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

Citation: *D. G. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 51

Tribunal File Number: GE-16-3861

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: March 14, 2017

DATE OF DECISION: April 18, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. G., Appellant

P. G., Witness

INTRODUCTION

[1] The Appellant applied for regular employment insurance benefits (EI) on April 28, 2016 after she stopped working with 1929811 Ontario Inc., doing business as Watershed Car & Truck Stop (the Employer) on April 27, 2016. A benefit period was established effective May 1, 2016, however, the Respondent determined that the Appellant had voluntarily left her employment with the Employer without just cause, and imposed a disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[2] The Appellant requested a reconsideration of the Respondent's decision, and the Respondent maintained its initial decision. The Appellant has now appealed the reconsideration decision to the Tribunal.

[3] The Tribunal decided to hear the appeal by way of teleconference hearing after considering:

a) the complexity of the issue under appeal;

b) that the Appellant was expected to be the only party in attendance; and

c) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as permitted by the circumstances and the considerations of fairness and natural justice.

ISSUE

[4] The issue under appeal is whether the Appellant voluntarily left her employment with the Employer without just cause.

EVIDENCE

[5] The Appellant indicated that she started working for the Employer as a cleaner in October 2014. In early spring 2015 she was laid off, but never received a Record of Employment (ROE).

[6] Later that spring, one of the waitresses who worked in the restaurant hurt her foot and the Appellant replaced this waitress while she was on sick leave.

[7] In January 2016 a meeting was called with all of the staff. She was not invited to the meeting. She worked at the restaurant during the meeting time. She understood that the meeting was to tell the employees that there would be a new manager (manager). The Appellant did not hear or understand that the manager would later be purchasing the restaurant.

[8] On February 22, 2016 the Appellant was walking past the manager and the office manager and the manager handed her a completed and signed a customer service comment card. The card (GD2-8) read as follows:

> Server's name: D. G.
> Quality of food – Very Good
> Cleanliness –Very Good
> Quality of Service – Poor
> Friendliness of Staff- Poor
> Speed of Service – Poor
> Appearance of Staff – the manager created his own box below Poor and checked it off
> Value for Money – Average
> Restaurant design – Very Good
> Customer Comments/Suggestions: You suck.

[9] The Appellant indicated that she felt humiliated and degraded. After her shift the manager went to her house; he said he was sorry and that it was a joke. She indicated that she did not consider this to be a joke and was very upset about it.

[10] Sometime in March 2016 the Appellant found out that the manager was going to purchase the restaurant.

[11] In April 2016 (GD3-25) the Appellant received a letter of termination dated March 30, 2016 from the Employer. It stated that as a result of a sale to new owners the Appellant's employment would be terminated effective April 27, 2016. The letter thanked the Appellant for her services and wished her well in the future. It did not indicate that she had any employment opportunities with the new owners.

[12] The waitress that the Appellant had been replacing returned to work. At first she replaced a cook. Around April 20-23, 2016, she advised the Appellant that she was taking back her waitressing shifts (GD3-25). The Appellant indicated that no one from management told her that the waitress was returning and there was no discussion about her taking back her shifts.

[13] The Respondent's evidence at GD3-17 indicates that an agent spoke with the office manager on June 22, 2016. The notes indicate that:

a) it was the Employer's "understanding" that all employees were aware that they could keep their jobs;

b) the Appellant approached the office manager and said she was going to take the layoff;

c) the Employer clarified to the Appellant that she was not terminated and there was no layoff situation and that her job would continue;

d) the Employer indicated that the Appellant was informed that she was not let go due to a shortage of work but the ROE's were being issued to show change of ownership;

e) the Employer could not recall the exact date of the conversation with the Appellant;

f) no formal written offer was given to any employee but everyone was given verbal offers and all employees are still working except for the Appellant.

[14] The Respondent's evidence at GD3-18 indicates that an agent spoke with the manager's wife (who was also a co-owner) on June 22, 2016. The notes state that the Appellant approached the manager and asked to be laid off but the manager made it clear to the Appellant that there would be no layoffs because they were in need of staff.

[15] At the hearing the Appellant stated that she has never had a conversation with the manager's wife/co-owner.

[16] The Respondent's notes indicate that when the Appellant was asked about having conversations about her employment, the Appellant indicated that no one advised her that she could continue working.

