[TRANSLATION]

Citation: *N. S. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 142

Appeal #: GE-14-3044

BETWEEN:

N. S.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Joanne Blanchard
HEARING DATE:	October 28, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

The Appellant, N. S., attended the hearing. She was represented by Gilbert Nadon. Gaël Morin-Greene, an articling student, also attended the hearing.

DECISION

[1] The Tribunal finds that the Appellant did not voluntarily leave her employment. The evidence submitted at the hearing indicates that she was instead dismissed. The Tribunal also finds that the Appellant did not lose her employment by reason of her own misconduct under the *Employment Insurance Act* (the Act).

INTRODUCTION

[2] The Appellant submitted a claim for Employment Insurance sickness benefits that took effect on March 9, 2014 (GD3-2 to GD3-16). On March 28, 2014, the Appellant requested that her Employment Insurance sickness benefits be converted to Employment Insurance regular benefits. She submitted a medicate certificate justifying a cessation of work until March 28, 2014 (GD3-17).

[3] The Canada Employment Insurance Commission (the Commission) determined that the Appellant voluntarily left her employment at Alimentation St-Onge on March 29, 2014, without just cause under sections 29 and 30 of the Act. The Commission therefore imposed an indefinite disqualification on her effective March 23, 2014 (GD3-26 and GD3-27).

[4] The Appellant submitted a request for reconsideration of the Commission's decision rendered on May 16, 2014. On July 2, 2014, the Commission informed the Appellant that it was upholding its initial decision on the voluntary leaving (GD3-37 and GD3-38).

[5] The Appellant is appealing the Commission's reconsidered decision to the Tribunal (GD2-1 to GD2-20). On October 23, 2014, the Commission informed the Tribunal that it conceded the appeal on the issue after reviewing the additional information submitted by the Appellant's representative (GD11-1).

TYPE OF HEARING

[6] The hearing was held in person for the reasons set out in the Notice of Hearing dated October 24, 2014.

ISSUE

[7] The Appellant is appealing an indefinite disqualification imposed on her under sections 29 and 30 of the Act because she voluntarily left her employment without just cause.

APPLICABLE LAW

[8] Under section 30 of the Act, a claimant is disqualified from receiving benefits if the claimant voluntarily leaves an employment without just cause, unless an exception set out in paragraph 29(*c*) of the Act applies.

[9] Paragraph 29(*c*) of the Act stipulates that 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. The paragraph also stipulates that just cause is proven when any of the situations listed can be established.

[10] Subsection 49(2) of the Act stipulates that the benefit of the doubt should be given to the Appellant if the evidence on each side of the issue is equally balanced. The FCA reiterated this notion in *Alcuitas* (A-472-03).

EVIDENCE

[11] The Appellant submitted a claim for Employment Insurance sickness benefits that took effect on March 9, 2014 (GD3-2 to GD3-16). On March 28, 2014, the Appellant requested that her Employment Insurance sickness benefits be converted to Employment Insurance regular benefits. She submitted a medicate certificate justifying a cessation of work until March 28, 2014 (GD3-17).

[12] The Commission determined that the Appellant voluntarily left her employment at Alimentation St-Onge on March 29, 2014, without just cause under sections 29 and 30 of the Act. The Commission therefore imposed an indefinite disqualification on her effective March 23, 2014 (GD3-26 and GD3-27).

[13] The Appellant submitted a request for reconsideration of the Commission's decision rendered on May 16, 2014. On July 2, 2014, the Commission informed the Appellant that it was upholding its initial decision on the voluntary leaving (GD3-37 and GD3-38).

[14] The Appellant is appealing the Commission's reconsidered decision to the Tribunal (GD2-1 to GD2-20).

[15] The Appellant forwarded to the Tribunal a complaint for a prohibited practice that she filed with the Commission des normes du travail (GD8-1 to GD8-38).

[16] On October 23, 2014, the Commission informed the Tribunal that it conceded the appeal on the issue after reviewing the additional information submitted by the Appellant's representative (GD11-1).

SUBMISSIONS OF THE PARTIES

[17] The claimant stated the following:

(a) When she was on sick leave, she learned that her employer had advertised her position. She is of the view that her employer decided to end her employment as soon as she went on sick leave.

(b) The day before her return to work, she went to check the work schedule. She had always worked weekends, but she was not on the schedule. She name had been crossed out and she was advised to meet with A. S.

(c) She worked about 25 to 30 hours a week. She was a supervisor a few days a week, and a cashier.

(d) She was informed that to be a supervisor, she had to be available seven days a week. Her employer did not want someone who could be sick.

(e) She did not suspect that she would lose her employment following her sick leave. She was summoned to collect her termination of employment papers, but she never understood why.

(f) She filed a complaint for a prohibited practice with the Commission des normes du travail.

(g) She never left her employment. There is no evidence that she left. It was a chain of events. Her employer decided to end her employment as a supervisor and she was never called back to work as a cashier.

(h) Since she suffers from hearing loss, her telephone communications with the Commission were a problem. She had no hearing aid at that time, so she likely spoke loudly.

