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

[TRANSLATION]

Citation: *A. K. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 78

Tribunal File Number: GE-16-421

BETWEEN:

A. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Claude Durand

HEARD ON: May 31 and June 9, 2016

DATE OF DECISION: June 14, 2016

Canada

REASONS AND DECISION

PERSON IN ATTENDANCE

[1] The Appellant, A. K., was present at the hearing on May 31, 2016, with his representative, Counsel Gaël Morin Green.

[2] The other parties were not represented.

[3] This appeal was heard in person for the following reasons:

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

b) The information in the file, including the need to obtain additional information;

c) The fact that more than one participant, including a witness, might be present;

d) The fact that the Appellant or other parties are represented;

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

[4] At the hearing on May 31, a witness, P. P., was unable to attend for health reasons.

[5] After hearing the Appellant on May 31, 2016, the Tribunal granted the request for a postponement of the abovementioned appeal in order to hear the witness at a later time.

[6] The hearing was held by teleconference on June 9, 2016. The Appellant, Mr. A. K., was absent. The witness, P. P., was present along with the appellant's representative, Counsel Gaël Morin-Green.

INTRODUCTION

[7] In this case, an indefinite disentitlement was imposed on November 23, 2015, starting December 7, 2014. The Commission had determined that the Appellant voluntarily left his employment without just cause within the meaning of the Employment Insurance Act (the "Act").

[8] The appellant challenged the decision. On January 25, 2016, during an administrative reconsideration review, the Commission upheld its initial decision.

[9] The Appellant appealed to the Social Security Tribunal on February 2, 2016.

ISSUE

[10] The Tribunal must determine whether the Appellant voluntarily left his employment without just cause within the meaning of the Act.

THE LAW

[11] 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

EVIDENCE

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,
(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 - 4 -

[12] The claimant made an initial claim for employment insurance benefits effective September 20, 2015 (pages GD3-3 to GD3-19).

[13] Le record of employment from employer 6929702 Canada Inc., for the employment period from August 11, 2015 to September 16, 2015, states that the claimant worked 165 as a painter. He was laid off by reason of a shortage of work with no known recall date (page GD3-20).

[14] The record of employment provided by the Employer Fourn. Funéraires Victo, for the employment period from August 11, 2014 to May 20, 2015, indicates that the claimant worked 1188 hours and voluntarily left his employment (GD3-21).

[15] The claimant was employed by Fournitures Funéraires Victo until May 20, 2015, on which date he voluntarily left his employment because he wanted to change jobs (page GD3-22).

[16] Based on the facts in the file, the Commission determined that the Appellant had not shown just cause for leaving his employment. The Commission therefore imposed an indeterminate exclusion under sections 29 and 30 of the Act as of May 17, 2015, but given that the benefit period started on September 20, 2015, entitlement to benefit was denied starting on this date only (pages GD3- 23 to GD3-24).

[17] The Appellant filed a request for reconsideration of the Commission’s decision (GD3-25 to GD3-29).

[18] On January 14, 2016, the claimant's representative explained that he had left his employment because he had another job. He presented a letter from the employer in this

regard. It was a promise of employment dated May 19, 2015, signed by the employer (page GD3- 30).

[19] The letter confirmed that the employer wanted to hire the claimant. The employer said that the Appellant would need his painter's apprentice card before he could work on a worksite in Quebec, and that until he received his card, the employer would assign him to non-construction duties. Once the *Commission de la Construction du Québec (CCQ)* opened the apprentice "pool" he agreed to give the Appellant the number of hours of work required for him to obtain his card. The Appellant also had to have his secondary IV equivalency (pages GD3-31 to GD3-32 and GD3-33 to GD3-34).

[20] Following the claimant's reconsideration request, the Commission decided to let its initial decisions stand (GD3-49 to GD3-50).

Evidence at the hearing

[21] He knew P. P., owner of a company that renovates heritage buildings.

[22] He was looking for a reliable employee. He offered him a job in roughly mid-April 2015.

[23] Before accepting, he spoke with Mr. Parizeau to make sure it was not a seasonal job. He received assurances.

[24] Before the CCQ opened the apprentice employment pool, the employer confirmed that he would be performing labourer duties off-site, such as window washing, site preparation, equipment transport, and scaffolding assembly. The employer offered him an hourly wage of $20.

[25] Once the pool opened, the employer assured him he would get the 150 hours he needed to obtain his apprentice card, and promised him that his job would last.

[26] He was already attending night school to obtain his secondary IV equivalency diploma in French. He has since completed this program.

[27] The work stoppage in May 2015, one month after he started working for the employer, was completely unexpected.

[28] He now has his construction cards, and still works for Mr. P. P..

