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

[TRANSLATION]

Citation: *V. D. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 46

Tribunal File Number: GE-16-3045

BETWEEN:

V. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: March 23, 2017

DATE OF DECISION: April 4, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant and his representative, Yvan Bousquet, were present at the hearing, which was held in person.

INTRODUCTION

[1] The Appellant filed an initial claim for Employment Insurance benefits on March 17, 2013.

[2] On May 26, 2016, following a reconsideration of the claim, the Employment Insurance Commission of Canada (Commission) determined that the Appellant was disqualified from receiving Employment Insurance benefits due to voluntarily leaving X without just cause. The Commission also levied a warning in the form of penalty against the Appellant for having knowingly made a false or misleading representation.

[3] On August 2, 2016, after a reconsideration of the decision, the Commission upheld its initial decision.

[4] An appeal of the decision reconsideration was filed at the Social Security Tribunal on August 10, 2016.

[5] This appeal was heard in-person for the following reasons:

a) the fact that credibility may be a determinative factor

b) the information on file, including the need for additional information

c) the fact that the Appellant is represented or other parties are represented

d) the availability of videoconferencing where the Appellant resides

ISSUES

[6] The Tribunal must determine whether the Commission was able proceed with the reconsideration of the Appellant's claim in a 72-month time frame, pursuant to subsection 52(5) of the *Employment Insurance Act* (Act).

[7] The Tribunal must determine whether the Appellant must be disqualified from receiving Employment Insurance benefits due to leaving voluntarily without just cause, pursuant to sections 29 and 30 of the Act.

[8] The Tribunal must determine whether the Commission was able levy a warning against the Appellant in the form of a non-monetary penalty for having knowingly made a false or misleading representation, pursuant to subsection 38(1) and section 41.1 of the Act.

EVIDENCE

In the docket

[9] The Appellant's initial claim for Employment Insurance benefits mentions a termination of employment due to a "shortage of work." (GD3-3 to 13)

[10] The Appellant's Record of Employment completed on May 2, 2013, mentions a "Shortage of Work/End of Contact or Season" as reason for issuing the Record. (GD3-14)

[11] In a conversation between the Appellant and the Commission on April 28, 2016, the Appellant mentioned to the Commission that he had left X, because he wanted to work for himself with a friend. (GD3-15)

[12] In a second conversation between the Appellant and the Commission on April 28, 2016, the Appellant claimed to have left X to "take a break." The employer, not wanting to cause the Appellant to lose unemployment benefits, allegedly wrote "shortage of work" on the Record of Employment. While the Appellant was unemployed, a friend allegedly approached him to start an AFPAC business, which never materialized. (GD3-16)

[13] In a conversation between the Appellant and the employer, M. P., on May 4, 2016, the employer confirmed that the Appellant had quit his job at X. It is the employer who allegedly made the decision to write “shortage of work” on the Record of Employment, in order to avoid harming the Appellant by causing him to lose Employment Insurance benefits. (GD3-18)

[14] On May 26, 2016, the Commission notified the Appellant of the reconsideration of his claim dating from March 17, 2013. Due to false or misleading representations or statements that were made in the docket, the Commission used the provisions of the law that enable it to reconsider a claim within a 72-month time frame. (GD3-22)

[15] On May 26, 2016, the Commission determined that the Appellant is disqualified from receiving Employment Insurance benefits due to voluntarily leaving the X company without just cause. A warning in the form of a penalty was levied against the Appellant due to a false statement made knowingly. (GD3-20 to 21)

[16] The Appellant’s disqualification from receiving Employment Insurance benefits caused an overpayment of $14,472. (GD3-24)

[17] On July 21, 2016, in his application for reconsideration of a decision, the Appellant recounted the following events (GD3-32 and 33):

a) The Appellant was hired by the X as a first-year plumber.

b) He was in conflict with his employer, because the employer was asking him to work alone on the construction sites, which is prohibited, because a first-year plumber must always be accompanied by a “buddy” plumber. He discussed the matter several times with his employer, who “didn’t care” and said there was no danger. The employer allegedly threatened to dismiss the Appellant if he did not do what was asked of him.

c) After several discussions, the employer notified the Appellant that he was replacing him with an employee who had his own “buddy” cards.

d) He talked to his employer so that the employer did not make “trouble” for him by writing that he had to dismiss him.

