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

Citation: *M. F. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 68

Tribunal File Number: GE-15-4272

BETWEEN:

M. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Day

HEARD ON: May 17, 2016

DATE OF DECISION: May 19, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of the appeal via teleconference.

INTRODUCTION

[1] The Appellant made an initial application for regular employment insurance benefits (EI benefits) on August 6, 2015. The Respondent, the Canada Employment Insurance Commission (Commission), investigated the reason for the Appellant's separation from his employment and, on September 1, 2015, issued a decision that the Appellant was not entitled to EI benefits because he had voluntarily left his employment without just cause.

[2] On October 6, 2015, the Appellant requested the Commission reconsider its decision, citing numerous reasons for quitting and stating that he had no choice but to leave the employment when he did. However, on November 27, 2015, the Commission maintained its decision that the Appellant had not shown just cause for voluntarily leaving his job when he did.

[3] The Appellant appealed to the General Division of the Social Security Tribunal (Tribunal) on December 22, 2015.

[4] The hearing was held by teleconference because that 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] Whether the Appellant is subject to a disqualification for having voluntarily left his employment without just cause.

THE LAW

[6] Subsection 30(1) of the *Employment Insurance Act* (EI Act) stipulates that 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.

[7] Whether a claimant has "just cause" involves a consideration of subsection 29(c) of the EI Act, which provides that for the purposes of sections 30 to 33,

> (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,
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> (v) obligation to care for a child or a member of the immediate family,
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> (vi) reasonable assurance of another employment in the immediate future,
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> (vii) significant modification of terms and conditions respecting wages or salary,
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> (viii) excessive overtime work or refusal to pay for overtime work,
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> (ix) significant changes to 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(2) of the EI Act stipulates 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.

[9] Subsection 30(5) of the EI Act provides that if a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours 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).

EVIDENCE

[10] The Appellant made an initial application for EI benefits on August 6, 2015 (GD3-3 to GD3-17). On his application, the Appellant stated that his last day of work for 3 Woods Technical (3 Woods) was July 17, 2015 and gave his reason for separation as “Quit” (GD3-6). The Appellant completed a Quit Questionnaire in support of his application (GD3-9 to GD3-11), in which he stated that he quit his employment as an apprentice electrician with 3 Woods on July 17, 2015 “for many reasons”, citing the fact that he was working alone when he was supposed to be training with a journeyman and the fact that he was forced to use his own vehicle to do service calls and not properly reimbursed for the associated expenses, as well as issues with hours, overtime and job-related stress.

[11] A Record of Employment (ROE) was provided on July 20, 2015 by 3 Woods, which confirmed that the Appellant had worked as an electrical apprentice until July 17, 2015, and gave the reason for separation as "Quit" (GD3-18).

[12] On August 31, 2015, an agent of the Commission spoke with the owner of 3 Woods regarding the reason for separation and documented the call in a Supplementary Record of Claim (GD3-20). The agent noted the owner's statements in response to the Appellant's Quit Questionnaire, namely that the Appellant didn't need permission to pick up parts when he knew what was needed for the work orders and should have taken care of getting the parts instead of going home, that the Appellant offered to use his own vehicle, and that when the Appellant spoke to him about broadening his experience, he made sure the Appellant was exposed to a variety of experiences.

[13] By letter dated September 1, 2015, the Commission advised the Appellant that he would not be paid EI benefits because he had voluntarily left his employment with 3 Woods on July 17, 2015 without just cause (GD3-21 to GD3-22).

[14] On October 6, 2015, the Appellant requested the Commission reconsider its decision to deny the Appellant's claim for benefits (GD3-23 to GD3-25), stating that he was asked to work alone on live power (which was not appropriate for someone of his training level), that when the company vehicle broke down, he was forced to drive his own vehicle and regularly put over 100 km /day on it (at his own expense), that the employer did not pay overtime, and that the stress level was such that he couldn't handle working for this employer any longer.

[15] On November 27, 2015, an agent of the Commission spoke with the Appellant regarding his request for reconsideration and documented their conversation in a Supplementary Record of Claim (GD3-28 to GD3-30). The agent noted the Appellant made the following statements:

(a) He is an apprentice electrician and yet rarely worked with a journeyman. He would be sent to clients' homes to work on live power wires alone and this is against the rules for an apprentice. When asked if he contacted the apprentice board to complain, the Appellant stated that he did not know how to do this and didn't think about doing this because he wanted to work;

(b) The employer's service van broke down and he had to use his own truck to go on service calls, which was costing him money as he was responsible for paying the gas, vehicle servicing and for the wear and tear on his own vehicle. When he brought the issue up with his employer, he was given the choice of not working or using his own vehicle. Employer was only willing to pay him 1 extra hour /day for using his own vehicle, which did not cover the costs.

