



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. S. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 20

Tribunal File Number: GE-15-2697

BETWEEN:

H. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Simone Reinsch

HEARD ON: February 2, 2016

DATE OF DECISION: February 8, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: H. S.

Representative/spouse: M. K.

INTRODUCTION

[1] The Appellant filed a claim for regular benefits on March 12, 2014. The Canada Employment Insurance Commission denied the initial claim, and on July 16, 2014 denied his reconsideration request on the basis that he had voluntarily left his employment without just cause. The Appellant was disqualified for the benefit period starting March 9, 2014. In addition, the Appellant was disentitled to benefits because, since voluntarily leaving his employment, he did not accumulate sufficient insurable hours after his departure to qualify for regular benefits.

[2] The Appellant filed an appeal to the Social Security Tribunal—General Division (SST-GD) on August 12, 2014. A teleconference hearing was set for January 28, 2015. The Appellant failed to appear and in accordance with section 12 of the *Social Security Tribunal Regulations*, the Member proceeded in the Appellant's absence. The appeal was dismissed. A decision was rendered on January 28, 2015.

[3] The Appellant appealed the January 2015 SST-GD decision to the Social Security Tribunal—Appeal Division (SST-AD). On August 31, 2015, the SST-AD allowed leave to appeal and returned the appeal to SST-GD. A teleconference hearing was scheduled to allow the parties to be heard.

[4] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issues under appeal.
- b) The fact that the appellant will be the only party in attendance.
- c) The information in the file, including the need for additional information.

- d) 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

[5] The Appellant appeals the following two issues:

- a) the indefinite disqualification, which arose when he left his employment at Polo Security without just cause, under section 30 of the *Employment Insurance Act* (EI Act); and
- b) whether, since his departure from Polo Security, he accumulated sufficient insurable hours of employment in order to meet the requirements of section 7 or 7.1 of the Act.

THE LAW

[6] In accordance to subsection 7(1) of the *Employment Insurance Act* (Act), unemployment benefits are payable as provided to an insured person who qualifies to receive them.

[7] Subsection 7(2) of the Act set outs the criteria that must be met to qualify for benefits. In their qualifying period, an insured person, other than a new entrant or a re-entrant to the labour force qualifies if the person

- a) has had an interruption of earnings from employment; and
- b) has had during their qualifying period at least the number of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700

more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

[8] Subsection 7(3) of the Act states that an insured person who is a new entrant or a re-entrant to the labour force qualifies if the person

- a) has had an interruption of earnings from employment; and
- b) has had 910 or more hours of insurable employment in their qualifying period.

[9] Subsection 7(4) of the Act states that an insured person is a new entrant or a re-entrant to the labour force if, in the last 52 weeks before their qualifying period, the person has had fewer than 490

- a) hours of insurable employment;
- b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;
- c) prescribed hours that related to employment in the labour force; or
- d) hours comprised of any combination of those hours.

[10] Subsection 8(1) of the Act states that the qualifying period of an insured person is the shorter of

- a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and
- b) the period begins on the first day of a preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10.

[11] Section 29 of the Act shows that 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 their 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 family 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) 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] Subsection 30(1) of the Act indicates a claimant is disqualified from receiving any benefits if a 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 31-33 in relation to the employment.

[13] Subsection 30(2) of the Act indicates that 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.

[14] In accordance with subsection 30(5) of the Act, if a claimant who has lost or let an employment as described in subsection (1) makes an initial claim for benefits, the following may not be used to qualify under section 7 or 7.1 to receive benefits:

- a) hours of insurable employment from that or any other employment before the employment was lost or left; and
- b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

[15] Subsection 30(7) of the Act, indicates with greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

EVIDENCE

[16] On March 12, 2014, the Appellant filed a claim for regular benefits.

[17] The Appellant declared that he worked at SJ Imports Ltd. during the period of October 16, 2012 to March 4, 2014.

[18] Two Records of Employment were submitted:

- a) Serial no. W32494488—Polo Security Services Ltd.: The Employer reported that the Appellant worked during the period of May 4, 2011 to December 31, 2013 at which time he quit. His bi-weekly earnings varied considerably from a low of \$266.50 to a high of \$1,129.18.
- b) Serial no. E19868464—SJ Imports Ltd.: The Employer reported that the Appellant worked during the period of October 16, 2012 to March 04, 2014 at which time he was laid-off. His semi-monthly earnings ranged from \$917.80 to a high of \$1428.00.