[17] At the hearing the Appellant indicated that she did not have conversations with the Employer about being laid off and did not have the conversations as indicated by the Respondent's notes. She stated that she does not know what job could have been offered her because the waitress she had been replacing took her waitressing shifts.

[18] The Respondent's notes of a conversation with the Appellant on June 22, 2016 indicate that the Appellant stated that she thought she was the only one terminated because she was originally hired to replace a waitress who went on leave and the waitress had returned two weeks prior to the termination letter. She thought the return of the waitress and the new ownership was the reason for the termination.

[19] In a note dated July 5, 2016 the Appellant wrote that she had just learned that the manager offered jobs to the other waitresses weeks before they actually purchased the business. She indicated that the waitress she had been replacing had since left the Employer and the position was filled without offering it to her. She also indicated that one other employee was not offered a job and she, as well as the Appellant, had not received their ROE's as of the date of that letter.

[20] The Respondent's notes of a conversation with the Appellant on September 23, 2016 indicate that the Appellant stated that no one ever offered her a job; she received a letter of termination and no offer of employment, written or verbal. She stated that she did not recall any discussions with the Employer about a layoff. The Respondent's notes state that "She didn't feel she had to "suck ass" to keep a job".

[21] The Appellant stated that she is over 60 years old; she has never refused work and has always taken whatever work is available. She stated that she lives in a very small place and if

the Employer had offered her a job she would have taken it because of the limited number of businesses where she lives.

[22] At the hearing she stated that she believed she was fired because of the letter of termination. She explained that when she picked up her letter of termination it was the only one in the box.

[23] On her application for benefits the Appellant indicated that she was no longer working because of a shortage of work.

SUBMISSIONS

[24] The Appellant submitted that she did not quit her position with the Employer. She stated that her position was terminated as per the letter of termination. She submitted that she was not offered a position with the new owners.

[25] The Appellant submitted that the comment card is evidence that the manager never had any intention of hiring her.

[26] The Appellant submitted that her ROE (GD3-15) does not include the hours she accumulated doing the cleaning from October 2014 until May 2015. She submitted paystubs with respect to these hours.

[27] The Respondent submitted that pursuant to clause 29(b.1)(iii) voluntary leaving includes 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.

[28] The Respondent submitted that the Appellant did not have just cause for leaving her employment on April 27, 2016 because she failed to exhaust all reasonable alternatives prior to leaving, such as:

a) Continue working for the new owner until other employment was found; and

b) Confirming her status with the Employer to resolve the situation.

[29] The Respondent indicated that the Employer was found to be more credible and confirmed on two occasions that the Appellant was advised that she could have continued working. The Respondent also noted that the other staff continued to be employed.

[30] The Respondent stated that the Record of Employment was not an issue.

ANALYSIS

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

[32] There are two elements to the issue as to whether the Appellant voluntarily left her employment with the Employer without just cause. The first element is whether the Appellant voluntarily left her employment, and if so, we then turn our minds to whether the leaving was with just cause.

[33] With respect to the burden of proof in such matters, the burden is on the Respondent to prove that the leaving was *voluntary*, and only once that is established does the burden shift to the Appellant to demonstrate that she had *just cause* for leaving.

[34] The Federal Court of Appeal in (*Canada (Attorney General)* v. *Peace*, 2004 FCA 56 at paragraph 15 wrote:

> 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?

[35] The standard of proof is on a balance of probabilities. (*Canada (Attorney General)* v. *White*, 2011 FCA 190; *Canada (Attorney General)* v. *Imran*, 2008 FCA 17).

[36] Pursuant to paragraph 29 (b.1) of the EI Act voluntarily leaving an employment includes 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.

[37] The Appellant claims that she did not voluntarily leave her position. She stated that she was terminated by the letter of termination and not offered new employment. She stated that if

she had been offered to stay, she would have stayed because of the limited opportunities in the area. The Respondent's evidence is that she was entitled to stay with the Employer after the sale and refused to do so, asking for a lay off instead.

[38] The Tribunal found the Appellant's testimony to be credible because it was consistent with her various statements on file. The Appellant's evidence as to why she thought she was terminated has not changed. She received a letter of termination and the waitress she had been replacing had returned. On her application for benefits she stated that she was not working because of shortage of work. This is consistent with her understanding that she no longer had work because the other waitress had returned.

