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

[TRANSLATION]

Citation: *A. S. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 21

Tribunal File Number: GE-15-2694

BETWEEN:

A. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: January 28, 2016

DATE OF DECISION: February 9, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, A. S., participated in the telephone hearing (teleconference) held on January 28, 2016.

INTRODUCTION

[2] On November 29, 2014, the Appellant filed an initial claim for benefits effective November 23, 2014. The Appellant stated that he had worked for the employer, Mega Brands Inc., from February 1, 2012, to November 23, 2014, inclusively, and that he had stopped working for that employer because of a shortage of work (Exhibits GD3-3 to GD3-14).

[3] On July 3, 2015, the Respondent (the Canada Employment Insurance Commission, a.k.a. the Commission) advised the Appellant that he was not entitled to regular employment insurance benefits starting on March 29, 2015, because he had voluntarily left Mega Brands Inc. on March 30, 2015, without just cause within the meaning of the *Employment Insurance Act* (the Act) (Exhibits GD3-19 and GD3-20).

[4] On July 9, 2015, the Appellant filed a request for reconsideration of an employment insurance decision (Exhibits GD3-21 and GD3-22).

[5] On August 7, 2015, the Commission notified the Appellant that it had upheld the decision rendered in his case on July 3, 2015, with regard to his voluntary leaving (Exhibits GD3-24 and GD3-25).

[6] On August 27, 2015, the Appellant filed a notice of appeal with the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (Tribunal) (Exhibits GD2-1 to GD2-3).

[7] On September 21, 2015, in response to a request by the Tribunal, dated September 2, 2015, the Appellant sent a [translation] “copy of the reconsideration decision under appeal” to complete his appeal file (Exhibits GD2A-1 and GD2A-2).

[8] On September 23, 2015, the Tribunal informed the employer, Mega Brands Inc., that if it wanted to become an "added party" in this case, it had to file a request to that effect by July 9, 2015 at the latest (Exhibits GD5-1 and GD5-2). The Employer did not respond.

[9] The hearing of this appeal was held by teleconference for the following reasons:

a) the information in the file, including the need for additional information;

and

b) the fact that this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit (Exhibits GD1-1 to GD1-4).

ISSUE

[10] The Tribunal must determine whether the Appellant had just cause for voluntarily leaving his employment under sections 29 and 30 of the Act.

THE LAW

[11] The provisions related to voluntary leaving are set out in sections 29 and 30 of the Act.

[12] Regarding the application of sections 30 to 33 of the Act with respect to disqualification from receiving employment insurance benefits in the case of "leaving without just cause", subsection 29(b.1) of the Act provides as follows:

> [...] 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 […]

[13] Subsection 29(c) of the Act states:

> […] 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.

[14] Subsections 30(1) and 30(2) of the Act include the following provisions concerning a "disqualification" from receiving benefits:

> […] (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. (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. length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

[15] The evidence on file is as follows:

a) A Record of Employment dated December 3, 2014, indicates that the Appellant worked as a "molding set-up" worker for Mega Brands Inc., from March 26, 2012, to November 26, 2014, inclusively, and that he stopped working for this employer due to a shortage of work (Code A – Shortage of Work / End of Contact or Season) (Exhibit GD3-15); and

b) An amended or replaced Record of Employment (serial number of amended or replaced Record of Employment: S09480796), dated April 1, 2015, indicates that this Appellant worked as a "molding set-up" worker for the employer Mega Brands Inc., from

March 26, 2012, to November 26, 2014, inclusively, and that he stopped working for this employer after leaving voluntarily (Code E – Voluntary Leaving) (Exhibit GD3-16).

[16] The evidence submitted at the hearing is as follows:

a) The Appellant explained that he had worked full-time, as a molding mechanic (plastic molding and setting) for the employer Mega Brands Inc., from March 26, 2012, to November 26, 2014 (Exhibits GD3-15 and GD3-16). He indicated that he had not signed a contract with his employer upon being hired and that the employer had specified to the Appellant that he needed someone on a permanent basis. He specified that he had had an hourly wage of $20.00 at the beginning of his employment and that this hourly wage had been $21.50 before his layoff. The Appellant explained that he had always worked with the same production team, which included five or six mechanics, and that he did alternative work from time to time. He explained that, at the end of each year, there was a decline in the company's output. He indicated that this decline had been palpable earlier in 2014 and that he was laid off in November 2014. The Appellant submitted that the employer had then informed him that there was a shortage of work and that he was going to have to "lay him off," but that he might call him back after the holiday break, around the second week of January. He stated that he had looked for work (e.g. sending out his CV) after January 2015, namely, after learning that his employer was not calling him back to work.

