



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. C. v Canada Employment Insurance Commission*, 2016 SSTGDEI 164

Tribunal File Number: GE-15-2523

BETWEEN:

R. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: January 19, 2016 and August 29, 2016

DATE OF DECISION: September 12, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

On January 19, 2016, the Claimant, R. C., attended a videoconference hearing. At that hearing, the Claimant raised constitutional issue(s) both verbally and in her written submissions at the hearing (RGD6). This hearing was adjourned so that the Claimant may pursue her Charter issues (RGD7).

On March 24, 2016, the Claimant attended a prehearing conference so that the Charter process can be explained (RGD8). The Claimant was provided until June 24, 2016 to advise whether she would be pursuing her Charter challenge.

On July 5, 2016, the Tribunal confirmed with the Claimant that she did not wish to raise a constitutional issue as part of this appeal (RGD9).

On July 25, 2016, the parties were advised that the Claimant's present appeal will proceed by way of a question and answer hearing until August 29, 2016 (RGD1A). The parties were asked "Do you have any further submissions and/or evidence, not already provided to the Tribunal, regarding the issue of voluntarily leaving your employment?" The Canada Employment Insurance Commission (Commission) indicated that it did not have further submissions (RGD10). On August 17, 2016, the Claimant responded to the Tribunal by providing a further submission considered below (RGD11). The hearing was concluded August 29, 2016.

INTRODUCTION

[1] On February 26, 2009, the Claimant made an initial claim for regular benefits.

[2] On February 14, 2013, the Canada Employment Insurance Commission (Commission) retroactively imposed a disqualification for regular benefits because she did not show just cause for leaving her employment on June 20, 2009. This decision resulted in an overpayment of \$19,221.00. On the same day, the Claimant was advised that unreported earnings were allocated

to her benefit period and because she knowingly made misrepresentations to the Commission, a warning letter was issued.

[3] On February 22, 2014, the Claimant requested that the Commission reconsider its decisions however; on May 7, 2014 however, the Commission maintained its initial decisions.

[4] On May 7, 2014, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). On September 2, 2014, the General Division rendered a decision on the issues of allocation of earnings and the imposition of a warning letter however; it did not decide on the issue of voluntary leaving. On October 7, 2014, the Claimant appealed to the Appeal Division of the Tribunal.

[5] On March 30, 2015, the Appeal Division initially refused the Claimant's leave to appeal however; on June 24, 2015, the Appeal Division amended its leave to appeal decision to allow the Claimant's appeal on the issue of voluntary leaving only since it was not heard by the General Division the first time (AD-15-337).

[6] On January 19, 2016, a hearing was held by videoconference given the complexity of the issue under appeal, the fact that the Claimant was going to be the only party in attendance and 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.

[7] On August 29, 2016 a hearing was held by Questions and Answers to ensure that the parties had made all their submissions and provided all their evidence before a decision was rendered since a videoconference hearing had already been held on January 19, 2016. Plus, this 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

[8] The Member must decide whether the Claimant should be disqualified from receiving any benefits as of June 14, 2009 because she voluntarily left her employment without just cause pursuant to section 29 and 30 of the *Employment Insurance Act* (EI Act).

THE LAW

[9] Section 29 of the EI Act stipulates that for the purposes of sections 30 and 33,

(a) “employment” refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, 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.

[10] Subsection 30(1) of the 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.

[11] 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.

EVIDENCE

[12] On February 26, 2009, the Claimant made an initial claim for regular benefits (RGD4-3 to RGD4-10).

[13] The record of employment (ROE) shows that the Claimant was employed with X from December 13, 2008 until she quit on June 20, 2009 (RGD4-11). The employer reported earnings for the period of March 9, 2009 until the week of June 14, 2009 (RGD4-12).

[14] On September 10, 2011, the Claimant wrote to the Commission indicating that her “decision to leave” was because her employment was on an on-call basis and her hours at the end of the work period were very little that she could not sustain herself. Plus, they were late hours of work (night shift) which was not conducive of her job search and interviewing during the day. Further, she did not feel safe alone at the front door nor did she have the background or (medical) training to respond and assist/move seniors. She resigned for all these reasons, writing: “So all combined I had resigned in which I thought I had told EI at the time ...” (RGD4-21).

