

Citation: *K. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 135

Appeal #: GE-14-2715, GE-14-3181

BETWEEN:

K. B.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Richard Sterne

HEARING DATE: November 26, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeals are dismissed.

PERSONS IN ATTENDANCE

The Claimant, K. B., attended the hearing by telephone.

DECISIONS

[1] The Tribunal finds that 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 Tribunal finds that the Claimant was not available for work because he was not referred to his course of study by the Employment Insurance Commission (Commission) or an authority that the Commission had designated, pursuant to section 25 of the Act.

[3] The Tribunal finds that the Claimant was not available for work because he was taking a course of study full time and only available part time, which limited his chances of finding suitable employment, pursuant to subsection 18(a) of the Act.

[4] The appeals are dismissed.

INTRODUCTION

[5] The Claimant was employed by Erican Hospitality Ltd. (Swiss Chalet) (employer) until December 20, 2013.

[6] On March 20, 2014, the Claimant applied for employment insurance benefits (EI benefits). In his application, the Claimant indicated that he quit his employment because it was a disrespectful environment. He also indicated that he was approved to take a pre-apprenticeship welder - level 1 training course at Conestoga College.

[7] On May 13, 2014, the Commission advised the Claimant that they were unable to pay him any EI benefits because he had voluntarily left his employment with the employer on December 20, 2013 without just cause within the meaning of the Act. They also stated that they were unable to pay him EI benefits because he was taking a training course on his own initiative and had not proven his availability for work.

[8] On June 3, 2014, the Claimant filed a request for reconsideration of the Commission's May 13, 2014 decisions, which were denied on June 5, 2014.

FORM OF HEARING

[9] The hearing was held by teleconference for the reasons provided in the Notice of Hearing dated October 28, 2014.

[10] The two appeals were heard together because they were based on the same facts.

ISSUES

[11] Did the Claimant have just cause for voluntarily leaving his employment?

[12] Did the Claimant prove that he was available for work?

THE LAW

[13] Subsection 18(a) of the Act:

A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

- a. capable of and available for work and unable to obtain suitable employment;

[14] Section 25 of the Act:

(1) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a period when the claimant is

- (a) attending a course or program of instruction or training at the claimant's own expense, or under employment benefits or similar benefits that are the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant; or
- (b) participating in any other employment activity

(i) for which assistance has been provided for the claimant under prescribed employment benefits or benefits that are the subject of an agreement under section 63 and are similar to the prescribed employment benefits, and

(ii) to which the Commission, or an authority that the Commission designates, has referred the claimant.

[15] 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.

[16] 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."

[17] 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.

EVIDENCE

[18] The Claimant was employed by Erican Hospitality Ltd. (Swiss Chalet) (employer) until December 20, 2013.

[19] On March 20, 2014, the Claimant applied for EI benefits. In his application, the Claimant indicated that he quit his employment because it was a disrespectful environment. He also indicated that he was approved to take a pre-apprenticeship welder-level 1 training course at Conestoga College.

[20] On May 12, 2014, the employer told the Commission that the Claimant had been rude to one of their servers. When the Claimant was approached to reprimand him about his behavior, he suddenly quit. The Claimant later texted the employer an apology and asked if he could use them as a reference. The employer said that the Claimant's work was "exceptional", "but his behavior was intolerable".

[21] On May 12, 2014, the Claimant told the Commission that his issues at work started about a year before he quit. He explained that there was always bickering going on between the servers and the guys in the kitchen. The Claimant stated: "I did not think that I was going to lose my job".

[22] On May 12, 2014, the Claimant told the Commission that he was taking the pre-apprenticeship course until September when the level 1 apprenticeship course would begin. He said that he was in school Monday and Friday 9:00 am to 1:30 pm and Tuesday, Wednesday, Thursday 9:00 am to 3:00 pm. He said he studied about 3 hours a night. The Claimant said that he could not change the course hours and would not drop the course. The Claimant said that he was willing to work part time, and he had applied to a grocery store to work weekends and Monday or Friday afternoon.

[23] On May 13, 2014, the Commission advised the Claimant that they were unable to pay him any EI regular benefits because he voluntarily left his employment with the employer on December 20, 2013 without just cause within the meaning of the Act. They said that they believed that voluntarily leaving his employment was not his only reasonable alternative.

[24] The Commission also stated that they were unable to pay him EI benefits from March 17, 2014 because he was taking a training course on his own initiative and had not proven his availability for work.

[25] On June 3, 2014, the Claimant filed a request for reconsideration of the Commission's May 13, 2014 decisions.

[26] On June 4, 2014, the Claimant told the Commission that he did not agree with the decision that he had no just cause to leaving his employment. The Claimant said that he

felt the employer was ungrateful and he knew it would be better for his future to just leave. He didn't plan to leave the way he did, as he was planning to give his two weeks of notice in the New Year. The Claimant said that he did receive discipline for disrespectful conduct. He said that he didn't complain to the employer about the bickering between employees. He said that he didn't approach his union about his issues. The Claimant confirmed that he had been looking for other work prior to leaving.

[27] On June 4, 2014, the employer told the Commission that the Claimant left when the employer tried to talk to him about his disrespectful behavior. The employer said he thinks the Claimant left because he was not happy that he wasn't doing better in life as he was still working in a restaurant. The employer said that the Claimant could have complained to his union if he was unhappy.

