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

[TRANSLATION]

Citation: *T. D. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 80

Tribunal File Number: GE-16-707

BETWEEN:

T. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

D. L. Construction

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: May 25, 2016

DATE OF DECISION: June 20, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. T. D., the Appellant (claimant) along with D. L. Construction, the employer attended the hearing.

INTRODUCTION

[1] On October 18, 2015 the Appellant made a renewal application for employment insurance benefits. On November 16, 2015 the Canada Employment Insurance Commission (Commission) denied the Appellant benefits because he voluntarily left his employment without just cause. On November 30, 2015 the Appellant made a request for reconsideration. On January 26, 2016 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (the Tribunal).

[2] 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 is not anticipated to be a prevailing issue.

c) The fact that more than one party will be in attendance.

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

e) 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

[3] The Tribunal must decide whether an indefinite disqualification should be imposed as the Appellant failed to prove he had just cause for voluntarily leaving his employment pursuant to section 29 and 30 of the *Employment Insurance Act* (the Act).

THE LAW

[4] Section 29 of the Act for the purposes of section 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;

(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) gnificant 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 is 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.

[5] Subsection 30(1) of the Act states:

(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 employment; and

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[6] Subsection 30(2) of the Act states:

> (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.

EVIDENCE

[7] On his application the Appellant stated he left his employment to attend an apprenticeship program and he would not be returning to his employer (GD3-5 to GD3-6).

[8] A record of employment indicates the Appellant was employed with D. L. Construction from March 30, 2015 to October 23, 2015 and he was dismissed from his employment (GD3-14).

[9] On November 3, 2015 the Commission contacted the employer who stated he Appellant was dismissed following a major disagreement between the two of them regarding when the Appellant was going back to school. He stated the Appellant could have gone back to school in January or April 2016 but not now when it was busy (GD3-15).

[10] On November 17, 2015 the Appellant stated to the Commission that when he registered for school in June the employer knew he was going back in October. He stated the employer changed his mind one week before saying it was the busiest time of the year and they needed him. He stated that he could have gone later but the apprenticeship coordinator told him that it was a good idea to make sure to get into the program as soon as he could. He stated that he was not told by a referring agent to quit his employment to attend the training (GD3-16).

[11] On November 18, 2015 the Commission notified the Appellant they would not pay him benefits because he voluntarily left his employment (GD3-18 to GD3-19).

[12] On November 30, 2015 the Appellant made a request for reconsideration reiterating he was dismissed for returning to school (GD3-19 to GD3-20).

[13] On January 21, 2016 the employer stated to the Commission that in May the Appellant had taken the morning off to book his school. He stated at that time he reminded the Appellant

not to book in the fall as it was a busy time. He stated that the Appellant had worked for him for four years and in the past the Appellant always booked in January or April. He stated when the Appellant returned he told him he had booked for October and was told he would likely have to cancel it. The employer stated that when October came the Appellant was told to change the date and if he didn't he wouldn't have a job to come back to as they were really busy. He stated the Appellant refused to change it (GD3-23).

[14] On January 21, 2016 the Appellant confirmed with the Commission that the employer had told him when he booked his school that he hoped they wouldn't be busy in October as they would need him. He stated he wanted to get his red seal and wanted to be done. He confirmed he could have booked earlier but felt the sooner the better. He stated he had emailed the apprenticeship coordinator two weeks before but he told him there were no openings left in January or April. The Commission questioned the Appellant has in a previous statement stated it was only one week before the training that his employer told him to change it. The Appellant stated that the employer had brought up changing prior but then let it go and then told him he absolutely had to change it because he was needed. He stated that the employer had called and there were spots in April but when he called there were none (GD3-24 to GD3-25).

[15] An email dated July 30, 2015 from the Appellant to the Apprenticeship Coordinator which states all level 4 classes are filled (GD3-26).

[16] On January 26, 2016 the Commission questioned the Appellant on the email (GD3-26) as it is dated July 30, 2015 and the Appellant had stated earlier that he emailed only a couple of weeks prior to the start date of October. The Appellant confirmed that he had not tried to contact other than the email (GD3-27).

[17] On January 26, 2016 the Commission notified the Appellant that they were unable to pay him benefits because it was determined he voluntarily left his employment without just cause (GD3-28 to GD3-29).

[18] On February 23, 2016 the Appellant filed a Notice of Appeal stating he disagreed that he voluntarily left his employment but rather his employer fired him. He stated that the employer had no viable reason to fire him for taking technical training for his job. He stated it is a

requirement of the apprenticeship program to take the classes and the employer was aware and agreed to this. The Appellant provided documentation of his course to support his appeal (GD2-1 to GD2-7).

