellant.

[12] On April 28, 2014, the Case Management Officer of the Tribunal assigned to the file (the "Officer"), contacted the parties by telephone to remind them regarding the in- person hearing, which was scheduled for the next day. At that point, the Employee advised that he would not be at the hearing because he could not retain counsel. The Officer then advised that the Employee did not require representation in order to appear at the hearing and that the Employee can request an adjournment in order to find a lawyer. The Tribunal adjourned the hearing to June 10, 2014 by way of a new Notice of Hearing dated May 13, 2014. The adjournment was made in anticipation of receiving the Employee's request for an adjournment in writing. The request in writing was never received.

[13] On June 9, 2014, the Officer attempted to contact the parties to remind them of the in-person hearing for the following day. The Officer was not able to get in touch with the Employee because he did not have a voice mail system and did not answer the telephone.

[14] On June 10, 2014 at 7.29 am, the Officer telephoned the Employee in order to remind him of the time and date for the hearing. The Employee advised that he just returned from work and would "try to attend the hearing".

[15] After having reviewed the Officer's advice and the signed receipt (dated May 14, 2014) for the Notice of Hearing, the Tribunal was satisfied that the Employee received the Notice of Hearing. As such, the Tribunal proceeded to hear the matter with only the Appellant in attendance.

FORM OF HEARING

[16] The hearing was heard in person for the reasons indicated in the Notices of Hearing dated February 7, 2014, March 6, 2014, and May 13, 2014.

ISSUE

[17] Whether or not the Employee voluntarily left his employment with just cause pursuant to paragraph 29(c) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")?

THE LAW

[18] Section 30(1) of the Act provides for an indefinite disqualification when a claimant voluntarily leaves his/her employment without just cause. It provides as follows:

30. (1) 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.

[19] Subsections 30(2) and (3) specify the following regarding the effect of the disqualification:

> (2) 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.
>
> (3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

[20] Subsection 29(c) of the Act provides that just cause is held to exist where the claimant had no reasonable alternative to leaving or taking leave, having regard to all of the circumstances, including, the circumstances which are enumerated in subparagraphs (i) to (xiv) of subsection 29 (c), which provide as follows:

> (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,
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> (viii) excessive overtime work or refusal to pay for overtime work,
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> (ix) significant changes in work duties,
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> (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
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> (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.

[21] According to the jurisprudence, the Commission first has to prove that the claimant voluntarily departed from his or her employment on a balance of probabilities. Once the voluntary separation has been established, the burden then shifts to the claimant to prove just cause on a balance of probabilities. To prove just cause, the claimant has to prove, that having regard to all of the circumstances, s/he had no reasonable alternative to leaving the employment when s/he did. (*White*, 2011 FCA 190; *Patel* 2010 FCA 95; *Rena Astronomo* A-141-97).

EVIDENCE

[22] The Employee applied for regular employment insurance benefits ("EI Benefits") on July 25, 2012 (GD3-21) and advised as follows: He worked for the Appellant from February 20, 2012 to July 1, 2012; He quit because of a personal conflict with his boss, "SM"; He worked alone in a restaurant and rarely interacted with others; The personal conflict did not begin after a specific event; The last two months were very trying; The Employee worked alone on Fridays and "SM" criticized his work; He had to prepare food and then "SM" insisted that he should also take out the garbage and wash the floors; "SM" said that it was the cook's job to do these things even though it was the deliverer's job; "SM" bullied him and another employee in the last few weeks; There were things that happened at the restaurant, which he did not want to witness; "SM" was always drunk; The Employee could not discuss the situation with anyone in a position of higher authority because there was no one above him; There was no union and he had a fear of retaliation so he did not consult outside agencies; He did not request any sort of transfer because there was only one restaurant; and, He went to look for work at other restaurants in person and responded to an ad prior to quitting (GD3-2 to GD3-22).

[23] According to the record of employment ("RO E") dated July 17, 2012, the Employee worked at "9257 Quebec" from February 20, 2012 to July 1, 2012. The reason for issuing the ROE was listed as Code "E" (GD3-23).