Testimony by the employer, P. P., on June 9, 2016.

[29] He is a building contractor specializing in exterior and interior renovation work on heritage buildings.

[30] His company operates year-round, usually for 11 out of 12 months, given the interior he has to perform.

[31] He offered Mr. A. K. a job in April 2015. He knew him, and knew he was a hardworking, dependable man. He needed a foreman on his worksites, which is why he hired the Appellant.

[32] The Appellant had checked that the employment was indeed permanent before accepting. The employer had reassured him of this and had also promised him the large number of hours he needed to get his apprentice card.

[33] He secondary IV French equivalency diploma that Mr. A. K. had to complete was never a problem. He attended night school and finished his program.

[34] The CCQ works with trade "pools" usually in summer every year. Mr. A. K. obtained his papers and still works for him.

[35] In May 2015, the site was delayed because of a delay in a grant awarded to a building he was hired to restore. For that reason, Mr. A. K. was temporarily laid-off.

[36] The situation was unforeseen.

[37] Then, the work resumed. There are currently five restoration sites in operation.

PARTIES' ARGUMENTS

[38] The Appellant's representative presented the following arguments:

a) The Commission had already conceded that the Appellant had reasonable assurance of another employment in the immediate future. Within the meaning of the case law, such reasonable assurance does not mean guaranteed employment. The Commission is not applying the proper test by referring to the letter from the employer and arguing that certain conditions had to be met before the Appellant could work;

b) The Appellant had already started night school to obtain his Secondary IV French equivalency, which did not prevent him from working on Mr. Parizeau's work sites as well. The CCQ opens its "pool" annually, and the employer guaranteed the Appellant the number of hours required for him to obtain his apprentice cards;

c) The Commission argues that the Appellant left a permanent job for a seasonal job. The Commission is mistaken, as the Appellant's employer has testified. The company works year-round and the Appellant obtained assurance that he would continue working on a full-time basis after he obtained his apprentice cards;

d) The delay in a grant that caused a temporary halt in work cannot be blamed on the Appellant. The turn of events was completely beyond his control

[39] The Appellant's representative bases his claims on case law found in Exhibit GD-7 (CUB 40170, CUB 54010, A-339-06- *Attorney General of Canada v. Cloutier, André and* A-75-07 *Canada (Attorney General) v. Langlois* (F.C.A.).

[40] The Commission Respondent argued that:

a) In the claimant's case, he showed us that he had a genuine promise of employment by providing the promise of employment signed by his new employer.;

b) However, the facts show that certain conditions had to coordinated before the claimant could accept the position offered: obtain his painter apprentice card that would enable him to work on Quebec work sites, that the pool would be opened by the CCQ for this

position, and that he would obtain his Secondary IV equivalency before he had his official painter cards and the claimant took evening course to do so;

c) the employer guaranteed him the number of hours required by the CCQ to obtain his trade card as a painter: 150 hours;

d) the employer stated that the claimant could work on non-construction duties until he obtained his cards, as a self-employed person, submitting invoices to the company. No hours were guaranteed in this regard;

e) by accepting this employment, the claimant put himself in a situation that could have led him to unemployment;

f) the new job offered was not for the immediate future and was not genuinely guaranteed, since it was condition to obtaining his secondary r equivalency, and the opening of the pool;

g) There was no long-term promise, and only 150 hours were guaranteed. The fact that he was able to work in the meantime as a self-employed person was no guarantee of permanent, full-time employment;

h) In this case, the Commission concluded that the Appellant did not have just cause to leave his employment on May 20, 2015 because he did not prove that he had exhausted all reasonable alternatives before leaving.

i) Considering all of these circumstances, a reasonable solution would have been to ensure he had a job of sufficient duration in the immediate future, without deliberately placing himself in a situation of potential unemployment. Therefore, the claimant failed to prove that he had just cause to leave his employment within the meaning of the Act.

[41] The Commission based its decision on decisions by the Federal Court, which confirmed that a claimant who voluntary leaves an employment has the burden of proving that there was no other reasonable alternative to leaving the employment at the time the claimant left. *Canada (AG) v. White, 2011 FCA 190.* The Court found that when a claimant leaves a permanent employment for a high-paying seasonal employment, the time of the voluntary separation and

the remaining duration of the seasonal employment are the most important circumstances to consider in determining whether leaving was a reasonable alternative and therefore showed just cause. While it is legitimate for a worker to want to improve his life by changing employers or the nature of his work, he cannot expect those who contribute to the employment insurance fund to bear the cost of that legitimate desire. *Canada (AG) v. Langlois, 2008 FCA 18 (A-75-07).*

ANALYSIS

[42] It is the responsibility of the insured, as counterpart to his or her participation in the plan, to not create risk and, even more so, to not transform simple risk into a certainty of unemployment (Langlois, 2008 FCA 18; Tanguay, 1458-84).

