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

[TRANSLATION]

Citation: *J. I. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 33

Tribunal File Number: GE-16-3370

BETWEEN:

J. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: February 22, 2017

DATE OF DECISION: March 15, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, J. I., attended the hearing. The Respondent, the Canada Employment Insurance Commission (Commission), did not attend.

INTRODUCTION

[1] On August 17, 2015, Appellant filed for regular Employment Insurance benefits, reporting that she had voluntarily left her employment. That application was accompanied by a Record of Employment, indicating a medical leave, as well as medical certificates justifying the illness. The Commission therefore established a special benefit period for medical reasons, and 14 weeks of special benefits were paid to the Appellant from August 23, 2015, to November 28, 2015.

[2] Subsequently, the Appellant requested that the Commission convert her special benefits into regular benefits. The Appellant stated that she would not be returning to work for this employer due to a shortage of work. The Commission approved the application for conversion and the Appellant received 22 weeks of regular benefits from November 29, 2015, to April 30, 2016.

[3] On June 14, 2016, the Commission imposed an indefinite disqualification on the Appellant's claim effective October 11, 2015, because the Commission found that the Appellant had voluntarily left her employment without just cause on October 14, 2015, during her special benefit period. The Commission also determined that the Appellant had knowingly made a false representation. No penalty was imposed in reference to the false representation; however, a warning was issued because the decision specified the following: [translation] "However, should we discover other omissions or inappropriate statements, we may impose more severe penalties or take legal action against you."

[4] The imposition of the disqualification due to the Appellant's unreported voluntary leaving resulted in an overpayment of $10,208.00—the total amount of benefits paid between November 29, 2015, and April 30, 2016. A notification of debt was sent to the Appellant on June 18, 2016.

[5] On June 22, 2016, the Appellant sought a reconsideration of the decision rendered on June 14, 2016. On August 8, 2016, the Commission advised the Appellant that it was upholding the decision rendered on June 14, 2016, concerning the voluntary leaving.

[6] On September 2, 2016, the Appellant appealed the Commission's reconsideration decision of August 8, 2016.

[7] On September 16, 2016, the Tribunal informed the employer that if it wanted to be included in the case as an added party, it would have to file the appropriate request with the Tribunal no later than October 3, 2016. The employer did not respond and the Tribunal decided not to add it as an added party.

[8] This hearing was held via teleconference for the reasons specified in the notice of hearing.

ISSUES

[9] The Tribunal must determine whether the appeal of the Commission’s decision regarding the Appellant’s indefinite disqualification from receiving Employment Insurance benefits for failing to prove just cause for leaving her employment has merit under sections 29 and 30 of the Act.

[10] Did the Appellant knowingly make a misrepresentation or provide false or misleading information, warranting the imposition of a non-monetary (warning) penalty under sections 38 and 41.1 of the Act?

EVIDENCE

Special benefits (sickness)

[11] The Appellant filed for regular benefits on August 17, 2015. She submitted that she had left her employment because she planned to move from X, Alberta, where her job is located, to X, Alberta. The Appellant also mentioned that this move was necessary, because she was alone in X, Alberta, everyone she was close to had moved, and she was unable to live alone. She would feel safer moving to X, Alberta, to live with her aunt (GD3-3 to GD3-13).

[12] A Record of Employment issued on August 18, 2015, stated that the Appellant had worked for an employer in X, Alberta, from March 24, 2014, to July 30, 2015, that she was on medical leave and that her return to work date was unknown (GD3-14).