SUBMISSIONS OF THE PARTIES

[17] The Appellant presented the following observations and submissions:

a) He explained that he had stopped working in November 2014 due to a shortage of work and that he had not left voluntarily. The Appellant argues that, contrary to what was reported in one of the statements he made to the Commission, he had never "resigned" on March 30, 2015 (Exhibit GD3-18). He said he had not known why the Commission had indicated that he had resigned, because that was false. He stated that, on March 30, 2015, he had met the employer about the two or three months' worth of alternative work that had been proposed to him(Exhibit GD3-18);

b) The Appellant argued that his application for benefits had been cancelled due to his non-acceptance of his former employer's offer temporary work (Exhibit GD2-2);

c) He stated that when his employer had called him back on March 30, 2015, to invite him to come back to work, he thought then he was going to resume working full-time as he had been doing before being laid off. The Appellant indicated that, after he had talked to his former employer, he then learned that it was actually alternative work for two or three months with another work team that needed staff (employees' absences due to medical reasons or parental leave). The Appellant specified that it was the same kind of work he had been doing before being laid off. He specified that it was not an issue of hourly wage or scheduling when the employer had proposed this temporary work to him. The Appellant indicated that he had refused the temporary position offered to him. He explained that he did not want to resume working just for a few months, only to go back on employment insurance and start looking for work all over again. The Appellant mentioned that, at his age, he wanted to get steady work or a permanent job: not temporary work. He also indicated that he wanted to have time to find himself a full-time job and do job interviews (Exhibits GD2-2, GD3-17, GD3-18 and GD3-21);

d) The Appellant explained that he had not wanted to accept a temporary position for two or three months if it meant he would have to miss out on the training that had Emploi-Québec had offered him. To that end, the Appellant indicated that he had met an Emploi-Québec agent on March 17, 2015, in the hopes of getting support in his job searching; the meeting occurred around two weeks before receiving an offer of temporary employment by the employer. He specified that Emploi Québec had offered him training to improve his chances of getting steady employment like he wanted. The Appellant emphasized that this training was also going to enable him to update the training that he had received before obtaining a high school diploma in 1996. He explained that he had then signed a contract with Emploi-Québec on May 27, 2015, to be able to take training that had been proposed to him. The Appellant specified that he had written a French exam and had gone to an interview with the institution where he had to take his training. He explained that this training had begun on August 28, 2015, and ended in May 2016;

e) The Appellant indicated that he had participated in an employment insurance information (training) session at the end of February 2015 on his rights and obligations to be eligible for benefits. He explained that he had learned, during this training session, that he had to accept a job that offered him the same conditions as those under which he had had been working before his job ended. The Appellant submitted that, after the training that he had received at the time, he had understood the fact that wanting to have a permanent job was one of those conditions. He emphasized that, when he had had a permanent job, the job that had been offered to him was an alternative-work job for two or three months (not permanent). According to him, because it was work that was not going to guarantee him the same conditions under which he had been working before his job came to an end, he refused that position. The Appellant argued that if he had known that he had the obligation to accept temporary work, he would have accepted it. The Appellant maintained that he had been ill-informed to that effect (Exhibits GD2-2, GD3-21 and GD3-23).

[18] The Commission presented the following submissions and arguments:

a) Subsection 30(2) of the Act provides for an indefinite disqualification when a claimant voluntarily leaves an employment without just cause. The legal test to be applied, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving his or her employment when he or she did so (Exhibit GC4-3);

b) The Commission explained that the Appellant had been laid off in November 2014 because of a shortage of work (Exhibit GD3-15). It indicated that the employer had called the Appellant back to work to offer him a temporary job for two or three months. The job offered the Appellant the same conditions under which he had been working before his layoff, namely, the same workspace and the same tasks, but with another work team. The Commission indicated that the Appellant had refused the Employer's offer, because the job was temporary, and he wanted a permanent job (Exhibits GD3-17 and (GD3-18). According the Commission, the Appellant made a personal choice in refusing the Employer's offer and he has to assume sole responsibility for it with respect

to his unemployment situation. It maintained that the Appellant had not demonstrated just cause for leaving voluntarily (Exhibit GD4-3);

c) It argued that the Appellant had been ill-justified in leaving his employment on March 30, 2015, the date on which he refused the job offered, because he had not shown that he had exhausted all reasonable alternatives before quitting the job that he had. The Commission explained that, given all the circumstances, a reasonable alternative would have been to accept temporary employment while continuing to look for another job that suited him better. The Commission indicated that another alternative would have been for the Appellant to inform the Commission before refusing the job offered. It assessed that the Appellant failed to show just cause for leaving his employment under the Act (Exhibit GD4-3); and

d) The Commission concluded that the Appellant had not demonstrated that the only reasonable alternative was leaving his employment (Exhibit GD4-4).

ANALYSIS

[19] In ***Rena-Astronomo* (A-141-97)**, which confirmed the principle established in ***Tanguay* (A-1458-84)** to the effect that the claimant has the responsibility to prove, when he or she voluntarily leaves his or her employment, that there are no other reasonable alternatives to leaving the employment at the time, the Federal Court of Appeal (the Court) recalled the following: "The test to be applied, having regard to all the circumstances, is whether, on the balance of probabilities, the claimant had no reasonable alternative to leaving his or her employment."