[39] The Appellant's testimony with respect to whether she was offered new employment or asked for a lay off is directly contradicted by the Respondent's evidence of the Employer's statements.

[40] The Tribunal places more weight on the Appellant's testimony than on the Respondent's notes of what the manager's wife and the office manager said because the Respondent's written notes are not direct evidence from the Employer. Further, the notes of statements from the manager's wife as to what her husband told the Appellant is found to be unreliable because she was only relaying what her husband told her. She did not indicate that she had any direct conversations with the Appellant. Further, the Appellant confirms that she had never had a conversation with the manager's wife.

[41] The Tribunal notes the wording of the Respondent's notes of the office manager's statements. It states that it was their "understanding" that all employees were aware that they could keep their jobs. The notes go on to state that everyone was given verbal offers. The Tribunal finds that these two statements are contradictory. If verbal offers were made to everyone, why would someone say that it was their "understanding" that all employees were aware that they could keep their jobs. For this reason, the Tribunal prefers the Appellant's evidence that she later found out that verbal offers had been made to the other employees, but not to her. This is direct testimony that has remained consistent over time.

[42] The Respondent's notes support the Appellant's testimony that no formal written offer was made, although a formal letter of termination was given.

[43] The Tribunal has considered all of the evidence before it and finds that it is more likely than not that the Appellant did not voluntarily leave her employment with the Employer for the following reasons:

a) Significant weight is placed on the comment card completed by the manager. Given this review of the Appellant's performance, which ranked the Appellant at poor or below, it is impossible to believe that the Employer had any intention of keeping the Appellant after the sale. The manager may have apologized but this does not change the fact that he completed the card and casually gave it to her during her shift, without conversation.

b) By being the only waitress not included in the January 2016 meeting, the Appellant was kept out of the loop with respect to the matters discussed at that time, which could have been the other staff was made aware that their employment would not be terminated.

c) For the reasons stated above, the Tribunal accepts the Appellant's evidence that she did not have any conversations with the Employer about being laid off.

d) She received a formal letter of termination.

e) The letter of termination wished her well in the future but did not indicate in any way that the new owners would be offering her employment.

f) The Tribunal finds that following termination, no job was offered to the Appellant, either formally or informally. The Tribunal accepts the Appellant's evidence in this regard. The evidence does not suggest that there was any sort of meeting where the Appellant was present that offers of employment were made.

g) The waitress the Appellant had been replacing had returned and had advised the Appellant that she would be taking her shifts back. Where the Appellant was not advised that this waitress was returning and was given a notice of termination, it makes sense to conclude that her termination was final.

h) The Appellant's comment that she did not think she had to "suck ass" to keep a job was given on September 23, 2016, months after she had been terminated. The Tribunal finds that this comment clearly indicates that the Appellant firmly believed that her employment had been terminated and no offer of employment had been extended. If an offer of employment had been extended, the need to beg to keep her job would not have been required. The Tribunal finds that this statement lends further credibility to her statement that she was not offered employment.

[44] Given these factors, the Tribunal finds that it is more likely than not that the Appellant did not have a choice to stay or to leave. She was given a letter of termination and she was not offered any other employment.

[45] Where the Appellant's employment was terminated and she was not offered to continue in the employment, subparagraph 29(b.1)(iii) does not apply. The Appellant did not refuse to continue in an employment because her employment was terminated. It cannot be said that she refused to continue in an employment after the business was transferred when the option or choice to stay was not available to her. She did not have a choice to stay or leave.

[46] The Tribunal acknowledges the Appellant's submission that she is missing insurable hours with respect to her cleaning work for the Employer. This is not the issue before the Tribunal and has not been considered. The matter of insurable hours is wholly within the jurisdiction of the Canada Revenue Agency as per section 90 of the EI Act and should she need assistance obtaining a Record of Employment there are avenues she can pursue with the Respondent.

[47] For the reasons set out above and after having considered and weighed all of the evidence on file, the Tribunal finds that the Respondent has not proven that it is more likely than not that the Appellant voluntarily left her employment. The Appellant is not disqualified from receiving benefits pursuant to subsection 30(1) of the EI Act.

CONCLUSION

[48] The appeal is allowed.

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

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.