



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. A. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 36

Tribunal File Number: GE-16-2197

BETWEEN:

S. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: December 7, 2016

DATE OF DECISION: March 15, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. S. A., attended the teleconference hearing.

INTRODUCTION

[1] The Claimant applied for employment insurance regular benefits on February 17, 2016 however; on March 9, 2016 the Canada Employment Insurance Commission (Commission) denied the Claimant's application. It determined that the Claimant voluntarily left his employment without just from January 24, 2016 onward because leaving was not his only reasonable alternative. Further, the Commission found that as of March 7, 2016 the Claimant was taking a training course on his own initiative and therefore did not prove his availability for work from that date forward. Finally, it allocated his vacation pay to the week of January 24, 2016 to January 30, 2016.

[2] On March 24, 2016, the Claimant requested that the Commission reconsider its decision regarding his voluntary leaving his employment. On May 4, 2016, the Commission maintained its decisions regarding his voluntary leaving and availability.

[3] On May 31, 2016, the Claimant appealed only the issue of voluntary leaving to the General Division of the Social Security Tribunal (Tribunal).

[4] The hearing was held by teleconference because the Claimant was going to be the only party in attendance at the hearing; the credibility was not anticipated to be a prevailing issue and 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.

ISSUE

[5] The Member must decide whether the Claimant should be disqualified from receiving any benefits because he voluntarily left his employment without just cause pursuant to section 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

[6] On application the Claimant indicated that he was employed until January 22, 2016 and that he was no longer working because he was on a leave of absence (GD3-3 to GD3-12).

[7] The employer indicated on the record of employment (ROE) that the Claimant quit his job as a painter to return to school (GD3-13).

[8] On March 9, 2016, the Commission indicated that the Claimant stated that he was still an employee and on a leave because he could no longer travel to work with his father-in-law as of December. He had (?) his cousin's car until she finished school (unclear); there was no public transit available; a ride with a colleague was not possible. He started school on March 7, 2016. The transcript is unclear and appears to say: that [if] he wouldn't have made the decision to go to school, he would have left because of the transportation issue (GD3-14).

[9] The employer advised the Commission that the Claimant quit school and had another position. They advised the Claimant that if it doesn't work out with the new employer, although not obligated, they would rehire him if they had a position available. He did not advise them of a transportation problem. The employer confirmed that there is no public transit available (GD3- 15).

[10] On March 9, 2016, the Commission denied the Claimant employment insurance regular benefits because he did not show just cause for leaving his employment effective January 24, 2016 as leaving was not his only reasonable alternative. Further, he was deemed not to be available from March 7, 2016 because he was taking a training course on his own initiative. Plus, it allocated his vacation pay (\$115.00) to January 24, 2016 to January 30, 2016 (GD3-16).

[11] In his request for reconsideration and notice of appeal to the Tribunal, the Claimant indicated that he had a doctor's note to show that he had doctor's orders to stay home for a week because of the shortness of breath (due to products) and back pain. When he was to return he was advised that he had been replaced (GD2-3 and GD3-18).

[12] The Claimant stated to the Commission, that he was switched to a spray painting job. He advised the employer of his asthma and inability to do that job plus, he had back pain. The Claimant stated that he was off for 3 days but when he came back he had been replaced because he didn't call them to advise that he would be off work. The Claimant stated that he did tell them and that he had a doctor's note. He went to speak with the "big boss" who in turn followed up with the supervisor. He followed up again and was told that they can't dismiss the new employee and apologized. He only mentioned to the employer that he wanted to go back to school in September but he did not quit his job (GD3-19).

[13] The Plant Manager advised the Commission that the Claimant's statements are completely false. The Claimant did not have a back injury. He left to go to school and wanted a few weeks off before he started. They asked him, and he agreed to stay until they could fill his position which was difficult. It took 3-4 weeks before they hired a replacement (GD3-20).

[14] On May 4, 2016, the Commission advised the Claimant that it determined that the employer's version of the facts were more genuine, reasonable and plausible; that the Claimant's initially stated reasons for the separation (transportation issues and to go to school) are generally a more accurate reflection of the situation than subsequent statements; he did not previously mention that he was off for 3 days and when he returned, he was replaced. Since he had stated that he began training on March 7, 2016, the employer's statements are more credible. The Commission maintained its initial decision (GD3-21 to GD3-23).

