Citation: ***A. P. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 148**

Date: September 2, 2015

File number: GE-15-1311

GENERAL DIVISION – Employment Insurance Section

Between:

A. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Joseph Wamback, Member, General Division - Employment Insurance Section

Heard by Videoconference on September 2, 2015, Toronto, Ontario.

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant did not attend the hearing. She advised the Tribunal that that she was not going to attend (GD7-1, 7-2, GD8-1, 8-2,8-3). The Tribunal continued with the teleconference hearing in the absence of the Appellant.

INTRODUCTION

[1] The Appellant filed for benefits and was denied by the Respondent at the initial level. The Appellant requested reconsideration and then Respondent denied her request at the reconsideration level. The Appellant filed an appeal with the Tribunal and a video conference hearing was scheduled.

[2] The hearing was held by Videoconference for the following reasons:

a) The fact that the credibility may be a prevailing issue.

b) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] The Appellant is appealing the Respondent's decision resulting from her request for reconsideration under Section 112 of the *Employment Insurance Act* (Act) regarding a disqualification imposed pursuant to sections 29 and 30 of the Act because she voluntarily left her employment without just cause.

THE LAW

[4] Section 29 of the Act:

For the purposes of sections 30 to 33,

(a) "employment" refers to any employment of the appellant 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 appellant 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,reasonable assurance of another employment in the immediate future,

(vi) significant modification of terms and conditions respecting wages or salary,

(vii) excessive overtime work or refusal to pay for overtime work,

(viii) gnificant changes in work duties,

(ix) antagonism with a supervisor if the appellant is not primarily responsible for the antagonism,

(x) practices of an employer that are contrary to law,

(xi) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xii) undue pressure by an employer on the appellant to leave their employment, and

(xiii) any other reasonable circumstances that are prescribed.

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

An appellant is disqualified from receiving any benefits if the appellant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the appellant 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 appellant is disentitled under sections 31 to 33 in relation to the employment."

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

The disqualification is for each week of the appellant'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 appellant during the benefit period.

[7] Section 112 of the Act:

(1) An appellant or other person who is the subject of a decision of the Respondent, or the employer of the appellant, may make a request to the Respondent in the prescribed form and manner for a reconsideration of that decision at any time within

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Respondent may allow.

(2) The Respondent must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Respondent may allow a longer period to make a request under subsection (1).

[8] Section 51.1 of the Regulations

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

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

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

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

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

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

EVIDENCE

[9] The Appellant filed for regular benefits on November 1, 2014. She stated that she was on a leave of absence from her employer. (GD3-4 through 3-12)

[10] The Appellant worked for Husky IMS from May 31, 1999 to May 23, 2014 when according to her record of employment she quit her job (GD 3-13).

[11] The Respondent notified the Appellant on December 17, 2014 to complete the Voluntary Separation from Employment Questionnaire. (GD3-15 through GD3-21) The Appellant failed to return the questionnaire and the Respondent proceeded to make their decision based on the information on file.

[12] The Respondent notified the Appellant on January 7, 2015 that they could not pay benefits as they determined she voluntarily left her employment without just cause and that voluntarily leaving your employment was not her only reasonable alternative. (GD3-23)

[13] The Appellant requested reconsideration on February 9, 2015. She completed her Voluntary Separation from Employment Questionnaire and stated that she had asked for and was denied a leave of absence until November 3, 2014. She was granted a leave until May 20, 2014. Once out of Canada, she asked again via email for an extension of her leave but was denied due to her employers operational constraints. She claimed that both her and her husband did not feel well following a death in the family and due to the fact that she worked with vulnerable children, she felt that should not work in her condition. She further stated that she did not seek medical attention during her absence from Canada because she did not have medical coverage in while in Croatia (GD3-25 to GD3-32).