(c) The employer would text or call him at all hours wanting to discuss the day or the next day's work or to yell at him for something. They were always arguing and it was a nightmare working for him. He did it as long as he could and then couldn't do it anymore, so he gave his 2 weeks' notice, but during this period he was unable to find another job because he was too busy working and unable to go to an interview, so he decided to keep working there. He was trying to make it work.

(d) Then there was a final incident when his daughter's daycare cancelled and he couldn't go to work. The employer called him and tore a strip off of him for costing the company money because he couldn't come to work that day. After that phone call, the Appellant couldn't do it anymore, was very stressed out and so he quit. The Appellant did not consult with a doctor about his job stress.

[16] By correspondence dated November 27, 2015, the Commission advised the Appellant that its decision of September 1, 2015 was maintained (GD3-31 to GD3-32).

At the Hearing

[17] The Appellant testified as follows:

(a) He was in his second year of apprentice training to become an electrician when he was hired by 3 Woods. He started work on March 1, 2015. There were only 3 people working at 3 Woods at the time: the owner, a certified journeyman and the Appellant. The terms of his employment were a 40 hour

work week, pay at the rate of $23/hour, supervision by the journeyman (with "some easy work to be done on my own"), and the use of a company vehicle for service calls.

(b) On his first day, the Appellant was out on a service call and texted the owner about a decision he needed some input on. The owner "got mad and told me to figure it out myself". According to the Appellant, "that's how it went from that point on": the Appellant was given little direction or guidance, was increasingly sent out on service calls on his own, and spent very little time working with the journeyman. The owner expected the Appellant to work on his own and to make "major decisions" that were "more about operation of the owner's business than electrician's work". Then the owner would telephone him late in the evening, ask for a run down on the day, and "rip into me about a decision or how he thought I should have done something". The Appellant said it felt like he never really left work because he knew the owner's call after hours was coming, sometimes even after he had gone to bed, and that he'd be very stressed out after speaking with him.

(c) As a second year apprentice electrician, the Appellant was not qualified to work with live electricity. Nonetheless, the owner sent him out "many times" on service calls – alone – where he was required to work with live electricity. The Appellant described being "in people's homes, right in front of the clients and they think I'm a journeyman because I'm there alone, crawling around in attics, working at heights". But he wasn't a journeyman and had to teach himself, learning on the fly in front of customers. He was not comfortable in these situations and they were great source of stress for him. He was constantly asking the owner to send him out to work with the journeyman, and the owner always got angry in response.

(d) The Appellant used the company van for service calls and, while he did not have a company credit card for gas, he was fully reimbursed when he

submitted the receipts for “gassing up” the company van while he was out on calls.

(e) In late May or early June 2015, the company van the Appellant had been using for service calls broke down. The owner advised the Appellant that he would not be able to work very many hours until the company van was fixed. The Appellant wanted to work, so he was willing to use his own vehicle (a 2006 Ford V8 F150 pick-up truck) for a short time until the company van was repaired. The owner told him it would be “a week max” before the company van was available to him again. The Appellant asked the owner to cover his vehicle expenses and to pay him “for mileage”, but the owner said he had the expense of repairing the company van and could only afford to give the Appellant one (1) extra hour’s pay/day for the use of his vehicle. That amounted to $23/day.

(f) After a week of using his own truck, the Appellant asked the owner about the status of the company van and was told “I’m working on it”. The Appellant continued to check in with the owner every few days about what was happening with the company van, but the owner always put him off, at one point even taking the Appellant to look at a new company van. The Appellant started to get the impression the owner was “in no hurry to get the van fixed”.

(g) Over the next month, the Appellant put between 75 – 200 km / day on his truck, “driving all over the city” on customer service calls. He received $23/day, which “didn’t even come close to covering the gas”, let alone compensating him for service and wear and tear, as “a true mileage rate” would have done. At one point, the Appellant’s truck broke down on a service call. The employer contributed nothing towards the costs of these repairs, which the Appellant arranged and paid for himself. The Appellant then resumed using his truck for work because the owner still had not had the company van repaired or acquired another one. As the weeks went on, the

Appellant advised the owner that the $23 / day was not covering the costs of using his own vehicle for work, but the owner steadfastly maintained it was all he could afford.