Testimony at the Hearing

[15] The Claimant testified that he did not leave his employment. The Claimant testified that he provided his employer with a doctor's note that he need to be off work for two weeks due to back pain. The employer approved the leave. When he returned, his employer advised him that he was supposed to be off for only one week (not two) so they replaced him. There was a misunderstanding between him, the supervisor and his boss. He remained off work while the boss spoke to the supervisor/plant manager and office. He called the employer to follow-up and was told by the plant manager that they are now very slow in January (usually the case every year) so they will call him back for February or March. The Claimant testified that the employer asked him about school but he told them that he wanted to go to school in

the coming summer. He kept following-up and each time, they said they'd call him back. Three weeks later, he called the payroll department and asked that they either take him back or give him his paperwork. He was advised to go apply for employment insurance benefits. The Commission had not received anything, so he called the payroll department again who sent in the paperwork.

[16] The Claimant testified that when he finally applied he was advised by Service Canada that the ROE says he is going to school. He testified that he explained to the agent that intended on taking a trade course but in July or September when they would be available, not in January or February. The Claimant testified that he indicated "leave of absence" on his application form because he was advised to "click on anyone" at Service Canada and then, when asked to explain.

[17] The Member asked the Claimant why there was a separation from his employment; why he was no longer working. The Claimant testified that he loved to work at his employer but because of his back pain, they didn't take him back; he is unsure if they laid him off. The Claimant stated that he does not understand and that he has "no idea" what the reason is that he could not return to work after he took time off for his back pain. The Claimant testified that he does not know the reason why he is no longer working there stating "I swear to God, I don't know why". He stated that the supervisor was racist toward him and that since he left; the Plant Manager was demoted to a supervisor position. The Claimant stated that the company can be contacted to confirm how many times he called them since January to go back to work. He stated "If they called me right now ... I would go to work today!".

[18] The Claimant testified that the employer knew he was asthmatic and that he sometimes had to use a puffer if the paint smell was too much for him. The Claimant testified that he was able to manage his pre-existing asthma at work for two years. The Claimant stated "I did not stop work". He went to see his doctor because of his back pain and only needed two weeks to rest. The Claimant stated that he wouldn't have applied for benefits and pursued this matter to the Tribunal if he chose to simply stop working, which he did not.

[19] The Member asked the Claimant about the medical documentation he provided his employer. The Claimant testified that the doctor's note that he provided to his employer stated he required two weeks of rest (the Claimant referred to his calendar) from January 15th until the end of January. Because of weather conditions, he had advised the employer by phone and then, on January 21st he went in to give them the note. When he returned on February 1st, he was told that he had been replaced. He doesn't understand why this all happened because he worked hard, 10-12 hours a day; never sat at home. The Claimant testified that he is being honest and that he is telling the truth. The Commission did not ask him for the doctor's note. The Claimant thinks he may have a copy of the note he provided to the employer and will send it to the Tribunal.

[20] The Claimant was referred to the employer's statements in GD3-15 that he left because he had another job. The Claimant testified that this statement is not true. In fact, since January 2016 he has been actively job searching (going to interviews; resumes) and he was unemployed until about two months ago. The Claimant testified that he did not go to school. In the summer (June/July) of 2015 he had a discussion with his boss who was encouraging him to go to school because he was a young man. He told him that he was considering going in September 2016. The Claimant stated that this is why he finds this all very upsetting.

[21] The Claimant was referred to the Plant Manager's statement in GD3-20; the Claimant testified that the employer is lying and that "absolutely nothing is true". The Claimant testified that this shows how much "they" were "racist on me" at this job. The supervisor targeted him; was "on his neck" and gave him the hardest jobs but he never complained and showed respect. The Claimant testified that he complained to the "big boss" about how "they", the Plant Manager (S. M.) and the supervisor (J., treated him. They prepared a letter that both he and the Plant Manager signed which shows that this was an issue between him and them. The Plant Manager is not on the floor so he relied on what the supervisor said to him. Claimant testified that it was the Plant Manager that provided the statements to the Commission and created all these problems for him. The Member provided the Claimant with the opportunity to send in this letter.

[22] The Claimant testified that he has no problem with transportation because he has his own vehicle. In fact, he even gave another person a ride. He testified that he actually had two cars (one for winter) so transportation was not a problem. He advised the Commission that this statement from the employer is not true. The Claimant stated that the Commission agent with whom he spoke was speaking in French and he had a hard time understanding what she said because of her Quebec accent (he's African). Her French is different. What he said and what she documented is not correct.

[23] The Claimant was provided the opportunity to send in the (a) medical note he provided to his employer at the time and (b) the letter to which he referred and wants to provide regarding the issues he had with the Plant Manager/supervisor.

[24] On December 12, 2016, the Claimant provided the Tribunal with a letter signed by both the Plant Manager and the Claimant on January 8, 2015. It documents three incidents (May 2014, August 2014 and January 7, 2015) where the Claimant put forth a complaint to the Plant Manager about the supervisor's (Jason) treatment of him. It notes that the Claimant feels that he was being targeted by the supervisor possibly due to racial discrimination (GD5).

