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

Citation: *S. D. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 149

Tribunal File Number: GE-16-2198

BETWEEN:

S. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: December 1, 2016

DATE OF DECISION: December 5, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

S. D., the claimant, attended the hearing via videoconference with her husband, G. D., who assisted his wife as her English is not very good.

Keith Shustov, the claimant's representative, attended the hearing via videoconference.

Pattanum Woodtikarn, the Thai-English interpreter, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on December 30, 2015. She filed for Employment Insurance (EI) benefits on December 31, 2015. An initial claim for EI benefits was established on January 3, 2016. The Canada Employment Insurance Commission (Commission) denied the claim because she had voluntarily left her employment on July 10, 2015 without just cause. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated April 22, 2016. The claimant appealed to the Social Security Tribunal (SST).

[2] The hearing was held by Videoconference for the following reasons:

a) The complexity of the issue under appeal.
b) The fact that the claimant will be the only party in attendance.
c) The information in the file, including the need for additional information.
d) The fact that the claimant or other parties are represented.
e) The availability of videoconference in the area where the claimant resides.

ISSUE

[3] The issue under appeal is whether the claimant had just cause for voluntarily leaving his employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

Information from the Docket

[4] The claimant applied for regular EI benefits on December 31, 2015 stating that she was no longer working due to a shortage of work and she would not be returning to this employer. She confirmed that she did not have any additional periods of employment during the last 52 weeks (Page GD3-3 to GD3-11).

[5] The employer submitted a Record of Employment (ROE) dated January 6, 2016 indicating that the claimant began working on August 31, 2015 and she was no longer working due to a shortage of work on December 30, 2015 accumulating 499 hours of insurable employment (Page GD3-12).

[6] The same employer submitted a ROE dated July 19, 2015 indicating that the claimant began working on September 3, 2013 and she quit on July 10, 2015 accumulating 1492 hours of insurable employment (Page GD3-14).

[7] The claimant was contacted by the Commission and she stated that she did not quit; she took a two month vacation to visit her family. The claimant stated that the owner said that if she takes a two month vacation that means she quit and he would have to rehire her. She stated that she went to visit her family in Thailand because the last time was two years ago adding that the cost of the flight was a lot so they wanted to go for two months instead of two weeks. The claimant stated that the employer said she could only take two weeks as vacation; she could go for two months but not as approved vacation leave. She stated that when she returned, she asked about statutory holiday pay and the employer told her that she already quit. She stated that when she came back she went back to work; the agreed upon return date was August 31, 2015. She stated that she thought she could go as long as she wanted with leave without pay. She further stated that she knew she would have to apply for her job again. She stated that it was the summertime and they had other people to work and she had to visit her parents and her husband's parents (Page GD3-16).

[8] The employer was contacted by the Commission and he stated that he guessed "it was sort of like an extended leave but to him he could not grant it for something like vacation." He

stated that the claimant gave him about a month's notice and he told her that normally vacation happens after one year of service and is for two weeks. He stated that he did not really have an option to negotiate as he needed workers. The employer stated that the claimant's husband works at the University and was off for the summer which is why they went when they did. He stated that they did not have an agreed upon date of return and when she came back the claimant was worried that she did not have a job. He stated that she called him and asked if they still needed her; he said "of course" as it is hard to keep people employed in the restaurant industry. The employer stated that the claimant's leave was not for an emergency and it was for such a long time adding that if someone took two months' leave and gave him no choice, he sees that as a quit. He stated that he had others take four or five month trips and wanted to come back with seniority; he could not do that adding that this affects their years of service, pay raises and increased vacation time. He further stated that at that point, they did not know that the restaurant was going to close (Page GD3-17).

[9] The claimant was contacted by the Commission and she stated that when she went on vacation, she knew she could return to the employer later (Page GD3-18).

[10] The employer was contacted by the Commission and he stated that he does not recall the claimant mentioning that her husband's father was ill. He was informed that the claimant stated it was his wife who guaranteed that she would have her position when she returned and the employer responded that they do not guarantee positions; if she came back then perhaps. He further stated that this is why they did termination because they did not have a fixed date of return. The employer stated that he spoke with his wife and she informed him that the claimant gave her only three weeks' notice and that they had the tickets already. He stated that they took vacation and went to Japan, China, Thailand and he is not sure where else (Page GD3-19).

[11] The Commission sent a letter dated January 23, 2016 informing the claimant that she cannot receive EI benefits because she voluntarily left her employment on July 10, 2015 without just cause within the meaning of the EI Act. The letter further informed that she had not worked long enough to receive EI benefits since leaving her employment without just cause as she had 499 hours of insurable employment but needed 665 hours of insurable employment (Page GD3- 20).