(h) Even though the Appellant was now using his own vehicle – at his own expense - to service the employer's customers (and not even being reimbursed for gas – as he had been when he used the company van), the owner nonetheless continued the daily angry calls to the Appellant at home in the evening, and continued to ridicule and berate him for various decisions when he had given the Appellant no guidance or instructions as support.

(i) By early July 2015, the Appellant was very stressed and fed up with being taken advantage of by the owner, and handed him "my two weeks' notice". It was then that the owner told the Appellant he was glad he hadn't bothered to get the company van fixed or buy a new one because the Appellant was leaving and it wasn't needed.

(j) The Appellant spent the next two (2) weeks looking for another job (while he continued to work at 3 Woods). A couple of potential employers replied to his enquiries, but they needed him to start the next day and he had committed to his notice period and finishing work at 3 Woods. When the two (2) weeks expired, he didn't have another job to go to and the owner said he could stay on at 3 Woods but would have to continue using his own truck for service calls and would still receive only $23/day for doing so.

(k) The final incident came a few days later, on July 17, 2015. That day, the Appellant's daughter's daycare was unavailable and his wife was working out of town and could not get home until noon that day. As soon as he found out about his childcare emergency, the Appellant texted the owner and advised he would be unable to start work until the afternoon. The owner's response was angry and he "put a big guilt trip on me, telling me I was costing him money that day". Around 1pm, the Appellant texted the owner that he could come in (now that his wife was home), and the owner sent him

> some work orders for service calls. On the second service call, the Appellant needed to source a particular part, which he eventually located in South Calgary. As it was by then late on a Friday afternoon, the Appellant estimated it would take 2.5 hours in rush hour for him to drive to get the part. So he called the owner to make sure he wanted to charge the client for his time spent sitting in traffic, but the owner didn't answer. As he regularly made such decisions on his own, the Appellant decided he'd pick up the part on Monday and, as it was the end of the day, went home. Later that evening, he got the usual call from the owner, who became "really angry" and started tearing a strip off of him about why the part for that service call didn't get picked up, and accused the Appellant of not wanting to use his own gas to drive out to get the part. The owner was screaming that the Appellant had cost him a lot of money that day. Knowing full well how much using his own vehicle for work had cost him personally, the Appellant "couldn't take it anymore" and told the owner that it would be best if they parted ways. The owner agreed and asked the Appellant to return the company tools he had, which he did.

[18] When asked about the owner's statement to the Commission's agent that the owner did try to ensure a broader range of experiences after the Appellant advised of his unhappiness at working alone, the Appellant denied this had occurred. The Appellant testified that he had been asking to work with the journeyman from the start and this was one of the things the owner argued with him about. According to the Appellant, there may have been one or two projects he got to work on with the journeyman, but that was all.

[19] The Appellant stated that the job at 3 Woods was not what he had hoped it would be, and that his hours were starting to go down by the time he quit on July 17, 2015. However, when the owner angrily accused him of not wanting to use his own gas to sit in traffic for 2.5 hours and of costing the owner money – when, in fact, for over six (6) weeks it had actually cost the Appellant a significant amount of money to use his own truck as a company vehicle – the Appellant realized the full extent of how he was being used by the owner, that the owner had no intention of remedying the situation, and that he had no choice but to leave his job.

SUBMISSIONS

[20] The Appellant submitted that he had just cause for leaving his employment at 3 Woods, namely the dangerous situations he was forced to work in involving unsupervised work with live electricity and the exploitation by the employer in forcing the Appellant to use his own vehicle for service calls without reimbursing his expenses. The Appellant further submitted that he did attempt to find other work prior to leaving his employment at 3 Woods, but was unsuccessful, and that the employer was taking advantage of him, which caused the situation to become so stressful and unbearable that he had no choice but to leave when he did.

[21] The Commission submitted that the Appellant was unhappy and dissatisfied with his working environment, but this did not provide just cause to leave an employment without first exploring reasonable alternatives. The Appellant volunteered to use his vehicle in the course of his duties and the employer provided him with compensation. The Appellant failed to bring his concerns about safety on the job to the employer or the provincial Apprentice Board. The Appellant has not provided any medical evidence to substantiate that he was obliged to leave work due to stress, nor that he attempted to reach an accommodation with the employer about the working conditions. The Appellant has not proven that the situation was so intolerable that he was required to quit when he did. A reasonable alternative to leaving would have been to remain employed until he secured new employment.