[19] The Appellant stated that he quit his job at Polo Security because he went to India for two months, and his Employer denied his request for a leave of absence (GD3-18 and GD3-19).

[20] On May 9, 2014, the Commission informed the Appellant that he was disqualified from receiving benefits because he voluntarily left his job from Polo Security Ltd., and given his circumstances the voluntary departure was not his only reasonable alternative. In addition, the Appellant was informed that since his voluntary departure without just cause, he had only accumulated 345 of the required 665 insurable hours of employment (GD3-20).

[21] The Appellant requested reconsideration in which he emphasized that he worked two jobs concurrently. Upon leaving his casual work at Polo Security Ltd. in December 2013, he remained employed full time at SJ Imports (GD3-24).

[22] On July 16, 2014, the Commission maintained the disqualification to benefits on the basis that he voluntarily left his employment with Polo Security Services Ltd., and his benefit period was not established (GD3-30 and GD3-31).

[23] The unemployment rate, for the Economic Region of Lower Mainland Vancouver BC for the week commencing March 9, 2014, was 6.3%. Hence the Appellant required 665 insurable hours of employment to qualify for benefits (GD3-32 and GD3-33).

[24] The Appellant filed an incomplete appeal to the Social Security Tribunal--General Division on August 12, 2014. The Appellant stated that he disagrees with both decisions because the Commission only considered his part time hours, whereas his full time work hours

more that adequately covers the insurable hours requirement. The appeal was deemed completed on August 29, 2014.

Testimony

[25] The Appellant agrees that the two issues under appeal include the disqualification resulting from having voluntarily left his employment, and the disentitlement to benefits by reason that he did not accumulate sufficient insurable hours to qualify for benefits since his voluntary departure.

[26] The Appellant stated that as a hard worker, “trying to make ends meet”, he worked two jobs. The job at Polo Security was part time or casual, whereas the job at SJ Imports was a full time position.

[27] The Appellant did not dispute that he voluntarily left his job at Polo Security. However he stated that as of December 2013, he remained employed on a full time basis. As of December 2013, the Appellant did not anticipate any job loss.

[28] The Appellant stated that SJ Imports approved his vacation leave for the period of January 2, 2014 to March 3, 2014. During this period, he received vacation pay. Thus he remained employed until March 4, 2014. He wasn't aware that he would be laid off from his full time job until he returned from his vacation leave.

SUBMISSIONS

[29] The Appellant submitted that the Commission's decision is incorrect because

- a) the hours accumulated with his full time work should be used to qualify him for benefits;
- b) the full time employment was his primary job;
- c) as a hard worker he was employed in two jobs concurrently to be better able to provide for his family; and
- d) when he left his job at Polo Security he believed that his employment with SJ Imports would continue once his employer approved vacation leave was finished.

[30] The Respondent submitted that the decision is correct because

- a) employment refers to any employment, in accordance with section 29 (a) of the EI Act, hence the casual status of the employment is not relevant;
- b) the Appellant left his employment at Polo Securities voluntarily;
- c) the Appellant voluntarily left his employment without just cause because he failed to exhaust all reasonable alternatives which may have included delaying his travel plans, and temporarily altering his on-call availability;
- d) the Appellant failed to prove that he left his employment with just cause within the meaning of the Act;
- e) pursuant to subsection 7(2) of the Act, the rate of unemployment in the region where the claimant resides is 6.3%;
- f) the Appellant needed 665 insurable hours of employment, but since his voluntary leaving from Polo Security he accumulated 345 hours;
- g) the determination of insured hours by the Commission is not a discretionary decision;
- h) the Tribunal does not have the jurisdiction to ignore or amend the legislative requirements of the EI Act;
- i) the Canada Revenue Agency (CRA) has the exclusive jurisdiction over the determination of the number of insurable hours under section 122 of the EI Act.

ANALYSIS

[31] According to section 30 of the Act, a claimant is disqualified from receiving any benefits if a claimant voluntarily left any employment without just cause, unless the claimant has since leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify for benefits; or the claimant is disentitled under sections 31 to 33 in relation to the employment.

Voluntary departure

[32] Case law has held that for the leaving to be voluntary, it is the claimant that must take the initiative to sever the employee-employer relationship (CUB 10045 and CUB 22495).