[15] To the Commission Investigator, the Claimant confirmed that she was hired to be on-call; she was not a full-time employee or an RN and should not have been lifting older people. She had advised her employer. She refused to provide any further information (RGD4-26).

[16] The employer advised the Commission Investigator that the Claimant never raised any concerns about her safety, feeling uncomfortable nor did she report any incidents. She advised that the building is secure from 4 pm until 12 pm, a home support worker left at 9 pm and another one came in at 4 am, the general manager was always on-call. She was told never to lift a senior and if required, and no one was there, she was to call 911. The Claimant resigned via email (RGD4-28).

[17] In response, the Claimant wrote that she did advise the employer of the times she was called by a senior who needed help when a manager and nurse aid was not on duty (she was the only person on duty). She was put in a position she did not know or expect when she was hired as an on-call, part-time receptionist. She “...quit due to late hours of work, safety issues and walk home late at night as a single woman alone... I am stating all the facts which is the best I can do.” She stopped reporting/claiming benefits after she quit because she had found work. (RGD4-34 to RGD4-35).

[18] On February 14, 2013, the Canada Employment Insurance Commission (Commission) retroactively imposed a disqualification for regular benefits effective June 14, 2009 because she did not show just cause for leaving her employment on June 20, 2009 (RGD4-36). This decision resulted in an overpayment of \$19,221.00 (RGD4-38 and RGD4-40).

[19] The Claimant requested that the Commission reconsider its decision(s) indicating that she has not been provided with the requisite information for her to address the issue of the monies she owes (or not). She requested that the Commission address her issues regarding the overpayments and provided copies of her 2013 notice of assessment with the CRA (RGD4-45 to RGD4-55). The Claimant advised the Commission that she strongly disagrees with the decisions made on her claim. She believes that she had just cause for leaving her employment and a disqualification should not be imposed. The Claimant stated that she had every right to leave her on-call position; she was not an RN and should not be required to lift patients. The Claimant was angry, interrupted and hung up on the Commission agent (RGD4-56 to RGD4-57).

[20] On May 7, 2014, the Commission advised the Claimant that it was maintaining its decision of February 14, 2013 (RGD4-58).

[21] On September 2, 2015, the Member requested that the Claimant and the Commission provide "All submissions regarding the issue of voluntarily leaving" (RGD2-1). On the same day, the Tribunal sent the employer a letter requesting whether it wants to be added as a party to this appeal however; no response was provided to the Tribunal (RGD3).

Testimony

[22] On January 19, 2016, at the videoconference hearing, the Claimant testified that her circumstances amount to just cause for leaving her employment. She confirmed that she was an on-call receptionist that had to be available any time (day and night shifts) and was responsible for addressing any emergency calls from seniors using a handheld radio (walkie talkie). When on the night shift (9pm to 4am) there was no healthcare professional available so she had to help a senior from a chair to a sofa; one senior asked to be shifted on his bed.

[23] The Claimant testified that she left her employment because of (a) financial hardship caused by not making any money; she was being given 1 or 2 shifts/week; she was going through

post-bankruptcy stress (2011) at the time (b) the nature of the job; her employer could not accommodate her request to not have to assist seniors; she was not hired to provide care to seniors and (c) health reasons: she could not do shifts or any lifting and, she emotionally health was unstable as she had gone through a prior traumatic event (mother committed suicide) and she was still dealing with the health issues associated with that anxiety. She could not care for seniors for this reason. When asked whether her doctor advised her to quit, the Claimant stated “not at all” although the doctor stated it was not the best job if her sleep was off. The doctor knew of her health conditions and need for a full-time job that would provide a livelihood for her health and well-being.

[24] Regarding alternatives to quitting, the Claimant testified she tried to look for work in another industry sector, full-time strictly office work. She stated that contrary to the employer statements to the Commission (RGD4-13), she had put in 2 incident reports in a log book regarding a fire alarm situation where she had to move a senior and another time when she had to shift a senior in his bed. The Claimant stated that she is not trained to do this type of work and the employer did not address her complaint of putting herself in an unsafe position. She had advised the manager, supervisor and another employee who was present during the fire alarm incident.

