



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. K. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 36

Tribunal File Number: GE-15-3402

BETWEEN:

T. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Richard Sterne

HEARD ON: March 8, 2016

DATE OF DECISION: March 8, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, T. K., and her Representative, Bryan Delorenzi – CDT Legal Services, attended the hearing by telephone.

INTRODUCTION

[1] The Appellant was employed by Landau Inc. (employer) until July 5, 2015.

[2] On July 10, 2015, the Appellant applied for employment insurance benefits (EI benefits).

[3] On August 12, 2015, the Canada Employment Insurance Commission (Respondent) advised the Appellant that they were unable to pay her any EI benefits because she had voluntarily left her employment on July 5, 2015, without just cause within the meaning of the *Employment Insurance Act* (Act).

[4] On August 25, 2015, the Appellant filed a request for reconsideration of the Respondent's August 12, 2015 decision, which was denied on October 2, 2015.

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

- a) The complexity of the issue(s) under appeal.
- b) The fact that the credibility was not anticipated to be a prevailing issue.
- c) The fact that the appellant would be the only party in attendance.
- d) The information in the file, including the need for additional information.
- e) The fact that the appellant or other parties are represented.
- f) 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

[6] Did the Appellant have just cause for voluntarily leaving her employment, pursuant to sections 29 and 30 of the Act?

THE 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 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,
- (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.

[8] **Subsection 30(1) of the Act:**

(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."

[9] **Subsection 30(2) of the Act:**

(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.

[10] **Subsection 30(3) of the Act:**

(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.

EVIDENCE

[11] The Appellant was employed by the employer from May 25, 2012 to July 5, 2015.

[12] On July 10, 2015, the Appellant applied for EI benefits.

[13] On August 5, 2015, the employer issued the Appellant's record of employment (ROE) and indicated the reason for issuing the ROE was code E, Quit.

[14] On August 10, 2015, the Appellant told the Respondent that she had quit because the employer had accused her of taking company property home without permission. The Appellant stated that she had taken 16 pieces of jewellery home because she didn't have her cell phone with her, in order to take pictures of them so she could email the pictures to the corporate office. She had a co-worker sign the communication book stating that she was taking the pieces home so she could take pictures of them. The Appellant said that it was corporate policy for the staff to wear pieces of store jewellery in the store and to special events. Occasionally they wore them

home by mistake. The Appellant stated that her manager had given her a written warning about taking the jewellery home, which she refused to sign because she felt that it implied that she was stealing. The Appellant stated that her manager had given her warnings previously, which she also didn't sign, because the accusations were false. The Appellant said that she quit her job because she had enough of the manager's harassment and false accusations. The Appellant said that she hadn't looked for a job at that time, as no one would be hiring until September or October. The Appellant stated that she had talked to the regional manager about the store manager's harassment, but the regional manager never did anything about it. She also sent an anonymous email to the President pointing out the store manager's poor work habits.

[15] On August 11, 2015, the employer told the Respondent that the Appellant was written up for taking jewellery home without the knowledge of the store manager. The employer also stated that the Appellant had been written up several times before for a variety of reasons. The employer sent the Respondent copies of the Appellant's written warnings dated February 16, 2016, February 20, 2016, and July 1, 2015, which the Appellant had refused to sign. Each warning included the phrase "I fully understand that if my performance, behaviour problem is not promptly rectified to the satisfaction of my employer, then the employer may terminate my employment."

[16] On August 12, 2015, the Appellant told the Respondent that she was bullied all the time by the store manager. The Appellant said that she wanted to keep her job, but the store manager had forced her to quit. The Appellant said that she didn't look for another job prior to quitting because there were no jewellery sales jobs available after Christmas, she had a restriction where she couldn't lift things over a few pounds, and her English wasn't very good so she could not work in an office.

[17] On August 12, 2015, the Respondent advised the Appellant that they were unable to pay her any EI benefits because she had voluntarily left her employment on July 5, 2015, without just cause within the meaning of the Act. They stated that they believed that voluntarily leaving her employment was not her only reasonable alternative.

[18] On August 25, 2015, the Appellant filed a request for reconsideration of the Respondent's August 12, 2015 decision.

[19] On September 17, 2015, the Representative advised the Tribunal that he had been retained by the Appellant. The Representative argued that the Appellant had no reasonable alternative but to leave her employment because she was bullied, harassed, and antagonized by the store manager.

[20] On October 2, 2015, the Respondent advised the Appellant that they had not changed their August 12, 2015 decision.

[21] On February 19, 2016, the Representative submitted additional representations and documentation, including the terms of settlement between the Appellant and the employer, dated October 20, 2015.

[22] On February 24, 2016, the Respondent submitted additional representations to the Tribunal.

[23] On March 8, 2016, the Representative submitted post hearing, a copy of the Appellant's February 1, 2015 anonymous email to the President regarding issues the Appellant was having with the store manager.

SUBMISSIONS

[24] The Appellant submitted that:

- a. the reason she left her employment was constructive dismissal.
- b. she was harassed and antagonized by her supervisor, creating a toxic work place..
- c. she made constant efforts to contact the management , in the form of emails informing them of the issue to no avail.
- d. she had just cause for voluntarily leaving her employment because of the harassment and antagonism with her supervisor, which she wasn't primarily responsible for.

