



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *J. P. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 155

Tribunal File Number: GE-16-2446

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alcide Boudreault

DATE OF HEARING: November 14, 2016

DATE OF DECISION: December 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE AND FORM OF HEARING

[1] The Social Security Tribunal of Canada (Tribunal) held a teleconference hearing for the reasons set out in the notice of hearing dated November 3, 2016, namely, the information contained in the file, including the need for additional information. This form of hearing best provides for the accommodations required by the parties. It also respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[2] The Appellant, J. P., attended the hearing held on November 14, 2016, along with Mario Durant and her counsel, Kim Bouchard.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

DECISION

[4] The Tribunal determined that an indefinite disqualification was not justified under sections 29 and 30 of the *Employment Insurance Act* (Act) because the Appellant had not voluntarily left her employment without just cause. The appeal is allowed.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[5] On April 19, 2016, the Appellant submitted a claim for benefits beginning on April 17, 2016 (GD3-3 to GD3-16).

[6] On May 11, 2016, in its notice of decision, the Commission informed the Appellant that she was not entitled to regular Employment Insurance benefits as of April 17, 2016, because she had voluntarily left her employment at Marché T. B. Inc. on November 3, 2015, without just cause within the meaning of the Act (GD3-19 to GD3-20).

[7] On May 11, 2016, the Appellant filed a request for reconsideration of the Commission's decision (GD3-21 to GD3-23).

[8] On June 14, 2016, in its notice of decision following the reconsideration, the Commission informed the Appellant that it had not amended its decision on the issue (GD3- 40 to GD3-41).

[9] On June 21, 2016, the Appellant filed an appeal with the Tribunal.

ISSUE

[10] The Tribunal must decide on the issue of the indefinite disqualification imposed on the Appellant under sections 29 and 30 of the Act because she voluntarily left her employment without just cause.

EVIDENCE

On File

[11] The Appellant filed an initial claim for Employment Insurance benefits effective April 17, 2016 (GD3-3 to GD3-16).

[12] The Appellant had worked for Marché T. B. until November 3, 2015. She left her job because she finished work at 11:15 p.m. and she was afraid of being out at night (GD3- 8 to GD3-10).

[13] The store manager had offered to let her work from 1 p.m. to 8 p.m.; however, the work schedule got changed, and the Appellant had no choice but to respect the new schedule and work until 11:30 p.m.

[14] The Appellant met with the manager to remind him that he had told her that she would be working from 1 p.m. to 8 p.m. The Appellant continued to work, but was scared at night. She left her job because she did not want to be leaving work at 11:30 p.m. (GD3-18).

[15] Mrs. F., the administrative assistant, confirmed that it was possible that the manager had told the Appellant that the schedule would be 1 p.m. to 8 p.m. (GD3-24).

[16] The Appellant was very anxious about being out at night because she had been sexually assaulted when she was younger. She had left another job for the same reason, namely having to work late at night (GD3-37).

[17] She had accepted the job because the manager had confirmed that she would be working only until 8 p.m. However, two months later, the schedule changed. She sometimes had to work until 11:15 p.m.

[18] The Commission found that the Appellant had worked until 10 p.m. and 11:15 p.m. only twice during an eight-week schedule. The Commission found her work schedule to be very reasonable.

At the Hearing

[19] At the time of hiring, the manager, Mr. G., had confirmed with the Appellant that she would be working only until 8 p.m. The Appellant met with Mr. G. to remind him that he had confirmed with her that her work shift would end at 8 p.m. However, Mr. G. replied that he had never said such a thing.

[20] The Appellant met with the administrative assistant, Mrs. F., to let her know about the situation. She told the Appellant that there was nothing she could do because the schedules were generated by a machine.

[21] Being a single parent, the Appellant continued working for 10 months while looking for another job. She quit her job after being approached one night at a bus stop.

PARTIES' SUBMISSIONS

[22] The Appellant submitted the following arguments:

- a) She is challenging the Commission's decision;
- b) More specifically, she argues that the decision was unfounded.

[23] The Respondent submitted the following arguments:

- a) Subsection 30(2) of the Act provides for an indefinite disqualification when a claimant leaves their employment voluntarily and without just cause.
- b) It found that the Appellant did not have just cause for leaving her employment on November 3, 2015, as she did show that she had exhausted all reasonable alternatives before leaving. Given the circumstances, a reasonable alternative would have been to find another job before she left her current one.
- c) The Appellant failed to show just cause under the Act for leaving her employment. Notwithstanding her fear of being out late at night, the facts show that, over a period of eight weeks, there were only two nights when she had finished work at 10 p.m. and 11:15 p.m.
- d) The situation was therefore not so intolerable that she had to immediately leave her job without first securing other employment, let alone voluntarily bring about her own unemployment. She could have found another job before she quit.
- e) The Appellant admits that this was a personal choice that she had made hastily when she saw the upcoming schedule.
- f) The Commission bases its decision on those of the Federal Court.

