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

Citation: *B. U. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 134

Tribunal File Number: GE-16-903

BETWEEN:

B. U.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: August 3, 2016

DATE OF DECISION: October 21, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. B. U. and his representative, Mr. Mark Crawford from the Unemployed Workers Help Centre, Regina, Saskatchewan, were present at the hearing.

INTRODUCTION

[1] On January 7, 2013, the Claimant made an initial claim for regular benefits noting that he had no alternative but to leave his employment of 4 days, on September 21, 2012, due to health and safety reasons (dangerous working conditions). On April 5, 2013, the Canada Employment Insurance Commission (Commission) denied the Claimant's application for regular benefits because he did not show just cause for leaving his employment. On April 23, 2013, the Claimant requested that the Commission reconsider its decision but on July 10, 2013, the Commission maintained its decision.

[2] On July 30, 2013, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). A hearing was held on January 29, 2014 and a decision to dismiss the Claimant's appeal was rendered on February 4, 2014.

[3] The Claimant subsequently appealed to the Appeal Division of the Tribunal. The leave to appeal was granted on February 26, 2015 and on November 17, 2015 a hearing was held. On March 4, 2016, the Claimant's appeal was allowed and the matter was returned to the General Division for a new hearing.

[4] The present hearing was held by teleconference for the following reasons: (a) The complexity of the issue 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 and given that (d) The information in the file, including the need for additional information.

ISSUE

[5] The Member must decide whether the Claimant demonstrated just cause for leaving his employment on September 21, 2012, and whether he should be disqualified from receiving any benefits pursuant to sections 29 and 30 of the Employment Insurance Act (EI Act).

[6] The Member confirmed at the hearing that the Claimant is not appealing the issue of insufficient insurable hours to qualify for benefits under section 7 of the EI Act.

EVIDENCE

[7] The Claimant initially applied for employment insurance benefits on January 7, 2013 indicating that he had worked for the Employer for 20 hours (4 days) but left on September 21, 2012 because of dangerous working conditions that compromised his safety. He indicated that there was no fall protections and safety harness provided even though he was working at heights of more than 3 meters. He also indicated that he did not request the equipment for fear of being fired since other employees did not use such equipment. He indicated that he did not have time to consult with outside agencies or look for another job before leaving (GD3-3 to GD3-14).

[8] Three record of employment for this Employer indicates that the Claimant quit his employment after working there from September 18, 2012 until September 21, 2012 (GD3-15). The Claimant submitted records of employment for four other employers where he was employed thereafter (GD3-16, GD3-17, GD3-29 and GD3-42).

[9] The Claimant requested to have his claim renewed his on March 12, 2013 (effective February 24, 2013) and then again April 15, 2013 (effective March 31, 2013). The Commission therefore advised the Claimant on two occasions (on April 5, 2013 and April 16, 2013) that he was disqualified from receiving benefits because he left his employment with the Employer without just cause because leaving was not his only reasonable alternative. As a result he had not worked long enough thereafter to establish a claim (GD3-18 to GD3-28, GD3-30 to GD3-41and GD3-43 to GD3-44).

[10] On April 23, 2013, the Claimant requested that the Commission reconsider its decision adding that his coworkers were aware of an incident in the past where a worker fell off the roof yet no changes were made with respect to safety/safety equipment (GD3-45).

[11] The Claimant advised the Commission that the Employer is a small, family business with approximately 8 employees. He worked on 2 to 3 storey buildings, putting stucco on the outside on scaffolding leaning over to pull up buckets over the edge without fall equipment. He did not put in a formal complaint with the province before leaving because did not want to

continue working in an unsafe environment while the province took its time to do an investigation. No other long term employees used fall equipment so he didn't think that talking to anyone would have resolved the issue. He feared dismissal if he made such a request (GD3-49 and GD3-51).

[12] The Employer advised the Commission that the Claimant advised them by text that he quit. The Employer (Owner/Secretary) advised that had they would have addressed the Claimant's concerns had he stated them; not all jobs require that the employees be 'tied-off' and they have the equipment when the job requires it; they are too small to have a safety committee (GD3-50).

[13] On July 30, 2013, the Commission maintained its initial decision that the Claimant did not have just cause for leaving his employment because he did not exhaust the reasonable alternative of discussing his safety concerns with his Employer prior to quitting (GD3-51 and GD3-52).