[20] This principle was confirmed in other decisions by the Court (***Peace*, 2004 FCA 56, and *Landry*, A-1210-92)**.

[21] In addition, the words "just cause" as used in subsections 29(c) and 30(1) of the Act, were interpreted by the Court in ***Tanguay v. C.A.-C.*** (**A-1458-84** (October 2, 1985); 68 N.R. 154) as follows:

> In the context in which they are used these words are not synonymous with 'reason' or 'motive'. An employee who has won a lottery or inherited a fortune

> may have an excellent reason for leaving his employment: he does not thereby have just cause within the meaning of s 41(1). This subsection is an important provision in an *Act* which creates a system of insurance against unemployment, and its language must be interpreted in accordance with the duty that ordinarily applies to any insured, not to deliberately cause the risk to occur. To be more precise, I would say that an employee who has voluntarily left his employment and has not found another has deliberately placed himself in a situation which enables him to compel third parties to pay him unemployment insurance benefits. He is only justified in acting in this way if, at the time he left, circumstances existed which excused him from thus taking the risk of causing others to bear the burden of his unemployment.

[22] In ***Green* (2012 FCA 313)**, the Court stated:

> [...] the Board identified the relevant test with regard to "just cause" when it stated that the onus was on the Commission to show that the applicant had left his employment with Seismic voluntarily and that the applicant had to show that he had "just cause", in all of the circumstances, in leaving his employment.

[23] The Court also confirmed that the claimant who voluntarily left his or her employment had the responsibility to prove that there had been no other reasonable alternative to leaving his or her employment at the time (***White*, 2011 FCA 190**).

[24] A claimant is justified in voluntarily leaving his or job if, given all the circumstances (those listed in subsection 29(c) of the Act), leaving was the only reasonable alternative in his or her case.

[25] In this case, the Tribunal finds that the Applicant did not voluntarily leave the employer Mega Brands Inc., but rather that the employment ended on November 26, 2014, because of a shortage of work.

[26] The Appellant's testimony, which was not rebutted, was that the employer had informed him in late November 2014 of a shortage of work and that he was going to have to "lay him off."

[27] The employer then told the Appellant that he might call him back to work after the holiday break, around the second week of January 2015.

[28] The Tribunal finds that the Commission did not show in this case that the Claimant had voluntarily left his employment (***Green*, 2012 FCA 313**).

[29] Moreover, the Commission acknowledged that the Appellant had been laid off in November 2014 as a result of a shortage of work (Exhibits GD3-15 and GD4-3).

[30] The Tribunal notes that the burden of proof is on the Commission to show that the Appellant left voluntarily (***Green*, 2012 FCA 313**).

[31] The fact that the Appellant subsequently refused temporary employment that the employer had offered in late March 2015 does not alter the fact that his employment had ended on November 26, 2014. The employment relationship was terminated when the employer laid off the Appellant on November 26, 2014.

[32] The Tribunal is of the view that the Appellant's situation cannot be considered voluntary leaving under subparagraph 29(b.1)(ii) of the Act, because he declined the offer of employment that his employer had made to him on March 30, 2015.

[33] The Tribunal finds that the Appellant did not refuse "to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed […] ", as provided in subparagraph 29(b.1)(ii) of the Act.

[34] The evidence shows that the Appellant did not refuse to resume his employment when he was supposed to do so in January 2015. The employer did not call the Appellant back in January 2015 as expected.

[35] The employer did not contact the Appellant until late March 2015, nearly three months after telling him that he "might" call him back to work in January 2015. Furthermore, the employer did not suggest that the Appellant resume the employment that he had had before leaving, but rather it offered him temporary employment for a period of two or three months.

[36] The Tribunal is of the view that the amended or replaced Record of Employment (serial number: S09480796), which the Employer issued on April 1, 2015, inadequately reflects the reason for termination of the Appellant's employment (Exhibit GD3-16). The Tribunal finds that the Appellant could not have left voluntarily, as that document (Code E – Voluntary Leaving) indicates, when he was laid off following a decline in production at the employer.

[37] The Tribunal rejects the Commission's argument that the Appellant "did not have just cause to leave his employment on March 30, 2015, the date on which he refused the position offered because he did not show that he had exhausted all reasonable alternatives to leaving." (Exhibit GD4-3)

[38] The Appellant could not have left his employment voluntarily on March 30, 2015, because he had not had an employment relationship with his employer for more than three months.

[39] The Tribunal is of the view that there is no evidence in the record to show that the Appellant voluntarily left the employer, Mega Brands Inc., on November 26, 2014. His employment ended because of a "shortage of work."

[40] The Tribunal finds that the Commission did not meet its burden to show that there had been a voluntary leaving (***Green*, 2012 FCA 313**).

[41] The appeal on the issue has merit.

CONCLUSION

[42] The appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section