[24] On August 16, 2012, the Commission noted that the Employee advised as follows: He decided to leave his job voluntarily because he had an antagonistic relationship with the restaurant owner; The employer even asked him to step outside for a fist right just before he

decided to leave his job; He repeated his advice regarding taking out the garbage and mopping the floors; "SM" would get angry when he washed the floor and he missed a spot; The Employee believed that the new owner just did not like him; On Friday, night, which was the busiest night, the new owner would send everyone home at 8:00pm and left him alone to do everything, including, emptying the garbage and washing the floor; He would see all of the other employees laughing and drinking with the boss outside; He did not even have time to go to the washroom; The new owner was often drunk when he was at work; He did not complain to the labour standards board because he feared retaliation; He applied for new jobs and they did not work out; He was depressed and could not stand it any longer (GD3-24 and 25).

[25] On August 16, 2012, the Commission noted that the "SM" of the employer advised as follows: The Employee decided from one day to the next not to return to work; He would come to work under the influence of drugs and alcohol; He was the best cook but he had a lot of problems; A lot of people can attest that the Employee was in the bathroom or on breaks about 10 times a day; The Employee lied about his absence; He did not come to work on June 30, 2012 and called to say that his father had a heart attack; The next day he arrived at work and said that he had to leave two hours early to visit his father in intensive care; Two days later, he came to pick up his 6% vacation pay; The employer knew the Employee's brother and heard that the father did not really have a heart attack; Since the employer took possession of the restaurant on February 20, 2012, the deliverers had to wash the back of the restaurant; The waiters took care of their sections and the cooks were responsible for keeping the kitchen clean; The Appellant also mops up the floor; He did not have an antagonistic relationship with the Employee; When they had to discuss something, they would go outside so that they would not talk in front of the other employees; He let the other cooks go on Friday night at 8:00pm because the busy period was from 5:00 to 7:00pm (GD3-26 and 27).

[26] On August 17, 2012, the Commission noted that the Employee advised as follows: He does not drink alcohol or take drugs; He denies taking 10 breaks a day or going to the bathroom; On the contrary, he did not have time to take any bathroom breaks; His father went into the hospital on June 29, 2012 in the evening because he did not feel well and he

underwent bypass surgery for blocked arteries; The new owner never told him that there were respective sections for washing the floor; In the summer period, most of clients came to the restaurant between 7:30 and 8:00pm; The new owner dismissed a server, "N" and orchestrated her dismissal even though she was a good employee and had worked there for 6 years (GD3-28 and 29).

[27] The Appellant filed the Notice of Appeal to the Board of Referees on September 14, 2012 and gave the following evidence: He does not mind if the Employee gets employment insurance benefits but he will not be used as a scape goat (GD3-32).

Testimony at the Hearing:

[28] The Appellant testified under solemn affirmation and advised as follows:

[29] The employer numbered company purchased the restaurant from its previous owners in or around February 15, 2012 and "SM" became the manager of the restaurant. ("SM" is the employer's representative and is referred to herein as the "Appellant" for the sake of simplicity).

[30] The Employee had been working at the restaurant for a few years prior. The Appellant does not disagree with the Employee's advice to the Commission that he was working there for three years.

[31] The Appellant had experience managing a reception hall prior to becoming manager of the restaurant. The restaurant was a fast food restaurant, which also had tables and waitresses. The Appellant and his brother started to work there after the restaurant was acquired.

[32] There were about 5 cooks and each of them would cook and prepare the food on the spot as it was ordered.

[33] The busy period was from 5 to 8 pm. This was the case even in the summer. There was never any rush after 8pm. This is the way that it is in the industry and the way that it still is

today. He always arranged to have 4 cooks present and working during the busy period. The shifts were from 11am to 8pm, 5pm to 9pm, 5 to 8pm, and 5 to 11/12pm.

[34] The Employee always worked the 5pm to 11pm/12pm shift. He worked these hours prior to the Appellant's arrival and thereafter. His hours were not changed.

[35] He did not know the Employee personally prior to taking over the restaurant. His father and brother worked in the construction industry and knew the Employee's brother.

[36] The Appellant advised that he did not have a bad relationship with the Employee.