Evidence provided to the Tribunal:

[14] In his written submission, the Claimant indicated that he did speak to the owner's son (supervising) about his safety concerns however; he was told not to worry, and that he would get used to the heights. Although he did not ask directly whether they had fall protection, nothing was mentioned with respect to fall equipment, he was not offered the equipment (to use or buy for him), none of the other employees use fall protection nor was there any fall protection in the job vans. Further, the owner's son and others told him about a prior incident where an employee did fall and was seriously injured and rushed to hospital. He was shaken and felt that he was imminent danger of falling and/or getting seriously injured. He reported the Employer to Occupational Health and Safety and he awaits the report of the investigation. The boss made it clear to him that in order to be efficient; he would have to stand so that his toes hung over the scaffolding plank. He refused to work for a company where the entire company does not follow the occupational health and safety regulations (GD2-4, GD2-5 and GD6).

[15] The Claimant provided the following documentary evidence:

i) Resignation Letter (email) to the Employer dated September 24, 2012 indicating that he can no longer work there because the job was not suitable for him (GD6-2).

ii) Occupational Health and Safety Regulations which stipulates "An employer or contractor shall ensure that workers use a fall protection system at a temporary or permanent work area where (a) a worker may fall three metres or more; or (b) there is a possibility of injury if a worker falls less than three meters" (GD2-6) and that an employer shall develop a fall protection plan where a worker may fall 3 meters or more (GD2-7).

iii) Two notices of contravention from the Saskatchewan Ministry of Labour Relations and Workplace Safety dated October 7, 2003, May 18, 2012 indicating that the Employer had workers working at heights over 6 meters without the legislated guard rail and without fall protection (GD2-5 to GD2-14).

[16] At the hearing, the Claimant reiterated his reasons for leaving noting that he felt very unsafe, he was not provided with fall protection even though he worked very close to the edge of roofs and walls. He testified that he knows the Employer did not have any such equipment because he looked in the equipment vehicle and when he asked the owner's son about safety, he was not told that there was equipment. The Claimant admitted that he did not ask specifically if they had such equipment but he did ask about the fear/possibility of falling. The Claimant testified that the owner's son was the supervisor on site and that there were only two other employees. He testified that none of the ever used safety equipment, there was no orientation or safety meetings as the Employer had advised the Commission.

[17] The Claimant confirmed that he did not speak with the Saskatchewan Department of Labour's Occupational Health and Safety until after he left. He did not speak with the owner directly but submitted that the owner's son was the supervisor and represented the owner. He tried to get used to the heights as he was told, but he feared for his safety; almost fell many times and didn't want to risk it; he just couldn't go another day.

SUBMISSIONS

[18] The Claimant submitted that he was in imminent danger and therefore, had no option but to leave his employment. He worked at heights over 3 meters and was not provided with fall equipment, training or plan which is contrary to the law. When he asked about it, he was

rebuffed (laughed at) and told by the employer's son (acting on behalf of the employer) that he'd get used to the heights - he was told nothing about, or offered, safety protection. The owner's son is a representative of the owner and in effect is the owner. Plus, the Employer had similar previous violations, one of which was just 5 months prior to the Claimant working there. This evidence shows that the Employer was in working in clear violation of the law which was ignored and that they continued to work as they have all those years confirming the Claimant's position that his concerns would not be addressed and speaks to the Employer's credibility. Also, contrary to the Employer's statements to the Commission, the Claimant did not just leave; he submitted a carefully worded and polite letter of resignation so that he does not damage his future employability (GD6-2). The Claimant submitted that CUBS 76402, 74903, 69798, 68111, 57768 and especially 23760 support his position (GD8).

[19] The Commission submitted that the Claimant did not have just cause for leaving his employment because he failed to exhaust all reasonable alternatives prior to leaving including (a) discussing his safety concerns with the Employer prior to leaving in an attempt to alleviate the dangerous working conditions and (b) did not go to Occupational Health and Safety prior to quitting (he went after to put in a formal complaint). The fact that the Employer has prior violations on file regarding fall protection, it does not mean that the equipment was not available for the Claimant's use, had he requested it.

ANALYSIS

[20] The relevant legislative provisions are reproduced in the Annex to this decision.

[21] 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.

[22] 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).