[19] On May 16, 2016 the Appellant submitted additional information in support of his appeal. The apprenticeship and training documents indicated the responsibilities of the employer it pertains to the contract which was signed in 2010 (GD6-1 to GD6-11).

EVIDENCE AT THE HEARING

[20] The Appellant confirmed that he applied for school in May for his lever 4 to start on October 26, 2015 and be completed on December 18, 2015. He stated when he told his employer of the date, he told him good but he hoped they wouldn't be busy. He stated that there was lots of work came up so his employer asked him to change the date. He emailed the apprenticeship coordinator who said there was no way he could because all the courses were full. The week before the start date of his course, he and his employer had a little meeting and he told him to change the date. He and the employer were on the phone all week trying to change the date and then Friday came and the employer came and told him that if he was going to do this than not to come back so he took it was fired. Therefore because he was fired he should get EI. He said he had full intention of going back to work.

[21] The employer stated in May the Appellant asked to take a morning off to register for his level 4 and at that time he told him to remember they are busy in the fall and January would be better time to go. He stated when the Appellant came back he told him he had booked in for October. In July the employer stated that he asked the Appellant to change it, but he said he emailed the coordinator but the other classes were full. He stated when it came closer to October they had a lot of work booked up so he asked the Appellant again to change the date and he said he called but it was still booked up for January. The employer stated that he called the coordinator and discussed what was going on and he was told they had 12 spots available in April. The employer stated he discussed this with the Appellant who told him it wouldn't work because he was going to be seeding with his parents. The employer felt his business was taking second seat and he needed his employees to be reliable in order to make his business work. He stated that he told the Appellant that if he wanted to go in April that would be fine but if went in

October he would have to let him go. They discussed it and he kind of agreed they would part ways and if he needed him he would come back casual. The employer stated he called Service Canada and was told because the Appellant was not returning to put dismissed on the Record of Employment.

[22] The Appellant confirmed to the Tribunal that his previous training was done in January or March and when asked why he decided to go in October he stated that he thought he would go in October because it was something different. He stated that the statement made by his employer that when he was booking in May the employer didn't say not to book in the fall. There was no definite agreement between them as when he would go.

[23] The Appellant stated the email of July 30th to the coordinator confirmed the classes were full. When asked by the Tribunal what he had requested as the email only indicates a response he stated he must have asked if there was any possibility he could change his classes.

[24] The employer stated that he contacted the coordinator the week before he was told that the Appellant could go in April and it would cost $200.00 to change the date. He stated he did not have a problem with the cost but he would talk to the Appellant and he would make the final decision.

[25] The Appellant when asked by the Tribunal if he was given the option of going to school rather than stay employed he stated that he figured going to school was the best thing. He stated that he had been told by the coordinator that if he didn't get his next level in soon as possible he might have to wait four years as there were lots of level 4 students. The Appellant confirmed this conversation took place when he was in his level 3 training.

[26] The employer stated that it was a mutual agreement between an employer and employee when it is a good time to go school. He stated especially for small businesses as in his case he only has 2 staff, so he loses half his staff when they go to school. The employer stated that the coordinator told him if he was the employer he would cancel the Appellant's training for October on his own and register the Appellant in April and tell him that is when he is going. The employer stated he didn't want to be like that and would give the Appellant the option.

[27] The Appellant confirmed that he was given the choice to stay employed and go to school in April or to go in October knowing you had no job to go back to. The Appellant stated that although he didn't have a job to return to he did start his own business when he was finished school so he should still qualify for benefits.

[28] The Appellant stated that the employer told him he could go in April, but he called the apprenticeship people, as well as his mother did and they were both told there were no openings. He stated he was not able to get a hold of the coordinator himself. The Tribunal member asked why he didn't try emailing the coordinator as he had in the past, and he replied there were no reasons he couldn't have.

[29] The Appellant stated the pages he sent in are clearly black and white and state the employer's responsibilities. He stated that the coordinator told him that the employer has to let him go to school and that the employer could not cancel his course.

[30] The employer stated he never discouraged the Appellant to go to school any other time, this time they had a major disagreement.

SUBMISSIONS

[31] The Appellant submitted that:

a) He was fired from his employment and he should eligible to collect employment insurance; and

b) His employer had an obligation to allow him to attend a course of instruction.

[32] The employer submitted that:

a) He gave the Appellant the option to change his course date from October to April but he refused to do so; and

b) There is to be a mutual agreement on attending courses and in the past the Appellant attended training in slower period of business and in this case the company was too busy to allow him to go to school in October.

