Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. Y. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 19

Tribunal File Number: GE-15-1752

BETWEEN:

S. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Alpine Access Canada Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alyssa Yufe

HEARD ON: February 2, 2016

DATE OF DECISION: February 8, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The hearing was scheduled for February 2, 2016 by telephone conference.

The Tribunal left the phone line open for approximately 45 minutes.

No one attended the hearing.

The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal"), checked the Canada Post confirmations in the file and saw that the Appellant and the Employer had received the Notice of Hearing.

On this basis, the Tribunal was satisfied that the parties received the Notice of Hearing and it proceeded in absence of the parties and pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* SOR/2013-60 (the "SST Regulations").

DECISION

[1] The Tribunal finds that the Appellant has not proven that he had just cause for voluntarily departing his employment on a balance of probabilities. The appeal is, accordingly, dismissed.

INTRODUCTION

[2] The Appellant filed an initial claim for benefits on January 28, 2015 (GD3-10). The Appellant's claim was effective January 18, 2015 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on March 9, 2015 that it was unable to pay the Appellant employment insurance benefits because he departed his employment voluntarily without just cause (GD3-38).

[4] The Appellant filed a Request for Reconsideration with the Commission. The Commission decided on April 29, 2015 to maintain its decision with respect to the issue of voluntary departure (GD3-46).

[5] The Appellant filed an appeal to the Tribunal on May 28, 2015 (GD-2). The Appellant sent in a copy of the reconsideration letter shortly after he received a reminder notice from the Social Security Tribunal (GD2A).

[6] The Tribunal added the Employer as a party on October 13, 2015. The Employer did not file any submissions, despite that it was given an opportunity to so do (GD6).

[7] No one attended the hearing, which was scheduled for December 8, 2015. The Case Management Officer of the Social Security Tribunal (the "CMO") telephoned the Appellant a few days prior to the hearing on the Tribunal's instructions because it appeared from the Canada Post confirmations that the Appellant had not claimed the Notice of Hearing from the post office. The Appellant was provided with the information necessary to attend the hearing by the CMO. The Appellant also confirmed to the CMO that he had a copy of the file, which had been provided earlier together with the GD6 document). Out of an abundance of caution, the Tribunal decided to adjourn the hearing to February 2, 2016 even though it was satisfied that the Appellant had actual notice of the hearing. The Appellant and Employer were sent a new notice of hearing with a copy of the file (GD7).

FORM OF HEARING

[8] The hearing was scheduled to be heard by telephone conference for the reasons indicated in the Notices of Hearing dated November 5, 2015 and December 8, 2015.

ISSUE

Voluntary Departure

[9] Whether or not the Appellant voluntarily departed his employment with just cause pursuant to paragraph 29(c) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")?

THE LAW

Voluntary Departure: Law

[10] Section 30(1) of the Act provides for an indefinite disqualification when a claimant voluntarily leaves his/her employment without just cause. It provides as follows:

> **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.

[11] Subsection 29(c) of the Act provides that just cause is held to exist where the claimant had no reasonable alternative to leaving or taking leave, having regard to all of the circumstances, including, the circumstances which are enumerated in subparagraphs (i) to (xiv) of subsection 29 (c), which provide as follows:

> (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.

[12] Section 30(2) and (3) specify the following regarding the effect of the disqualification:

> (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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

[13] According to the jurisprudence, the Commission first has to prove that the claimant voluntarily departed from his or her employment on a balance of probabilities. Once the voluntary separation has been established, the burden then shifts to the claimant to prove just cause on a balance of probabilities. To prove just cause, the claimant has to prove, that having regard to all of the circumstances, s/he had no reasonable alternative to leaving the employment when s/he did (*White*, 2011 FCA 190; *Patel* 2010 FCA 95; *Rena Astronomo* A-141-97).

EVIDENCE

Appellant Evidence:

Application for Benefits:

[14] The Appellant worked at "AAHO" (the "Employer") from August 4, 2014 to January 19, 2015. The Appellant quit because his equipment and internet connection did not meet the requirements and there were internet connection issues at his location (Application for Benefits, GD3-2 to GD3-10).

The 48 Hour Notice:

[15] By email dated January 20, 2015, the Employer sent the Appellant an email "48hr Home Office Notice", which provided that the Appellant's home office does not meet the requirements for Sykes Home Powered by Alpine Access. The Employer policy required the Appellant to meet the high speed internet meeting requirements by the beginning of shift on Thursday, January 22, 2015 at 1:00pm MT. The Employer stated that the Appellant was valued as an employee and that if he could not meet the requirements by the deadline, he would be at risk of removal from the Employer. The Employer included the list of requirements. The Employer, DP, advised, "Please let me know if you have any questions" (The "48 Hour Notice", January 20, 2015, GD3-20 and GD3-34).