[13] The following documents were provided as medical evidence:

- August 4, 2015: a first medical certificate issued by a physician at the medical clinic in X, Alberta authorizing a medical leave from work until August 18, 2015 (GD3-15) (translation);

- August 18, 2015: a letter sent by Alberta Health Services to the treating physician. This letter confirms that the Appellant was accepted as a patient and describes her symptoms. It also mentions that the Appellant has financial difficulties because she has not been paid by her employer since she stopped working and did not know whether her Employment Insurance claim would be accepted. The Appellant has no one to support her in X, Alberta, so she is planning to move to X to live with her aunt. Finally, the Appellant was directed toward another assistance organization and she has a meeting scheduled for August 24, 2015 (GD3-18) (translation);

- August 19, 2015: a second medical certificate issued by the treating physician at the medical clinic in X, granting an indefinite leave from work effective August 19, 2015 (GD3-16) and a letter signed by that same physician dated August 20, 2015, providing details about the physician's diagnosis and the Appellant's symptoms (GD3-17) (translation);

- November 16, 2015: a third medical certificate issued by the HYS medical clinic in X, Alberta, indicating that the Appellant was doing better and that she should be able to return to work in December 2015 (GD3-22);

- November 26, 2015: a fourth medical certificate issued by the HYS medical clinic in X, Alberta, indicating that the Appellant was doing better and that she would be capable of working as of December 1, 2015 (GD3-22);

[14] On September 9, 2015, during a conversation with the Commission, the Appellant stated that she had been on leave from work because she was sick, but that she did not know what to report when she filed her Employment Insurance claim. She sent her medical certificates to the employer, and the employment relationship between her and the employer was not severed. However, she is unsure if she will be able to return to work for the same employer, because she moved to X, Alberta, which is five hours away from X, Alberta. However, she had not yet advised the employer that she had left X, Alberta. The Commission advised the Appellant to report any work stoppage, including an eventual voluntary departure. GD3-19

[15] The Appellant received 14 weeks of sickness benefits from August 23, 2015, to November 28, 2015.

Voluntary leave

[16] In December 2015, at the Appellant's request, her sickness benefits were converted into regular benefits. However, on June 14, 2016, the Commission notified the Appellant that it could not pay her regular Employment Insurance benefits as of October 11, 2015, because the Appellant had voluntarily left her employment on October 14, 2015, without just cause. The Commission also concluded that the Appellant had made a false or misleading statement. The disentitlement to benefits resulted in an overpayment of $10,208.00, during the period from November 29, 2015, to April 30, 2016.

[17] The facts in support of that decision are as follows:

- October 1, 2015: Correspondence sent by the employer to the Appellant asking her to follow up on the letter dated September 14, 2015, which gave her until September 25,

2015, to update her medical file. The Appellant was also advised that she had until October 8, 2015, to provide the required information. If she failed to follow up on this letter or to report for work, it would be considered that she had abandoned her job and the employer would terminate her employment (GD3-29);

- October 14, 2015: A letter from the employer to the Appellant notifying her that her employment had ended (GD3-30). The employer also sent a copy of that letter to Service Canada, which received it on November 17, 2015 (GD3-21);

- March 23, 2016: A Record of Employment advising that the Appellant had voluntarily left her employment on October 14, 2015 (GD3-23)

- May 25, 2016: A letter from the Appellant explaining that her medical certificate, issued on August 19, 2015, and provided to the employer, was for an indeterminate period. The employer required other medical certificates and the Appellant was unable to obtain them within the required time frame because she did not have a family physician in X, Alberta. (GD3-24 and 25); these same facts were reiterated in a conversation with the Commission on June 9, 2015 (GD3-31 and 32);

- June 9, 2015: The employer explained to the Commission the actions it took before ending the Appellant's employment, such as the letters sent to the Appellant (GD3-29 and GD3-30) and a telephone conversation with the Appellant in which it explained the need for a new medical certificate. The employer stated that the Appellant's move serves as proof that she did not want to return to work. The employer also confirmed that the Appellant had not returned to work since July 2015. The Commission therefore asked the employer to amend the Record of Employment to indicate that the Appellant had left her employment in July 2015. GD3-33

- June 10, 2016: A new Record of Employment indicating that the Appellant had voluntarily left her employment on July 30, 2015 (GD3-37)

[18] The Appellant sought a reconsideration of the June 14, 2016, decision. On August 8, 2016, the Commission upheld the decision only on the issue of voluntary leaving (GD3-50).