[28] The Claimant clarified that he was in an accelerated pre-apprenticeship level one course, and would start his work training with an employer in September 2014. He said that he had been applying for part-time work, but he had not gotten any calls back. The Claimant said that if he had to work part-time he would. However his dad and he believed it was best for him to focus on the schooling. He did not think he would be able to balance work and school. The Claimant stated that he had only been approved by Conestoga College.

[29] On June 5, 2014, the Commission advised the Claimant that they had not changed their May 12, 2014 decisions regarding voluntarily leaving his employment and his availability for work.

SUBMISSIONS

[30] The Claimant submitted that:

- a) he left his employment because his career was going nowhere, and it was best for his future.
- b) he was taking a full time apprenticeship welding course at Conestoga College.

- c) he would not be able to focus on school, if he was working full time.
- d) he had applied for part time work.

[31] The Respondent submitted that:

- a) the Claimant did not demonstrate just cause for voluntarily leaving his employment and therefore imposed an indefinite disqualification effective March 16, 2014, pursuant to sections 29 and 30 of the Act.
- b) the Claimant failed to prove he was available for work while attending full time the training course in pre-apprentice welding at Conestoga College from March 10, 2014 to October 29, 2014, and therefore imposed an indefinite disentitlement from March 16, 2014, pursuant to subsection 18(a) of the Act.

ANALYSIS

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

VOLUNTARY LEAVING

[33] 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.

[34] During the hearing the Claimant said that he left his employment because there was always a lot of bickering going on between the employees. However, he mainly left, because his career wasn't going anywhere and he wanted to return to school. He explained that he had been accepted in a pre-apprenticeship welding course at Conestoga College.

[35] The Tribunal finds that the Claimant did have reasonable alternatives to quitting his job when he did. He could have spoken to his employer about a future career path with his employer. He could have brought the employee bickering concerns to the

attention of his union. He could have looked for and secured a part time job prior to quitting his job to take the course.

[36] Sections 29 and 30 of the Act provide an exception to the general rule that insured individuals that are not deliberately unemployed are entitled to benefits. This exception must therefore be strictly interpreted (**Goulet A-358-83**).

[37] The Tribunal finds that the evidence shows that the Claimant's behavior was equally responsible for the employee bickering. The Tribunal finds that the Claimant's reasons for quitting his employment, do not qualify as an exception pursuant to subsection 29(c) of the Act.

[38] 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 190

[39] The Tribunal finds that the Claimant did not prove that there was no reasonable alternative to leaving when he did, and therefore did not have just cause for voluntarily leaving his employment, pursuant to sections 29 and 30 of the Act.

AVAILABILITY FOR WORK

[40] Subsection 18(a) of the Act states that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that he was capable and available for work.

[41] Subsection 25(1)(a) of the Act states that a Claimant is unemployed and capable of and available for work during a period when the claimant is attending a course or program of instruction or training at the claimant's own expense, or under employment benefits, that is the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant.

[42] The Claimant was taking a full time pre-apprenticeship welding course at Conestoga College. The Claimant said that he had only been approved to take the course by Conestoga College. The Tribunal finds that the Claimant was not attending a course to which the Commission, or an authority that the Commission designated pursuant to section 63 of the Act, had referred the Claimant. The Tribunal finds that the Claimant was not unemployed and capable of and available for work while he was taking his course, pursuant to section 25 of the Act.

[43] Previous case law has confirmed that in order to prove availability, a claimant must show that he/she:

1. has a desire to return to the labour market as soon as suitable employment is offered;
2. must express that desire through efforts to find a suitable employment; and
3. must not set personal conditions that might unduly limit their chances of returning to the labour market. (**Faucher A-56-96**)

[44] During the hearing, the Claimant said that he had been looking for part time work while he was taking his course. He said that he was in school Monday and Friday 9:00 am to 1:30 pm and Tuesday, Wednesday, Thursday 9:00 am to 3:00 pm. He said that he studied about 3 hours a night. The Claimant said that he could not change the course hours and would not drop the course. The Claimant said that he was willing to work part time, and that he had applied to a grocery store to work weekends and Monday or Friday afternoon.

[45] The Tribunal finds that the Claimant was not available to return to the labour market as soon as suitable employment was offered, because he would not drop his studies to return to full time employment.

[46] The Tribunal finds that the Claimant was not making efforts to find suitable full time employment, because he was enrolled in his course on a full time basis.

[47] The Tribunal finds that the Claimant had set personal conditions by only being available on a part time basis (weekends and Monday or Friday afternoons), which would

limit his chances of finding employment. He had previously been working full time and not part time.

[48] The Tribunal finds that the Claimant was not capable of and available for work, and therefore he was not entitled to EI benefits, pursuant to subsection 18(a) of the Act.

[49] The Federal Court of Appeal confirmed the principle that a person enrolled in a course of full-time study is presumed to be not available for work, and that this presumption is refutable only in exceptional circumstances.

Canada (AG) v. Lamonde, 2006 FCA 44

Canada (AG) v. Gagnon, 2005 FCA 321.

CONCLUSION

[50] The appeals are dismissed.

Richard Sterne

Member, General Division

DATED: November 29, 2014