Commission's Conversations with the Appellant:

[16] The Appellant quit because it was a home based business and he no longer met the internet connection or computer requirements. The Appellant was not able to upgrade his computer to meet the requirements as it would have been too expensive for him to replace his computer. The Appellant contacted his internet service provider, "Telus" and was told that the drop in services was due to increased population and wiring capacity that would be upgraded in the future. The Appellant has a letter from the Employer regarding the issues and he would provide them to the Commission (Commission notes, February 21, 2015, GD3-13).

[17] The Appellant faxed the notice (February 23, 2015, GD3-14).

[18] The Appellant had high speed internet but the Employer required an ultra high speed service, that would need him to register a business. Telus told the Appellant that to upgrade, he would have to prove that he was self-employed or that he had business needs. The Appellant did not ask Telus, what kind of proof it required. The Appellant assumed that because he was not self-employed, he could not upgrade the service. The Appellant did not contact any other internet service providers to see if he could get the speed that he needed. The Appellant also had to upgrade his computer because it no longer met the current requirements. Due to the 48 Hour Notice, the Appellant did not have time to upgrade his Internet and his computer. The Appellant stated that he informed the Employer that he would need more time to complete the upgrades but the Employer would not give him more time (Commission notes, February 26, 2015, GD3-15).

[19] The computer issues were with the Appellant's computer and not the Employer's computer. The Employer provided the Appellant with the computer/AIB and he also had to use his own computer and this is the one, which he would need to upgrade. Since his computer was not meeting the standards, it was his responsibility to fix it. The Appellant did not ask the Employer to extend the 48 hour period as he did not think that it was possible. When the Commission queried whether the Appellant noticed that DP's email advised, "please let me know if you have any questions" (GD3-34), the Appellant advised that he did not think that this meant that he could ask for an extension. The Appellant did not follow up with the supervisor's request to contact him after he submitted his first resignation because he knew that he would not have been able to complete the upgrade requirements to his computer. The Appellant was not at

home when the Employer called him and he began to pursue other opportunities instead. The Appellant's lease was ending in February 2015 and he could not find somewhere affordable to live so he decided to move. The Appellant did not consider asking to transfer because he had not yet found an apartment in Ontario that would meet the Employer's requirements (secure and quite location) and he still had to upgrade his computer. The Appellant was staying with family in Ontario and does not have his own designated office space (Commission notes, March 9, 2015, GD3-37).

[20] The Appellant stated that he was sick and staying in X and apologized for returning the call so late. The Appellant advised that he had asthma and an attack on Friday so that is why there was another delay. The Appellant asked why he had to pay employment insurance premiums if he could not receive benefits. The Appellant did not feel that he had any alternatives. Even if the Appellant had been granted a leave of absence, he did not have money for a new computer. He made the decision to leave his employment and to pursue other opportunities because he knew that he would not be able to comply. The Appellant decided to move back to Ontario because he had a few job interviews in January and they did not work out. He could not renew his lease. He made the decision to move after he lost his employment. He did not want his work record to show that he was fired. He did not discuss the situation with his team when he was asked to because he knew that the situation could not be resolved (April 1, 2015, GD3-44).

Evidence from the Request for Reconsideration (GD3-42) and Notice of Appeal (GD2):

[21] The Appellant could not meet the Employer's requirements because of 1) computer systems and 2) internet connection speed. The Appellant was given 48 Hour Notice or risk removal and this was not something, which he could resolve in 48 hours (GD3-42).

[22] The Appellant was working two jobs and the last Employer changed his schedule so he was forced to quit his first job unwillingly with a loss of income (GD2).

[23] While working on his second job, the system froze one day and he was asked to reboot. The tech person then decided that he did not meet the system speed requirements. The Appellant explained that nothing changed since the last 5 months. The supervisor sent the Appellant a 48

hour notice to comply. The decision was very harsh and the service provider could not guarantee him super high speeds and said that the speed was not decreased. This was not something that was within his power to resolve so he had no alternative but to resign (GD2).

[24] The commission agent refused to give the Appellant her last name and she was very abrupt and kept suggesting that the Appellant had other options (GD2).

Employer Evidence

[25] According to the record of employment dated February 4, 2015 ("ROE"), the Appellant worked at "RWCS", the Employer from August 5, 2014 to January 19, 2015. The reason for issuing the ROE was listed as Code "E" for "Quit". He had accumulated 885 insurable hours (GD3-12).