[23] The Member first considered that it is incumbent of the Commission to show that the Claimant left his employment voluntarily. In this case, it is undisputed evidence that the Claimant left his employment after 4 days on September 21, 2012 (GD3-15 and GD6-2).

[24] The onus of proof then shifts to the Claimant to show that he left his employment for just cause (White A-381-10, Patel A-274-09). In this case, the Claimant did meet that onus for the reasons to follow. He provided evidence to demonstrate that he was left with no reasonable alternative to leaving his employment when he did pursuant to paragraph 29(c)(iv) of the EI Act.

[25] The Member first considered the circumstances referred to in subsection 29(c) and whether any existed at the time the Claimant took leave from his employment. According to case law, these circumstances must be assessed as of that time (Lamonde A-566-04). In this case, the Claimant submitted that he left his employment because of the dangerous working conditions. He was afraid of falling from heights more than 2 to 3 storeys because he was working on scaffolding and/or roofs without fall protection. Prior to leaving, the Claimant spoke to the owner's son, his supervisor on site, about his safety concerns however, he was rebuffed, laughed at and advised to not worry, and that he would get used to the heights. He and other coworkers also recounted prior incident of another employee falling, being seriously injured and rushed to hospital. The Claimant testified that despite his expressed concern he was not offered fall protection and none was available in the two company vans. For his own safety, he felt that he was left with no reasonable alternative but to quit.

[26] The Member therefore, considered paragraph 29(c)(iv) of the EI Act which stipulates that just cause exists if the Claimant had no alternative to leaving, having regard to all the circumstances, including, working conditions that constitute a danger to health or safety.

[27] The Member finds that the working conditions did constitute a danger to the Claimant's health and safety, and that the Claimant's fear of serious injury is justified. Further, the Member finds that the Claimant had no alternative but to leave when he did for the following reasons.

[28] First, the Member finds the Claimant's consistent direct and documentary evidence more credible than the indirect verbal evidence of the Employer for several reasons. First, the Commission only spoke to the Employer representative once (owner/secretary) who was not on

site and who indicated that had they would have addressed the Claimant's concerns had he stated them (GD3-50). This is contrary to the Claimant's consistent statements to the Commission, his submissions and direct testimony. The Commission did not confirm his statements with the owner's son with whom he actually expressed his concerns. Second, the Employer stated to the Commission that not all jobs require that the employees be 'tied-off' and they have the equipment however, she was not asked to confirm whether it was required on the site the Claimant was employed. She was also not asked to comment on the prior accident (fall) mentioned by her son and other workers to the Claimant which was upsetting to him and a reason why he felt unsafe and left. Finally, the Member recognizes that the documentary obtained by the Claimant showing that the Employer, on two prior occasions, was in violation of the Occupational Health and Safety Regulations for having employees working at heights over 6 meters without the legislated guard rail and without fall protection (GD2-5 to GD2-14), was obtained long after he quit. This information therefore, did not formulate part of the Claimant's reason for leaving when he did because he did not know about these prior violations. The Member finds however, that this evidence speaks to the credibility of the Employer's statements to the Commission that they follow provincial safety regulations and that they use fall protection if the job requires it.

[29] The Member therefore placed more weight on the Claimant's consistent statements, written submissions and direct testimony at the hearing, than on the Employer's (one) indirect statement to the Commission. The Member acknowledges the Commission's position that the Claimant did not speak to the owner about his concerns and that he did not put in a complaint with the Saskatchewan Department of Labour's Occupational Health and Safety Division, prior to leaving. The Member agrees that it is reasonable to expect that the Claimant speak to his employer in an attempt to alleviate the dangerous working condition before quitting. The Member accepts the Claimant's testimony that by expressing his safety concerns to the owner's son, who was the supervisor on site, he felt that he was speaking to the owner/employer. The Member finds therefore that by expressing his concerns to the owner's son/supervisor, he did speak to the Employer prior to leaving. When his concerns were dismissed and the owner's son and others, made light of another employee's serious fall and injuries, he concluded that nothing was going to change and he had to immediately leave for fear of imminent injury. The Claimant also repeatedly noted that he was told to stand with his toes over the edge of the

scaffolding/plank in order to efficiently pull up buckets of stucco without being tied off (GD3-49, GD6). Plus, contrary to the Employer's statement to the Commission, the Claimant testified that fall protection was not available (not in the trucks), nobody else in the company used it, nor was it offered. For all these reasons, the Member also finds that the Claimant's fear of falling and getting seriously (potentially fatally) injured was justified. Further, the Member finds that even if the Claimant exercised his right to refuse unsafe work until he was provided with the proper safety fall protection, the evidence shows that everyone who worked for the Employer continued to work unsafely and in clear violation of the law. The Member finds that it is not reasonable therefore, to expect that the Claimant remain working under such working conditions while he looks for another job and/or puts in a formal complaint with the Saskatchewan's Ministry of Labour and wait for an investigation, etc.