[12] The claimant submitted her Request for Reconsideration stating that she worked for this company since October 2012 and she had her first vacation from July 7 to August 26, 2013; the employer resumed her employment on September 3, 2013. She stated that she had another vacation in 2015 and the employer again resumed her employment on August 31, 2015. The claimant submitted a text message dated August 29, 2015 from the employer's wife through her son's cellphone which states "Hello P. I hope you guys had a great trip. We scheduled [the claimant] starting Monday." The claimant stated that she actually returned from vacation on August 30, 2015 and back to work right away on Monday August 31, 2015 without resting from jet lag (Page GD3-24).

[13] The claimant submitted her Notice of Appeal to the SST stating that as she thought it was a temporary situation, she kept her uniform and she was not requested to return her uniform. She stated that she did not write any kind of resignation letter nor did she receive any letter from the employer terminating her employment. She further stated that she did not receive her ROE however, when she was laid off in December 2015, she was given her ROE along with her T4 (Page GD2-2).

[14] The claimant stated that she and her manager, the employer's wife, agreed that she would be available to return to work on August 31, 2015. She stated that her son, who was employed at the same restaurant, received a text message from the manager informing him that the claimant was scheduled for shifts commencing on Monday, August 31, 2015. The claimant stated that when she returned to Canada, she simply came to work and began working again; she did not have to fill out a job application or go through any kind of orientation process. Further, the claimant stated that her pay stub issued on September 18, 2015, show that the year to date earnings do not start from zero as they might for a new employee but continue to follow the amounts set out in the previous pay stubs. The claimant stated that she did not know that the employer considered her to have quit her employment and only learned of this when she applied for and was denied EI benefits. At the same time, the claimant also discovered that the employer had listed her as having quit when she took her first vacation in the summer of 2013 (Page GD2- 2).

[15] The claimant stated that the employer had no formal process in place for vacation requests; employees simply asked their manager for permission to take vacation and this was either granted or denied by the manager. In 2013, the claimant explained that she requested vacation and asked if she should quit; the manager told her that a resignation was not necessary and that she could take two months off as a vacation and still remain an employee during this time. In May 2015, she asked for permission to take vacation between July 12 and August 30, 2015 and she received permission to go on vacation. She stated that it was indicated that because it was summertime, it was easy to cover her shifts on a temporary basis by employing students and this stressed that it was a temporary arrangement (Page GD2-2).

[16] The claimant submitted her pay stub dated July 10, 2015 with a year to date (YTD) amount of $8,135.16. A pay stub dated July 24, 2015 with a YTD amount of $8,439.75. A pay stub dated September 18, 2015 with a gross pay amount of $550.44 and YTD amount of $8,990.19 (Pages GD2-15 to GD2-17).

[17] The Commission provided the Unemployment Rate and Benefit Table for the period of December 6, 2015 to January 9, 2016 which indicates that the unemployment rate was 7% requiring 665 hours of insurable employment to qualify for EI benefits (Page GD3-30).

Testimony at the Hearing

[18] The claimant's representative stated at the hearing that when she went on vacation in July 2015 she was not aware that she was quitting her job. He stated that as far as the claimant was aware, she was going on an extended trip and her job would still be there when she returned. When the claimant returned from vacation, she did not apply to get her job back, she simply returned to work and at no point did she consider herself to have quit. It would appear that the employer acted the same way in that the claimant simply returned to work after an extended leave. Therefore, it is the claimant's position that the hours she accumulated during her employment should be used to calculate her EI claim.

[19] The claimant testified that she travelled to Thailand from July 12 to August 30, 2015. She confirmed that she returned to work on August 31, 2015.

[20] The claimant was asked about her statement that her employer would not authorize her for two months' vacation. She stated that she did not learn that she was not approved for two months' vacation until after she returned from her vacation and applied for EI benefits.

[21] The claimant stated that she never knew that she was quitting her job confirming that she did not speak to the employer but only spoke to her manager, the employer's wife, who approved her leave. She stated that her manager told the owner about her departure and return dates and neither said anything to her about quitting and only spoke to her to confirm her return date. She stated that before her return date on August 31, 2015, her manager sent a message to her son informing that she had been put on the schedule on the following Monday.

[22] The claimant stated that she bought her tickets before May 2015 confirming that she bought her tickets before she requested permission to be absent. She stated that in 2013 she did something similar and it was approved and she returned to work as usual. She stated that there was no mention about quitting either time and so she did not know that she was quitting when she took vacation. The claimant was asked what she would have done if her manager did not approve the two month vacation and she stated that she would not go because she could change the tickets.