[25] The Claimant noted on this exhibit that he is unable to find a copy of the doctor's note.

SUBMISSIONS

[26] The Claimant submitted that he did not voluntarily leave his employment. The Claimant submitted that the employer's statements are false - he did not leave to go to school or to accept other employment and he did not have transportation problems. He submitted that while he was off on an approved two-week medical leave, he was replaced after one week by another employee. The Plant Manager relied on the supervisor, who racially bias against him (as GD5 shows) and provided statements to the Commission. The Claimant submitted that the Commission agent, with whom he initially spoke, had a different French accent that he did not fully understand. The Claimant submitted he does not understand why couldn't go back to work/there was a separation of employment.

[27] The Commission submitted that the Claimant changed his initial reasons for leaving his employment (that he left to go to school and because of transportation issues) after he was

denied benefits for those reasons. The Commission found the employer's and the Claimant's initial reasons more credible. It found that given his initial reasons, the Claimant did not have just cause for leaving his employment because he failed to exhaust all reasonable alternatives prior to leaving. The Commission submitted that the Claimant could have stayed employed and tried to schedule his courses around his hours of work. Failing this, the Commission submitted that the Claimant could have secured other suitable employment that could accommodate his course schedule prior to quitting. Further, the Claimant could have discussed his transportation issues with the employer who may have been able to arrange transportation for him or he could have secured employment close to home prior to quitting.

ANALYSIS

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

[29] Sections 29 and 30 of the EI Act stipulate that a claimant who voluntarily leaves his/her employment is disqualified from receiving any benefits unless he/she can establish 'just cause' for leaving.

[30] The Member recognizes that it has been a well-established principle that just cause exists where, having regard to all the circumstances, the Claimant was left with no reasonable alternative to leaving pursuant to subsection 29(c) of the EI Act (Patel A-274-09, Bell A-450-95, Landry A-1210-92, Astronomo A-141-97, Tanguay A-1458-84).

[31] The Member first considered that it is incumbent of the Commission to show that the Claimant left his employment voluntarily. The onus of proof then shifts to the Claimant to show that he left his employment for just cause (Green 2012 FCA 313, White A-381-10, Patel A-274-09). In this case, the Member finds that, for the reasons to follow, the Commission did not meet the initial onus of showing that the Claimant left his employment voluntarily.

[32] The Commission was met with contradictory reasons for the separation of employment. On the one hand, the employer indicated on the ROE and stated to the Commission that the Claimant quit his employment in order to go to school and because he had another position. The Claimant, on the other hand, indicated on his application and initially advised the Commission that he was on a leave without a specific return to work date

because he was going back to school on March 7, 2016 and because he had transportation problems. The Claimant subsequently advised the Commission that he did not quit his job. He was not working because while he was off work due to his asthma (paint) and back pain, the employer replaced him; not because he went/wanted to go school or had transportation problems.

[33] The Commission found the employer and the Claimant's initial statements to be more credible than the subsequent reasons/statements the Claimant provided after its initial decision to disqualify the Claimant from receiving benefits. The Commission justified its position by noting that (a) it is plausible that the Claimant changed his reasons for leaving because he was denied benefits for those reasons and (b) he did not initially mention that he was off work because of back injury and that he had been replaced. In its submissions to the Tribunal, the author also noted that she further questioned the Claimant's credibility, because she was the agent to whom the Claimant spoke on May 4, 2016 (GD3-21) and she denies telling the Claimant that he was disqualified from receiving benefits because he was young and that he should find a job instead of relying on employment insurance benefits (GD2-4, GD3-21 and GD4-3). The Commission did not provide any justification for why it found the employer more credible.

[34] The Member acknowledges that the Commission's consideration is supported by "an abundant and uniform case law [that] has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision." (CUB 25154).

[35] The Member also acknowledges that the Federal Court has since confirmed that the Tribunal must not overlook or ignore a claimant's initial and spontaneous statements, as this can raise significant credibility issues. It noted that "... the Board of Referees had the role and the duty to assess to then make a finding and, above all, justify it" (Bellefleur 2008 FCA 13).

[36] In the case at hand, the Member considered, and did not overlook the Claimant's initial statement to the Commission (GD3-14) however, unlike the Commission; the

Member did not place more (or all the) weight on that one initial statement for a couple of reason.