[33] The Commission has the onus of proof to show that the Appellant left his employment voluntarily (*Green* 2012 FCA 313).

[34] The facts on file are undisputed. The Appellant confirmed having left his employment at Polo Security limited on December 31, 2013. He left his employment to travel to India for an extended period of time.

[35] Upon review of the Appellant's consistent statements, and the ROE's, the Commission determined that the Appellant voluntarily left his employment.

[36] The Tribunal finds that the Appellant voluntarily left his employment because he took the initiative to sever the employer/employee relationship.

[37] The Tribunal finds that the Commission fulfilled its onus of proof to show that the Appellant left her employment voluntarily.

Just cause for his voluntary departure

[38] According to subsection 29 and 30 of the Act, the definition of "just cause" is a question of law. The legal test to be applied under paragraph 29 (c) of the Act is whether the claimant had no reasonable alternative to leaving the employment, having regard to all the circumstances (*White* 2011 FCA 190; *MacLeod* 2010 FCA 301; *Imran* 2008 FCA 17).

[39] A claimant who voluntarily leaves her employment must provide proof that she had just cause for doing so (*Green* 2012 FCA 313; *White* 2011 FCA 190; *Patel* 2010 FCA).

[40] Given the Appellant's submissions, the Tribunal considered paragraph 29 (c) (vi): reasonable assurance of another employment.

[41] The Federal Court of Appeal has held that only the facts that existed at the time the claimant left the employment must be considered when determining if one of the exceptions apply (*Lamonde* 2006 FCA 44).

[42] The Appellant does not dispute that on December 31, 2013, he quit his job with Polo Security when the Employer refused to grant him an unpaid leave of absence. He left his part time/casual employment to go on vacation.

[43] The facts on file are undisputed. The Appellant had a history of working two jobs concurrently including a full time job at SJ Imports and a part time/casual job which he left on December 31, 2013. SJ Imports paid the Appellant vacation pay until his layoff on March 04, 2014. The Appellant left his part time/casual job to go on vacation. The vacation leave or unpaid leave of absence was not approved by Polo Security Inc.

[44] The Commission maintained that in accordance with section 29 (a) of the EI Act, employment refers to all employment. Hence the Commission determined that the nature of the employment, which was lost due to his voluntary departure, was not relevant to the issue of just cause. In addition, the Commission determined that the Appellant voluntarily left his employment without just cause because he failed to exhaust all reasonable alternatives which may have included delaying his travel plans, and temporarily altering his on-call availability.

[45] The Tribunal finds that the Commission correctly interpreted the definition of “employment” in section 29(a) of the EI Act. However the Tribunal finds that the Commission failed to recognize, given the circumstances, that the Appellant worked two jobs concurrently.

[46] The Federal Court of Appeal (FCA) has held in circumstances where the claimant has held two concurrent jobs “...that the claimants had just cause for leaving one of their two concurrent positions voluntarily because he had “reasonable grounds to believe” that the other position would continue (*Leung* 2004 FCA 160; *Gennarelli* 2004 FCA 198, and *Marier* 2013 FCA 39). Justice Trudel, in her interpretations of paragraph 29(c) of the Act, states that “nothing in the Act requires claimants to hold more than one position at a time (*Marier* 2013 FCA 39, paragraph 25).

[47] The Tribunal finds as fact, that as of December 31, 2013, the Appellant had reasonable assurance that his full time position would continue. As such the Tribunal finds that the Appellant's voluntary departure, while a personal decision, did not increase his risk of unemployment.

[48] The Tribunal finds that the Appellant demonstrated good cause because he had reasonable grounds to believe that his full time position would continue. The Tribunal is supported in this decision by the FCA.

[49] The disqualification in accordance to section 30 of the EI Act is overturned.

[50] In light of the findings, there is no need to address the issue of whether the Appellant accumulated sufficient insurable hours of employment to qualify under section 7 or 7.1 of the EI Act.

CONCLUSION

[51] The Tribunal finds that the Commission met its onus to show that the Appellant left his part time/casual position voluntarily. However the Appellant met his onus to show that he had just cause for leaving one of his two concurrent positions as "nothing in the Act requires claimants to hold more than one position at a time". The disqualification to benefits is overturned.

[52] The appeal is allowed.

Simone Reinsch

Member, General Division - Employment Insurance Section