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

Citation: *B. B. v Canada Employment Insurance Commission*, 2017 SSTGDEI 196

Tribunal File Number: GE-16-3233

BETWEEN:

B. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christopher Pike

HEARD ON: March 27, 2017

DATE OF DECISION: April 5, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant attended the hearing by teleconference. The Canada Employment Insurance Commission (Commission) received notice of the hearing electronically on January 31, 2017 but did not attend. The Tribunal is satisfied that the Commission received notice of hearing and proceeded in their absence pursuant to subsection 12(1) of the *Social Security Tribunal Regulations*.

INTRODUCTION

[2] The Appellant left his employment on February 19, 2014. On April 13, 2016 the Commission disqualified the Appellant from receiving benefits because they determined he had voluntarily left his employment without just cause. The Appellant requested reconsideration of this decision on May 25, 2016. The Commission informed the Appellant that they maintained their original decision on June 27, 2016. The Tribunal accepted the Appellant's appeal on August 23, 2016.

[3] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issue under appeal.

b) The fact that credibility is not anticipated to be a prevailing issue.

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

d) The information in the 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.

ISSUE

[4] The Appellant is appealing the Commission's decision disqualifying him from receiving benefits pursuant to sections 29 and 30 of the Act because he voluntarily left his employment without just cause.

EVIDENCE

[5] The Appellant worked for the Ontario Public Service. He was laid off in August 2011 and given the right to apply on internal competitions for the following two years. He was successful in securing new employment with the Ontario Public Service in May 2013.

[6] His August 2011 lay off was the subject of a grievance under his collective agreement. In February 2014, his grievance was resolved by an agreement entered into by him, the Government of Ontario and his bargaining agent. His bargaining agent represented him during the negotiations which led to the resolution of the grievance. The agreement provided for certain amounts to be paid as salary, retirement benefits, and accrued vacation pay. As well, the agreement provided that the Appellant would retire effective the day the agreement was entered into and prohibited him from applying for employment with the Ontario Public service in the future.

[7] The Appellant testified that the term of the agreement requiring him to retire and barring his re-employment was introduced by his employer at the end of the negotiations leading to the agreement. He stated that he was given virtually no time to consider this term of the agreement before he was expected to sign it. He testified that this term of the agreement was presented to him by his employer as a "take it or leave it" proposition. He stated he felt pressured into accepting it by his employer. Upon signing the agreement, he was permitted to return to his workplace long enough to collect his personal belongings and leave.

[8] The evidentiary record does not show the Appellant's bargaining agent as having registered an objection to this term of the agreement or as having supported it.

[9] The Appellant noted that the payments made to him as salary were treated as insurable earnings.

[10] The Appellant acknowledged that he did have the alternative to "walk away" from the agreement. He stated that if he did so, he would have remained in the employment he then held. He testified that he had no idea of the long-term prospects for that employment and was not given adequate time to weigh his options. He also noted that if he had refused to accept this term of the agreement, he stood to lose the substantial payment provided for in the agreement and the benefit of the work he had put into pursuing his grievance.

[11] The Appellant described the agreement as imposing mandatory retirement on him when no such requirement existed in the Ontario Public Service at that time.

[12] The Appellant also stated that he did not believe the requirement to relinquish employment and not return was a common feature of similar agreements.

SUBMISSIONS

[13] The Appellant submitted that he was compelled to quit his employment by the imposition of a mandatory retirement condition in the agreement he entered to resolve his grievance. He asserted that he signed the agreement under duress from his employer because he feared losing the financial benefits of the agreement if he refused to accept all terms.

[14] The Appellant was emphatic in asserting that his employment was terminated involuntarily from his point of view.

[15] The Commission submitted that they concluded that the Appellant did not have "just cause" for leaving his employment in February 2014 because he failed to exhaust all reasonable alternatives prior to leaving. The asserted that considering all of the evidence, the Appellant had the reasonable alternative remaining employed if he did not agree to the terms of the settlement offered to him.

ANALYSIS

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

[17] A claimant who voluntarily leaves his or her employment without "just cause" is disqualified from receiving benefits by subsection 30(1) of the Act. This is in keeping with the

purpose of the Act, which is to provide benefits to individuals who have been involuntarily separated from employment and are without work (*Gagnon*, A-1059-84).

[18] Section 29 of the Act provides that "just cause" for voluntarily leaving one's employment exists if a claimant had no reasonable alternative to leaving, having regard to all the circumstances. The section also sets out a non-exhaustive list of circumstances which may amount to just cause. The analysis of a voluntary leaving case requires two phases.

[19] In the first phase, the Commission must satisfy the Tribunal that the Appellant voluntarily left his employment (*Green v. Attorney General of Canada*, 2012 FCA 313). If they do so, the burden is then on the Appellant in the second phase of the analysis to prove he had no reasonable alternative to leaving (*Tanguay*, A-1458-84).

