[TRANSLATION]

Citation: ***C. N. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 95**

Date: May 26, 2015

File No: GE-15-41

GENERAL DIVISION – Employment Insurance Section

Between:

C. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision rendered by Claude Durand, Member, General Division – Employment Insurance Section

In-person hearing held on March 25, 2015, in Repentigny, Quebec.

REASONS AND DECISION

[1] The Appellant, C. N., attended the hearing held on March 25, 2015. She was accompanied by her representative, Jacques Patenaude, of the Mouvement Action Dignité Lanaudière, and by L. D., a witness.

[2] This appeal was heard at an in-person hearing for the reasons set out in the Notice of Hearing dated February 10, 2015.

[3] In this case, an indefinite disentitlement was imposed effective August 3, 2014. The Canada Employment Insurance Commission (the Commission) found that the Appellant had voluntarily left her employment without just cause within the meaning of the *Employment Insurance Act* (the Act).

[4] The Appellant contested that decision. Following the request for reconsideration the Commission upheld its initial decision on December 5, 2014.

[5] On December 19, 2014, the Appellant appealed to the Social Security Tribunal.

ISSUE

[6] The Tribunal must determine whether the Appellant had just cause for leaving her employment under sections 29 and 30 of the *Employment Insurance Act* (the Act) and whether the imposed disentitlement applies.

APPLICABLE LAW

[7] 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, 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.

EVIDENCE

Evidence in the Commission's file

[8] An initial Employment Insurance claim took effect on August 3, 2014 (pages GD3-3 to GD3-17).

[9] The Appellant worked for FMC Recyclage Inc. from May 25, 2014, to July 4, 2014.

[10] The Appellant stated that she left her job because the working conditions were hazardous to her health. She stated that she suffered from recurring back aches attributable to her work station. She also stated that she suffered an indisposition in June as a result of the heat.

[11] She made submissions to the employer in May 2014 in order to improve the working conditions, in particular in terms of ventilation and the location of her work space. No changes

were made before she resigned (pages GD3-26 and 27).

[12] On June 19, 2014, she asked whether she could leave work early in order to renew her driver's licence. The employer refused. The Appellant disregarded the directives and received a disciplinary notice in early July. She refused to sign the notice and then resigned.

[13] When questioned by the Commission, the Appellant stated that she had not discussed the matter with her employer before handing in her resignation.

[14] She was unionized but did not file a grievance or complaint.

[15] She stated that she took steps to find employment before resigning, but to no avail (pages GD3-20 to 22).

[16] The employer refuted the Appellant's statements concerning the potential risks of the job on the health of employees. Once a year, employees are medically screened for the presence of lead and mercury. The employer provides the equipment required to work and complies with CSST standards (page GD3-21).

[17] The employer denied that his refusal to grant the Appellant leave was related to the complaint filed with the CSST. He stated that he did not know what gave rise to the complaint, as it was confidential.

[18] According to the employer's version, the Appellant was denied a request for leave, which she disregarded. A few days later, the employer issued her a disciplinary notice with respect to the unauthorized absence, and the Appellant handed in her resignation (page GD3-44).

Evidence at the hearing:

From the Appellant

[19] She had been working for FCM Recyclage Inc for four years.

[20] She asked permission to leave early on June 19, 2014, to renew her driver's licence. The director, L. C., granted her permission. Only 15 days later, namely, on July 2, did the employer summoned her to give her a disciplinary notice as a result of the incident.

[21] She refused to sign the notice because it would have meant that she agreed to having left work without permission.

[22] This incident with the employer informed her decision to leave. She had been attempting for months to change the working conditions, and her health had been affected.

From the Appellant's witness, Ms. L. D.

[23] The employees submitted a complaint regarding the working conditions.

[24] When the complaint was filed, she and the Appellant were working as daytime workers at the sorting centre.

[25] The working conditions were difficult, and improvements were not made until after the complaint was filed.