False or misleading representations

[19] In its June 14, 2016 decision, the Commission concluded that the Appellant had knowingly made false or misleading statements. In that same decision, the Commission informed the Appellant that it was not imposing a monetary penalty for false representations. However, penalties could be imposed if other false representations were discovered (GD3-38 to GD3-39).

[20] In her reconsideration request of June 14, 2016, the Appellant stated that she did not make a false representation. However, the issue of the false representation was not reconsidered by the Commission (GD3-43).

[21] In her notice of appeal, the Appellant stated that she did not make false representations (GD2-10-GD2-11).

[22] On February 23, 2017, at the Tribunal's request, the Commission produced as evidence the request for the conversion of sickness benefits to regular benefits, in which the Appellant stated that she would not return to work for the employer due to a shortage of work (GD7-2).

SUBMISSIONS

[23] The Appellant argued that she did not voluntarily leave her employment and that the severance of the employment relationship was provoked by the employer. She was therefore dismissed and the letter dated October 14, 2015, notifying her that her employment was ending is proof of this.

[24] At the hearing, the Appellant argued as follows:

1) That she moved to X, Alberta, on August 24, 2015, and it was not until a month after her move that the employer contacted her by telephone, in September 2015, asking for a new medical certificate. During that conversation, the Appellant reminded the employer that her last medical certificate put her off work indefinitely, that she had just moved to X, Alberta, and that she had not yet found a family physician, and to give her a little more time. During that conversation, the employer did not indicate a time frame in which she had to provide the medical certificate. On or around October 10, 2015, the Appellant received a letter from the employer dated October 1, 2015, asking her to provide a medical certificate by October 8, 2015, otherwise she would lose her job. She telephoned the employer for further explanation, but the employer did not return her call.

2) The Appellant also stated that she had forgotten to tell the Commission that she had called the clinic of her former family physician in X, Alberta, to ask for a new medical certificate. The clinic had advised her to find a doctor in X, because a physical medical consultation with the treating physician must be done before a medical certificate can be issued. Without a car to drive five hours or the health to take the bus for eight hours to return to X, Alberta, the Appellant attempted to find a family physician in X, Alberta. The Appellant noted that this fact had not been disclosed to the Commission earlier, because the Appellant did not consider it to be important.

3) Because her English is not very good, the Appellant decided that she would be better off with a francophone doctor. She went to the francophone St. Thomas Hospital in X and was told that the earliest availability to see a doctor was December 13, 2015. This was too late, so the Appellant continued looking and finally found a francophone doctor at HYS Medical Centre, who issued medical certificates dated November 16 and 26, 2015.

4) Furthermore, the Appellant stated that she chose not to go to the Emergency department at a hospital in X because she felt that her health condition required a doctor who would take the time necessary to properly assess her psychological status. However, the Appellant later testified that she had gone to the Emergency department and that she had waited four hours before being told that she would be better off finding a family physician.

5) The Appellant also testified under oath that following her move to X, Alberta on August 24, 2015, she had not looked for a family physician in X because she had continued her medical treatment and follow-up with Alberta Health Services, in X, Alberta, by telephone. Therefore, despite her move, she was still a patient of Alberta Health Services. However, she did not ask them for a new medical certificate because she felt that it was not their responsibility to issue medical certificates (this organization only issues medical reports to treating physicians). This was attested by the August 18, 2015, letter from Alberta Health Services, which was used by her treating physician to issue the medical certificate dated August 19, 2015.

6) Finally, on the issue of the false representations that were made, the Appellant testified that she did not recall having made a false representation, as the Commission had never given her an explanation about this. If the false representation is about the fact that she stated that she had not voluntarily left her employment, she says she maintains that position. Furthermore, when she completed the questionnaire for her application for the conversion of sickness benefits to regular benefits, she was not asked why her employment had ended.