[37] Only 1 other person quit the employment and this was because she wanted to be paid in cash and the Appellant would not agree to do that. There was one waitress, "N" who was fired right before the Employee departed. The Appellant advised that "N" had worked there for 6 years and that she had a bad attitude and was rude to customers and was not doing her work. He also said that there were other allegations, which he preferred not to get into. He said that the outcome was in his favour regarding a Normes du Travail (the provincial employment standards office) complaint, which "N" had made against him.

[38] The Employee was a good Employee and cook for the first few months. Then, he burned his hand and took a few weeks off while on CSST.

[39] The Appellant was not there when the Employee burned his hand but he understood from the other employees that the Employee was drunk when he burned his hand.

[40] When the Employee came back from his CSST leave, he advised the Appellant that he had personal problems at home involving his spouse and other issues.

[41] The Appellant noticed that the Employee would be drunk and he suspected that he consumed drugs in the bathroom during work. The Appellant advised that on one or two occasions, the Employee arrived at work inebriated and he was not able to really move or work so the Appellant had to send him home.

[42] The Appellant denied the Employee's advice to the Commission that the Appellant was ever drunk at work. He said that it appeared that the Employee accused the Appellant of everything that the Appellant had alleged regarding the Employee's conduct.

[43] The Employee would ask to leave at 10.30pm to purchase beer at the depanneur nearby prior to the shift ending because the depanneur would cease selling alcohol by 11.00pm. The Appellant would agree to this request and then would see the Employer drinking from a 40 ounce bottle of alcohol by 10.40pm in the alley. This happened on a few occasions. The Appellant would reprimand the Employee and tell him that he was not permitted to drink alcohol while working.

[44] With respect to the allegation regarding the consumption of drugs, the Appellant advised that he saw an empty bag in the toilet of the restaurant bathroom and that after he asked all of the other employees about it, he was sure that it was the Employee's because the other employees told him this and because he saw that the Employee was the last person to use the bathroom when he found the bag there. When he confronted the Employee regarding this allegation, the Employee argued that it belonged to the other employees.

[45] Contrary to what the Employee alleges regarding the business picking up and the restaurant becoming busy only at 7.30 or 8.00pm in the summer months, the Appellant repeated that the busy period was from 5pm to 8pm and that the Employee only worked later than the other cooks because he had always worked the last shift.

[46] With respect to the Employee's allegation that the Appellant forced him to take out the garbage and mop the floor when these items were not part of his job description, the Appellant advised that all of the cooks were required to do the same functions and that he instituted changes when he became the manager.

[47] The Appellant explained that prior to his arrival, there was no owner or manager present at the restaurant and that it was a "free for all". He said that the restaurant was near bankrupt and that changes were necessary. The Appellant explained that he did not change everything right away and that the changes were made in increments so as not to upset the employees. The Appellant also explained that when he first came into the restaurant, he

cleaned out 3 bags of grease from the kitchen and that he wanted to avoid this kind of mess build up in the future by having the employees clean the restaurant consistently and regularly. The Appellant explained that even he mopped and swept the floor and cleaned up the area after he finished cooking regularly. The Appellant advised that he works there 7 days a week.

[48] The Appellant added that he did not know that the Employee was dissatisfied with anything at work because he never complained to him or anyone else about it.

[49] The Appellant advised that the heart attack, which the Employee claimed his father suffered never happened and that the by-pass surgery, the Employee referred to when he spoke to the Commission occurred a few years ago. He stated that the representations of the Employee in this regard to him and then to the Commission were outright lies. The Appellant knew this to be true because his father and his brother knew the Employee's brother and they made inquiries and reported back on this.

[50] When the Tribunal asked the Appellant, why the Employee would have made up a story regarding his father and his health when the Employee would have known that this was something, which his employer could easily verify, the Appellant advised that he suspected he did this because he had no other reasonable excuse for having missed work on the days in question without notice.

[51] The Appellant also advised that he understood that someone came into the restaurant from the restaurant Deli Plus, a few days earlier and encouraged the Employee to apply for a job there instead. The Appellant suspects that the Employee went to apply for the position at Deli Plus and that is where he was when he did not come into work on the days in question. The Appellant also understands that the Employee did not secure the job at Deli Plus before leaving and did not have a job offer at Deli Plus before leaving or at any point in time.