ANALYSIS

[22] Section 30 of the EI Act stipulates that a claimant who voluntarily leaves his employment is disqualified from receiving any benefits unless he can establish “just cause” for leaving.

[23] It is a well-established principle that “just cause” exists where, having regard to all the circumstances, on balance of probabilities, the claimant had no reasonable alternative to leaving the employment (*White 2011 FCA 190, Macleod 2010 FCA 301, Imram 2008 FCA 17, Astronomo A-141-97, Tanguay A-1458-84*). The list of circumstances enumerated as “just cause” in paragraph 29(c) is neither restrictive nor exhaustive, but delineates the type of circumstances that must be considered (*Campeau 2006 FCA 376; Lessard 2002 FCA 469*).

[24] The initial onus is on the Commission to show that the Appellant left his employment voluntarily; once that onus is met, the burden shifts to the Appellant to show that he left his employment for "just cause" (*White, (supra); Patel A-274-09*).

[25] The Tribunal finds that the Appellant left his employment with 3 Woods voluntarily. It is undisputed that the Appellant took the initiative to sever the employment relationship when he quit his job on July 17, 2015 at a time when the employer still had work for him.

[26] The onus of proof then shifts to the Appellant to prove that he had no reasonable alternative to leaving his job when he did (*White, (supra), Patel, (supra)).*

[27] The Tribunal must consider the test set out in sections 29 and 30 of the EI Act and the circumstances referred to in subsection 29(c) of the EI Act, and determine whether any existed at the time the Appellant left his employment. These circumstances must be assessed as of that time (*Lamonde A-566-04*), **namely the day he quit his job: July 17, 2015**.

[28] It is not imperative that the Appellant fit precisely within one the factors listed in subsection 29(c) of the EI Act in order for there to be a finding of "just cause". The proper test is whether, on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment, having regard to all the circumstances, including but not limited to those specified in paragraphs 29(c)(i) to (xiv) of the EI Act (*Canada (Attorney General) v. Landry (1993) 2 C.C.E.L. (2d) 92 (FCA)*).

[29] Paragraph 29(c)(vii) of the EI Act provides that a significant modification of terms and conditions respecting wages or salary are one of the circumstances to be considered to determine if the Appellant had no reasonable alternative to leaving and, therefore, just cause for voluntarily leaving an employment. For the reasons set out below, the Tribunal finds that such circumstances existed for the Appellant.

[30] The Tribunal first considered the Appellant's various statements to the Commission and in his testimony at the hearing about how he felt he was forced to use his own vehicle in the course of his employment. The Tribunal then considered the Commission's submission that the Appellant volunteered to use his vehicle for work and was compensated by the employer. While the Commission's agent documented that the owner stated the company van broke down, and

that he told the Appellant he would need to lay him off, to which the Appellant responded by offering to use his own vehicle (GD3-20), there is no evidence from the employer that the Appellant was compensated for the use of his vehicle.

[31] The Tribunal prefers the evidence of the Appellant with respect to the use of his own vehicle because his testimony was forthright, direct, detailed and consistent with his statements to the Commission (GD3-28). The Tribunal accepts the Appellant's testimony in connection with the breakdown of the company van and the use of his own vehicle as credible ***in its entirety***, and finds that:

(a) It was a term of the Appellant's employment that he would have the use of a company van to make service calls;

(b) The Appellant used the company van for the first three months of his employment and was fully reimbursed by the employer when he put gas in it;

(c) When the company van broke down, the Appellant offered to use his own vehicle ***for a short time, which on the basis of representations from the owner was expected to only be for one (1) week while the company van was repaired;***

(d) The Appellant, in fact, ended up having to use his own vehicle in the course of his employment for a period of ***at least six (6) weeks***, during which time no steps were taken to repair the company van or acquire a new one;

(e) The Appellant's only compensation for doing so was payment of an extra hour's wages/day, namely $23/day, which did not come close to covering the costs incurred by the Appellant for gas, vehicle servicing, or wear and tear on his vehicle; and

(f) Using his own vehicle in the course of his employment for at least six (6) weeks caused the Appellant to be significantly out of pocket because of his employment, which in turn directly and significantly reduced his compensation from that employment.