[18] The Respondent stated the following:

(a) Subsection 30(2) of the Act stipulates an indefinite disqualification when a claimant voluntarily leaves an employment without just cause. It should be verified whether the claimant had a reasonable alternative to leaving her employment when she did.

(b) The Commission treated the file as a case of voluntary leaving, since the loss of employment was the result of her more limited availability given her course schedule, because the claimant preferred to continue her training and took the risk of losing her employment.

(c) It does not matter whether the case is one of loss of employment through misconduct or voluntary separation without just cause provided that a disqualification would be warranted in either case. Both grounds could be mentioned in the notice of disqualification sent to the claimant. The Commission therefore found that the claimant did not have just cause for leaving her employment because she failed to

show that she had exhausted all her reasonable alternatives before leaving. Having regard to all the circumstances, the Commission was satisfied that a reasonable alternative for the claimant would have been not to make the personal choice to continue her training. Consequently, the claimant failed to show that she had just cause for leaving her employment under the Act.

(d) By prioritising her training, the claimant lost her employment. As a result, she created her own unemployment situation. If she had not continued her training, she would still be employed.

ANALYSIS

Voluntary leaving

[19] The Commission reviewed the additional information provided and found that the Appellant should be given the benefit of the doubt under the circumstances. On October 23, 2014, the Commission informed the Tribunal that it conceded the appeal on the issue submitted. Even though the Commission conceded the issue, the Tribunal must still assess the legality of the concession and render a decision on the issue before it.

[20] Paragraph 29(*c*) of the Act stipulates that a person has just cause for voluntarily leaving an employment if the person has no reasonable alternative to leaving, having regard to all the circumstances (*Canada (Attorney General) v. Hernandez*, 2007 FCA 320).

[21] The Appellant must therefore show that her reasons for voluntarily leaving her employment meet the requirements of the Act. It is a question of fact that the Tribunal must rule on according to the specific circumstances of each case.

[22] In this case, the Appellant gave clear and credible testimony at the hearing. A number of pieces of additional information were submitted, which helped the Tribunal better understand the circumstances surrounding the Appellant's loss of employment. In particular, the Appellant stated that she never voluntarily left her employment. She went on sick leave, and the day before

her return she learned that she had been crossed off the work schedule. The circumstances surrounding her availability had not changed and she wanted to continue working.

[23] The Tribunal agrees with the Commission's reconsidered position that there is reason to give the Appellant the benefit of the doubt in this case. Under subsection 49(2) of the Act, the Commission must give the claimant the benefit of the doubt if the evidence on each side of the issue is equally balanced. The FCA also reiterated this notion in *Alcuitas* (A-472-03). However, the Tribunal finds that the facts as submitted by the Appellant do not show that the Appellant voluntarily left her employment. The Appellant gave credible testimony indicating that she wanted to return to work following her sick leave. The Tribunal finds that the Appellant never intended to voluntarily leave her employment.

[24] The Tribunal refers to *Desson* and *Easson* to conclude that the Appellant did not voluntarily leave her employment and that she was instead dismissed (*Desson*, 2004 FCA 303; and *Easson*, A-1598-92). In *Easson*, the FCA stated the following:

> Legally speaking, the subject matter of the appeal before the Board of Referees was a disqualification under section 28. By interpreting the facts in a slightly different manner so as to conclude that the case was one of quitting without cause rather than one of being fired, the Board did not stray from the subject matter it was called upon to consider. The principle that the Board of Referee's jurisdiction is limited to dealing with the decision that the Commission has made, once again confirmed by this Court in *Michael Hamilton v. A.G.C.* (1989), 91 N.R. 144, was respected (*Easson*, A-1598-92).

[25] However, the Tribunal reviewed the issue from the viewpoint of misconduct.

Misconduct

[26] To establish misconduct, the onus is on the employer and the Commission to show that the Appellant knew or ought to have known that the behaviour was reprehensible and inconsistent with the employment. However, in this case, the Tribunal finds that the employer and the Commission failed to discharge the onus on them with the evidence presented. The evidence in the file shows that the Appellant was dismissed for being absent from her job due to illness.

[27] The Tribunal refers to the FCA, which stated that there will be misconduct where the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the employer (*Canada (Attorney General) v. Mishibinijima*, 2007 FCA 85). The evidence submitted at the hearing does not show that the Appellant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer. Given that the Appellant reported for work to find out her schedule and she was available to return to her job as a supervisor or cashier, the Tribunal finds that the Appellant could not have expected to lose her employment.

[28] The Tribunal refers to the FCA, which determined that to constitute misconduct under the Act, the action complained of must have been wilful or deliberate or so reckless as to approach wilfulness. Misconduct therefore involves reprehensible, wilful behaviour, and by definition, wilfulness implies an obstinate determination to follow one's own will (*Canada (Attorney General) v. Tucker*, 1986 FCA 381). The Tribunal finds that the evidence submitted by the parties does not show that the Appellant's behaviour was so reckless as to approach wilfulness.

[29] The Tribunal finds that the Appellant did not lose her employment by reason of her own misconduct under sections 29 and 30 of the Act.

CONCLUSION

[30] The appeal is allowed

Joane Blanchard
Member, General Division

DATE OF REASONS: December 8, 2014