ANALYSIS

[24] The relevant legislative provisions are included in an appendix to this decision.

[25] Under section 29 of the Act, a claimant has just cause for voluntarily leaving an employment if, given the circumstances, the claimant had no reasonable alternative to leaving. Subsection 30(1) of the Act provides that a claimant is disqualified from receiving any benefits if the claimant left an employment without just cause.

[26] In *Astronomo v. Canada (Attorney General)*, 1998 CanLII 8216 (FCA) (A-141-97), the Federal Court of Appeal established that the role of the decision-maker is to determine whether the claimant's leaving was the only "reasonable alternative in his or her case."

[27] When the Appellant was hired, the manager, Mr. G., had told her that he needed someone to work from 1 p.m. to 8 p.m., a schedule that the Appellant found suitable. Later, Mr. G. denied having said any of that. Mrs. F., the administrative assistant, stated that it was possible that Mr. G. would have promised a work schedule from 1 p.m. to 8 p.m., as this met his needs at the time.

[28] As the manager, Mr. G. ought to have known that the schedule could change. According to the administrative assistant, it is impossible for a schedule to remain the same given that work schedules are subject to the collective agreement and that the schedules are automatically generated.

[29] The Commission must prove that this is a case of voluntary leaving, all the while taking the applicable circumstances of the situation into consideration. The Appellant, for her part, must prove that her leaving was justified. All the circumstances related to the reasons for the termination of employment must be considered. Once voluntary leaving has been established, it must be determined whether the claimant had just cause for leaving within the meaning of paragraph 29(c) of the Act.

[30] The Federal Court of Appeal (*Patel v. Canada (Attorney General)*, 2010 FCA 95; *Tanguay*, A-1458-84) has established that the onus is on the Commission to prove that the leaving was voluntary. Once this has been established, the claimant must show that they had just cause for leaving the employment.

[31] The Commission argued its position by stating that, over an eight-week period, there were only two nights when the Appellant had finished work at 10 p.m. and 11:15 p.m. The Federal Court of Appeal (*Bell* A-450-95) has established that it is an error to conclude that there was no "just cause" because there was no urgent or imminent need and that the work situation had not become critical to the point that it left the claimant no option other than to quit their job.

[32] When she was younger, the Appellant was sexually assaulted, an event that resulted in significant trauma. Given that she is a single parent, the Appellant had no choice but to work in order to support her child. She also had to work shifts that did not end too late at night. Once

she had to work until 11 p.m., the Appellant's situation became untenable as she had to wait for the bus in a secluded area where she was often alone.

[33] In the past, she has had to leave jobs that required her to work late. In this case, the manager had confirmed that he was looking for someone to work a day shift that would end at 8 p.m., a schedule that very much suited the Appellant. When the schedule was changed, the Appellant spoke with the manager, Mr. G., to ask him why her schedule was changing after he had promised her that her time slot would not be changing. He replied that he had never said such a thing.

[34] The Appellant met with the Mrs. F., the administrative assistant, in the hopes of getting an explanation, but to no avail. However, she confirmed that it was possible that the manager would have told her that her schedule would remain the same.

[35] The legislation does not demand the impossible of a person with regard to just cause for voluntary leaving. It is important, however, to determine what led to the voluntary leaving. Were there other reasonable alternatives that could have been considered? Why did the Appellant not use these seemingly reasonable alternatives that were available to her? Were there any problems, constraints or decisions related to her personal life?

[36] The Appellant had attempted to discuss the changes to her schedule because she wanted to continue working for the employer. However, the employer was uncompromising and said that the schedule was computer-generated and that there was nothing he could do about it. The Appellant was not asking for the employer's help on a whim, but so that she could keep a job that she liked because the assault that she had survived when she was younger placed a significant limitation on her personal life. This situation was outside of the Appellant's control.

[37] The Commission found the Appellant's schedule to be more than reasonable considering the fact that, out of the eight schedules that were checked, only two nights were scheduled until 10 p.m. and 11:15 p.m. The Tribunal underscored that, in situations of sexual assault, it is generally accepted that the victim would carry scars for many years, if not for life.

[38] Personal circumstances over which the Appellant has no control may justify her leaving if the Appellant had exhausted all reasonable alternatives before quitting. The Appellant has proven that she quit her job only after having sought reasonable alternatives. No reasonable solution addressed the Appellant's specific situation.

CONCLUSION

[39] The Tribunal refers to the Federal Court of Appeal decision *Smith v. Canada (Attorney General)*, A-875-96, which states there are "situations occurring independently from the will or participation of the claimant and beyond his control." In the Tribunal's opinion, the Appellant has proven that leaving her employment was the only "reasonable alternative" in her case. The appeal is allowed.

Alcide Boudreault
Member, General Division
Employment Insurance

DATE OF REASONS: December 19, 2016.

APPENDIX

THE LAW

Employment Insurance Act

112 (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within **(a)** 30 days after the day on which a decision is communicated to them; or **(b)** any further time that the Commission may allow.

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).

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) (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.