

Citation: *Eco-Shift Power Corp. v. Canada Employment Insurance Commission*, 2014
SSTGDEI 122

Appeal #: GE-13-2423

BETWEEN:

Eco-Shift Power Corp.

Appellant
Employer

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Richard Sterne

HEARING DATE: June 25, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal is allowed.

PERSONS IN ATTENDANCE

The Appellant (employer), Eco-Shift Power Corp., was represented by G. W., CEO, and J. H., CFO, at the hearing by telephone.

On March 12, 2014, J. K. (Claimant) was advised of the appeal by the Appellant and that if he wished to be added as a party to the proceeding that a request must have been received by the Social Security Tribunal by March 27, 2014. No request was received.

DECISION

[1] The Tribunal finds that the Appellant did prove that there were reasonable alternatives available to the Claimant for leaving when he did, and therefore the Claimant did not have just cause for voluntarily leaving his employment, pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[2] The appeal is allowed.

INTRODUCTION

[3] The Claimant was employed by Eco-Shift Power Corp. (Appellant) from April 2, 2012 to April 5, 2013.

[4] On May 1, 2013, the Claimant applied for employment insurance benefits (EI benefits).

[5] On June 20, 2013, the Canada Employment Insurance Commission (Commission) advised the Appellant that they had approved the Claimant's claim for EI benefits because he had voluntarily left his employment with just cause because he had no reasonable alternatives in the circumstances.

[6] On June 25, 2013, the Appellant filed a request for reconsideration of the Commission's June 20, 2013 decision, which was denied on July 24, 2013.

FORM OF HEARING

[7] The hearing was by teleconference for the reasons provided in the Notice of Hearing dated May 15, 2014.

ISSUE

[8] Did the Claimant have just cause for voluntarily leaving his employment with Appellant?

THE LAW

[9] **Section 29 of the Act:**

For the purposes of sections 30 to 33,

(a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(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; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

- (i) sexual or other harassment,
- (ii) obligation to accompany a spouse or common-law partner or a 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,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (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.

[10] Subsection 30(1) of the Act:

(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."

[11] Subsection 30(2) of the Act:

(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.

[12] Subsection 51.1 of the Regulations:

For the purposes of subparagraph 29(c)(xiv) of the Act, other reasonable circumstances include

(a) circumstances in which a claimant has an obligation to accompany to another residence a person with whom the claimant has been cohabiting in a conjugal relationship for a period of less than one year and where

(i) the claimant or that person has had a child during that period or has adopted a child during that period,

(ii) the claimant or that person is expecting the birth of a child, or

(iii) a child has been placed with the claimant or that person during that period for the purpose of adoption; and

(b) circumstances in which a claimant has an obligation to care for a member of their immediate family within the meaning of subsection 55(2).

EVIDENCE

[13] On February 2, 2012, Eco-Shift Power Corp, (Appellant) offered the Claimant the position of Vice President, Business Development. This position was a regular full-time exempt position which meant that he was not eligible for overtime, and his base salary was to be \$120,000.00 per annum. In addition to his base salary he was also eligible to receive a car allowance of \$1,000.00 per month. A bonus structure was to be offered based on the board of directors' expectations of performance. Upon date of hire he was to be entitled to participate, upon carrier acceptance, in the management group benefit plan which included Life Insurance coverage, Long Term Disability coverage, weekly indemnity, Health and Dental.

[14] The Claimant was employed by the Appellant from April 2, 2012 to April 5, 2013.

[15] On March 21, 2013, the Claimant resigned his position and advised the Appellant that several items of his employment agreement had been unfulfilled despite attempts to have them addressed. Specifically:

- Health and dental benefits, life insurance, and Long term disability had not been put in place
- Variable compensation plan had not been put in place by the board of directors
- Finalization of the Appellant's financing had not been completed.

[16] On May 1, 2013, the Claimant applied for EI benefits. In his application, the Claimant stated that he quit his job because the material clauses, commitments, and conditions of his employment agreement were not honored despite repeated attempts to resolve these issues over the period of 11 months of employment.

[17] On June 20, 2013, the Claimant told the Commission that his salary offer included benefits that Appellant had told him that they were getting so he didn't think it would be an issue. The Claimant said the Appellant had told him that they had gotten three million dollars in financing. He said that his employment contract stated that a bonus program was to be established but was never set up. He said that he resigned his position because the

Appellant had not lived up to his employment contract and the stress of the poorly managed company, which was having constant cash flow problems, was too much.

[18] On June 20, 2013, the Appellant told the Commission that the Claimant had told them that he resigned because he had a better job offer. The Appellant stated that they were a startup company and that benefits would be provided when they could afford them. The Appellant stated that their financing was not in place when they hired the Claimant, but it didn't prevent him from doing his job.

[19] On June 20, 2013, the Commission advised the Appellant that they had approved the Claimant's claim for EI benefits because he had voluntarily left his employment with just cause because he had no reasonable alternatives in the circumstances.

[20] On June 25, 2013, the Appellant filed a request for reconsideration of the Commission's June 20, 2013 decision. The Appellant stated that the Claimant had advised them in his exit interview that he was returning to the transportation industry from which he came, because they could offer him financial security and a larger salary. The Appellant pointed out that according to Linked In, the Claimant was currently employed at TradeForce Tech (TFT) and was responsible for Business Development, and that based on the TFT website, the Claimant was their Vice President Operations.

[21] The Appellant stated that TFT was in direct competition with the Appellant. They said that the Claimant had breached his fiduciary duty to the Appellant by seeking personal economic gain from his training, use of confidential information, and the solicitation of their customers and suppliers.