[14] The employer advised the Respondent on March 13, 2015 that the Appellant went on a leave of absence due to a death in the family. While she was still on leave, she requested an extension of the leave and the employer states they were unable to accommodate her due to operational concerns. The Appellant worked in the on-site day care and they needed her back for the summer which is their busiest season. The employer states that the Appellant was warned during their correspondence that if she does not return on her scheduled date, they will

consider to have abandoned her position. The employer states that the Appellant was aware that if she did not return to work by May 26, 2014 they consider her to have abandoned her job. The employer provided a copy of the Appellant's correspondence and termination letter to the Respondent. (GD3-33 through 38)

[15] The Respondent attempted to contact the Appellant on March 17, 2015 by phone and email with limited success. The Appellant provided copies of email correspondence with her employer. (GD3-39 through GD-53)

[16] The Respondent notified the Appellant on March 25, 2015 that after an in-depth review of the circumstances of her case and of supplementary information provided and based on their findings and the legislation, they regret to inform her that they have not changed their decision as communicated to her on January 7, 2015. (GD3-54, 55)

[17] The Appellant filed an appeal with the Tribunal on April 13, 2015 (GD2-1 through GD2- 20)

[18] The Tribunal scheduled a video conference hearing.

[19] The Appellant notified the Tribunal on July 13, 2015 that she will not attend the video conference hearing and directed the Tribunal to proceed in her absence. (GD6-1) The Tribunal advised the Appellant that the hearing will proceed as scheduled and will be decided based upon the evidence contained in the docket and any additional submissions provided by the Appellant in accordance with the *Social Security Tribunal Regulations* section 12(1). The Appellant confirmed her intentions not to attend on Sept 2, 2015. (GD8-1, 2, 3)

SUBMISSIONS

[20] The Appellant submitted that;

a) She did not feel that she was physically or emotionally able to return to work on her scheduled return date.

[21] The Respondent submitted that;

a) Subsection 30(2) of the Act provides for an indefinite disqualification when an appellant voluntarily leaves her employment without just cause. The test to be applied, having regard to all the circumstances, is whether the Appellant had a reasonable alternative to leaving her employment when she did.

b) In the case at hand, the Appellant has not proven that she had no option but to quit her job when she did. The Appellant could have returned to work at the end of her approved leave of absence or she could have sought medical attention to substantiate a further leave if she was medically unable to return to work.

c) Although the situation was very tragic, the employer had allowed the Appellant 5 weeks off work to attend a family funeral and notified her that her request to extend her leave until November 3rd, 2014 was denied. She was additionally warned that if she did not return to work by May 26th, 2014, they would consider her to have resigned. Evidence of this is found in the emails the employer has sent on April 28th (GD3-44), May 12th (GD3-46), as well as May 15th (GD3-47). Although the Appellant was aware of her employer's position, she chose remain steadfast in her insistence to remain out of Canada (GD3-47 & GD3-48)

d) The Appellant has also argued that she was emotionally and physically unable to return to work as scheduled. However, she did not seek medical attention one time during her 6 month absence from Canada and has not provided any medical evidence to support this claim (GD3-26). Furthermore, the medical note the Appellant provided was dated January 21st, 2015, which is 9 months after her departure from Canada (GD3-38). While the note does indicate that she was suffering emotionally after a death in their family, it did not indicate that she was unable to work at any time. Without seeing a medical professional, it is not plausible that the Appellant alone could have diagnosed that she would be recovered and able to return to work by November 3rd. Faced with a tragic family situation, the Appellant may have felt that she had good reason to remain on leave without approval. However, good cause is not synonymous with just cause. Consider *Imran* (A-104-07) which addresses the difference between good reasons for quitting and having just cause for doing so:

ANALYSIS

[22] The Tribunal member connected to the Video Conference Hearing at 12:48 PM Eastern and waited until 1:31 PM and the Appellant did not attend the hearing. The Tribunal, received correspondence dated July 13, 2015 indicating that the Appellant would not attend the hearing. The Tribunal member advised the Appellant that if she wishes to attend the hearing, it will take place at the time and location specified. If the Appellant does not attend then the Tribunal will render a decision based on the evidence contained in the docket and her previous submissions in accordance with the provisions of the *Social Security Tribunal Regulations,* section 12(1). The Appellant further advised the Tribunal on September 2, 2015 that she would not attend the hearing and submitted a copy of correspondence from her employer. (GD8-3)

[23] The issue before the Tribunal is whether the Appellant voluntarily left her employment and, if so, had she demonstrated just cause pursuant to section 29 and 30 of the Act.

[24] Appellants who voluntarily leave their employment will not be entitled to receive benefits unless they can establish they had "just cause" for doing so. The term "just cause" is not defined in the legislation. Paragraph 29(c) of the Act lists certain examples or circumstances which may constitute just cause. These examples are not exhaustive to all of the circumstances of each individual case in determining whether just cause exists.