[25] The Respondent submitted that:

- a. the Appellant did not demonstrate just cause for voluntarily leaving her employment, and therefore they imposed an indefinite disqualification pursuant to sections 29 and 30 of the Act, effective July 5, 2015.
- b. the Appellant did not have just cause for leaving her employment on July 5, 2015, because she failed to exhaust all reasonable alternatives prior to leaving.

ANALYSIS

[26] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work (**Gagnon [1988] SCR 29**).

[27] Subsection 30(1) of the Act provides for an indefinite disqualification when the claimant voluntarily leaves her employment without just cause. The test to be applied, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving her employment when she did.

[28] During the hearing, the Appellant stated that she had joined the employer as a jewellery sales associate in May 2012. She said that she was acting as the de-facto store manager in the beginning, because there wasn't a store manager. The Appellant said that when the store manager was hired in October 2013, she had to train her as the manager had not been properly trained and was disorganized. The Appellant said that initially she and the store manager got along very well. The Appellant stated that when the store manager asked to only work part time, she had been offered the job as store manager. The Appellant said that she declined the position because she would have no longer earned the 20% commission she was earning on her sales. The store manager remained on as manager, but that was the beginning of the deterioration in their relationship. She said that the manager began stealing her sales, by taking credit for her sales that were on hold. She said that she thought that the manager felt threatened by her. She said that the manager made fun of her poor English, harassed, and belittled her.

[29] The Appellant said that she had stayed working for the employer because she liked selling. She said that she had health issues and could not lift anything heavy. She also said that there was a lot of unemployment in the area, so it was difficult to find another job.

[30] The Appellant said that she had approached the regional manager in 2014 about the harassment problems she was having with the store manager, but nothing was done about it. On February 2015, she sent an anonymous email to the President, outlining her concerns with the store manager. The Appellant said that she had set up a new Gmail account and had used a fictitious name to send the email to the President.

[31] The Appellant said that she took the 16 pieces of jewellery home to take pictures of them to be emailed to the corporate office. She recorded the fact that she had taken them home in the communication book. She said that they were encouraged to wear the jewellery in the store and to special events. The Appellant that the employees were trusted to take the jewellery home and bring it back the next day. The Appellant said that she felt that the last written warning was accusing her of theft.

[32] The Tribunal finds that the Appellant was credible during the hearing in that she was open and consistent in her comments and answers to questions, while under oath.

[33] Sections 29 and 30 of the Act provide an exception to the general rule that insured individuals that are not deliberately unemployed are entitled to benefits. This exception must therefore be strictly interpreted (**Goulet A-358-83**).

[34] Subsection 29(c)(i) of the Act states that 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 sexual or other harassment.

[35] The Tribunal notes that the Appellant's written warnings dated February 16, 2016, February 20, 2016, and July 1, 2015, included the phrase "I fully understand that if my performance, behaviour problem is not promptly rectified to the satisfaction of my employer, then the employer may terminate my employment."

The written warnings were for issues such as:

- failure to follow company rules, procedure, and policies.
- failure to perform job assignments
- closing paperwork not complete.
- unauthorized removal of company property.

The Appellant stated that she had refused to sign these written warnings because they were false.

[36] The Tribunal finds that there was no evidence of written company rules, procedures, or policies. The Tribunal accepts the Appellant's statement that the written warnings about not following the company rules and procedures were false.

[37] The Appellant stated that it was common practice to wear the jewellery in the store or to special events in order to promote it. The Appellant said that occasionally they forgot to take it off before they went home, however they were in a position of trust and that it would be returned the next day. The Appellant stated that she had taken the 16 pieces of jewellery home in order to take pictures of them to be emailed to the corporate office. The Appellant had her associate witness her recording of her taking the jewellery home in the communication book. The Tribunal finds that a written warning for taking the jewellery home was a form of harassment.

[38] The Tribunal finds that the warnings for minor procedural incidents that included the warning that she may be terminated if her performance, behaviour problem was not promptly rectified to the satisfaction of the employer constituted harassment, pursuant to subsection 29(c)(i) of the Act.

[39] Subsection 29(c)(x) of the Act states that 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 antagonism with a supervisor if the claimant is not primarily responsible for the antagonism.

[40] The Tribunal finds that the store manager's making fun of the Appellant's poor English and belittling the Appellant constituted antagonism with her supervisor that she was not primarily responsible for, and therefore constituted just cause for voluntarily leaving her employment, pursuant to subsection 29(c)(x) of the Act.

[41] The Tribunal finds that the Appellant did not have other reasonable alternatives to resigning her employment when she did. The Tribunal finds that the Appellant did attempt to talk to upper management about her conflicts with the store manager, but nothing was done about it. The Tribunal finds that the store manager's final written warning essentially accused the Appellant of theft, and the trust in their working relationship was gone. The Tribunal accepts that the Appellant had not looked for another job prior to resigning because she had not planned on leaving. She loved her sales job and it was the wrong time of the year to find another jewellery sales job. Her health issues and poor English limited her opportunities for working elsewhere.

[42] The Federal Court of Appeal reaffirmed the principle that where a claimant voluntarily leaves her employment, the burden is on that claimant to prove that there was no reasonable alternative to leaving when she did.

Canada (AG) v. White, 2011 FCA 190

[43] The Tribunal finds that the Appellant did prove that there was no reasonable alternative to leaving when she did, and therefore she did have just cause for voluntarily leaving her employment, pursuant to sections 29 and 30 of the Act.

CONCLUSION

[44] The appeal is allowed.

Richard Sterne
Member, General Division - Employment Insurance Section