[25] The Claimant was asked why she did not secure work prior to leaving. The Claimant testified that she did not quit her employment, she simply was not offered any more hours. She kept herself on the on-call list and was available. The employer was not committed to giving her hours so she just kept looking for other work. On June 20, 2009 she told her employer “I will not respond to those job requirements” and that she would not move a senior if required; she will not jeopardize her health or that of the seniors. The Claimant stated that the separation with her employer resulted when she secured other part-time work in the fall of 2009; the employer probably took her off the list.

Written Documentation

[26] After the hearing, on January 20, 2016, the Claimant wrote to the Tribunal noting that she had taken an on-call job without any guarantee of hours or regular work week schedule. Prior to taking this job she had suffered from traumatic stress syndrome and anxiety resulting in health

issues. She did not realize that this job required a level of compassionate care and response to seniors if called upon during the working hours of 9 pm to midnight. A fire alarm incident and the requirement to shift a senior in his bed caused her to be anxious and she was not able to respond to these situations. “This posed a safety risk to others and she at that time which the seniors home management were told her reasons for leaving were for these reasons not being able to handle these aspects of the job and lack of work as an "ON CALL" employee”. The Claimant provided a list of 39 employers that she contacted for employment. Her employer made it clear that they could not accommodate her concerns. “Lack of work available, nature of the job, environment and contributing health issues all left no option for R. C. to move onwards to find alternative work.” (RGD6).

[27] To the Tribunal, on February 19, 2016, the Claimant provided a written submission indicating:

“...In my conversations with the EI agents I spoke with the wrong words as in reality I never quit the on call job at [X] on 7th. I was looking for full time work during this time while being on call. I was not given hours during this time I was looking and interviewing with prospective employers. I also could not tell the prospective employers I was working on call or else they would say I could not make myself available for scheduled full time work. How could I quit a job if I had no other employment to go to it would not make sense at the same time I wanted work full time knowing I could not reduce my chances of securing full time work. The hours at the home were not being offered as I was not on a schedule rather relieved people when on vacation or sick... I made it known I was not working to interviewers only not others such as EI or [X] on 7th. I may have worded my work situation in a way that misled EI agents in assuming I quit my on call job to collect EI. Why would I do that as I had continually needed income to support myself ... There is no written documentation with my signature or conversation saying I quit as the way I understand it I was still on call having advised the EI office of my employment and earnings during this claim period of entitlements. I had taken jobs afterwards that were part time and permanent in 2010 as my records will show under my tax return” (AD1B-1).

[28] For the Question and Answer hearing, only the Claimant made submissions to the Tribunal (RGD11 noted below).

SUBMISSIONS

[29] The Claimant submitted that she did not quit her employment; he remained on the on-call list but she was provided with very few hours. The Claimant submitted that she continued to

look for full-time work as this position could not sustain her livelihood. The Claimant submitted that she had advised her employer of her safety concerns during the night shift however; those concerns were not addressed by her employer. Due to the lack of available hours/work, the nature of the job and contributing health issues, she had no alternative but to move on and find alternative work.

[30] The Claimant submitted that her file was not available to her at the time the initial decision was made nor has the Commission disclosed or submitted any evidence to support its position. She has complied with all requirements for being available for work during the period of entitlement. The employer did not make any attempt to accommodate her complaints of safety to herself and others as a receptionist on duty from 9:00 pm. The Commission's decision has provided undue financial hardship (RGD11).

[31] The Commission submitted that that the Claimant did not have just cause for leaving her employment because she failed to exhaust all reasonable alternatives prior to leaving. A reasonable alternative to leaving would have been to discuss her safety concerns with her employer or alternatively, lodged a complaint with someone in higher authority than her manager or possibly Employment Standards. The Claimant could have also looked for and secure other employment on the days she was not scheduled to work, prior to leaving. The Claimant placed herself in an unemployment situation for personal reasons. She did not show that her situation was so intolerable or that any reasonable alternatives could not be resolved that she had to immediately leave her employment (RGD5).

ANALYSIS

[32] Sections 29 and 30 of the EI Act stipulate that a claimant who voluntarily leaves his/her employment is disqualified from receiving any benefits unless he/she can establish 'just cause' for leaving.