[22] On July 23, 2013, the Appellant told the Commission that when the Claimant was hired, that they were in process of getting benefits, but there was no guarantee. The Appellant stated that the Claimant did not make any sales during his tenure, so he didn't get a bonus.

[23] On July 24, 2013, the Claimant told the Commission that he would never have accepted the Appellant's job offer if he had known that there were no benefits. He said that he was acting on good faith waiting for his bonus plan, which was never put in place.

[24] On July 24, 2013, the Commission advised the Appellant and the Claimant that they had not changed their June 20, 2013 decision.

SUBMISSIONS

[25] The Appellant submitted that:

- a) they were surprised that the Claimant had just cause for resigning his employment.
- b) the Claimant was using EI benefits to sustain himself while he was setting up a company to compete with the Appellant.
- c) the Claimant was very much aware of the Appellant's business plan and challenges at the time he accepted employment with the Appellant.
- d) they did not breach any promises in their employment agreement with the Claimant.

[26] The Respondent submitted that:

- a) the Claimant proved just cause for leaving his employment on April 5, 2013, because he had no reasonable alternative to leaving under the circumstances.

ANALYSIS

[27] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work (**Gagnon [1988] SCR 29**).

[28] Subsection 30(1) of the Act provides for an indefinite disqualification when the claimant voluntarily leaves his employment without just cause. The test to be applied, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving his employment when he did.

[29] During the hearing, the Appellant stated that they were stunned and surprised by the Claimant's allegations. The Appellant said that they saw the Claimant as someone who was honest and had integrity. They saw a long term relationship with the Claimant. They said that they had no notice of the Claimant's resignation, and that they had verbal commitments

from the Claimant about their long term relationship. They said that the Claimant had not expressed any concerns to them about his employment agreement.

[30] The Appellant said that the Claimant was the highest paid employee and had not missed a paycheque. They said that the Claimant had been a hardworking, contentious employee and that they had been “thrilled to have him”. They said that they were investing in him so that he would stay and help them build the company.

[31] The Appellant stated that they had spent over three months meeting with the Claimant discussing the Appellant’s business model, their challenges, and his role, before the Claimant accepted their employment offer. They said that the Claimant was very much aware of the Appellant’s business plan and financial situation.

[32] The Appellant said that the Claimant was aware that the Appellant was very close to raising their investment capital at the time he resigned. They said that there was no commitment to the Claimant on the timing of raising this capital in his employment contract.

[33] The Appellant said that the Claimant’s role was business development to increase sales and that during his term he did not make a single sale. In fact they said that their sales declined. They were surprised that the Claimant expected a bonus under these circumstances. The Appellant said that they were prepared to bonus the Claimant when their sales grew as a result of his efforts.

[34] The Appellant said that they never guaranteed a benefit package to the Claimant. They said that the Claimant was aware that the Appellant did not have a benefit package at the time he accepted their offer of employment, but that they hoped to offer one when they could afford it. They were not able to implement a benefit package because their sales had decreased.

[35] The Appellant stated that their former President had resigned thirty days before the Claimant. The Appellant said that they believed that the Claimant had been enticed into resigning by the former President so that they could join forces and start their own company (Newco) to compete directly with the Appellant.

[36] The Appellant stated that they believed that the Claimant resigned after eleven months, so that his Non-Disclosure Agreement (NDA) period was limited to three months. (If he had stayed past 12 months, his NDA period would have increased to six months).

[37] The Appellant said that Linked In and the Newco website listed the Claimant as their Vice-President of Development. The Newco website showed that their products and services were identical to the Appellant's. The Appellant said that Newco took the Appellant's business model verbatim and had approached all of their customers and suppliers.

[38] The Appellant said that they believed that the Claimant was collecting EI benefits while he was setting up Newco to compete with them.

[39] The Tribunal finds that the Appellant was credible because of the forthright manner in presenting the facts of their appeal and their answers to questions during the hearing.

[40] The Tribunal finds that the Claimant knew the Appellant was in a startup stage and was aware of their financial situation when he accepted their offer of employment. The Tribunal finds that the Claimant should have known that he was not entitled to a bonus when he did not make any sales. The Tribunal finds that there is strong evidence that the Claimant voluntarily left his employment to start Newco to compete with the Appellant.

[41] The test for just cause for voluntarily leaving ones employment, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving his employment when he did.

[42] The Tribunal finds that the Claimant did have a number of other reasonable alternatives to leaving when he did, having regard to all the circumstances. The Tribunal finds that he should have continued working with the Appellant until he found more suitable employment. The Claimant could have discussed his concerns regarding his employment agreement with the Appellant before he resigned. The Tribunal finds that the Claimant could have stayed with the Appellant and helped them build their company.

[43] The Federal Court of Appeal reaffirmed the principle that where a claimant voluntarily leaves his employment, the burden is on that claimant to prove that there was no reasonable alternative to leaving when he did.

Canada (AG) v. White, 2011 FCA

[44] The Tribunal finds that the Claimant did not prove that he had no reasonable alternatives to leaving and therefore did not have just cause for voluntarily leaving his employment.

[45] The Federal Court of Appeal made a distinction between a claimant showing his/her leaving their employment was reasonable given the circumstances and that they may have had good motive to leave or reasons, but that it is not synonymous with just cause.

FCA A-1458-84 Tanguay

[46] The Tribunal finds that the Claimant may have had personal reasons for quitting his employment, but they were not just cause for voluntarily leaving his employment, pursuant to sections 29 and 30 of the Act.

CONCLUSION

[47] The appeal is allowed.

Richard Sterne
Member, General Division

DATED: October 22, 2014