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

[TRANSLATION]

Citation: *D. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 66

Tribunal File Number: GE-15-3300

BETWEEN:

D. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Claude Durand

DATE OF HEARING: March 15, 2016

DATE OF DECISION: May 12, 2016

Canada

REASONS AND DECISION

PERSON IN ATTENDANCE

[1] The Appellant, D. M., was present at the hearing

[2] This appeal was heard by videoconference for the following reasons:

a) The fact that credibility may be a determinative factor.

b) The information in the file, including the need for additional information.

c) This method of proceeding best meets the needs of the parties for accommodation.

INTRODUCTION

[3] In this case, the Canada Employment Insurance Commission (the "Commission") imposed a disentitlement on the Appellant determining that he did not have just cause within the meaning of the *Employment Insurance Act of Canada* (the "Act") to leave voluntarily on March 2, 2015.

[4] The Appellant requested a reconsideration of that decision, which was upheld by the Commission on April 29, 2015 (page GD3-32).

[5] The Appellant challenged that decision and appealed to the Social Security Tribunal on October 16, 2015. However, his appeal was filed late and was incomplete.

[6] On January 4, 2016, an extension of the time to file an appeal was granted.

ISSUE

[7] The Tribunal must decide if the Appellant was justified in leaving his employment under sections 29 and 30 of the Act and whether disentitlement applies.

THE LAW

[8] 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) (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, 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,

(xiv) any other reasonable circumstances that are prescribed.

EVIDENCE

Evidence in the file

[9] The Appellant was employed by Corporation Tantrum Inc. (distributor of the Red Bull trademark) until March 2, 2015, the date on which he voluntarily left his employment because he was dissatisfied with his working conditions (page GD3-18).

[10] The Appellant was hired on February 9, 2015 as a representative for the Red Bull trademark. He was required to deliver and set up products at different points of sale, grocery stores and corner stores. He resigned on March 2, 2015.

[11] The Appellant explained that he resigned because of the mandatory excessive overtime work. He worked an average of 15 hours of overtime per week, without any additional pay (page GD3-20).

[12] The Appellant was taking courses at night in addition to working. He had informed his employer of this fact.

[13] The employment contract stipulated 38 to 42 hours per week but in the first two weeks he had worked 55 hours.

[14] He worked 12-hour days without breaks and did not even take the time to eat in order to complete his worksheet.

[15] He had discussed the situation with the company's trainer and director. The last week worked, the Employer had made a change to his work route, but it did not change his workload. In effect, the trainer had to leave earlier on Friday. He therefore finished the day on Friday at 1:00 p.m. rather than 7:00 p.m., which explains why that week, he had worked only 42 hours.

[16] The Employer stated that employees are paid a fixed rate for 40 hours weekly. It is possible that some weeks, employees work more than 40 hours, and other weeks less. It believes that the work week is between 38 and 42 hours. The employee, Mr. D. M., had agreed to the salary of $35,000 and these conditions (page GD3-21).

[17] The Employer stated that the employee had to learn to manage his schedule and admitted that the first few weeks after being hired are more intensive. That information appears in the hiring contract. The Employer believes that the Appellant would have eventually had a schedule between 8:00 a.m. and 4:00 p.m. if he had persisted (page GD3-27).

[18] The Appellant denied that the Employer allegedly told him that he would be working more hours in the first few weeks. He stated that he was not paid for the hours worked (page GD3-29).

Appellant's evidence at the hearing

[19] He is a university student studying marketing.

[20] Since 2011, he has combined his studies and a full-time job.

[21] His ambition is to work in the marketing field and more specifically in product merchandizing, positioning and placement.

[22] This work as a representative was in line with his aspirations. He resigned from his previous work with Super Club Vidéotron to accept this employment.

[23] When he was offered the position, he had agreed that he would earn a salary of $40,000 per year for working 40 hours per week. A service vehicle and gas were included in this employment contract.

[24] The Employer had never respected that agreement. He earned a salary equivalent to $35,000 and worked about 55 hours and more per week. He was not paid for overtime.

[25] He had tried to talk to the Employer to ensure compliance with the original contract, both in terms of the salary and the hours worked, but had been unsuccessful.

[26] After three weeks of training, he had resigned.

[27] He had looked for work before leaving his employment.

PARTIES' ARGUMENTS

[28] The Appellant argued as follows:

a) On several occasions, he had asked for a copy of his employment contract and the Employer had always refused.

b) The Employer had told him that he would be working between 38 and 42 hours and that his work days would end around 4:00 p.m.; that never happened.

c) The Employer had manipulated him and changed its version to make him work without paying him.