[23] The claimant's husband stated that when the employer shut down, she received a ROE and applied for EI benefits. He stated that the claimant did not understand why the hours on her ROE were so low so she contacted the employer and she was told to come and get another ROE and this is when they learned that the employer documented that the claimant quit her employment in July 2015 in order to take vacation. He stated that the claimant did not know that she had quit.

SUBMISSIONS

[24] The claimant submitted that:

a) The employer had an informal policy regarding vacation requests. While it is apparent that they had an internal policy that would say that the claimant quit on the ROE, it seems this policy was never communicated to the employees themselves. The employees would request vacation, be approved and simply return to work following

their vacation. It was simply viewed as vacation that they had taken. She had a return to work date; she returned from vacation and returned to work. The employer used the term "sort of like an extended leave" which seems to imply the difference between leaving the job entirely. There does not appear to be any communication about the claimant losing her job and two days prior to her anticipated return to work date, she received a message confirming her return to work date. She did not have to apply for her job; she simply returned to work.

b) She had no intention to leave her job. The employer's wife requested that she resume her employment after she returned. She asked for vacation approval in advance from the employer's wife, it was accepted and her return to work date was acknowledged so that she could follow up and make the work schedule immediately (Page GD3-22).
c) Her EI payments were continually deducted from her payroll since 2012 with the same employer. The employer never told her that her vacation was considered a quit (Page GD3-24).
d) It was a misunderstanding between her and the employer as she was under the impression that the vacation was authorized because they allowed her in the past (Page GD3-25).
e) She did not voluntarily leave her employment as she believed that she was only going on vacation and she resumed her position on August 30, 2015. She only discovered that she had been listed as having quit by her employer after she was laid off when the business closed entirely and her EI application was denied (Page GD2-1).
f) If her employer assumed she had quit then why did she receive continuing pay stubs. Her September paystub shows that she continued to work and did not quit. She had no intention to quit. All her documents show that she continued to work for the employer and before she took vacation she was not given the ROE dated July 10, 2015 to indicate that she was quitting or told that she had to quit. Further, the employer did not give her the ROE until after the business shut down. If she had known the first time that it was considered a quit, she would not have taken a second vacation in 2015 but there was no information from the employer at all.
g) CUB 76240 is a case similar to her case in which the Umpire upheld the Board of Referees' [now Tribunal] decision. In applying that case law to this case, the agreement

between the claimant and the employer as to the requested leave was reached in the course of employment; the claimant requested vacation time and both the start date and the return date were agreed to by the employer. The claimant did not surrender the terms of the employment agreement nor did she see any need to do so. The employer never informed her that the terms became unacceptable. The employer failed to apprise the claimant of the changes completely. The employer never notified the claimant that they considered her as having quit and she only found out about this several months later (Page GD2-3).

h) CUB 6811 confirms that the benefit of the doubt is to be given to the claimant if the evidence is equally credible. The employer's only evidence is the ROE stating that the claimant quit her job. The claimant has in support of her position, her own behaviour, that of the employer in terms of scheduling her for shifts, pay stubs issued without interruption in earnings, past agreed upon arrangements specifically assurance from the employer that a long vacation does not require a termination of employment and therefore, the claimant's evidence is considerably stronger than it is required to be under the doctrine of granting the claimant the benefit of the doubt. She did not leave her employment voluntarily; she did not believe that she left it at all (Page GD2-4).

[25] The Commission submitted that:

a) When the employer denied the claimant's leave request and when she chose to take the leave anyways on July 10, 2015 for two months so she could go to Thailand to visit family and friends, she severed the employer/employee relationship and caused her own unemployment situation. In light of the evidence, it is the Commission's position that the claimant taking the leave after it was denied by the employer was tantamount to voluntary leaving her employment. The Commission maintains that the claimant had the choice to either stay and keep her job or take her leave and lose her job (Page GD4-2).

b) The claimant wanted to go out of the country and asked for a leave of absence. The leave could not be granted so she left on July 10, 2015 for 2 months anyways. There was nothing about the job that forced her to quit. She just wanted to go out of the country on vacation so she could visit family and friends. Based on the evidence, the Commission therefore concluded that the claimant had the reasonable alternative of not causing her

own unemployment and continuing in employment. Consequently, the claimant failed to prove that she left her employment with just cause within the meaning of the EI Act (Page GD4-3).

c) The claimant was not a new entrant/re-entrant to the labour force because she has shown that she had at least 490 hours of labour force attachment in the 52 weeks preceding her qualifying period, as required by subsection 7(4) of the EI Act. Therefore the claimant needed the number of insured hours specified in paragraph 7(2)(b) of the EI Act to qualify for benefits (Page GD4-3).

d) Pursuant to the Table in subsection 7(2) of the EI Act and the regional rate of unemployment of 7% in the economic region where the claimant resides, she required 665 hours of insurable employment since leaving her employment to qualify for EI benefits, whereas she only accumulated 499 hours of insurable employment. The Commission therefore maintains that the claimant is subject to a disqualification pursuant to paragraph 30(1)(a) of the EI Act because she accumulated insufficient hours of insurable employment to qualify for benefits under section 7 or 7.1 the EI Act since leaving her employment without just cause (Page GD4-3).