[25] The Commission is of the opinion that by failing to respond to the employer's requests on time, the Appellant brought on the end of her employment. This action amounts to voluntary leaving.

[26] Furthermore, the Commission submits that the Appellant's move to X, Alberta constitutes evidence that she did not intend to return to work in X, Alberta. Furthermore, the fact that the Appellant reported voluntary leaving in her claim for benefits filed on August 17, 2015, is evidence of her voluntary leaving.

[27] The Commission finds that the Appellant failed to exhaust all reasonable alternatives prior to leaving. Reasonable alternatives under the circumstances would have been: to discuss the situation with her doctor to see if it was necessary to leave her job; to find a job in X, Alberta before moving; and finally, to take the necessary steps to provide the information required by her employer. Consequently, the Appellant failed to discharge her burden of the proof, which was to prove that she had just cause for leaving her employment within the meaning of the Act.

ANALYSIS

[28] The relevant legislative provisions are reproduced in an appendix to this decision.

[29] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work (*Gagnon* [1988] SCR 29). Therefore, claimants who voluntarily leave their employment will not be entitled to receive benefits unless they can establish that they had just cause for doing so, under sections 29 and 30 of the Act.

Voluntary leaving

[30] The Commission submits that the Appellant voluntarily left her employment on October 14, 2015, while the Appellant claims that she was dismissed.

[31] These opposing views result from the cause of the severance of the employment relationship that is recorded on the Record of Employment, which is "voluntary leaving" and the succession of events that led to the voluntary leaving. The onus of proof rests with the Commission to show that the leaving was voluntary, and then with the Appellant to show that

she had just cause for voluntarily leaving (*Green* 2012 FCA 313; *White* 2011 FCA 190; *Patel* 2010 FCA 95).

[32] In this case, the Tribunal determines that the Commission was discharged its burden of proving that the Appellant voluntarily left her employment on October 14, 2015.

[33] Subsection 30(1) of the Act provides the following with respect to the "disqualification" from receiving benefits: "[...] (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."

[34] Unless explicitly stated in the Act, the Tribunal believes that a clear manifestation of the Appellant's desire to leave her employment must be found. The evidence does not show that the Appellant explicitly expressed her desire to leave her employment on October 14, 2015. However, the substantiating evidence shows that, based on her conduct, the Appellant did voluntarily leave her employment.

[35] The Commission submits that the Appellant reported voluntary leaving in her claim for benefits filed on August 17, 2015, and that this constitutes proof that the appellant voluntarily left her employment. The Tribunal cannot share this opinion, because it was following this initial claim for benefits that a special benefit period was established. Furthermore, the June 14, 2016, decision, which was upheld at the reconsideration stage, clearly states that the voluntary leaving occurred on October 14, 2015, that is, two months after the initial claim for benefits and while the Appellant was receiving special benefits (GD3-38).

[36] The Commission also submits that the Appellant's move to X, Alberta constitutes proof that she did not intend to return to work in X, Alberta. The Tribunal notes that this finding was wrong because, according to the first Record of Employment issued on August 18, 2015, the Appellant was on medical leave from work as of July 30, 2015, and her return to work date was unknown. Furthermore, the medical certificate dated August 19, 2015, was accepted by her employer and it allowed her to extend her leave. Therefore, there was no severance of the employment relationship when the Appellant had to leave her employment for medical reasons.

[37] However, despite the continuation of the employment relationship, the Appellant did not notify the employer of her new address in X, Alberta. The Appellant therefore did not receive the employer's first letter of September 14, 2015, which asked her to provide a medical certificate by September 25, 2015. The Appellant testified that it was not until a month after her move, in September 2015, that she received a call from the employer asking her to provide a medical certificate. However, during this telephone conversation, the employer had not specified a deadline to provide the requested information.

[38] Therefore, the Tribunal finds that the circumstances that led to the voluntary departure must be analyzed from when the Appellant failed to provide her employer with a new medical certificate, and not from the date of the initial claim for benefits. This analysis also cannot be done from the time when the Appellant made the decision to move to X, Alberta, because in the Tribunal's view, the Appellant's move is not what provoked the voluntary leaving, as will be shown further on in the decision.