[18] On August 2, following the decision reconsideration, the Commission upheld its initial decision. (GD3-35, 36)

At the hearing

[19] The Appellant essentially reiterated the events submitted in his written statement presented at the time of the application for reconsideration of the decision. (GD3-32, 33)

[20] The employer knew upon the Appellant's hiring that he did not have his own "buddy" plumber cards and was therefore unfit to work alone on a construction site, but the employer allegedly hired him in spite of everything.

[21] The Appellant allegedly protested several times to his supervisor, because he was sent to work alone on the construction sites even though it was prohibited by the rules of the *Commission de la construction du Québec* (CCQ) ([translation] "Quebec Construction Commission"). During these discussions, the supervisor allegedly forced the Appellant to continue working alone on the construction sites and allegedly asked him to take an exam at home in order to verify his competency.

[22] One Friday, at the end of the day, the Appellant's supervisor allegedly summoned him into his office to apprise him that he had been replaced by an employee with his own buddy cards.

[23] There allegedly was a discussion with his supervisor in order to ensure that the employer specified "shortage of work" on the Record of Employment. This conversation allegedly took place because the Appellant and his supervisor were on bad terms and the supervisor was threatening the Appellant with making him lose his unemployment.

PARTIES' ARGUMENTS

The Appellant presented the following arguments

[24] He never made the statements such as those transcribed in the records of his conversations with the Commission. He had to answer the questions in rapid succession that were more than confirmations, and he was contacted when he was at work for his new employer and in the presence of his new employer.

[25] He was not on good terms with his employer for various reasons, notably the fact that he was asked to work alone on construction sites when he was not fit to do so legally.

[26] He did not leave voluntarily; he was pushed out the door and replaced with another employee possessing superior qualifications to his, namely his own "buddy" plumber cards.

[27] He never knowingly made a false statement. He simply indicated on his Employment Insurance claim the ground that he believed to be the most appropriate, given the circumstances.

[28] His reason for ending the employment was not taking a "break." He allegedly used that word before the Commission because he wanted to take a "break" after his termination of employment due to the anguish caused by his employer.

[29] He was approached by a friend who wanted to start his own business after the Appellant's termination of employment.

The Respondent made the following submissions

[30] The Appellant testified to the Commission investigator that he had quit his job voluntarily. This version of the facts was confirmed by the employer.

[31] The Appellant allegedly quit because he wanted to start his own business and take a break; he allegedly also mentioned a conflict with the employer about tasks to be carried out. Whether the Appellant left voluntarily due to a personal choice or because of a conflict with his employer, he did not show that, in his case, leaving his employment was the only reasonable alternative.

[32] The Appellant created his own situation of unemployment.

[33] The Appellant knowingly made misleading representations by indicating at the time of the filing of his claim that he had been laid off for a shortage of work, when he had in fact quit his job.

ANALYSIS

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

Reconsideration time frames

[36] This issue is not directly addressed by the Commission in its reconsideration of the decision or in its arguments to the Tribunal. However, the Appellant mentioned specifically in his written application for reconsideration of a decision and at the hearing that he wanted to contest the 72-month reconsideration time frame established by the Commission. The Tribunal will therefore rule on this issue.

[37] Subsection 52(1) of the Act states that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

[38] With respect to that claim, subsection 52(5) of the Act indicates that the Commission has a 72-month time frame to reconsider a benefit claim if it feels that a false or misleading representation or statement was made.

[39] In *Canada (Attorney General) v. Dussault*, 2003 FCA 372, the Federal Court of Appeal confirmed the principle that the Commission does not have to prove that a false or misleading representation was made knowingly or that it was legitimized by a penalty in order to rely on subsection 52(5). According to that decision, the mere existence or presence of a false or misleading representation suffices, to the degree that the Commission is reasonably satisfied with this fact, to proceed with a reconsideration within a 72-month time frame without it being necessary to seek the intention of the person making the representation.

[40] In this docket, the Commission alleges that the Appellant wrote “shortage of work” on his initial claim for Employment Insurance benefits when in fact he had quit his job voluntarily.

[41] The Appellant mentions that it was not a matter of voluntary leaving but of a constructive dismissal.

