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

[TRANSLATION]

Citation: *F. S. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 120

Tribunal File Number: GE-16-915

BETWEEN:

F. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Jean-Philippe Payment

HEARD ON: September 27, 2016

DATE OF DECISION: September 28, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The claimant attended the hearing alone.

I INTRODUCTION

[1] The claimant filed an initial claim for benefit on October 19, 2015 (Exhibit GD3-15). Between August 28, 2006 and October 1, 2015, the claimant worked as a "receiving supervisor" for Uniprix C. B. et F. G. ("the employer") (Exhibit GD3-18). On December 8, 2015, the Commission informed the claimant of measures taken in regard to her Employment Insurance claim and said it was unable to pay her benefits starting October 4, 2015 (Exhibit GD3-22). On December 29, 2015, the claimant filed a reconsideration request with the Commission, and on February 1, 2015, the Commission upheld its voluntary departure decision in the claimant's case (Exhibit GD3-24 to 26 and 30). Dissatisfied with the Commission's reconsidered decision in his case, the claimant brought an appeal before this Tribunal (Exhibits GD2).

[2] This appeal was held 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 for additional information.

ISSUE

[3] The Tribunal must determine whether the claimant voluntarily left her employment without just cause pursuant to section 29 and 30(1) and 30(2) of the *Employment Insurance Ac*t (the Act).

EVIDENCE

[4] The evidence on file is as follows:

a) a claim for regular benefits dated October 19, 2015 (Exhibit GD3-15);

b) a record of employment showing the last day worked as October 1, 2015 and Code E, for voluntary departure (Exhibit GD3-20);

c) the employer states that when the claimant left, she said that she could no longer perform her duties (Exhibit GD3-20) ;

d) the employer states that it was not possible to transfer the claimant to more suitable duties because there were no vacant positions (Exhibit GD3-20);

e) the employer states that the position was later given to a man because it was considered easier for a man given that the work involves fairly heavy lifting and placing items in high places, although it can be filled by a woman or a man (Exhibit GD3-20) ;

f) the employer said that a younger woman would certainly have been able to perform the duties, but the claimant had reached an age where such tasks might have become more difficult Exhibit GD3-20).

ARGUMENTS

[5] The Appellant made the following arguments:

a) She left her employment because it was becoming too physical demanding for her (Exhibit GD3-19) ;

b) For several weeks, she had started to feel that her body was no longer capable of certain tasks (heavy lifting) (Exhibit GD3-19) ;

c) Approximately a year and a half ago, her former position had been taken over by a man, and she became the floor clerk, which was much less demanding, but still demanding enough (Exhibit GD3-19) ;

d) She found that her job was too demanding at times, but only when she had to perform physically demanding tasks, and it was not all day, but usually once a day (Exhibit GD3-19) ;

e) She had not looked for another job before quitting because the work had become too much for her (Exhibit GD3-19) ;

f) She was not going to keep working at her job for months more until she found another job, and she quit because her body seemed to be telling her that she had to leave (Exhibit GD3-19) ;

g) She did not consult her physician before leaving her employment because she did not consider that her condition warranted seeing a doctor (Exhibit GD3-19) ;

h) Her body was simply unable to perform the tasks required because of her age (Exhibit GD3-19) ;

i) She mentioned her situation to the employer, but there were no other positions available for her (Exhibit GD3-19) ;

j) She did not plan to leave her job, even though she started noticing that her duties were becoming more difficult; she hoped she could “push through it” and continue working for her employer (Exhibit GD3-21) ;

k) She realized that she could not go on when she noticed that extra work was coming (Exhibit GD3-21) ;

l) At the same time, she knew that 100 (one hundred) crates of paper were about to arrive, and she would have to help lift crates, place them out back and organize the goods and a big sale coming up, which meant a lot of loads to lift (Exhibit GD3-21);

m) With about 20% of her days spent on tasks that were becoming difficult, although they changed from day to day, and with the time of year (Exhibit GD3-21) ;

n) Her body had been telling her for several weeks that the strain was becoming a lot for someone her age (Exhibits GD3-26 et 29) and a physician had confirmed the same thing (Exhibit GD3-26) ;

o) Sales were on the horizon, which meant large numbers of crates compared to regular events (Exhibits GD3-26 and 29, as well as GD2-2) ;

p) The annual early December inventory involved a lot of preparation and planning for all of the merchandise still in the warehouse (Exhibit GD3-26) ;

q) She was also the resource person for replacing the receiving supervisor when he was absent (Exhibits GD3-26 and GD2-2 and Hearing), which meant even more handling of loads (Exhibits GD3-26 and GD2-2) and back to a 40- (forty) hour a week schedule (Exhibit GD3-26) ;

r) There was no short-term possibility of another more suitable position coming available within the company (Exhibits GD3-26 and 29, then GD2-2) ;

s) Heavy loads accounted for 20% (twenty percent) to 25% (twenty-five percent) of her daily work (Exhibit GD3-29) ;

t) She did not speak with her employer because she was afraid the workload would be too much (Exhibit GD3-29) ;