[32] The Tribunal finds that the employer's on-going failure to provide a company van to the Appellant (after allowing a week for repairs) was a significant alteration to the terms of the Appellant's employment. The Tribunal further finds that the employer's failure to fully reimburse the Appellant for the expenses he incurred in operating his vehicle in the course of his employment (thereby causing the Appellant to incur sizable out-of-pocket expenses because of that employment) was a significant modification of the terms and conditions respecting the Appellant's wages within the meaning of paragraph 29(c)(vii) of the EI Act.

[33] The Tribunal is supported in its analysis by the Federal Court of Appeal's affirmation of the general principle that, where the terms and conditions of employment are significantly altered, a claimant will have just cause for leaving their position: *Lapointe v. C.E.I.C. A-133-95*.

[34] The Tribunal is also supported in its analysis by the abundant jurisprudence that has found a claimant to have "just cause" where the employer has acted unilaterally in any manner which fundamentally alters the terms of employment as they existed prior to separation (*CUBs 18960, 18009, 17495, 26973 (affirmed by Lapointe, supra)*). Similarly, refusing to honour the terms of employment will render inappropriate a disqualification for leaving employment without just cause (*CUB 17491*); and reneging on the wage to be paid has been found to be the equivalent of unfairly exploiting, tricking or constructively dismissing a claimant and provides just cause for leaving (*CUBs 12252, 12402, 23480*).

[35] The use of a company van was a term of the Appellant's employment with 3 Woods and, by extension, the Appellant was never meant to be out-of-pocket for any expenses associated with travelling on service calls during the course of his employment (as evident from the full reimbursement when the Appellant paid to put gas in the company van). The employer and the Appellant operated under these terms for the first three months of the Appellant's employment at 3 Woods. Then the company van broke down and, faced with the prospect of not working (and thereby not earning any income), the Appellant offered to use his own vehicle for a short time while the van was repaired. The owner took the Appellant up on his offer, told him it would only be for a week and said he could only afford to pay the Appellant $23/day because of the costs he was facing to repair the company van. At best, this was a brief, temporary

variation in the terms of the Appellant's employment. In no way did it represent a renegotiation of the terms, nor an amended agreement on terms going forward.

[36] Yet the employer took no steps to repair the van or provide an alternate company vehicle, and instead made excuses and had the Appellant use his vehicle for at least six (6) weeks until the Appellant finally quit. As can be seen from the employer's explosive accusation in the final incident (namely that the Appellant did not want to use his own gas, which cost the owner money), the reason for this could well have been because the employer was quite happy to have the Appellant use his own truck to drive between 75 - 200 km per day to service the employer's customers, with the Appellant paying for all of the gas, repairs and costs of wear and tear (not to mention the cost of insuring the vehicle), while the employer avoided the expense of repairing the company van or buying another one (and saving on insurance as well) – and to make only a nominal payment towards the Appellant's vehicle expenses. However, an employee is not required to underwrite or subsidize an owner's business, which is exactly what was happening in the Appellant's case.

[37] The Tribunal considers the employer's failure to provide a replacement company vehicle for the Appellant's use and the employer's failure to properly reimburse the Appellant for the expenses he incurred in using his own vehicle during the course of his employment to be exploitive and just cause for the Appellant leaving his employment with 3 Woods.

[38] Furthermore, given the owner's admission a month into the Appellant using his own vehicle that he had not, in fact, "bothered" to repair the company van or buy a new one, it is clear the owner was quite happy with the situation as it was and had no intention of either providing a company van or properly reimbursing the Appellant for his expenses in using his own vehicle. The Tribunal therefore finds that continuing to work while seeking other employment would only have caused the Appellant to incur even more out-of-pocket expenses for the operation of his vehicle during the course of his employment (for which there was little or no prospect of reimbursement) and, therefore, was not a reasonable alternative for the Appellant.

CONCLUSION

[39] Having regard to all of the circumstances noted above, the Tribunal finds that the Appellant has proven that he was left with no reasonable alternative but to leave his employment with 3 Woods on July 17, 2015. The Tribunal finds that the Appellant has demonstrated just cause for voluntarily leaving his employment at 3 Woods and, therefore, is not disqualified from receipt of EI benefits pursuant to section 30 of the EI Act for doing so.

[40] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section