[39] The oral and documentary evidence shows that the employer contacted the Appellant in September 2015 to ask her to provide a new medical certificate to continue to justify a previously approved leave. This request was repeated in a letter dated October 1, 2015, in which the employer advised the Appellant that she had until October 8, 2015, to either provide a new medical certificate or report to work, otherwise, the employer would consider that she had left her employment. The Appellant did neither of these two options by October 8, 2015, and the employer therefore considered that she had left her job. Therefore, on October 14, 2015, there was break in the employment relationship.

[40] In this case, the Tribunal finds that by failing to provide her employer with the medical certificate, and by failing to report to work on October 8, 2015, the Appellant voluntarily left her employment. It is therefore a voluntary leaving that must now be analyzed to determine whether, in light of all the circumstances disclosed by the evidence, the Appellant had just cause for voluntarily leaving her employment under the Act.

[41] The test for determining whether a claimant had just cause for voluntarily leaving their employment under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (*White* 2011 FCA 190; *Macleod* 2010 FCA 301; *Imran* 2008 FCA 17; and *Astronomo* A-141-97).

[42] Furthermore, in *Landry* (A-1210-92), the Federal Court of Appeal stated that it is insufficient for a claimant to show that he or she was acting reasonably in leaving one's employment. Reasonableness may be a good cause but it is not necessarily just cause. It must be shown that, having regard to all the circumstances, the claimant had no reasonable alternative to leaving.

[43] The Commission submits that leaving one's employment to move to another region for personal reasons does not fall within any of the reasons set out in paragraph 29(*c*) of the Act. The Tribunal notes that paragraph 29(*c*) of the Act is neither restrictive nor exhaustive, but subparagraphs (i) to (xiv) delineate the type of circumstances that must be considered. (*Campeau* 2006 FCA 376, *Lessard* 2002 FCA 469). However, a claimant need not necessarily fit into one of these categories in order for there to be a finding of "just cause."

[44] The Tribunal agrees with the Commission that the Appellant's move was a personal choice. Moreover, the Appellant admitted this at the hearing.

[45] Furthermore, case law repeatedly states that leaving an employment for personal reasons, such as wanting to be closer to family, does not constitute just cause within the meaning of paragraph 29(*c*) of the Act. [Translation] “From a human point of view, it is easy to understand that a person sometimes has to move for personal reasons: it is perfectly normal to sympathize with her. However, such a ground does not constitute just cause under the Act and jurisprudence, in the sense that it is not related to leaving the employment, but to other pure personal reasons” (*Tanguay*, A-1458-84).

[46] Despite the above, the Tribunal finds that in determining that the Appellant did not have just cause for leaving her employment, the Commission relied mainly on the Appellant's move, but the move was not what provoked the voluntary leaving. Indeed, according to the employer's statement of June 10, 2016, the Appellant notified the employer that she was in X, Alberta, and that she could not return to X, Alberta to obtain a new medical certificate. The employer then explained to the Appellant that she could obtain a medical certificate from anywhere. Therefore, regardless of the move, the employer would have accepted a medical certificate from a physician in X, Alberta.

[47] The Commission submits that the Appellant did not have just cause for leaving her employment on October 14, 2015, because she failed to exhaust all reasonable alternatives prior to leaving. According to the Commission, a reasonable alternative would have been to secure a new job in X, Alberta, before moving. Here again, the Tribunal cannot accept this argument because the initial claim for benefits was not made on the basis of the move, and the definitive rupture of the employment relationship was not provoked by the Appellant's move.

[48] In this case, the loss of employment was caused by the Appellant's failure to provide her employer with a new medical certificate to extend her medical leave. Therefore, the Tribunal must analyze the circumstances that prevented the Appellant from fulfilling this obligation to determine whether, having regard to all the circumstances, the Appellant exhausted all reasonable alternatives to leaving her employment.