u) Either you can do your job or you cannot and so you leave your job (Exhibit GD3-29) ;

v) She did not want help; she said that she believes that everyone should do their own job (Exhibit GD3-29) ;

w) She did not search for work before leaving because her résumé was not ready (Exhibit GD3-29) ;

x) She said she has friends, she wanted to leave her job and find something else, but she could not name names (Exhibit GD3-29) ;

y) She was concerned about the people who would take over for her in the company (Hearing) ;

z) She left her job in receiving to make way for someone else, but she kept her "floor clerk" duties (Hearing) ;

aa) She felt she was losing her fitness (physical) (Hearing);

bb) She filled bins and lifted a meter high onto the conveyor belt to send them up (Hearing);

cc) The tendons in her elbows were strained (Hearing);

dd) She ended up with a lot of duties at one point (Hearing);

ee) She was less enthusiastic about coming to work that she had been (Hearing);

ff) The manager ended up giving her thirty-two (32) hours of work (Hearing);

gg) In 2009, she had a work accident and had to go all the way to the last appeal level to win her case (Hearing) ;

hh) She has not sat down with the employer to tell him about the pain in her arms (Hearing);

ii) She may have mentioned it to him during a meal (Hearing);

jj) Restocking is part of her clerk job (Hearing);

kk) Working forty (40) hours a week makes it difficult to search for work (Hearing);

ll) When she had wrist problems, she went to see a doctor; it was obvious, but the temporary pain she feels on lifting crates is not constant (Hearing);

mm) Her employer would not have forced her to leave (Hearing);

nn) That day, her boss was beside her and it all came out suddenly, she told the owner, "I'm tired, I can't go on any more" (Hearing) ;

oo) She had not planned on resigning (Hearing).

[6] The Respondent made the following arguments:

a) The claimant said that she left her job because she turned 65 in January and her job was becoming too physically demanding; for several weeks, she had started feeling that her body was no longer capable of certain tasks, like lifting heavy loads (Exhibit GD4-5) ;

b) The claimant did not prove that her employer had significantly changed her initial work duties without giving her a say (Exhibit GD4-5) ;

c) The claimant did not prove that her work duties had changed significantly, or that her employer was forcing her to endure an abusive or unreasonable situation (Exhibit GD4-5) ;

d) Her job was demanding only at times, when she had to perform heavy physical tasks, which did not take up the entire day, and some days were more demanding than others (Exhibit GD4-5) ;

e) These statements do not support her voluntary departure (Exhibit GD4- 5) ;

f) The claimant did not show that voluntary departure was the only reasonable option in her case because her duties had not changed (Exhibit GD4-5) ;

g) She did not show that her working conditions posed a danger to her health or safety to a degree that she was compelled to leave (Exhibit GD4-5) ;

h) If her work duties were detrimental to her health, the claimant should have consulted a physician and provided a medical certificate stating that her job, and more specifically this task, was damaging her physical health, but she did not (Exhibit GD4-5 et 6) ;

i) Although the claimant says she preferred to leave and find a job more suited to her condition, she nevertheless failed to show that she had reasonable assurance of a new job that she could start in the immediate future, before leaving her employment (Exhibit GD4-6) ;

j) Having regard to these facts, the Commission contends that if the claimant was no longer able to hold her job, she should have ensured that she had another job better suited to her expectations and requirements before leaving (Exhibit GD4-6) ;

k) The claimant decided to leave her job and in so doing made a personal choice that cannot be justified under the Employment Insurance Act (Exhibit GD4- 6) ;

l) She should have openly discussed the situation with her employer, and informed him of the specific tasks she had difficulty in performing, in order to find a solution to lighten the task that was causing her a problem, and check whether she could have help, which she did not show she had done (Exhibit GD4-6) ;

m) The claimant did not show that she experienced a significant, unilateral change in her working conditions and did not prove that her working conditions were restrictive and dangerous to her health and safety (Exhibit GD4-6).

ANALYSIS

[7] The relevant legislative provisions are included in the Appendix to this decision.

[8] In this case, the Tribunal is of the opinion that the Commission has proved the claimant's voluntary departure, as required by the decision in Tanguay (A-1458-84). Indeed, the claimant confirmed several times that she left her employment with the employer at her own discretion. At the hearing, the claimant also told the Tribunal that she had lost enthusiasm for her work, and announced to her employer that she was resigning during one of her work days, without any preparation. In the same jurisprudence cited above, the Court stated once the Commission discharges its onus of proof, it is up to the claimant to prove that a voluntary departure was justified.

[9] Herein, the facts are relatively simple. The claimant raises facts that may relate to subparagraph 29 (c) iv) of the Act, namely, working conditions that are dangerous to health and safety. Despite the fact that the claimant does not mention this subparagraph directly, it seems clear to the Tribunal that because the claimant mentioned grounds related to her physical and mental health throughout her case, the Tribunal must analyze the claimant`s voluntary departure from this angle.