[42] Whether the reason for the termination of employment was dismissal, involuntary leaving or voluntary leaving, it is established in reconsidering the evidence on file that the Appellant was not laid off due to shortage of work; this was incidentally confirmed by the Appellant at the hearing. As a result, the "shortage of work" stated by the Appellant on his claim for Employment Insurance benefits objectively constitutes a false statement.

[43] As mentioned in *Dussault*, the mere presence of a false or misleading representation in the docket suffices to prolong the 72-month reconsideration time frame without it being necessary to show that the false representation was made knowingly or that it was legitimized by a penalty, and without it being necessary to rule on the intention of the person making the representation.

[44] With the evidence in the docket showing a false or misleading representation by the Appellant, the Tribunal is of the opinion that the Commission was able reconsider the Appellant's claim within a 72-month time frame, pursuant to subsection 52(2) of the Act.

Voluntary leaving

[45] Section 30 of the *Employment Insurance Act* (Act) provides for a disqualification from receiving Employment Insurance benefits if a claimant loses their employment due to their own misconduct or if they leave that employment voluntarily without just cause. Paragraph 29(*c*) provides that a claimant will have just cause for voluntarily leaving their employment if, given all the circumstances, leaving was the only reasonable alternative in their case. A list of specific circumstances justifying leaving voluntarily is provided in paragraph 29(*c*).

[46] It is incumbent upon the Commission to prove that the leaving was voluntary and upon the Appellant to show that he had just cause to leave his employment. (*Green v. Canada* (*Attorney General*), 2012 FCA 313)

[47] Therefore, as a first step and before ruling on the issue of just cause, the Tribunal must first determine whether there was, in this docket, a situation of voluntary leaving.

[48] The facts in the docket show two contradictory versions with respect to the issue of voluntary leaving.

[49] Firstly, there is the Appellant's version such as reported by the Commission through two records of telephone conversations over the course of April 28, 2016. In these conversations, we learn that the Appellant quit X, because he wanted to start his own business with a friend. A little later, the Appellant says that he left to take a "break" and that, after he had left the company, his friend approached him to see whether he wanted to start his own business.

[50] The Appellant's version presented at the time of the reconsideration of the decision and at the hearing is different. In that version, we learn that the Appellant did not want to leave X. He was allegedly forced to leave after having let his employer know of his misgivings about working alone on construction sites, which the employer asked him to do, even though he had not reached the necessary level of "buddy" plumber. This situation allegedly created a conflict between the Appellant and his employer, and the Appellant was then allegedly notified that he had been replaced by a better-qualified employee with his own "buddy" cards.

[51] The Tribunal is very familiar with the decision by the Federal Court of Appeal in *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, establishing the principle that more weight must be given to initial and spontaneous statements than to subsequent statements made in response to an unfavourable decision by the Commission.

[52] However, the Appellant's initial and spontaneous statements lose a portion of their weight when they are recontextualized:

a) According to the Appellant, those statements were obtained while the Appellant was at work, in a vehicle and in the company of his new employer. The Appellant mentioned that he therefore did not feel comfortable speaking openly with the Commission at that time.

b) The questions asked over the phone by the Commission concerned the unfolding of events dating back more than three years.

c) The Appellant mentioned on several occasions that the Commission asked questions in rapid succession and that he was directed toward certain answers. He confirms that he does not have the time to explain himself and that the answers he gave were possibly misunderstood or misrepresented by the Commission.

[53] For these reasons, the Tribunal is of the opinion that the Appellant's spontaneous and initial statements have a diminished weight.

[54] At the hearing, the Tribunal found the Appellant credible; he answered questions with assurance and never contradicted himself. He was able to provide a detailed and convincing explanation for the contradictions mentioned previously.

[55] In sum, for the reasons mentioned above, the Tribunal attributes a slightly greater weight to the Appellant's statements made at the reconsideration stage of the decision and at the hearing.

[56] Regarding the employer's version, its weight is limited by the fact that that the investigator "explained" to the employer the conversation that she had had with the Appellant a few days earlier and the answers that the Appellant had provided to her. This element possibly affected the employer's responses, especially since the issues concerned far-reaching events more than three years in the past. The record of conversations with the employer is sparsely detailed and the wording seems to indicate that the employer has confirmed only that the investigator's confirmations with respect to the circumstances of the Appellant's termination of employment. Furthermore, despite the contradictions in the docket, the Commission did not deem it necessary to obtain again the employer's version of facts during the administrative review of the decision.