[49] According to the case law, the Act imposes on the claimant: "the duty that ordinarily applies to any insured, not to deliberately cause the risk to occur" (*Tanguay*, A-1458- 84). Having regard to the specific circumstances brought before it in this case, the Tribunal finds that, contrary to the Commission's claims, the Appellant did exhaust all reasonable alternatives available to her so as not to "deliberately cause" the loss of her employment.

[50] Indeed, the Appellant testified that her medical certificate dated August 19, 2015, indicated an indefinite leave from work. Because her employer had accepted this medical certificate to extend her leave from work, the Appellant believed that she did not need to provide another one. However, the Tribunal finds that after her conversation with the employer in September 2015, in which the employer asked for a new medical certificate, the Appellant

understood the urgency and did what any reasonable person who was worried about keeping their job would do, by doing everything she could to provide the requested medical certificate.

[51] The Appellant contacted the medical clinic of her former doctor in X, Alberta. However, that clinic was unable to respond to the Appellant's request, because she would have had to go to X, Alberta for a medical consultation before being issued a new medical certificate. Because she was sick, the Appellant was unable to travel to X, Alberta and, instead, she continued looking for a family physician in X, Alberta. She therefore went to the Emergency department at a hospital in X, Alberta where, after a consultation, she was advised to find a family physician because they were unable to issue a medical certificate.

[52] The Appellant also tried to find a doctor at the francophone St. Thomas Hospital in X, Alberta, where the earliest availability for a consultation was December 13, 2015. This was too late, so the Appellant continued looking for a family physician. While she was looking for a new doctor, the Appellant received the employer's letter dated October 1, 2015, asking her to provide a medical certificate by October 8, 2015, otherwise the employer would terminate the employment relationship. The Appellant testified that she had tried several times to contact the employer by telephone to explain that she would not be able to obtain a medical certificate by October 8, 2015, as she had not yet found a doctor in X, Alberta, but the employer did not follow up with her.

[53] Furthermore, even after receiving the employer's letter of October 14, 2015, indicating the final end of the employment, the Appellant continued looking for a doctor and succeeded in obtaining the medical certificates dated November 16 and 26, 2015.

[54] Taking all of the above into consideration, the Tribunal finds that the Commission's allegation that the Appellant did not attempt to provide the information required by her employer is an erroneous finding of fact. The Appellant was obviously unable to obtain a medical certificate on time. The Tribunal finds that from the moment that the employer asked her for a new medical certificate, the Appellant was thorough and used all resources available to her to follow up on the employer's request. Thus, having regard to all the circumstances, the Appellant had no reasonable alternative to leaving her employment.

[55] The Tribunal finds that the Appellant voluntarily left her employment on October 14, 2015. However, having regard to all the circumstances, voluntarily leaving was the only reasonable alternative and it was justified under sections 29 and 30 of the Act.

False or misleading representations

[56] As previously mentioned, this file does not deal only with the issue of voluntary leaving. In the June 14, 2016, decision, the Commission also notified the Appellant that a warning had been issued for making false representations. However, the reconsideration decision of August 8, 2016, assessed only the issue of voluntary leaving, despite the fact that in her reconsideration request, the Appellant asked for a comprehensive reconsideration of the June 14, 2016, decision.

[57] In accordance with section 113 of the Act, the Tribunal has the jurisdiction to hear an appeal of a reconsideration of a decision. Therefore, if the Appellant is declared disentitled from receiving benefits because of non-availability, the Tribunal must look at and decide on this issue. No reconsideration decision was rendered on the warning that was recorded in the initial decision. However, in her notice of appeal, the Appellant maintained that she had not made false representations.

[58] Subsection 3(2) of the *Social Security Tribunal Regulations* (SST Regulations) provides that "[i]f a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations." Based on the SST Regulations, the Tribunal has jurisdiction to make a decision on the warning because this issue was not resolved by the Commission despite the fact that a reconsideration request had been made.