Subparagraph 29(c)iv) -- working conditions that constitute a danger to health or safety

[10] In this case, the Tribunal considers that, under the conditions described by the claimant, her working conditions did not pose a danger to her health or safety. Moreover, the claimant referred instead to a “lack of fitness” or a lack of physical strength, perhaps, and a lack of enthusiasm at work. Even though the claimant noticed some strain in her limbs, which the Tribunal does not doubt, her working conditions do not appear, *prima facie*, hazardous to her health or safety.

Subparagraph 29 (c) iv) — Working conditions that constitute a danger to health or safety

[11] In *Marier* (2013 FCA 39), the Court reiterated its interpretation, namely, apart from the exception in subparagraph 29 (c) vi) of the Act, the other subparagraphs in paragraph 29 (c) of the Act imply third-party intervention. In the claimant`s case, third-party intervention is unfortunately missing. The evidence on file does not allow us to establish that the claimant`s

working conditions posed a danger to her. Her duties may no longer match her physical strength, which seems quite possible, but the reasons given by the claimant do not relate to subparagraph 29 (c) iv) of the Act.

General

[12] In the case before it, the claimant very clearly told the Commission and the Tribunal that her body had been telling her for several weeks that the strain she was putting it under was starting to become burdensome at her age (Exhibits GD3-26 et 29). She said that a physician would have confirmed as much if she had seen one (Exhibit GD3-26 and Hearing). At the hearing, the claimant said that when she had wrist problems, she went to see a doctor; that pain was obvious, but for temporary pain from lifting crates, the pain is not constant. In the way she means it during the hearing, her physician would certainly have recommended that she stop lifting heavy loads.

[13] At the hearing, the claimant said that on the precise day of her voluntary departure, [translation] “her boss was beside her and it came out all of a sudden, she told the owner, “I’m tired and I can’t go on anymore.”

[14] The claimant was quite explicit during the Commission`s investigation and at the hearing when she said [translation] “either you can do your job or you can’t, and you quit your job" (Exhibit GD3-29), [translation] “she didn’t want help, she said she believes that everyone should do their own job” (Exhibit GD3-29) and that restocking was part of her clerk duties (Hearing). After weighing the evidence and submissions by the parties, and unfortunately for the claimant, within the meaning of the decision in *Bois* (A-31-00), even though she had a “good reason” and a highly personal reason for quitting her employment, this is not the same as “just cause” within the meaning of the Act. To the Tribunal it seems that quitting a job as she did was not the only reasonable solution in the circumstances, as explained in *Astronomo* (A-141-97). For example, the claimant could have asked for lighter duties.

[15] The benefit system is “risk-based” (*Canada (Attorney General) v. Langlois* (2008 FCA 18)) and to create the risk of unemployment or to create the risk of the payment of benefits is not the same as to authorize the payment of such benefit. Finally, the Tribunal would that in *Goulet & al. v.* (A-358-83) and *Hills v. Canada (Attorney General)* ([1988] 1 S.C.R. 513), the Courts affirmed that the Act requires a restrictive interpretation of provisions that provide disentitlement to benefits, such as the one relied upon by the claimant.

CONCLUSION

[16] The appeal is dismissed.

Jean-Philippe Payment,
Member, General Division - Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

a) *"employment" refers to any employment of the claimant within their qualifying period or their benefit period;*

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

b.1) (b.1) voluntarily leaving an employment includes

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

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

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

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

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

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

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

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi)) practices of an employer that 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."

30 (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

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

(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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) 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).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

Jurisprudence

In *Goulet & Associates v. Canada (Deputy Attorney General and Employment and Immigration Commission Canada)* (A-358-83), the Court states that sections 20 and 30 of the Act provide an exception to the general rule and these provisions must therefore be strictly interpreted.

Tanguay v. Canada (Canada Employment and Immigration Commission) (A-1458-84) explains that it is up to the Commission to prove that a departure was voluntary. Once that point has been established, the onus is on the claimant to show that he or she left the employment for just cause.

Canada (Attorney General) v. Bois (A-31-00) is part of a series of consistent case law explaining that the term "just cause" is not defined in the Act. However, the term "good reason" is not a synonym for "just cause." Although a claimant may have good reason to leave an employment, such reason does not necessarily constitute just cause within the meaning of the Act.

In *Astronomo v. Canada (Attorney Genreal)* (A-141-97), the Court determined that the decision-maker must examine whether, based on a balance of probabilities, the claimant had no reasonable alternative in the circumstances but to leave.

In *Canada (Attorney General) v. Marier* (2013 FCA 39), the Court reiterates its interpretation that that except for subparagraph 29 (c) vi) of the Act, the other subparagraphs of paragraph 29(c) of the Act assume third-party intervention.

In *Crichlow v. Canada (Attorney General)* (A-562-97), the Court determined that (the General Division) was entirely within its rights to find that the applicant had not established "misconduct" justifying a disqualification under section (29) of the Act and the (Appeal Division) had no reason to change the majority decision of the (General Division) concerning an interpretation of the facts, and it did not have the necessary authority to substitute its opinion for that of the (General Division) in terms of how to interpret these facts.