Employer's Conversations with the Commission

[26] The Appellant quit his employment. SI said she would verify whether the email was sent. When an employee starts with the Employer, they are provided with an "A in a box kit" ("AIB") to do the work. The AIB includes a computer console, stand, video switch box, network/Ethernet cable, USB mouse and keyboard, power cord/brick and VGA cable. The employee is required to use their own monitor and to obtain their own telephone and internet service. If the computer did not meet the necessary equipment standards, then the employee was required to contact technical support to have troubleshooting done. If the equipment was found to be the issue, then a new AIB would be sent to the employee and the Employer would pay for any work that was missed due to the issue. If the issue was related to the employee's equipment, they would be given the warning to update their services and terminated if they do not comply. If the employee had informed the Employer that he was getting the repairs done, they do have a practice of extending the completion timeframes to allow time for the upgrades or repairs. The Employer did not terminate the Appellant. It received the resignation notice from him dated January 22, 2015 and states that he was resigning due to 1) the internet connection issue; 2) to be close to family; and, 3) to pursue other opportunities (Commission notes, March 2, 2015, GD3-16)

[27] The technical issues usually arise when the Employer notices that there are dropped internet connections or telephone calls. If the issue was not related to the hardware that was

supplied, then it is the employee's job to troubleshoot the issue with the Internet service provider. The Appellant's email stated that Telus was coming to trouble shoot the issue but that he was not in compliance with the requirements. He wanted to be removed from the employment to pursue other opportunities. The Appellant's manager emailed him to see if he was available to talk. The Employer received a follow up email from the Appellant stating that the Appellant was not at home and confirming that he was resigning due to the internet issue, to be closer to family and to pursue other opportunities. The Employer would not have assisted to upgrade the Appellant's services as it is his responsibility to have the required connection. The Appellant had the option to choose the provider he wanted. The Appellant could have taken unpaid personal leave to allow time to complete the upgrades, if it would have taken more than 5 days. If the Appellant needed more time, he only had to ask for it. The Appellant would have been transferable within Alberta or Ontario because it had branches there. The Appellant did not request to transfer (Commission notes, March 6, 2015, GD3-17 to 18).

[28] The Appellant was not required to have a second computer of his own as a back up to the equipment provided. The Commission repeated the Appellant's advice, that his home office system did not comply and that he could not meet the requirements and could not afford to purchase a new system. SI advised that even if that was the case, the Employer would have provided time off or an accelerated pay schedule to assist with the costs. SI called back and confirmed that the Appellant was required to use his own personal computer for training but not for the day to day duties. DP confirmed that the 48 Hour Notice arose as a result of the internet access issues and not because the Appellant was required to obtain another home computer (Commission notes, April 24, 2015, GD3-45).

Documents Provided by the Employer:

[29] GD3-25 to 30 is the Employer Work Area Agreement. It provides that the Appellant had to have a designated home office and had to maintain subscription to a reliable, high speed, hard wired, bi-directional internet connection using DSL or Cable that met the following requirements: 1. Land Based (not a wireless or satellite broadband connection); 2. Reliable with consistent "up" time; 3. Unlimited use. The Employee also agreed to maintain a landline telephone line with certain qualifications.

[30] By email dated January 22, 2015, at 3:29pm, the Appellant wrote to DP of the Employer and advised that Telus contacted him and they were sending a technician to his apartment to check the line/or drops or interruption in the apartment. The Appellant advised that he understood that he was not currently meeting the home office requirements of a reliable internet connection so he was requesting to be removed so he could pursue other opportunities (January 22, 2015, GD3-35).

[31] By email dated January 22, 2015, at 1:37pm, DP wrote to the Appellant "are you able to come to the bridge and talk?" (GD3-36).

[32] By reply email dated January 22, 2015 at 4:22pm, the Appellant stated, "sorry I am not at home. Yes. I am resigning. It is a number of reasons 1/ internet connection issue 2/ to be close to family 3/ to pursue some other opportunities" (GD3-36).

SUBMISSIONS

[33] **The Appellant** submitted that he had just cause for the voluntary departure for the following reasons:

a) The Appellant was professional and responsible and his only option was to look for other opportunities (GD3-42);

b) The Appellant did not intend to resign for the sake of it but because of the situation or circumstances requested by the Employer (GD3-42);

c) The Appellant is being penalized for respecting the Employer's decision (GD3-42);

d) The Appellant is not seeking employment insurance for the sake of it but due to circumstances beyond his control (GD3-42); and,

e) The representative at the Commission only suggested that the Appellant could do this or that (GD3-42).