[29] The Respondent Commission argued as follows:

a) It is the Commission's view that voluntarily leaving his employment because, at the beginning of that employment and during the three weeks of training, he worked more hours that what was set out in the employment contract constitutes leaving voluntarily. The claimant failed to demonstrate that he had just cause to leave his employment because he had not tried the job long enough to acquire the desired experience to reduce the time required to accomplish the duties.

b) The claimant mentioned that the Employer had not talked about the greater number of hours during the training weeks when it is plausible to think that learning a job as a representative might require an investment of effort or time at the start of the job if someone wanted to retain that employment. In addition, after a few weeks, the Employer changed the claimant's route to accommodate him.

c) The claimant worked the new route for only one week and reached the 42 hours as set out in the employment contract. The claimant indicated that he had told the Employer that he was taking a course two nights per week and that that was his priority.

d) The claimant had been told by the Employer when he was hired that he could adjust his work schedule, which he could have done on the days that he had a course. The claimant did not show that this was an abusive or intolerable situation or that the employment contract had not been respected. For these reasons, the claimant failed to prove that he had just cause to leave his employment within the meaning of the Act.

e) In this case, the Commission determined that the claimant did not have just cause to leave his employment on March 2, 2015 because he had not shown that he had exhausted all reasonable alternatives before resigning. Having regard to all the circumstances, a reasonable alternative would have been to retain his employment and continue his efforts to find other employment that suited his skills.

ANALYSIS

[30] Pursuant to the wording of subsection 29(c) cited above, to determine whether just cause for leaving an employment exists, it must be asked whether, on a balance of probabilities, the claimant had no reasonable alternative to leaving, having regard to all the circumstances (*Canada (Attorney general) v. White*, 2011 FCA 190 [*White*]*; Harold McNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306).

[31] In this case, the Appellant accepted an employment and decided three weeks after starting the position that the work he was required to carry out did not correspond to the work proposed in the interview. He claimed that the number of hours greatly exceeded what had been expected and that the pay was less than had been discussed.

[32] The Appellant argued that he had just cause within the meaning of the Act to leave his employment after three weeks based on subsection 29(c) of the Act:

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

(viii) excessive overtime work or refusal to pay for overtime work

[33] At the hearing, the Appellant stated that he had agreed with the Employer on a salary of $40,000 per year. In addition, he stated that he had asked his employer on several occasions for a copy of his employment contract. The Employer had allegedly never given this document to him.

[34] I note that no employment contract appears in the file. However, after reviewing the various exhibits in the file, I note that the Employer has always maintained that the salary was $35,000 and had been accepted by the Appellant.

[35] Based on the facts in the file, the Appellant, for his part, had always argued that he was not paid enough but without mentioning the figure of $40,000 as the base salary. He stated rather that he was working more hours than expected, the workload was excessive and he was not paid for his overtime.

[36] The balance of probabilities shows that the Appellant's annual salary was $35,000. That is the figure that I will accept.

[37] The Appellant accepted a job as a representative on the road and he received training. He considers that he was unfairly treated because, in the first two (2) weeks, he worked about 55 hours per week. Since he was also taking university courses, that schedule did not work for him and he quit the job.

[38] I note that the Employer had estimated the work hours at about 40 hours per week, which the Appellant had accepted. I understand that the Appellant may have been stressed and tired after working more than fifty (5) hours in the first two (2) weeks. I can understand also that he was feeling unfairly treated for not being paid overtime for what he considered an excessive work schedule.

[39] I note that the Employer tried to find a solution by asking the trainer to change the route in the third week, which had reduced the hours of work to 42 hours. Also, it had offered to adjust the Appellant's schedule on the evenings that he had courses.

[40] I listened to the Appellant explain to me his reasons for leaving. He is a determined and articulate young man, with strong convictions, but he does not appear to me to be much inclined to compromise. Despite the accommodations offered by the Employer, he remains persuaded that the latter had tried to manipulate him by making him work additional hours without paying him for them.

[41] However, according to the Appellant's own admission, he had accepted a fixed salary knowing that the hours could vary depending on the season.

[42] It seems to me that, during a period of training, in a type of work that requires time for travel, the establishment of new contacts and the need to learn new ways of doing things, it is normal for the hours to increase. That more time needs to be devoted while in training to carry out the tasks required by a job is part of the learning curve.

[43] I reject the Appellant's arguments that he was in an intolerable and unfair situation. I do not believe that that reflects the reality of the case or the reality of the market.

[44] I examined the Commission's arguments and I am also of the opinion that the Appellant's decision was hasty in the circumstances and that he himself brought on his situation of unemployment.

[45] I therefore conclude that, before leaving his employment, a reasonable alternative would have been to work for a longer period of time and acquire the desired experience for him to be able to determine if the working conditions that he had accepted were being respected and reasonable or, moreover, he could have looked for other employment before resigning.

[46] At the hearing, the Appellant indicated that he had carried out job searches before resigning but unsuccessfully. However, I note that at page GD3-26, he had stated that he had not carried out job searches before resigning. Furthermore, he had also added that, even if he had not been at school, he would have left the employment because the conditions were not satisfactory.

[47] The Federal Court of Appeal has established the principle that much greater weight should be given to initial, spontaneous statements than to subsequent statements after an unfavorable decision from the Commission (*Marc Lévesque*, A-557-96; *Clinique Dentaire O. Bellefleur*, 2008 FCA 13, A-139-07). In this case, I accept that the Appellant did not search for employment before resigning in order to try to mitigate a foreseeable situation of unemployment.

[48] The Tribunal finds that the Appellant did not prove that he had just cause to leave his employment under the Act and that he had no reasonable alternative to leaving, having regard to all the circumstances.

CONCLUSION

[49] The appeal is dismissed.

Claude Durand
Member, General Division – Employment Insurance Section