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

Citation: *W. S. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 150

Tribunal File Number: GE-16-1413

BETWEEN:

W. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

1265767 Ontario Ltd / J.'s Value Mart

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Michael Sheffe

HEARD ON: November 21, 2016

DATE OF DECISION: December 5, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, W. S., attended the in person hearing**.**

INTRODUCTION

[1] The Appellant filed an initial claim for employment insurance benefits (benefits) on November 12, 2015 (Exhibit GD3-14). The Appellant was sent a decision from the Canada Employment Insurance Commission (Commission), dated December 8, 2016, denying him benefits because it was determined by the Commission that since leaving his employment he had not accumulated sufficient insurable hours to establish a claim for benefits (Exhibits GD3-22 and GD3-23). The Appellant requested a reconsideration of this decision on January 5, 2016 (Exhibits GD3-24 to GD3-27). The Appellant was sent a reconsideration decision, dated March 7, 2016, which upheld the original decision denying him benefits (Exhibit GD2-7). The Appellant appealed this decision to the Social Security Tribunal (Tribunal) on April 7, 2016 (Exhibits GD2-1 to GD2-4).

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

a) The complexity of the issues under appeal.

b) The fact that credibility may be a prevailing issue.

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

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

e) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] Issue 1: Whether the disqualification for voluntarily leaving an employment without just cause, pursuant to sections 29 and 30 of the *Employment Insurance Act (Act),* should be upheld.

[4] Issue 2: Whether the decision that the Appellant does not have sufficient hours of insured employment to qualify for benefits according to section 7 or 7.1 of the *Act should* be upheld.

EVIDENCE

[5] The Appellant was employed by 1265767 Ontario Limited, operating as J.'s Valu-mart (J.'s), until August 1, 2015 at which time he voluntarily left his employment (Exhibit GD3-17).

[6] The Appellant worked for the race track during this same time. He was laid off from that employment on November 6, 2015. He had accumulated 497 insurable hours since he left his employment with J.'s (Exhibits GD3-16 and GD4-1).

[7] On his last day at work at J.'s, there was no one in the manager's office, but the Appellant saw two other managers on the floor of the supermarket. The Appellant spoke with one of the manager on duty to enquire if there were any specific duties which were required to be completed. This was the usual practise.

[8] The Appellant's first task was to go outside to gather the buggies. J. E., the manager, asked the Appellant to put away some stock. The Appellant was working in one of the aisles putting away stock and facing the shelves when J., the owner came into the aisle from the freezer area. J. yelled at him but the Appellant could not recall exactly what the issue was that J. was talking about. At the time, the Appellant was on a ladder and was in a precarious position. He did not want to fall off the ladder.

[9] The Appellant stated that J. rudely and loudly spoke to him. According to J., he stated that he noticed the Appellant was facing the shelves. This was around 5:00 p.m. J. told the Appellant that there were other tasks to complete and that facing the shelves could wait until near closing time.

[10] The Appellant had not been spoken to by J. in that manner, before. He had worked at J.'s for about twelve years and was aware of procedures and what had to be done and how to complete the tasks.

[11] The verbal exchange escalated. J. told the Appellant that he might be able to do as he pleased at his other job, but in this store, the Appellant had to report to the office to find out what he was supposed to do. According to the Appellant, J. spoke to him loudly, in a rude, sarcastic manner. The Appellant did not want to put up with this type of behaviour and the treatment he was receiving from J., so he gave his two weeks' notice at that time. J. told him that if that is how he felt, he should leave immediately. The Appellant walked out of the store (Exhibits GD3- 36 and GD3-37).

[12] The Appellant believed that it was J. who acted inappropriately. The Appellant did not contact J. for several days. He believed that J. should have contacted him.

[13] J. wrote a letter to the Tribunal. He wrote that on the last day that the Appellant was at the store working, he was speaking to B., as he referred to the Appellant, in a normal voice. He advised that the Appellant shoved a cart of frozen products at him before he left the store. J. stated that the Appellant did not ask what was to be done during that shift, but just began facing the shelves, which was a task that was usually done at the end of the day.

[14] Before he left the store and after the Appellant told him that he was quitting. J. advised that he asked the Appellant if he was sure he understood what he was saying. The Appellant repeated that he quit and J. replied by saying, "Ok. The door is there. Leave."

[15] J. stated in the letter which he wrote, that he was aware that the Appellant had another job and when he scheduled shifts for the Appellant, he took this into consideration so that the Appellant could work in both places. J. wondered why the Appellant acted in this manner on that day. He had been working for him for about eight to ten hours per week, for many years without a prior incident (Exhibit GD7-1).

[16] During the hearing, the Appellant denied shoving or throwing any carts or products at J., frozen or otherwise, during their verbal exchange.

[17] During the hearing the Appellant sated that he knows that technically he quit. It was his intention to back up his feelings regarding how J. was treating him. Before he left the store, one of the other managers tried to dissuade the Appellant from leaving, but the Appellant told that manager, whose name is J. E., that he was adamant that he wanted to leave. Even though the Appellant felt as if he was letting J. E. down, he was very upset and he left the store.