[34] **The Respondent** submitted as follows:

a) Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant voluntarily leaves his or her employment without just cause. The test to be applied, having regard to all of the circumstances, is whether the claimant had a reasonable alternative to leaving his/her employment when s/he did. The Appellant had the burden to prove that there was no reasonable alternative (*White*, 2011 FCA 190)(GD4-3);

b) The Appellant had several reasonable alternatives. The Appellant could have discussed the situation with his Employer to clarify what was required, and to ask for assistance and more time than the 48 hour notice period. The Employer made this reasonable alternative available to him when it stated, "are you able to come to the bridge so we can talk" (GD3-36)(GD4-3);

c) The Employer confirmed that he was not required to upgrade his personal computer and that his internet connection connection was the only issue (GD4-3);

d) The Employer's summary of the sequence of events reflects that the Appellant did not want to pursue the issue and that he had other priorities (GD4-3);

e) The Appellant could have contacted other internet service providers (GD4-4);

f) Given that the Appellant replied that he was "not at home" and that he mentioned that he was not renewing his lease and that he had other interviews in Ontario for work in January, the two other reasons, which the Appellant gave for quitting, "being closer to family" and "to pursue other opportunities" were relevant and that the internet connectivity issue was not the primary reason (GD4-4);

g) the Appellant could have asked for extra time or assistance or for a transfer to an office in Ontario (GD4-4);

ANALYSIS

[35] It has long been held that the rationale for the general rule, that employees who voluntarily terminate the employment relationship are not entitled to employment insurance benefits, (save and except for in exceptional circumstances, such as those, which are enumerated in the legislation), is that the Act is in essence "insurance" against involuntary unemployment and that an essential rule of insurance is that an "assured shall not deliberately create or increase the risk" (*Crewe* (1982) 2 All E.R. 745 per Lords Donaldson and Denning.) (*Tanguay* A-1458-84).

[36] This rationale is also reflected in the *dicta* of Pratte J. in *Tanguay*, wherein he stated that to prove "just cause" the claimant must satisfy the Tribunal that s/he had no reasonable alternative than to place "himself on the roles of the unemployed for insurance purposes" (*Tanguay* A-1458-84, Pratte J.). Proving that there was no reasonable alternative at the time of the departure, is a requirement of the test for just cause and is written into subsection 29 (c) of the Act.

[37] The law is clear that the employment insurance scheme is not intended to be used to subsidize employees who depart voluntarily for personal reasons and create risks for reasons which do not amount to just cause (*Bois* 2001 FCA 175).

Findings of Fact:

[38] The Tribunal finds as a fact that the Commission has proven on a balance of probabilities that the Appellant left his employment voluntarily. The Appellant admitted this fact in his application for benefits and in the Notice of Appeal. The burden has now, accordingly shifted to the Appellant to prove that he had just cause for voluntarily leaving his employment (*White*, 2011 FCA 190; *Patel* 2010 FCA).

[39] The Appellant argued in the statements, which he made to the Commission and in his own written statements and Notice of Appeal that he had just cause for departing his employment voluntarily.

[40] The Appellant argued that he had no choice but to resign. The Appellant submitted that he was not able to afford a new computer and that he also could not comply with the requirements of his job within the 48 hour deadline provided by the Employer.

[41] The Appellant also stated that he wanted to resign to be closer to family and to pursue other opportunities.

[42] The Employer denied that the Appellant had a computer problem and testified that the Appellant did not need his own computer for work purposes. The Employer advised that it made an effort to get in touch with the Appellant to discuss the matter. The Employer advised that on January 22, 2015, the Appellant tendered his resignation and declined the supervisor's offer to discuss the issues surrounding his challenges with meeting the job requirements (GD3-35 and 36).

[43] In weighing the Appellant's evidence against the Employer's, it appeared from the Commission notes that the Appellant contradicted himself on several occasions. At GD3-15, the Commission reported that the Appellant advised that he asked the Employer for more time to complete the upgrades and that the Employer would not give him more time. The Appellant then appears to have stated to the Commission that he did not ask for more time and did not follow up with the Employer's request to contact the Employer because the Appellant knew that he would not have been able to complete the upgrades required. It was then noted that the Appellant blamed the issue on his own computer and started to argue that he could not afford to fix his own computer (GD3-37 to GD3-44), when the Employer stated clearly that the Appellant was not required to use his own computer for his work.