[33] The Respondent submitted that:

a) The Federal Court of Appeal in *Easson* A-1598-92 ruled that, where two distinct notions are dealt with together in the same provision of the Act or Regulations, it could be argued that the issue is not the one contained in each component rather the overall purpose of the provision;

b) In this case, since the claimant made the personal decision to attend apprenticeship training effective October 26, 2015 rather than re-schedule it for another period as requested by the employer; this is what initiated the separation. The Commission considers this a case of voluntary leaving as the claimant put himself into a position of being unemployed without exhausting all reasonable alternatives. The jurisdiction has shown that, without prejudice, voluntary leaving and misconduct issues can adjudicated on the basis of either of those grounds, as both notions fall under the same statutory provision and are subject to the same sanction:

c) The claimant voluntarily left his employment and did not have just cause for doing so on October 23, 2015 because he failed to exhaust all reasonable alternatives prior to leaving;

d) A reasonable alternative to leaving would have been to cancel his October 2015 scheduled apprenticeship training and re-schedule for another time as per the employer's schedule or he could have obtained an approval to quit and participate in the apprenticeship program. It is considered the claimant had the option in May 2015 to enroll in the October 2015 or January 2016 program however chose the October class to get his red seal done class and hoped that it would not be busy at work but nevertheless it ended up being busy and his employer needed him to continue working requesting he re- schedule but the claimant failed to do so and decided to go to school anyways; and

e) The claimant failed to prove that he left his employment with just cause within the meaning of the Act.

ANALYSIS

[34] The Tribunal must decide whether the Appellant should be disqualified pursuant to sections 29 and 30 of the Act because he voluntarily left his job without just cause. Subsection 29(c) of the Act provides that an employee will have just cause by leaving a job if there is no reasonable alternative to leaving taking into account a list of enumerated circumstances. The test to be applied, having regard to all the circumstances, is whether the Appellant had a reasonable alternative to leaving his employment when he did. Under subsection 30(1) of the Act, an employee is disqualified from receiving benefits if he voluntarily leaves his job without just cause.

[35] The Appellant presents the argument that he did not voluntarily leave his employment but rather his employer fired him because he took a course of instruction.

[36] The Supreme Court of Canada has stated that the cardinal principal of section 28 (now section 29) is that the loss of employment which is insured against must be involuntary. Thus claimants are disqualified if they lose employment by reason of their own misconduct, or if they voluntarily leave their employment without just cause. The consequences under (i.e., disqualification under section 30(1) whether it is found that he claimant lost his employment because of misconduct or because he voluntarily left under the Act are the same. Parliament linked voluntary leaving and misconduct due to the fact that contradictory evidence may make it unclear to the cause of the claimant's unemployment (*Canada A.G. v Easson* A-1598-92).

[37] The Tribunal finds it was the Appellant who initiated the separation of the employee/employer relationship when he decided to enroll and participate in a course of instruction against the employer's request to change the date. The evidence supports the Appellant was provided with an option of staying employed and moving his course to April 2016, however he made the decision to leave and therefore the Tribunal is satisfied that Appellant voluntarily left his employment.

[38] The Federal Court of Appeal reaffirmed the principle that where a claimant voluntarily leaves his employment, the burden is on the claimant to prove that there was no reasonable alternative to leaving when he did (*Canada (AG) v. White,* 2011 FCA 190 (CanLII)).

[39] The Tribunal cites (*Rena-Astronomo v. Canada* (A-141-97)), which confirmed the principle established in (*Tanguay v. Canada (A.G.)* (A-1458-84)) according to which the onus is on the claimant who voluntarily left an employment to prove that there was no other reasonable alternative for leaving the employment at that time, MacDonald J.A. of the Federal Court of Appeal stated: “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.”

[40] In making the determination as to whether just cause exists, the focus is on whether the claimant had a reasonable alternative to placing himself in the position of being unemployed and forcing others to bear that burden. Just cause exists if, at the time an Appellant leaves his employment without having secured another job, circumstances existed which excused him from taking the risk of causing others to bear the burden of his unemployment. The Tribunal finds the Appellant failed to show that leaving his employment was his only alternative and that he didn’t have any reasonable alternatives available to him or that circumstances existed that made him leave his employment when he did.

[41] The Appellant presents the argument that his employer had an obligation to allow him to attend a course of instruction. The Appellant provided documentary evidence (GD6-1 to GD6-11) in support of his appeal highlighting the sections of employer responsibility and eligibility that the employer must allow the apprentice to attend the required technical training and examinations.

[42] The employer presented oral evidence that there is to be a mutual agreement between the employee and employer on when to attend courses and in the past the Appellant attended training in slower period of business and in this case the company was too busy to allow him to go to school in October.

[43] The Tribunal finds that although the documentary evidence provided by the Appellant states an employer must allow the apprentice to attend the required technical training and examinations it does not state that he must do so when the employee wants to go.