[18] The Appellant advised that he was also uncomfortable during the argument with J. on that day because there were customers in the store who heard everything and the Appellant believed that J. should have spoken to him in the office, away from the customers. The Appellant stated that J. actually told him that if he did want to quit that "he should get the hell out of my store."

[19] The Appellant submitted a letter which accompanied his appeal documents. He wrote that he had worked for J.'s for about 12 years, not five as indicated on the record of employment which he received. The Appellant believes that he had grounds to voluntarily leave according to subsections 29 (c) (i), (x), and (xiii) of the *Act*. He was upset that the Commission seemed to have taken everything which J. said as the truth, while not believing anything which he said (Exhibits GD2-5 and GD2-6).

[20] The Appellant stated during the hearing, that he did not speak to J. for several days after he left the store because he was upset. He was feeling that he received very poor treatment from J. J. was the person to whom he should speak if he had problems, but he was not sure what to do because it was J. with whom he had the dispute.

[21] About a week later, the Appellant returned to the store with his uniform. He used this as an excuse to speak with J. about the situation. When the Appellant entered J.'s office, J. saw the uniform, but would not discuss anything with him. J. told him to "Put it there and get out."

[22] The Appellant wrote a letter which accompanied his appeal documents. In it, he wrote that while the record of employment (ROE) indicates that the date he left J.'s was August 1, 2015, while in fact it was actually July 29, 2015. The Appellant was working at his other job at the race track on that day. The Appellant points out that the ROE indicated that he began working at J.'s on November 11, 2014, while in fact he began working there about 12 years

ago. The Appellant points out these discrepancies to highlight the fact that he believes that the employer has not told the truth, but he advised that has (Exhibits GD2-6 and GD3-16).

SUBMISSIONS

[23] The Appellant submitted that he should not have to accept workplace violence from an employer.

[24] The Appellant submitted that the employer has made false statements on his ROE and this should show reasonable doubt concerning the employer's version of the facts.

[25] The Respondent submitted that the Appellant did not show just cause for voluntarily leaving his employment.

ANALYSIS

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

Issue 1:

[27] In cases of voluntary leaving, the test to be applied, having regard for all of the circumstances, is whether on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment.

[28] In *Canada (Attorney General) v. White*, 2011 FCA 190, the Federal Court of Appeal reaffirmed the principle that where a claimant voluntarily leaves an employment, the burden is on that claimant to prove that there was no reasonable alternative to leaving.

[29] In the present case, the Appellant was involved in an argument with his employer. The Appellant had worked there for many years, without such an incident. During the argument, the Appellant told his employer that he was giving his two weeks' notice. The employer asked the Appellant if he was aware of what he was saying and if he was serious about quitting. The Appellant said that he was. The employer then told him to leave. The Appellant left the store. He did not return to the store for a week at which time, the Appellant returned with his uniform and tried to speak to the employer. The employer refused to speak with him.

[30] The Appellant cited paragraphs 29 (c) (i), (x), and (xiii) of the *Act* in his reasons for his appeal of the decision to deny him benefits, why he voluntarily left his employment. The Appellant had advised that in the years that he had worked for the employer this incident was the first in which there was a verbal argument. After the argument, the Appellant felt as if he was not valued as an employee. He did not want to be treated in this manner. He told his employer that he would be quitting.

[31] Regarding paragraph 29 (c) (i) of the *Act*, the Tribunal finds that instead of quitting on the spot, the Appellant could have accepted the remarks made by J. When both he and J. had time to calm down, the Appellant could have discussed the matter in a calm, rational manner. He should not have made a sudden decision to inform his employer that he wanted to quit his job

[32] Regarding paragraph 29 (c) (x) of the *Act*, there was a verbal disagreement between the employer and the Appellant on his last day working at J.'s. The Appellant advised during the hearing that this was the first time that he and the employer had become embroiled in a heated discussion about his duties. The employer also advised that the two had not previously been involved in a verbal disagreement.

[33] The Tribunal finds that the situation did not occur independently from the participation of the Appellant. There were some loud verbal exchanges between the two people. The Tribunal finds that this does not meet the standard of antagonism with a supervisor if the claimant is not primarily responsible for the antagonism. This was not an ongoing occurrence. From the evidence submitted by both the Appellant and the employer, they got along well. While it may be unfortunate that the two engaged in a heated argument, it probably could have been settled amicably if the Appellant had not escalated the circumstances by announcing he was quitting his job.

[34] The Appellant told the employer that he was going to quit his job. The employer tried to get the Appellant to rethink or revise his statement, but the Appellant would not recant his resignation.

[35] Regarding paragraph 29 (c) (xiii) of the Act, the Appellant told the employer that he was giving two weeks' notice at the time he and J. had the verbal disagreement. The Appellant

was asked by J. if he realized what he was saying and when the Appellant confirmed that he wanted to quit, J. told him to leave the store at that time and not stay a further two weeks.

