[TRANSLATION]

Citation: *A. P. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 80

Date: May 4, 2015

File number: GE-15-389

GENERAL DIVISION
Employment Insurance Section

Between:

A. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Aline Rouleau, Member, General Division – Employment Insurance Section

Teleconference hearing held on April 17, 2015, in Quebec.

REASONS AND DECISION

PERSONS IN ATTENDANCE AND TYPE OF HEARING

[1] The Tribunal held a teleconference hearing on April 16,2015, for reasons set out in the Notice of Hearing dated March 12, 2015, namely, the issue and the information on file.

[2] Only the Appellant, A. P., participated in the hearing.

[3] The respondent Commission did not participate in the hearing.

INTRODUCTION – STATEMENT OF FACTS AND PROCEDURES

[4] The Appellant filed an initial claim for benefits effective September 28, 2014 (GD3-3 to GD3-16).

[5] In light of the information obtained, the Commission concluded that the Appellant had left his employment on July 5, 2014, without just cause, and imposed an indefinite disqualification effective September 28, 2014 (GD3-22 and GD3-23).

[6] The Appellant requested a reconsideration of the Commission's decision (GD3-24 to GD3-26), which was upheld (GD3-29 and GD3-30), hence the present appeal to the Tribunal (GD2-1 to GD2-13).

ISSUE

[7] Did the Appellant voluntarily leave his employment without just cause under sections 29 and 30 of the *Employment Insurance Act* (the Act)?

APPLICABLE LAW

[8] Section 29 and subsection 30(1) of the Act read as follows:

> **29.** 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, 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,

(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.

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.

EVIDENCE

Evidence in the Appellant's file

[9] The Appellant worked for Thrifty Car Rental from May 9, 2011, to July 5, 2014, and the reason for the termination of the employment was a shortage of work (code A) (GD3-19).

[10] The Appellant also worked for Le Repère du plongeur Inc. from June 30 to August 29, 2014, and the reason for termination of the employment was a shortage of work/end of contract or season (GD3-18).

[11] The Appellant worked for Les lavages industriels Vigneau Inc. from September 15 to 29, 2014, and the reason for the termination of employment was a shortage of work/end of contract or season (GD3-17).

[12] The Appellant explained the circumstances of his departure on July 5, 2015, from Thrifty Car Rental (GD3-21) by stating that he had needed help to complete his claim because he did not fully understand and that he therefore indicated a shortage of work. The Appellant stated that he left his employment to go work for Le repère du plongeur, where he worked 30 to 40 hours per week during the season. This was a seasonal job.

[13] The Appellant stated (GD3-21) that he had to take a diving course and that, by working at Le Repère du plongeur, he could acquire experience in this field. However, in the end, he did not get accepted into the training program.

[14] When the file was reconsidered, the Appellant stated (GD3-27) that he worked about the same number of hours per week for both jobs and that he did not have sufficient availability to do both jobs at the same time. He chose to keep the job with Le Repère du Plongeur, since he had to attend classes in September in this field, even though he knew it was a seasonal job.

[15] In his request for reconsideration (GD3-24 to GD3-26), the Appellant indicated that he had received confirmation of his enrolment to Holland College (Summerside, P.E.I.) for commercial diving training, scheduled to begin on September 3, 2014. Following his enrolment, he was asked to take an English test, which required a pass mark of 90%. Since he failed the test, his enrolment was cancelled.

[16] In his Notice to Appeal to the Tribunal, the Appellant stated that he had been in the labour force since early December 2014 in permanent employment. He provided confirmation of conditional enrolment from Holland College for the commercial diving program.

Evidence in the Commission's file

[17] The Commission contacted Thrifty Car Rental for more detailed information on the reason for the Appellant's termination (GD3-20). The employer explained that the Appellant had started a new job and no longer had sufficient availability, as work schedules had been cut and were variable. The employer added that there was not actually a shortage of work, but that the Appellant was not available at the times he was needed.

[18] The Commission contacted the Appellant on November 17, 2014 (GD3-21) and December 18, 2014, when the file was being reconsidered (GD3-27).

[19] The former employer (Thrifty Car Rental) was contacted again (GD3-28) and stated that there was no problem with the Appellant's work. The problem lay with his decision to change jobs. If he had wanted to continue working, he could have, since no layoffs were planned. During this exchange, the employer stated that the Appellant was working in another of its businesses at the time.

Appellant's evidence at the hearing

[20] The Appellant's testimony at the hearing included the following additional information.

[21] To comply with the admission requirements for the diving program, he took the English test twice, without success. On August 28, 2014, he learned that he was not accepted into the program.

[22] The Appellant stated that, when he left his job with Thrifty, he had been working fewer hours for three or four months due to a misunderstanding with the person in charge of schedules. At first he would work 40 hours per week but, when he left, he was working 20 to 30 hours per week. However, the Appellant did not want to provide details concerning this misunderstanding because he did not want to cause problems for the person in question.

[23] In the Appellant's opinion, he should receive benefits like everyone else because he pays into unemployment.

SUBMISSIONS OF THE PARTIES

[24] The Appellant submitted the following:

(a) When he was at CÉGEP, he realized that he wanted to study commercial diving. He changed jobs in late June 2014 to acquire experience in diving, and he had a job that afforded him the opportunity to work in this field. A series of circumstances resulted in his being unemployed and unable to pursue his studies.

(b) After he stopped working at the diving shop, he found another job that lasted for the few weeks scheduled, but it was not an ideal time for finding a job on the X.

[25] The respondent Commission submitted the following (GD4-1 to GD4-9):

(a) When it initially reviewed the file, the Commission established that the Appellant had left in order to start a new job and that he no longer had sufficient availability to offer his former employer. There was no shortage of work; rather, the Appellant was not available when the employer had work for him. The Appellant did not seek to return to his former employer and acknowledged that he had left his employment. He left a permanent job because he had to attend courses. He knew that it was seasonal, and he worked 30 to 40 hours per week.