[44] The Tribunal finds from the employer's oral evidence that is was to be a mutual agreement but also employees were expected to go to school in slower times of a company's business is a more accurate account of how the program is designed.

[45] The Tribunal does not find that the employer was unreasonable in his request for the Appellant to change his date from a time when his company was busy, and in particular the fact that the employer was a small business with two employees and by allowing the Appellant to attend training he would be losing half his staff.

[46] The Tribunal finds the evidence on the file from both the employer and the Appellant that when he booked his training in May that the Appellant was aware this was not an appropriate time and the employer might need him in October (GD3-24 to GD3-25). The Tribunal finds the initial statements were contracted by the Appellant in his oral evidence, however the Tribunal finds that the Appellant's initial statements hold more weight. The Tribunal finds that the evidence is clear that the employer requested as early as July advising the Appellant that he needed to change the date substantiates that the October date was not satisfactory.

[47] The Tribunal finds that there is a history of the Appellant attending his levels of training in the winter or spring months as from the Appellant's oral evidence that he chose to attend the fall training because it was something different cannot support he had no reasonable alternative but to attend the course.

[48] The Tribunal find the documentary evidence provided by the Appellant (GD6-7) supports the employers submissions that the Appellant had previously attended training in January or March in the three previous years.

[49] The Appellant presents the argument that in July he tried to change his course date and then again one week prior to the start date but was told all level 4 classes are filled.

[50] The Tribunal finds the Appellant provided a copy of an email sent to his coordinator however the information is inconclusive as to what the Appellant asked as there was only a response.

[51] The Tribunal finds the evidence does not support the Appellant made a concerted effort to change his course date and that he wished to accommodate his employer.

[52] The Tribunal finds the Appellant's credibility is questioned by his oral evidence. The Tribunal finds the email response indicates all level 4 classes are full, the Appellant was not able to provide a reasonable explanation as to why the email did not include the question he asked, or what he had specifically asked if he could change his date to January as his response to the Tribunal was that he must have asked if there was any possibility he could change his classes.

[53] The Tribunal finds the Appellant's oral evidence that he (and his mother) called the apprenticeship program and was told there were no openings, following his conversation with his employer that there were openings in April again is not a reasonable response. The Tribunal finds in the past the Appellant always been in contact with his coordinator but this time only called the general program. The Appellant was not able to provide any explanation why he didn't contact his coordinator personally by phone or email as he had in the past, or if he was not able to reach him, leave him a message which would allow him to confirm that there were openings in April and that he would be allowed in.

[54] The employer testified that he had called the apprenticeship coordinator a week before the course date and explained the situation was told there were openings available in April. He testified that he offered this date to the Appellant but the Appellant still refused to change the date.

[55] The employers evidence that the Appellant did not want to go in April because he would be busy on the farm seeding supports that the Appellant had made a personal decision back in May 2015 that he was going to attend his level training in October 2015 was his intention.

[56] The Tribunal finds from the employers evidence that in his conversation with the coordinator that he could change the date to April and a cost of $200.00 to which the employer agreed he would pay is an accurate account of the situation and the fact that the Appellant could have easily changed his date.

[57] The Tribunal finds that the Appellant had reasonable alternatives available to him prior to leaving that he failed to exhaust.

[58] The Tribunal finds the Appellant could have changed his course date to attend the training in April 2016 and stay employed. The Tribunal finds that although the Appellant argued that he was told by the coordinator that he was to pursue his training as quickly as he good there is no evidence to support that by waiting a few more months would jeopardize his certification.

[59] The Tribunal cites (*Canada v. Macleod* (A.G.) (A-96-10)) which confirms it is settled law that voluntarily leaving one's employment to undertake studies does not constitute "just cause": (*Canada (A.G.) v. Mancheron*, 2001 FCA 174 (CanLII)), 109 A.C.W.S. (3d) 538 at para. 2. Consequently, neither the umpire nor the board could reasonably conclude, on the record, that the claimant had just cause for leaving his employment.

[60] The facts are clear the Appellant made a personal decision to pursue his course without the approval of his employer or to seek approval from the Commission prior to his leaving to determine if he would still be eligible for benefits to attend the course. The Appellant found it necessary to complete his studies and that he felt it was the right thing to do.

[61] The Tribunal sympathies with the Appellant's situation, however the Tribunal does not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (AG) v. Levesque*, 2001 FCA 304).

[62] The Tribunal relies on (*Canada (A.G.) v. Knee* 2011 FCA 301) which states:

> *However, tempting as it may be in such cases (and this may well be one), adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.*

[63] The Tribunal finds an indefinite disqualified from receiving benefits be imposed because the Appellant voluntarily left his employment without just cause pursuant to sections 29 and 30 of the Act.

CONCLUSION

[64] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section