[57] After having considered all the components, the Tribunal is of the opinion that the evidence tends to show that the Appellant did not resign or quit voluntarily but was pushed out the door by his employer, who wanted to replace him due to his misgivings about working alone on the construction sites and due to his lack of qualifications. The Appellant was allegedly forced to quit by placing himself before the evidence that he had been replaced by a better-qualified employee. This version of the facts is also supported by the employer's

statements, as the employer claimed to the Commission to have hired an employee other than the Appellant, because he needed a plumber who had his own “buddy” cards.

[58] As has been mentioned earlier, it is the Commission that must prove that the Appellant voluntarily left his employment. In the docket, the weight of the evidence tends to lean slightly in the Appellant’s favour by demonstrating more of a constructive dismissal or an involuntary leaving than a voluntary leaving.

[59] The Tribunal finds that it has not been shown that the Appellant voluntarily left the X company. The Appellant cannot be disqualified from receiving Employment Insurance benefits for that reason. With leaving voluntarily not having been shown, the Tribunal will not decide on the issue of just cause.

Warning in the form of a penalty

[60] Under subsection 38(1) of the Act, the Commission may levy a penalty against a claimant who knowingly made false or misleading representations at the time of a benefit claim or who provided information that they knew was false or misleading. It is incumbent upon the Commission to show that the claimant knowingly made a false or misleading representation. Once this evidence has been prepared, it is the Appellant who must explain why he provided inaccurate information.

[61] Section 40 of the Act provides that a penalty cannot be levied beyond a 36-month [*sic*] following the month in in which the act or omission occurred. Section 41.1 provides that the Commission may levy a warning as a penalty against the person who committed the act or omission. This warning can be levied within a 72-month time frame.

[62] In order to determine whether a false representation was made “knowingly,” the Tribunal must determine whether, according to the balance of probabilities, the Appellant had the subjective knowledge of the fact that he was making a false or misleading representation. (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 2006)

[63] The contents of the docket indicate that the Appellant himself allegedly indicated, on his initial Employment Insurance claim, a termination of employment due to a "shortage of work."

[64] The evidence previously considered and weighed tends to show that the Appellant left his job more under the guise of a constructive dismissal or an involuntary leaving than on a ground such as a shortage of work or voluntary leaving. In this context, stating that the employment ended due to a shortage of work objectively constitutes a false or misleading representation.

[65] The Tribunal must now determine whether this statement was made knowingly.

[66] The Appellant claimed to have indicated "shortage of work" on his initial claim, because he believed that it was, under the circumstances, the best thing to put down among the various choices of suggested answers. He merely indicated on the claim that he believed it to be the most appropriate, given that he did not consider his leave as voluntary or as a by-the-book dismissal.

[67] As already mentioned, the Tribunal finds the Appellant to be credible in his statements. The explanations provided by the Appellant during the reconsideration of the decision and at the hearing are plausible and tend to show that the Appellant did not have the subjective knowledge to make a false or misleading representation.

[68] In *Canada (Attorney General) v. Purcell*, A-694-94, the Federal Court of Appeal confirmed the principle that "[i]f, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection 33(1)."

[69] In following this principle, the Tribunal finds that the Appellant really did make a false or misleading representation in the context of his initial claim for Employment Insurance benefits, but that this representation was not made knowingly by the Appellant, because he was able to show that he did not know that his representation was false.

[70] A non-monetary penalty (warning) should not have been levied against the Appellant for the contraventions alleged by the Commission.

CONCLUSION

[71] With respect to the issue of the reconsideration time frame, the appeal is dismissed.

[72] With respect to the issue of voluntary leaving, the appeal is allowed.

[73] With respect to the issue of the levying of a warning in the form of a penalty, the appeal is allowed.

Yoan Marier
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 employment; and
>
> **(b)** the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) Concerning the "length of disqualification," subsection 30(2) of the Act states the following: 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, 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.

- **41.1 (1)** The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

  (2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.

- **52 (1)** Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

  (2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

  (3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

  (a) the amount calculated is repayable under section 43; and

  (b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

  (4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

  (5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.