[36] This may not have been the answer that the Appellant thought he would receive, but as an employer who had just been told that his employee wanted to quit his job, the employer had the right to accept the verbal resignation, which he did. The employer gave the Appellant an opportunity to retract his verbal resignation, but the Appellant did not.

[37] The employer advised that he spoke to the Appellant in his regular voice, not a raised tone. He was astonished at how the Appellant reacted. The Appellant advised that the employer was yelling at him while he was up on a ladder putting stock on one of the shelves in one of the aisles.

[38] The Appellant was upset that the ROE which he received had discrepancies. He highlighted these on the copy of the ROE which he submitted, at exhibit GD2-8. The Commission tried to contact the payroll department regarding the discrepancies. The Commission could not connect with anyone there and no one returned their call. However, the Appellant's hours which he worked at J.'s, were credited to him up to the week ending August 1, 2015.

[39] The Appellant stated that on August 1, 2015 he was working at his other place of employment. However, this date was a Saturday and the employer advised that the Appellant was paid for all of the hours he worked to that date according to the ROE.

[40] The evidence in the record and the evidence provided during the hearing did not contain anything on the basis of which it could be concluded that in departing the claimant had "no reasonable alternative". The Appellant could have not told the employer that he was quitting. If he was upset at the way he was being treated during the discussion, he could have waited until the employer finished and then calmly provided his views on the issues raised by the employer.

[41] The Appellant did not return to the supermarket for a week in order to try to get his job back. The Appellant advised during the hearing that he believed that his employer should have initiated a conversation with him regarding the appellant returning to work. When the Appellant

finally did go to the supermarket after a week had gone by, the employer would not discuss a return to work by the Appellant.

[42] The Tribunal finds that after such a long time, it would be reasonable for the employer to have moved on and reorganized his staff such that the Appellant's services were no longer required.

[43] Considering that there is no demonstration of continued harassment, antagonism, or pressure by the employer for the Appellant to quit his job, the Tribunal finds that the Appellant did not meet the requirement that he had to prove that he left his employment with just cause.

[44] The Tribunal finds that because the Appellant was willing to stay at the employment for an additional two weeks, there was no immediate concern that he leave. The Appellant stated that he just used this as a tactic to indicate how upset he was because of the argument.

[45] The Tribunal finds that the Appellant told his employer that he was resigning his employment on July 29, 2015 during the argument, and this was accepted by the employer.

[46] The Tribunal finds that the Appellant put himself out of a job by resigning his job.

[47] The Tribunal finds that the Appellant voluntarily left his employment without just cause.

Issue 2:

[48] Subsections 30 (1) and 30 (5) of the *Act* stipulate that in situations in which a claimant voluntarily leaves an employment without just cause, the number of insurable hours accumulated in that employment or any previous employment, cannot be used to qualify the claimant for benefits under sections 7 or 7.1 of the *Act.*

[49] In *Canada (Attorney General) v. Trochimchuk,* 2011 FCA 268, the Federal Court of Appeal upheld the principle, " that in circumstances where, absent just cause, an individual voluntarily leaves employment, the hours of insurable employment accumulated in any employment before the date upon which the person left the employment are excluded from the computation in relation to qualification for benefits."

[50] In *Canada (Procureur Général) v. Levesque*, 2001 FCA 304, the Federal Court of Appeal upheld the section of the *Act* which specifies the required number of hours a claimant needs in order establish a claim. The Court wrote, in that case, "The claimant accumulated 594 hours of work instead of the 595 hours required by subsection 7(2) of the *Employment Insurance Act*. She was short one hour of work in order to fulfill the conditions required by that section if she was to be eligible for unemployment benefits. This requirement of the *Act* does not allow any discrepancy and provides no discretion."

[51] In *Lapointe v. Canada (Attorney General)*, 2011 FCA 66, the Federal Court of Appeal upheld the principle that claimants must accumulate sufficient hours of insurable employment during the applicable qualifying period in order to receive benefits.

[52] The Appellant continued to work at the race track until he was laid off on November 6, 2015 at which time he had accumulated 498 insurable hours from the time he voluntarily left his employment at J.'s.

[53] The Commission determined that the Appellant was not a new entrant/re-entrant to the labour force because he had at least 490 hours of labour force attachment in the 52 weeks preceding his qualifying period. Thus, he needed the number of insurable hours as specified in paragraph 7 (2) (b) of the *Act* to qualify for benefits.

[54] According to the table in subsection 7 (2) of the Act, the Appellant required 630 insurable hours to establish a claim for benefits, because at the time, the rate of unemployment was 7.4 % in the economic region where he lived.

[55] The Tribunal finds that because of the voluntary leaving without just cause, the Appellant could not use any insurable hours which he accumulated before he left J.'s, and could only use the 498 insurable hours he accumulated from that point in time.

[56] The Tribunal finds that the Appellant had not accumulated sufficient insurable hours to establish a claim for benefits.

CONCLUSION

[57] Both issue of the appeal are dismissed.

Michael Sheffe
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.

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.

7 (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person qualifies if the person

(a) has had an interruption of earnings from employment; and

(b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) to (5) [Repealed, 2016, c. 7, s. 209]

(6) An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.