[43] The test to determine if the claimant had just cause to leave her employment under section 29 of the Act is whether, having regard to all the circumstances, and on a balance of probabilities, the claimant had no reasonable alternative to leaving her employment (White, 2011 FCA 190; Macleod, 2010 FCA 301; Imran, 2008 FCA 17; Astronomo, A-141-97). 141-97).

[44] The onus is on the Commission to show that the claimant left voluntarily and on the claimant to show just cause for voluntarily leaving the employment (Green, 2012 FCA 313; White, 2011 FCA 190; Patel, 2010 FCA 95).

[45] These broad principles developed in case law provide the benchmarks to decide the issue. In this case, there is no doubt that the Appellant left his employment voluntarily. The Tribunal must decide if the Appellant had just cause to act in this way, that is, did he have just cause within the meaning of the Act, and did she have no reasonable alternative to leaving.

[46] Herein, the Appellant left a permanent job to accept a higher-paying job in the heritage building restoration field.

[47] The Appellant and the employer testified that before accepting the offer of employment, the Appellant had discussed the matter with the employer to ensure the position would be permanent.

[48] The employer explained that his company functioned in winter and summer restoration work included both the interior and exterior of buildings.

[49] Since the Appellant had to obtain his apprentice papers, the Employer signed a letter of guarantee assuring him of the number of hours required by the CCQ once the “pool” opened. In the meantime, the Appellant performed work outside the construction site for the employer. This is what the Appellant did for approximately 1 month. However, the planned work had to be interrupted because of a delay in the grant, thus forcing a work stoppage.

[50] I do not believe that this delay in work can be blamed on the Appellant or the employer. In my opinion, the work stoppage does not prove that the employment was vulnerable, as the Commission claims. In fact, many sectors of activity rely on government grands, and if the funds are late, the work is delayed.

[51] As stated in l’A-819-95, these were the circumstances existing at the time that the claimant left his employment, which has some bearing on the question of whether he had just cause to leave his employment, and not some unforeseen event.

[52] In (Tanguay A-1458-84), the Federal Court of Appeal ruled: "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. Sometimes, the claimant might have reasonably believed that at the time he left his employment, he would not be unemployed; this would be enough to excuse his conduct. In other cases, claimants leave an employment knowing they will not be able to find another, even when such behavior could, in some circumstances, be excusable.

[53] In this case, I note that this is precisely what happened. The Appellant could not anticipate an unforeseen delaying the payment of a grant that would delay the work in progress.

[54] The Commission contends that the employment offered to the Appellant was contingent on a number of conditions, particularly that he obtain his apprentice trade papers and Secondary IV equivalence.

[55] I note that the Appellant h\was already taking his night courses to obtain his Secondary IV equivalency in French. The employer testified that this did not prevent him from working for the employer and that he finished the course. It is helpful to note that although the Appellant's name may have a foreign ring, he speaks excellent French. This is not someone who needs to master a language simply to make himself understood.

[56] I have examined the promise of employment letter dated May 19, 2015. The letter represents a commitment by the employer to provide the Appellant with the 150 hours required to obtain his apprenticeship certificate with his company, rather than having to register in a trade school. This guarantee is required by the union. I am dismissing the Commission's allegation that this was not a true guarantee because it included several conditions.

[57] Furthermore, it is helpful to note her that the case law is constant on the notion of reasonable assurance in an immediate future. This does not mean having a job guaranteed by an employer before leaving. An important nuance must be made between reasonable assurance and guarantee.

[58] I am also setting aside the Commission's arguments that there was no promise of long-term employment, since only 150 hours were guaranteed. On this matter, the testimony of the Appellant and the Employer were clear, and I am allowing their statements credibility. The Appellant had reasonable assurance of another employment and assurance that it would last.

[59] The situation described in subparagraph 29c)(vi) of the Act assumes three things: "reasonable assurance", "another employment" and "the immediate future".

[60] Herein, I note that these three things are present in the Appellant's case. He left his employment on May 20, 2015 and started a new job on August 11, 2015. He had reasonable assurance of another employment in the immediate future before he left his employment.

[61] After considering the facts in the file and hearing and assessing the witness's testimony, the Tribunal concludes that the Appellant had just cause for leaving his employment within the meaning of sections 29 and 30 of the Act and that he had no reasonable alternative to leaving, having regard to all the circumstances. Accordingly, no disentitlement is necessary.

CONCLUSION

[62] The appeal is allowed.

Claude Durand
Member, General Division – Employment Insurance Section