[33] The Member recognizes that it has been a well-established principle that just cause exists where, having regard to all the circumstances, the Claimant was left with no reasonable alternative to leaving pursuant to subsection 29(c) of the EI Act (Patel A-274-09, Bell A-450-95, Landry A-1210-92, Astronomo A-141-97, Tanguay A-1458-84).

[34] The Member however must first consider that it is incumbent of the Commission and the employer to show that the Claimant left her employment voluntarily. The onus of proof then shifts to the Claimant to show that she left her employment for just cause (White A-381-10, Patel A-274-09).

Did the Claimant voluntarily leave her employment?

[35] In this case, the Member finds that the Commission met the onus placed upon it to demonstrate that the Claimant voluntarily left her employment. Although the Claimant testified at the hearing and indicated in her subsequent submission to the Appeal Division that she did not quit her job and that she may have misled the Commission into assuming she did so to collect benefits (AD1B-1), all the other evidence does not support her testimony. The Claimant indicated that she would not quit her employment because she was in need of an income and noted that there was no written documentation with her signature or conversation saying she quit (AD1B-1). The Claimant testified she was of the understanding that she was still on-call until she secured other part-time work in the fall of 2009 and that's when the employer probably took her off the list.

[36] The Member acknowledges that although the employer had indicated to the Commission that the Claimant had resigned by email (RGD4-28), there is no evidence of a signed resignation letter or email. The Claimant did however provide the Commission with a signed statement on two occasions prior to a decision being rendered, that she "resigned" or "quit" her employment and provided her reasons (RGD4-21, RGD4-34 and RGD4-35). According to the Commission, when it was reconsidering its decisions, the Claimant also verbally stated that she had just cause for leaving her employment and that a disqualification should not have been imposed, and she had every right to leave her on-call position (RGD4-56 & RGD4-57). Member also noted that, contrary to the Claimant's suggestion that she likely remained on the on-call list until she secured other part-time employment in the fall of 2009, the employer issued the ROE on July 10, 2009 indicating she quit (RGD4-11). Finally, immediately after the hearing, the Claimant provided a written statement to the Tribunal indicating her reasons "for leaving" noting that she had to "... move onwards to find alternative work" (RGD6).

[37] The Member placed more weight on her two initial, consistent, signed submissions and to her statements to the Commission verbally, than on her testimony at the hearing after a decision was rendered, reconsidered and communicated to her. It wasn't until the hearing, that the Claimant expressed her contention that she had not quit her job; that she remained on the on-call list and that the employer simply did not offer her any more hours. The Member therefore finds that the Claimant voluntarily left her employment on June 20, 2009.

[38] The Member's consideration is supported by case law that states that:

“An abundant and uniform case law has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision.” (CUB 25154)

Did the Claimant show just cause for leaving her employment?

[39] The onus of proof now shifts to the Claimant to show that she left her employment for just cause. In this case, the Claimant provided three primary reasons for leaving her employment (a) the lack of hours/work available (b) the nature of the job: she was not trained, or emotionally able, to respond to seniors' needs when required on the night shift and (c) because she was unable to sustain herself financially on the few hours of work provided, and the nature of the job, she had resultant health issues - anxiety, loss of sleep, weight loss (RGD4-21, RGD4-34, RGD4-35 and RGD6).

[40] The Member considered the circumstances referred to subsection 29(c) and whether any existed at the time the Claimant took leave from her employment. According to case law, these circumstances must be assessed as of that time (Lamonde A-566-04). Given the Claimant's reasons for leaving, the Member specifically considered paragraphs 29(c)(iv) and 29(c)(vii) as possible circumstances where the Claimant may have just cause for leaving her employment.