[52] The Appellant advised that the Appellant did not ever commence a proceeding or complaint against him with the Normes du Travail (the provincial employment standards office).

SUBMISSIONS

[53] The Appellant employer submitted that the Employee did not have just cause for voluntarily leaving his employment for the following reasons:

a) All of the Employee's claims are false and he is willing to argue in front of a judge (GD3, GD2)(testimony);

b) The Appellant and Employee did not have an antagonistic relationship (GD3, GD2)(testimony);

c) The Employee did not show up to work and lied about his absence (GD3, GD2)(testimony); and,

d) The changes he made regarding the mopping of the floor were reasonable and the changes, which he made to the work hours of the other employees were justified (GD3 and testimony).

[54] The Respondent submitted that the Employee had just cause for the following reasons:

a) The legal test is whether, having regard to all of the circumstances, the Appellant had a reasonable alternative to leaving his employment (*Tanguay* A-1458-84, *Astronomo* A-141-97)(GD3-35); and,

b) "When there is a contradiction in the statements/ and or events, the benefit of the doubt is given to the [claimant]" (GD3-35).

[55] The Employee submitted that he had just cause for voluntarily leaving his employment for the following reasons:

a) He had an antagonistic relationship with his employer; (GD3);

b) He tried to find other work prior to leaving (GD2 and GD3); and,

c) He had become depressed and could not complain to any other authority because there was none. There was no union and he feared retaliation from his boss if he complained to the "Labour Standards Board" (GD3).

ANALYSIS

[56] It has long been held that the rationale for the general rule, that employees who voluntarily terminate the employment relationship are not entitled to employment insurance benefits, (save and except for in the exceptional circumstances enumerated in the legislation), is that the Act is in essence "insurance" against involuntary unemployment and that an essential rule of insurance is that an "assured shall not deliberately create or increase the risk" (*Crewe* (1982) 2 All E.R. 745 per Lords Donaldson and Denning.) (*Tanguay* A-1458-84).

[57] This rationale is also reflected in the *dicta* of Pratte J. in *Tanguay*, wherein he stated that to prove "just cause" the claimant must satisfy the Tribunal that s/he had no reasonable alternative than to place "himself on the roles of the unemployed for insurance purposes". (*Tanguay* A-1458-84, Pratte J.). Proving that there was no reasonable alternative at the time of the departure, is a requirement of the test for just cause and is written into subsection 29 (c) of the Act.

[58] The law is clear that the employment insurance scheme is not intended to be used to subsidize employees who depart voluntarily for personal reasons and create risks for reasons which do not amount to just cause (*Lanteigne* 2009 FCA 195).

[59] The Tribunal finds as a fact that the Commission has proven on a balance of probabilities that the Employee left his employment voluntarily. This fact was admitted by the Employee (GD2, GD3). The burden has now, accordingly shifted to the Employee to prove that he had just cause for voluntarily leaving his employment (*White*, 2011 FCA 190; *Patel* 2010 FCA).

[60] After reviewing the evidence in the file and the submissions of the parties in the file and after hearing the Appellant's direct *viva voce* testimony, the Tribunal finds that the Employee voluntarily departed his employment without just cause.

[61] The Tribunal accepts the Employer's evidence on the contentious points because the Appellant's evidence was cogent, consistent, and reliable throughout the file and the hearing. The Tribunal also finds that the Appellant's answers and explanations to the Tribunal's questions were similarly logical and consistent.

[62] With respect to the Employee's submission that he voluntarily departed because there was antagonism between him and the Appellant, the Tribunal does not find that anything in his relationship with the Appellant amounted to antagonism as that term is understood in accordance with paragraph 29(c)(x) of the Act. This is because the presence of antagonism was not established on a balance of probabilities nor was it established that the Appellant was not primarily responsible for any such alleged antagonism.