(b) On July 5, 2014, when he decided to voluntarily leave his employment, the Appellant was leaving a permanent job for a job that he knew was seasonal. In the Commission's view, this goes against the legislation, as the Appellant put himself in a situation in which he had to resort to Employment Insurance.

(c) The Commission concluded that the Appellant did not have just cause for leaving his employment on July 5, 2014, because he failed to show that he had exhausted all reasonable alternatives before leaving or that voluntarily leaving was the only reasonable alternative.

(d) A reasonable alternative would have been to contact his region's local employment centre to see whether he could be referred to the training course. He also could have checked with his employer to see whether they could agree on his availability in connection with the new job or the planned training.

ANALYSIS

[26] First, it is important to recall the principles of the Act highlighted by the case law. The Federal Court of Appeal stated in *Landry* (A-1210-92) that the Commission does not have to consider whether the claimant's conduct is reasonable; rather, it must consider whether the claimant left his employment in any of the circumstances described in subsection 29(c) of the Act and, if not, whether the claimant had no reasonable alternative to leaving.

[27] In *Canada (AG) v. White*, 2011 FCA 190, the Federal Court of Appeal confirmed that it is the responsibility of the claimant who voluntarily left his employment to prove that there was no reasonable alternative to leaving his employment at that time.

[28] The decision in *Attorney General of Canada v. Langlois*, 2008 FCA 18, determined a question of principle relating to voluntary separation from employment in favour of seasonal employment. The excerpts cited below show the angle from which the situation needs to be examined:

> [22] Under the circumstances, I believe that one must view the legislator's no-reasonable-alternative requirement and related case law from a different perspective when applying it to situations contemplated by subparagraph 29(*c*)(vi), where the

person leaves his employment with the reasonable assurance of another employment in the immediate future.

[29] A voluntary leaving of one employment in favour of a seasonal employment is covered by subparagraph 29(*c*)(vi); that being established, how does one determine whether the respondent had just cause to leave his employment for another, seasonal or not? Beyond the reasonable assurance of another employment in the immediate future, paragraph 29(*c*) invites one to have regard to all the circumstances surrounding the claimant's leaving in order to determine whether it was the only reasonable alternative as.

[32] The reason for this approach, dictated by the legislator and followed consistently by the courts, goes to the foundation of the employment insurance scheme. The insurance offered by the scheme is a function of the risk run by an employee of losing his employment. Apart from certain exceptions, it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke that risk or, a fortiori, transform what was only a risk of unemployment into a certainty: see *Tanguay v. Canada (Unemployment Insurance Commission)* (1985), 10 C.C.E.L. 239 (F.C.A.). That is why an employee's voluntary leaving in favour of seasonal employment poses a special problem in the context of the rules of employment insurance. Indeed, seasonal employment, by its very nature, involves a risk — if not a certainty — of a cessation of work that may or may not give rise to benefits, depending on whether or not the number of hours required under section 30 of the Act has been reached.

[33] In my view, in the case of seasonal employment, the time of the voluntary separation and the remaining duration of the seasonal employment are the most important circumstances to consider in determining whether leaving was a reasonable alternative and, accordingly, whether there was just cause for it.

[34] Switching to seasonal employment late in the season when it is about to end and when it is obvious that the requirements of section 30 will clearly not be met creates a certainty of unemployment for which there can be no just cause. The employee is free to

> quit his non-seasonal job, but it is he alone then who must assume the risk of his voluntary leaving. How does this apply to the case at bar?

[29] These principles having been recalled, the Tribunal will now analyze the facts filed as evidence and the grounds raised by the Appellant.

[30] The reason that can push a person to leave a job must be more than just a good personal reason which, although understandable, does not meet the criteria that define just cause.

[31] The Tribunal must determine, having regard to all the circumstances and the evaluation criteria set out by the case law, whether the Appellant's leaving his employment when he did constituted the only reasonable alternative in his case. Whether or not a claimant meets the criteria provided for in the Act is a matter of fact that must be decided according to the circumstances that are specific to each case.

[32] The Appellant left his employment with Thrifty Car Rental to take on a job with Le Repère du Plongeur Inc. This concerns the circumstance provided in subparagraph 29(c)(vi), whereby a claimant has just cause for leaving their employment. However, one must also assess whether the Appellant's new job represented a potential risk or a certainty of unemployment because it was seasonal.

[33] The Appellant knew that his new job would end within a short period of time, since he planned to return to school in September 2014 and because, for him, the new job was a means to acquiring experience in a field in which he planned to complete his training. The Tribunal was not informed as to whether the job with Le Repère du Plongeur could have continued, but it seems as though the season had ended.

[34] The Appellant also must have known that, between June 30, 2014 (the date he left his employment) and August 29 2014 (the date the new job ended), he would not be able to accumulate the minimum number of hours required to be entitled to receive benefits. But that was not his goal. Rather, his goal was to return to school in September.

[35] In the Tribunal's view, the Appellant's situation represented more than a risk of unemployment—it represented a certainty of unemployment.

[36] Notwithstanding the Appellant's argument that he was entitled to receive benefits because he paid into Employment Insurance, it is important to note that the payment of benefits depends not only on contributions to the plan, but also on compliance with certain conditions of the Act.

[37] For these reasons, the Tribunal concludes that the Appellant did not have just cause under the Act for voluntarily leaving his employment and that he was not entitled to receive benefits when he filed his claim.

CONCLUSION

[38] The appeal is dismissed.

Aline Rouleau
Member, General Division
Employment Insurance Section