[30] Finally, the Member considered the case law put forth by both parties. The Member agrees with the Commission that Canada v. Hernandez, 2007 FCA 320, stands for the principle that just cause does not exist, even when a claimant shows that he/she quit because of dangerous working conditions, unless they have discussed the working conditions with their employer prior to quitting. In the case at hand however, the Member finds that the Claimant did speak with his employer about his concerns prior to leaving, but he was rebuffed and was not offered fall protection.

[31] Although, not the most relevant, the Member also reviewed and considered the principles in CUB 76402 (refers to the suitability of work as a refutable matter to be considered for just cause, which was a consideration herein) and CUB 68111(that points to subsection 49(2) of the EI Act providing benefit of the doubt to the Claimant, which was not relevant/necessary herein).

[32] In CUB 57768, the Claimant submits that Umpire Ruth Krindle noted that "the board was in error when it dismissed the unlawful practices of the employer as being irrelevant to the issue of just cause. Subsection (xi) makes evidence of unlawful practices relevant. It would be for the board to consider the sufficiency of the evidence, but the evidence is certainly relevant to the issue and must be considered". In this case, however, the Claimant's primary and repeated reasons for leaving his employment was because he worked under unsafe working

conditions and not because the Employer's practices were unlawful. The Member acknowledges that after the Claimant left, he did submit evidence that the Employer's practices were contrary to the Occupational Health and Safety Regulations (GD2-6 and GD2-7) and that in fact, the Employer was found to be in violation of these Regulations prior to him working there (GD2-5 to GD2-14). This evidence provided credence to the Claimant's position that his working conditions constituted a danger to his health and safety and it diminished the credibility of the Employer's statements that they followed provincial safety regulations and that they use fall protection if the job requires it.

[33] In CUB 74903 (just cause was found when the working conditions were unsafe) and in CUB 69798, as in this case, the Member agrees that it supports the findings herein. In the latter case, as in this one, the Commission submitted that a reasonable alternative to leaving when working under intolerable conditions was for the claimant to speak to the owner of the company prior to leaving. The Umpire found the claimant had met the onus of establishing the existence of intolerable working conditions or detrimental health effects as the reason for leaving and he had alerted management about it. He therefore, showed just cause for leaving. Similarly, in this case, the Claimant established the existence of unsafe working conditions and he had advised the owner's son/supervisor of his concerns. The Member did also note that in the same decision that the Umpire Teitelbaum noted that "The fact that other workers accept unsafe and hazardous working conditions does not mean that those conditions do not constitute just cause. Clearly, none of the employees should have been required to work under the type of conditions which indisputably existed at the work site."

[34] Finally, CUB 23670 supports the Member's finding that since the evidence shows that the Claimant was subjected to unsafe working conditions, it follows that it is not reasonable to expect him to continue working there until he first contacts government authorities, that is, Saskatchewan's Ministry of Labour and wait for an investigation. Umpire J. Jerome writes that the Board "erred in law when it concluded that the claimants should have attempted to improve their working conditions by involving government authorities prior to quitting. The claimants were under no such obligation given the fact that the employer operated its business with total disregard to accepted business ethics and government regulation. The Board has, in effect, reached a conclusion which cannot be reconciled with its finding that the claimants terminated their employment as a result of the intolerable working conditions."

[35] Having regard to all the circumstances noted above, the Member therefore finds that the Claimant did demonstrate that he was left with no reasonable alternative but to leave his employment pursuant to subsection 29(c) of the EI Act.

[36] The Member finds that the Claimant has shown just cause for voluntarily leaving his employment on September 21, 2013, and therefore should not be disqualified from receiving benefits pursuant to sections 29 and 30 of the EI Act

CONCLUSION

[37] The appeal is allowed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Section 29 of the Employment Insurance Act states:

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) 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.

Section 30 of the Employment Insurance 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

(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.