[63] To the contrary, the Tribunal finds that the Appellant explained that until the Employee made the decision to leave voluntarily without notice, the Appellant had a good relationship with the Employee. The Tribunal can accept, however, that the relationship may have been strained because it also accepts the Appellant's submissions and testimony that towards the end of the employment, the Employee arrived to work in an inebriated state and had to be sent home on a few occasions, the Employee would drink at work and may have consumed drugs or illegal substances during work hours and on the work premises. The Tribunal finds that in these circumstances, it can hardly be said that if the relationship was strained, that the Employee was not primarily responsible for it.

[64] With respect to the allegation of the Employee, that he was required to carry out tasks which were not in his job description or to work excessive hours, the Tribunal does not find that the circumstances amounted to a "significant modification of terms and conditions respecting wages or salary" pursuant to paragraph 29(c)(vii) or "excessive overtime work" or "significant changes in work duties" pursuant to paragraphs 29(c)(viii) or (ix). The

Tribunal makes these findings because it accepts the Appellant's evidence on these points and does not find that a requirement to mop the floor and clean up the kitchen, which all employees, including, the Appellant were required to do, could amount to modifications, which were "significant" as that term is understood in accordance with the Act and jurisprudence or even that such a requirement was unreasonable.

[65] The Tribunal finds further that there were no changes in the Employee's work schedule or hours or remuneration. Contrary to what is alleged by the Employee and the picture, which he painted for the Commission, (that the Appellant and his colleagues would be dismissed early and could be seen and heard laughing and at leisure whilst the Employee was working late and cleaning and performing tasks, which he never should have been assigned), the Employee worked alone after his colleagues departed only because their shifts had ended earlier and he had always worked on the last shift.

[66] The Tribunal notes, parenthetically that had the Employee refused to comply with the Appellant's instructions to mop the floor, such a refusal would have amounted to a refusal to comply with a reasonable directive of an employer and it would be considered misconduct (*Easson* A-1598-92; *Bedell* A-1716-83; *Morrow* A-170-98). The same can be said for the Employee's failure to refrain from drinking alcohol or consuming drugs on the work premises (*Wasylka,* 2004 FCA 219; *Mishibinijima 2007 FCA 36/S.C.C. FILE N^{O}: 31967; Lemire 2010 FCA 314)* and the seemingly untrue statements, which he made to the Appellant as an attempt to justify his absences without prior notice (*Locke* A-799-95; *Parsons* 2005 FCA 248; *Fleming* 2006 FCA 16).

[67] With respect to the evidence that the Employee sought employment and may have trained at the Deli Plus restaurant prior to his departure (GD3-24 and the testimony of the Appellant), the Tribunal finds that this evidence amounts to one example of the Employee's attempts to exhaust his reasonable alternatives. The Tribunal does not find, however, that the Employee's application for a job with Deli Plus amounted to a reasonable assurance of another employment in the immediate future or that the Employee

ever had any reasonable assurance of another employment at any other prospective employer as those terms are understood in accordance with paragraph 29(c)(vi) of the Act and the jurisprudence (*Lessard* 2002 FCA 469; *Bordage* 2005 FCA 155; *Sacrey* 2003 FCA 377). The Tribunal finds further that the Employee did not argue this point.

[68] As such, the Tribunal has considered all of the Employee's submissions (GD2 and GD3) and the circumstances enumerated in section 29(c) of the Act, and finds that just cause cannot be proven on a balance of probabilities for the voluntary departure.

[69] With respect to reasonable alternatives, the Tribunal also accepts the Appellant's evidence that the Employee never complained regarding any of his tasks at work and did not notify the Appellant of his intention to resign. The Tribunal finds in this regard, that the Employee could not prove just cause in any event because to prove just cause and to satisfy the Tribunal that he had no reasonable alternative, an employee is required to bring his or her dissatisfaction to the attention of the employer and to attempt to resolve the issues in question prior to his or her departure (*White* 2011 FCA 190).

[70] On this basis, the Tribunal does not find that the Employee has proven that he had just cause or that he had exhausted all of his reasonable alternatives prior to leaving (*White*, 2011 FCA 190; *Patel* 2010 FCA 95; *Rena Astronomo* A-141-97).

CONCLUSION

[71] For the foregoing reasons, the appeal is allowed.

Alyssa Yufe
Member, General Division

DATED: June 11, 2014