[41] With respect to paragraph 29(c)(vii), the Member considered whether the Claimant had no alternative but to leave her employment because there were significant modification of terms and conditions respecting wages or salary. The Claimant testified that she left her employment

because of the financial hardship caused by not making any money; she was being given 1 or 2 shifts/week. She indicated in her written submissions that she left her employment because she was an on-call employee and near the end, she was being offered so few hours that she could not support herself (RGD4-21 and RGD6). The Member also considered however, that the Claimant consistently noted that she was hired as a part-time, on-call, receptionist and that her hours were sporadic throughout her employment as evidenced on the ROE and reported earnings (RGD4-11 and RGD4-12). The Member finds therefore, that the terms of her employment with respect to wages were not significantly modified when she left her employment. To show just cause nonetheless, the Claimant must show that she had no alternative but to leave for this reason. The Member agrees with the Claimant when she noted in one of her submissions that it wouldn't make sense at the time, to quit her job if she had no other employment to go to (AD1B-1). The Member acknowledges that because of her financial circumstances, and the sporadic work hours, the Claimant was continuously looking for other employment (RGD6-2). The Claimant however, did not wait to secure other employment prior to leaving. This was a reasonable alternative especially since there was no an urgency to leave when she did for this reasons. The Member agrees with the Commission that the Claimant could have continued to look for and secure other employment on the days she was not scheduled to work, especially since she was only provided 1 to 2 shifts/week prior to leaving.

[42] With respect to paragraph 29(c)(iv), the Member considered whether the Claimant had no alternative but to leave her employment because her working conditions constituted a danger to her health or safety. The Claimant consistently stated that because she was not trained in assisting seniors (she was hired as a receptionist) and because she emotionally was not able to care for seniors (due to a prior traumatic event); she was putting the seniors and her health and safety in jeopardy. The employer on the other hand, stated to the Commission, that the Claimant never raised concerns about her safety plus, she was not required to lift a senior, and if no one was available during the night shift, the general manager was on-call and/or she was to call 911 (RGD4-28). The Claimant testified that in fact, the employer did know about her concerns since she had put in 2 incident reports in a log book regarding a fire alarm situation where she had to move a senior and another time when she had to shift a senior in his bed. The Claimant submitted that the employer however, did not address her concerns. The Member notes that the Claimant was employed in this capacity for 6 months, and reports 2 incidents where she had to

respond to a senior when there was nobody else around (although during the fire alarm incident she stated that another employee was present). The Member finds that even if the Claimant was in fact required to respond to such rare/sporadic incidents on the night shift, she had several reasonable options to leaving her employment for this reason. For instance, the Member agrees with the Commission, that a reasonable alternative to leaving would have been to further discuss her safety concerns with her employer. If her manager and supervisor were not addressing her concerns, she could have complained to someone of higher authority at the employer or possibly the Ministry of Labour (Employment Standards Act). The Member also adds that the Claimant could have discussed working only those shifts where there was a caregiver on site.

Alternatively, given her financial situation, agree to work all shifts and when the occasion arose where she felt anxious or was not trained to perform, to call upon the on-call general manager, call 911 or other agreed upon remedy the employer was prepared to accept.

[43] Finally, the Claimant indicated that because of the reasons already considered (lack of work hours and the nature of the job); she consequently had health issues including, anxiety, loss of sleep and weight loss. The Member considered that it has been well established case law that claimants who submit that they had just cause for leaving their employment as a result of health issues must (a) provide medical evidence to substantiate their claim by indicating that the claimant is unwell and that he or she was obligated to leave work due to the medical condition (b) demonstrate that he or she had attempted to reach an agreement with the employer to accommodate the health concerns and (c) prove that he or she attempted to find alternative employment prior to leaving (CUB 80905). In this case, the Claimant has not met any of these conditions. If the Claimant required accommodation at work, a reasonable alternative would have been to provide the employer with the required medical documentation indicating that her work affected her health and negotiate a solution.

[44] The Member finds that the Claimant's most obvious alternative to unemployment, given her dire financial situation, was to secure other employment. This is a realistic alternative given her testimony that in fact, a short while later in the fall of 2009, she secured other part-time employment. In order for just cause to exist, the Claimant must demonstrate that she had no alternative but to leave when she did pursuant to subsection 29(c) of the EI Act. The Member agrees with the Commission that the Claimant did not show that her situation was so intolerable

that she had to immediately leave, so waiting until she secured other employment was a reasonable alternative to unemployment.

[45] The Member finds that the Claimant did not meet the onus of demonstrating that she was left with no reasonable alternative but to leave her employment pursuant to subsection 29(c) of the EI Act.

[46] The Member therefore, having regard to all the circumstances, finds that the Claimant has not shown just cause for voluntarily leaving her employment on June 20, 2009, and is therefore disqualified from any benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[47] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section