[59] Jurisprudence has established that the imposition of a warning or penalty is within the Commission's discretion. Case law has also held that there is no authority to interfere with discretionary decisions of Commission unless it can be shown that the Commission: "exercised its discretion power in a non-judicial manner or acted in a perverse or capricious manner (bad faith, improper purpose or motive, taking into account irrelevant factors, ignoring a relevant

factor, or acting in a discriminatory manner) without regard to the material before it” (*Uppal* 2008 FCA 388).

[60] The Tribunal must therefore determine whether the Commission exercised its discretion judicially.

[61] The imposition of the disqualification due to the unreported voluntary leaving generated an overpayment of $10,208.00. The Commission concluded that the Appellant had knowingly made a false or misleading statement. After having regard to all the circumstances, the Commission issued one warning to the Appellant following the false representation—in the June 14, 2016 decision.

[62] In *Canada (Attorney General) v. Mootoo*, 2003 FCA 206, the Federal Court of Appeal confirmed the principle that for a finding of misrepresentation, on the balance of probabilities, the claimant must have subjective knowledge that the report was false in order to penalize him or her.

[63] It is incumbent upon the Commission to show that the false statement was made knowingly (*Gates*, A-600-94).

[64] In *Mootoo*, the Court stated: "Once it appears from the evidence, however, that a claimant has wrongly answered a very simple question or questions on a report card the burden shifts to claimant to explain why the incorrect answers were given” *Canada (Attorney General) v. Mootoo*, (2003) FCA 206.

[65] The Tribunal finds that the Commission failed to discharge its burden of proof in establishing that the false statements were made knowingly.

[66] The Court has held that the Commission must provide evidence of the actual questions asked and the answers given, to discharge the onus of proof (*Caverly* A-211-01).

[67] At the hearing, the Appellant acknowledged that she had completed a questionnaire when she requested the conversion of her special benefits to regular benefits. The Appellant also stated that when she completed the questionnaire, it did not have any questions about her loss of employment. Yet, on February 24, 2017, after the hearing, the Commission produced this questionnaire, completed by the Appellant on December 1, 2015, in which the Appellant stated that she had stopped working due to a shortage of work.

[68] Given the information in the questionnaire for the conversion of the Appellant's benefits and the fact that the questions asked in the questionnaire were relatively simple, the Tribunal finds that under normal circumstances, the Appellant should have known that she was making false statements to the Commission by failing to report that she had stopped working due to voluntary leaving.

[69] However, the Tribunal finds that the Appellant lacked subjective knowledge when she was completing the questionnaire. The Tribunal finds that it appears from the Appellant's testimony and submissions in the file, she did not understand that she was to state the fact that she had stopped working because of voluntary leaving. She still thought that the severance of the employment relationship had been provoked by the employer with the termination of employment letter that she had received from the employer. Thus, the Tribunal finds that the Appellant has provided a reasonable and credible explanation to explain her false representation and that the false representation was not made knowingly.

[70] Given the above findings, the Tribunal finds that the appeal with respect to the imposition of a warning must be allowed. Given this finding, the Tribunal does not have to determine whether the Commission exercised its discretion judicially when it imposed the warning.

CONCLUSION

[71] Based on the Act, the above-mentioned case law and the evidence in the file, the Tribunal finds that the Appellant was not dismissed and that she voluntarily left her employment. However, the Appellant met her onus to show that she had no reasonable alternative to leaving her employment. Thus, the Appellant had just cause for voluntarily leaving her employment under sections 29 and 30 of the Act.

[72] The Tribunal also concludes that the Appellant made a false statement, but that this statement was not made knowingly.

[73] The appeal is allowed on the issue of voluntary leaving.

[74] The appeal is allowed on the issue of the imposition of a warning.

Bernadette Syverin
Member, General Division – Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

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 or common-law partner or a 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.

Employment Insurance Regulations