[37] First, the Member considered the Claimant's entire initial spontaneous statement noting that the Claimant did not only provide the reasons why he is not working but he also maintained that he was still an employee and that he was on a period of leave with an unspecified return to work date (GD3-14). This part of the statement is supported by the prior application form (GD3- 6), subsequent submissions (GD3-18) and his direct testimony that he did not quit and that he was on a medical leave when the employer replaced him. The Member finds that the Claimant never wavered from this position. The Commission placed more weight on only the part of the Claimant's initial statement to the Commission that he wasn't working because of transportation issues and because he started school. It concluded that this meant that he voluntarily left his employment finding the employer's statement more credible. The Member however could not ignore that the Claimant had also initially stated that he was on a leave and still employed.

[38] Second, the Claimant provided direct testimony that brought into question the accuracy of the transcript of his initial statement or discussion (GD3-14). The Claimant testified that when he first spoke to the Commission, the agent spoke to him in French. He testified that he had a hard time understanding the agent's Quebec accent and her French was different. He stated that what the agent documented is not correct. It is not what he said. The Member finds the Claimant's testimony plausible and notes that the transcript is somewhat unclear. The Member placed more weight therefore on the direct testimony that there was miscommunication than on this indirect, hearsay evidence of the Commission.

[39] Further, the Member is obligated to consider and analyze all the evidence before the Tribunal. In this case, the Member noted that the only evidence provided to the Commission prior to the hearing was one initial and one subsequent statement from each of the Claimant and the employer. No other evidence was provided to support or refute either the Claimant's or employer's positions. The Member, on the other hand, also had the direct (testimonial) and documentary (GD5) evidence provided at the hearing to consider.

[40] The Claimant testified that he did not voluntarily leave his employment. He testified that he doesn't really understand why there was a separation of employment and feels that there was a misunderstanding between him, the supervisor and his boss. He testified that he provided the employer with a medical note and that he was approved to be off for two weeks. When he returned, he was advised by the employer that they expected him to be off for only one week, so they replaced him. He testified that despite repeatedly following-up with the employer, he was advised that they could not dismiss his replacement; it was slow in January so they will call him back for February or March. The Claimant testified that he provided his employer with a doctor's note but did not have a copy to provide the Tribunal (GD5). The Member notes however, that when directly confronted with the employer's statements to the Commission (GD3-15 and GD3-20), the Claimant adamantly insisted that the employer's statement that there was never a back injury was untrue. The Member finds that the Claimant's direct testimony rebuts the Commission's indirect evidence from the employer.

[41] Further, the Claimant testified that the Plant Manager's statements to the Commission are untrue and false. To support his position and to place doubt on the credibility of the employer's statements to the Commission, the Claimant provided documentary evidence that shows his prior issues with the supervisor who he felt targeted and was racially biased against him (GD5). The Claimant noted that the Plant Manager relied on the supervisor to provide the statements to the Commission. The Claimant also testified that he did not state to the Commission that he had problems with transportation to work; he had his own car and actually provided a colleague a ride. The Member finds that the Claimant's testimony is supported by the employer's statement to the Commission that he did not mention any transportation problems to them (GD3-15). The Claimant's testimony also refutes the double hearsay statements of the employer to the Commission that Claimant told them, he quit to both, go to school, and to accept new employment. The Claimant acknowledged that he did speak to his employer about going to school several months prior (June 2015) because his employer was encouraging him to go to school. He testified that although he considered it, he argued that he couldn't start anything until the summer or fall of 2016. Regarding new employment, the Claimant testified that this statement is untrue and that in fact, he remained unemployed until the fall of 2016.

[42] The Member finds that the Claimant was forthcoming, genuine and adamant in his position. The Member finds that the evidence does not support a finding that the employer was more credible. The Member therefore, placed more weight on the Claimant's direct testimony than on the indirect, unsupported statements of the employer to the Commission. As a result, the Member was unable to come to the same conclusion as the Commission that the reason for separation was that of the Claimant voluntarily leaving his employment.

[43] Finally, the Supreme Court of Canada has confirmed that the purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work (Gagnon [1988] SCR 29). In other words, sections 29 and 30 of the EI Act provide an exception to the general rule that insured individuals that are not deliberately unemployed are entitled to benefits (Goulet A-358-83). In this case, the evidence shows that the Claimant was replaced while he was on medical leave, and that there was no work available upon his return. The Claimant followed-up repeatedly thereafter without success. The employer had stated to the Commission that if the Claimant's alleged new employment didn't work out, they would hire him back if they had work available (GD3-15). The Claimant also testified that "If they called me right now ... I would go to work today!". For all the reasons provided, the Member finds that the Claimant did not deliberately place himself in an unemployment situation.

[44] The Member, having regard to all the circumstances, finds that the Commission did not meet the initial onus of showing that the Claimant left his employment voluntarily. The Claimant therefore should not be disqualified from receiving benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[45] The appeal is allowed.

Eleni Palantzas
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.