SUBMISSIONS OF THE PARTIES

[26] The Appellant's representative submitted the following:

(a) In essence, the Appellant left in order to preserve her health;

(b) Even if she did not have a medical certificate, the Appellant had suffered from back sprain in the past because of her work;

(c) The Appellant is the one who filed the complaint with the CSST;

(d) The recommendations in the CSST report confirm that the Appellant's complaints are founded;

(e) The employer wanted to give her a disciplinary notice, whereas the director had already given her permission to leave orally. The Appellant then realized that this was a ploy to discourage her. She decided to leave, as she could not expect a change from her employer. Her decision was grounded in her culture, as she comes from a country where bosses are almighty and workers' rights are often violated;

[27] The Respondent Commission submitted that:

(a) The facts on file show that the Appellant had been working for the company for four years (page GD3-18). The Appellant explained the challenges of her employment, and the report of the Commission de la santé et de la sécurité du travail (C.S.S.T.) provided confirm her statements (pages GD3-30 to GD3-39). However, the employer stated that the requested changes were made (page GD3-46);

(b) In this case, the Appellant had a discussion with the employer, and some employees filed a complaint with the Commission de la santé et de la sécurité du travail (C.S.S.T.). However, the Appellant left immediately, without awaiting the outcome or waiting for the employer to make the changes. In addition, there was no immediate danger;

(c) The Commission was of the opinion that the Appellant left her employment without pursuing all reasonable alternatives. She should have awaited the outcome and her employer's actions in response to the recommendations. Moreover, she did not file an official complaint with her union. She also failed to provide a medical certificate confirming that a doctor had advised her to leave her employment because her working conditions affected her health (pages GD3-8 and GD3-20);

ANALYSIS

[28] The obligation is on a claimant, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (*White* 2011 FCA 190; *Murugaiah* 2008 FCA 10; *Hernandez* 2007 FCA 320; and *Campeau* 2006 FCA 376).

[29] The test for determining whether a claimant had just cause for leaving their employment under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (*White* 2011 FCA 190; *Macleod* 2010 FCA 301; *Imran* 2008 FCA 17; and *Astronomo* A-141-97).

[30] The question is not whether it was reasonable for the claimant to leave their employment, but rather whether leaving the employment was the only reasonable course of action open to them, having regard to all the circumstances (*Laughland* 2003 FCA 129).

[31] Framing the question as whether leaving the employment is what a reasonable and prudent person would do in similar circumstances is applying the wrong test for "just cause" (*Imran* 2008 FCA 17).

[32] The burden of proof is on the Commission to show that the leaving was voluntary. Then, the burden of proof shifts on the claimant to demonstrate just cause for so leaving (*Green* 2012 FCA 313; *White* 2011 FCA 190; and *Patel* 2010 FCA 95).

[33] These key jurisprudential principles having been stated, the circumstances of this case can now be considered.

[34] The Appellant submitted that she left her employment for workplace health and safety reasons. She claimed that she was pressured to leave because of an unjustified disciplinary notice.

[35] The employer submitted that the Appellant left on her own initiative after receiving a disciplinary notice for leaving work without permission.

[36] We are clearly faced with contradictory versions.

[37] I have reviewed the evidence on file and listened to the Appellant and her witness. I can see how the working conditions on the sorting line they described to me could be difficult.

[38] It is true that the CSST report dated August 22, 2014, highlights a number of areas for improvement.

[39] I note that the employer made the changes suggested following submission of the CSST intervention report.

[40] The witness confirmed to me that the Appellant had been one of the employee representatives asking that the employer make changes to the workplace.

[41] However, this does not demonstrate that the employer pressured the Appellant to leave her job or that her working conditions were untenable or put her health at risk.

[42] I do not accept the argument that the Appellant, because of her culture, concluded that the employer would make no changes and that she was better off resigning.

[43] This case concerns a unionized employee with four years of seniority on the job, who was also an employee representative working to pursue workplace health and safety demands. The Appellant was clearly aware of her rights, and her ethnic origin will not be allowed as an excuse for claiming that she was in a no-win situation.

[44] The evidence shows that the Appellant resigned without attempting to find alternatives to putting herself in a situation of unemployment.

[45] I do not accept the Appellant's claims that her health was at risk.

[46] The evidence does not in any way show that the Appellant suffered harmful effects to her health in the workplace.

[47] In this case, the Appellant appears to have decided to leave her employment after being issued a disciplinary notice. She did not seek out any alternatives before making this decision.

[48] Alternative solutions could have been considered, namely, further discussing the situation, which she deemed problematic, with her employer. Or consulting her union if she felt that the disciplinary notice was unjustified. The Appellant also could have consulted a doctor to see whether she needed time off, or asked for time off to look for another job before leaving the one she had.

[49] In this case, the Appellant failed to meet the burden of proving that she had just cause for leaving her employment and that, in her case, leaving was the only reasonable alternative in the circumstances.

[50] The Tribunal finds that this was a voluntary leaving under sections 29 and 30 of the Act. Consequently, the imposed disentitlement applies

CONCLUSION

[51] The appeal is dismissed.

Claude Durand
Member, General Division – Employment Insurance Section