ANALYSIS

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

[27] The question of just cause for voluntarily leaving employment requires an examination of whether having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (*MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306); (*Canada (Attorney General) v. Imran*, 2008 FCA 17).

[28] In *Tanguay v. Canada (Canada Employment and Immigration Commission)*, A-1458-84 the Federal Court of Appeal (FCA) drew a distinction between a "good cause" and "just cause" for voluntary leaving.

[29] According to the FCA decision *Canada (Attorney General) v. Laughland*, 2003 FCA 129, the issue is not whether it was reasonable for the claimant to leave her employment, but

whether the claimant's only reasonable alternative, having regard to all the circumstances, was to leave the employment. Reasonableness may be "good cause", but it is not necessarily "just cause".

[30] The claimant bears the burden of establishing just cause (*Canada (Attorney General) v. Patel*, 2010 FCA 95).

[31] In this case, the claimant is adamant that she did not quit her job but she went on approved vacation. The Tribunal accepts the claimant's statements and testimony that she requested vacation from her manager, the owner's wife, and she was approved to take two months' vacation. The Tribunal further accepts that the claimant was never informed that she was considered by the employer to have quit her employment when she requested and was approved an extended leave. From this, the Tribunal concludes that the claimant did not quit her employment.

[32] The claimant has provided evidence to show that the employer maintained her position while she was away providing her with notice of her work schedule prior to her return to Canada and the paystubs show that her employment was not terminated with payroll. The Tribunal has no reason to doubt the claimant when she testified that if she were not authorized vacation she would not have gone because she could change the tickets. The Tribunal is convinced that the claimant was never informed that by taking an extended vacation she was quitting her employment and from this, the Tribunal further finds that the claimant was not intent on quitting her job.

[33] The Commission stated that the claimant was denied a leave request but she chose to go anyway and this severed the employer/employee relationship and caused her unemployment situation. The Tribunal disagrees. While the claimant did initially inform the Commission that the employer denied her vacation leave and the employer would have to rehire her, the Tribunal recognizes that the claimant does not speak or understand English very well and therefore there could have been a misunderstanding. The Tribunal accepts the claimant's statement that she was not provided with the ROE dated July 10, 2015 until she requested it from her employer and this is when she learned that she had quit her employment. The claimant then spoke to the Commission and informed the Commission of what she had learned from her employer

however, the Tribunal is not convinced that the claimant was aware that she could not take more than two weeks' vacation when she requested her vacation leave. The claimant stated that she requested leave from her manager and was approved, however; the Commission spoke to the owner and not the manager therefore, the Tribunal places more weight on the evidence provided by the claimant.

[34] The Tribunal finds that the claimant did not voluntarily leave her employment. The claimant requested vacation leave through her manager, the owner's wife, and was approved. The employer stated that he did not really have a choice because he needed workers. The claimant was not required to return her uniform or to reapply for her job. The claimant's employment was never severed according to payroll and she was notified of her work schedule prior to returning from vacation. The Tribunal is not satisfied that the claimant initiated the separation from employment because the claimant was approved vacation leave.

[35] The Tribunal sought guidance in CUB 74053, where Justice Durocher states:

> "First, and before the claimant assumes the task of showing "just cause", it is the onus of the Commission to clearly prove that the claimant did leave his employment voluntarily. This is logical, since it is the Commission that first, and unilaterally, took the decision on this ground. It also flows that if the Commission does not discharge this onus, the claimant does not have to undertake to prove just cause, or another reason. And it is also an error in law to forego the first step, and impose the burden on claimant to show that he had just cause for leaving."

[36] The Commission has not proven that the claimant left her employment voluntarily; therefore the claimant is not required to prove just cause for having voluntarily left her employment on July 10, 2015 pursuant to sections 29 & 30 of the EI Act. The claimant's hours of insurable employment should be used in the calculation for her claim for EI benefits.

CONCLUSION

[37] The appeal is allowed.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.

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) 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.