[20] Justice Sexton explained voluntarily leaving as follows in *Attorney General of Canada v. Peace* 2004 FCA 56, at paragraph 15

> … Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?

[21] In this case, the Appellant testified that during the negotiation of an agreement to settle a grievance, his employer unexpectedly and at the last minute introduced a term to the agreement requiring him to relinquish his employment. He asserted that he had no choice but to accept the agreement and retire because he was pressured by his employer to do so. However, the Appellant did acknowledge that if he was willing to give up the payments provided for in the agreement, which he asserted was no real choice at all, he could have stayed in his employment.

[22] The Tribunal notes that the Appellant believed he was under duress in making his decision to retire. However, the evidence establishes, and the Tribunal finds, that the Appellant had the choice, unattractive as it was, to reject the agreement and remain employed. The Tribunal therefore finds that by retiring as provided for in the agreement he entered, the Appellant voluntary left his employment as contemplated by the Act (*Canada (Attorney General) v. Peace* 2004 FCA 56).

[23] The second question that the Tribunal must answer is whether the Appellant had "just cause" for leaving his employment. The Appellant asserted that his employer put undue pressure on him to quit his employment by adding the requirement that he retire to this agreement offered to him. That may be so, but the Appellant has the onus to prove he had no reasonable alternative but quitting.

[24] Establishing "just cause" for leaving employment under paragraph 29(c) requires an examination of "whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment" (*MacNeil v. Canada* (*Employment Insurance Commission*), 2009 FCA 306). Paragraph 29(c) also sets out a non-exhaustive list of circumstances which may amount to just cause, including:

> (xiii) undue pressure by an employer on the claimant to leave

[25] "Just cause," as used in paragraph 29(c) of the Act was interpreted by the Federal Court of Appeal in *Tanguay* (A-1458-84) as follows:

> In the context in which they are used these words are not synonymous with 'reason' or 'motive'. An employee who has won a lottery or inherited a fortune may have an excellent reason for leaving his employment: he does not thereby have just cause within the meaning of s 41(1). This subsection is an important provision in an Act which creates a system of insurance against unemployment, and its language must be interpreted in accordance with the duty that ordinarily applies to any insured, not to deliberately cause the risk to occur. To be more precise, I would say that an employee who has voluntarily left his employment and has not found another has deliberately placed himself in a situation which enables him to compel third parties to pay him unemployment insurance benefits. <u>He is only justified in acting in this way if, at the time he left, circumstances existed which excused him from thus taking the risk of causing others to bear the burden of his unemployment.</u>
>
> (emphasis added)

[26] While the Tribunal does not wish to equate the payments to which the Appellant was entitled under the agreement he entered with lottery winnings or an inheritance, this passage from *Tanguay* illustrates the point that a claimant who makes a choice to leave employment because of a change in his or her economic circumstances may have "good cause" or reason or motive to leave employment but not be able to establish "just cause" under section 29 of the Act.

[27] A situation more closely analogous to the Appellant's arose in *Quinn* (A-175-96), in which a nurse, upon hearing during the course of collective bargaining that her employer was threatening to remove severance pay from her union's new contract, chose to resign and claim severance pay rather than risk losing the substantial severance payment provided for in the existing contract. The Court described the nurse's action in resigning to secure her severance payment as understandable, but found doing so did not establish "just cause" for quitting her employment.

[28] The *Quinn* decision, which is binding on this Tribunal, stands for the proposition that a claimant who chooses to claim a lump sum payment instead of remaining employed is not in a position to prove "just cause" for quitting his or her employment. The Tribunal also notes that such a finding is consistent with cases like *Tanguay* which hold that a claimant may not to provoke the risk unemployment or cause it to become a certainty.

[29] The Appellant argued he had "just cause" to leave his employment because of the undue pressure to retire placed on him by his employer. The only evidence of undue pressure being placed on him came from the timing of the insertion of the retirement requirement and the financial consequences of refusing to accept it. The Tribunal acknowledges that the Appellant was put in the position of having to make a difficult and unattractive choice in a short time, but the Tribunal finds this circumstance does not amount to undue pressure as contemplated by subsection 29(c) of the Act.

[30] The reasons the Appellant offered in his testimony are sensible, logical reasons to accept the terms of the agreement and retire instead remaining employed. As such, they demonstrate "good cause" as discussed in the jurisprudence which binds this Tribunal, but these reasons do not constitute "just cause". The Tribunal finds that the Appellant has not met his onus of establishing that he had "just cause" for voluntarily leaving his employment.

CONCLUSION

[31] The appeal is dismissed.

Christopher Pike
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.