[25] The legal test for just cause, as set out in paragraph 29(c) of the Act, is whether an appellant has "no reasonable alternative to leaving the employment". In making the determination as to whether just cause exists, the focus is on whether the appellant had a reasonable alternative to placing himself/herself in the position of being unemployed and forcing others to bear that burden. Just cause exists if, at the time an appellant leaves his/her employment without having secured another job, circumstances existed which excused him/her from taking the risk of causing others to bear the burden of his/her unemployment.

[26] In CUB 73370 *Michel Beaudry,* Chief Umpire Designate wrote:

> "Section 30 of the Act provides that appellants who voluntarily leave their employment without just cause are not entitled to benefits. The legislation reflects the intention of the employment insurance scheme which is to compensate those

> individuals whose employment has been terminated involuntarily and who are without work through no fault of their own. The Act is not intended to benefit individuals who choose not to be employed.

[27] An appellant who seeks to demonstrate just cause must also show that he/she had "no reasonable alternative to leaving or taking leave." The Federal Court of appeal has affirmed that the burden is on the plaintiff to demonstrate that there was no reasonable alternative to leaving (*Rena Astronomy* A-141-97)

[28] Under section 30(1) of the Act, an appellant is disqualified from receiving benefits if he/she voluntarily leaves an employment without just cause, unless he/she satisfies one of the exceptions set out in section 29(c) of the current Act. Section 29(c) of the Act stipulates that an appellant can voluntarily leave his/her employment if he/she has no reasonable alternative to leaving. This section also stipulates that just cause is proven when the existence of any of the 14 situations listed can be established. Those situations are set out in section 29(c)(i to xiv) of the EI Act. The Tribunal reviewed the exceptions set out in section 29(c) with the evidence provided by the Appellant in her submissions to the Respondent and the Tribunal. In this case the Tribunal finds that the Appellant did not establish that she met any of the situations set out in section 29(c)(i to xiv) of the Act.

[29] The Tribunal finds that the Appellant left her employment on an approved leave of absence and she was to return to her employment on May 20, 2014. The Appellant's employer confirmed to the Respondent that the Appellant was clearly aware of her obligation to return to her employment and that if she failed to do so her employer would treat her as having abandoned her employment. The Appellant made a personal decision not to return to work on the agreed date and in doing so abandoned her employment. The Tribunal finds that the employer had allowed the Appellant 5 weeks off work to attend a family funeral and notified her that her request to extend her leave until November 3rd, 2014 was denied. She was additionally warned that if she did not return to work by May 26th, 2014, they would consider her to have resigned. Evidence of this is found in the emails the employer has sent on April 28th (GD3-44),

[30] Jurisprudence states that remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job: (*Murugaiah* 2008 FCA 10*; Campeau* 2006 FCA 376).

[31] In this case all the evidence, including the Appellant's own testimony, demonstrates that she voluntarily left her job by not returning to her employment on the agreed date with her employer. The Tribunal finds that the Appellant made a personal choice not to return to work and she did not provide any medical documentation to her employer to demonstrate any illness or disability. The Tribunal finds that the Appellant took the initiative in severing her relationship with her employer.

[32] The Tribunal cannot conclude that the Appellant's circumstances were such as to justify placing the financial risk, which would arise from leaving her employment, on others. The Appellant's appeal must therefore be dismissed.

[33] Section 51.1 of the Regulations states;

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

> (a) circumstances in which an appellant has an obligation to accompany to another residence a person with whom the appellant has been cohabiting in a conjugal relationship for a period of less than one year and where
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> > (i) the appellant or that person has had a child during that period or has adopted a child during that period,
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> > (ii) the appellant or that person is expecting the birth of a child, or
> >
> > (iii) a child has been placed with the appellant or that person during that period for the purpose of adoption; and
>
> (b) circumstances in which an appellant has an obligation to care for a member of their immediate family within the meaning of subsection 55(2).

[34] The Tribunal finds based on the evidence submitted by the Appellant that she does not meet any of the exceptions set out in section 51.1 of the Regulations

CONCLUSION

[35] The appeal is dismissed.

Joseph Wamback
Member, General Division - Employment Insurance Section