[44] The Tribunal finds that after reviewing the record carefully, the statements provided by the Employer and Appellant were not equally credible or plausible. The Tribunal preferred the indirect evidence of the Employer regarding the facts surrounding the termination of the employment and the computer issue because the Employer's statements were corroborated by

business records and email records, which showed the final communications between the Appellant and the Employer and because of the Appellant's own admissions or contradictions in the file (GD3-35 to 36) (*Morris* A-291-98, leave to appeal to S.C.C. refused [1999] S.C.C.A No. 304; *Mills* A-1873-83).

[45] The Tribunal finds that the 48 Hour Notice amounted to a warning that the Appellant's employment could be terminated for non-compliance with a fundamental term of his employment contract. After receiving the 48 Hour Notice, the Appellant researched whether it was possible to comply with the Employer's requirements with his internet service provider. The Appellant did not contact other internet service providers and the Appellant failed to discuss the situation with his Employer when the Employer reached out to him via email.

[46] Instead, the Appellant made plans to move to another residence and find another job.

[47] Notwithstanding that the Appellant may have been quite panicked regarding his employment situation and that he may have feared that he would be dismissed for misconduct (GD3-44), the Appellant should have taken whatever steps were necessary to preserve his employment, including, having a discussion with his Employer about the situation and the options open to him to resolve it. To do otherwise, as the Appellant has done means that he pre-empted the termination of his employment and brought about the termination of his employment. In this regard, the Appellant deliberately caused the risk to have occurred and he created his own situation of unemployment.

[48] This is especially the case because the Appellant advised that he had been operating with the same equipment and technology for at least 5 months when he knew or ought to have known what was required of him pursuant to his contract of employment (GD3-25 to 30).

[49] In this regard, the Tribunal does not find that the Appellant's failure to comply with the technical requirements of his employment amounted to just cause and notes parenthetically, that the Appellant's failure to comply could also have been considered misconduct (*Easson*, 1994, 2 C.C.E.I. (2d) 82, 167 N.R. 232; *Brisette*, [1994] 1 F.C. 684 (C.A.), A-1342-92; CUB 65001).

[50] With respect to the Appellant's arguments that he moved to be closer to family and to find a new job, the Appellant admitted that he had no job offers or prospects at the time of his

departure from his employment. These reasons have been held to be purely personal in nature and incapable of amounting to "just cause" pursuant to the Act or jurisprudence/case law (*Bois* 2001 FCA 175; *Campeau 2006 FCA 376*; CUB 75011, 2010, CUB 80296, 2012; *Langlois* 2008 FCA 18; *Laughland* 2003 FCA 129).

Reasonable Alternatives:

[51] Even if the Appellant had proven the first part of the test for just cause on a balance of probabilities, (which for greater certainty the Tribunal finds, the Appellant was unable to prove), the Appellant failed to prove that he had no reasonable alternative than to have departed his employment voluntarily.

[52] The Appellant argued that the Commission should not have concerned itself with so many hypotheticals, (when it queried whether there were other internet service providers who the Appellant should have contacted or when it attempted to gauge what the Appellant's prospects were for obtaining an extension of the 48 hour deadline, or when it suggested that he could have taken a period of leave, GD2, GD3-42). The Tribunal disagrees. The Commission was simply applying the "reasonable alternative test" to the circumstances of the Appellant's case (*White*, 2011 FCA 190; and, *Patel* 2010 FCA 95).

[53] The Tribunal finds that the Appellant failed to prove just cause on balance of probabilities because he failed to discuss the situation with his Employer and even declined his Employer's offer to so do (GD3-35 and 36). This prevented the Employer from attempting to accommodate the Appellant or grant him an extension of time. This is especially relevant given the Employer's statements to the Commission that an extension of time or a period of leave or a transfer to Ontario could have been granted (GD3-16 to 18, GD3-45)(*Murugaiah* 2008 FCA 10, *Hernandez* 2007 FCA 320, *Campeau* 2006 FCA 376).

[54] The Appellant's other reasonable alternatives, were to have contacted other internet service providers and to have undertaken a more exhaustive search for the high speed internet service required. The Appellant could also have undertaken a job search and secured alternative employment prior to tendering his resignation in the January 22, 2015 email (GD3-35 and 36).

CONCLUSION

[55] For the foregoing reasons, the Tribunal finds that the Appellant has not proven on a balance of probabilities that he had just cause and no reasonable alternative than to have departed his employment voluntarily (*White*, 2011 FCA 190; and, *Patel* 2010 FCA 95).

[56] The appeal is, accordingly, dismissed.

Alyssa Yufe
Member, General Division - Employment Insurance Section