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

Citation: *C. B. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 65

Tribunal File Number: GE-16-4132

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: April 27, 2017

DATE OF DECISION: May 8, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. C. B., the Appellant (claimant) attended the hearing

INTRODUCTION

[1] On April 16, 2016 the Appellant applied for regular employment insurance benefits. On June 27, 2016 the Canada Employment Insurance Commission (Commission) denied the Appellant regular benefits because it was determined he voluntarily left his employment without just cause. On July 28, 2016 the Appellant made a request for reconsideration. On September 20, 2016 the Commission maintained its original decision. The Appellant appealed that decision on November 8, 2016. On November 9, 2016 the *Social Security Tribunal of Canada* (Tribunal) notified the Appellant the appeal was incomplete and requested the missing information. On December 8, 2016 the Appellant provided the information, which was beyond the time limit set out in subsection 52(1) of the *Department* of *Employment and Social Development Act* (DESD Act). On February 23, 2017 the Tribunal allowed the extension of time to bring the appeal.

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

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

b) The fact that the appellant will be the only party in attendance.

c) The information in the file, including the need for additional information.

d) 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

[3] The Tribunal must determine whether a disqualification should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act) because the Appellant voluntarily left his employment without just cause

EVIDENCE

[4] On April 16, 2016 the Appellant completed an application for employment insurance regular benefits indicating he quit his employment to attend a course of instruction and completed the training questionnaire (GD3-20 to GD3-26).

[5] On June 23, 2016 the Commission contacted the Appellant who stated he was expected to return to his employer on April 4, 2016 following his parental leave. He stated the work schedule changed and was not working with his family obligation. He stated that it was not possible to return to work because they had no childcare (GD3-33).

[6] On June 23, 2016 the Commission contacted the Appellant who stated he had signed up for training to become a consultant with Investors Group. He stated he is not paid for the training but he is certain to have job when completed. He stated the training will go until March 2017. He stated the on-line training takes 30-40 per week and he attends seminars on site. He stated his 13 year old son cares for the baby while he goes to these seminars (GD3-34).

[7] On June 23, 2016 the Commission contacted the employer who stated the Appellant was to return to work on April 4, 2016 after a period of leave but he did not return. The employer stated that normally the schedule would be the same upon return and the Appellant was a home agent always working from home. The employer stated when the Appellant was to return to work he requested to go part-time and his manager suggested two options but the Appellant stated he would not be able to return as he would not be able to go through level 2 training. The manager asked the Appellant if there was some flexibility in this sometime in the next six months but the Appellant said no. She stated she has already tried to schedule the Appellant two times for training and he gave reasons why he could not come back. The employer provided email correspondence in support of her statements (GD3-36 to GD3-40).

[8] On June 26 the Commission contacted the Appellant regarding the statements of the employer. The Appellant stated that he was required to do a week of training on his return but he could not because he didn't have a babysitter. The Appellant stated the employer never spoke to him about the flexibility and that was not his understanding. He stated the schedule proposed by the employer would not work because he could no longer work from home (GD3-42).

[9] On July 28, 2016 the Appellant made a request for reconsideration providing further explanations with the situation with his employer. He stated during his parental leave he was offered conditional employment with Investors Group and signed up for training. He stated that his employer did contact him and attempt to work out a new part time schedule however it was contingent on completing a 5 day training course in the office which he was not able to do. He stated that he did voluntarily leave his job but he felt he had no choice (GD3-45 to GD3-48).

[10] On November 8, 2016 the Appellant filed an appeal with the Tribunal. The Tribunal notified the Appellant on November 9, 2016 that his appeal was incomplete and requested the missing information. The Appellant filed a completed appeal on December 8, 2016.

[11] The Appellant explained the decision should be changed as expressed by the employer that if there was a virtual training environment he would have been an excellent candidate. He stated without the virtual training environment he would have been required to complete a 5 day training course in the office from 9 AM – 5 PM which would have been impossible due to the fact they did not have care for their infant child.

EVIDENCE AT THE HEARING

[12] The Appellant stated that when he voluntarily left he had a one year and they didn't have child care so that meant that one parent would need to stay home.

[13] The Appellant stated that when he spoke to his employer he asked to work part time and only evenings. He stated that it was communicated to him that he would have to come into the office for one week of training from 9 AM to 5 PM and training was a requirement for the return to his work. He stated his wife worked from 8:30 AM to 4:00 PM which meant they would not have childcare.

[14] The Appellant stated that the email correspondence in (GD3-38) in the second paragraph where it states “If we has some virtual training set up this would be a good option. T. did mention training during his hours that he is working might be an option (I did not think of at that time)” was never communicated to him.

[15] The Appellant stated that he initially contacted his employer on March 1, 2016 as shown in (GD3-39) and it took them until March 16, 2016 for a reply. He stated he was coming to the end of his parental leave and as he has a 6 person family he was looking for other options that would work around his wife’s schedule which would allow them to care for their child until they could find daycare.

[16] The Appellant stated it wasn’t an option for his wife to take time off from work for him to take the weeks training because she had not worked there a year and did not have vacation time and they needed her income. The Appellant confirmed that his wife didn’t ask for the time because if she had she likely would have been terminated.

[17] The Appellant stated that (GD3-22) when he filed for employment insurance benefits he stated that he quit to go to school which was another reason and he stated taking the course while he was on parental leave because he was going stir crazy. He stated that there was no option to put “obligation to care for a child” but he guessed he could have put “other”. He confirmed he was not authorized to take the course and he never spoke to anyone prior to taking it. The Appellant stated he had a job offer from Investors Group but it was contingent on passing the course, which he had a time frame of a year to complete.

[18] The Appellant stated in (GD3-33) his work schedule changed from 11 AM to 7 PM to 5 PM to 11 PM and he would no longer be able to work from home He stated that he would be required to drive an hour to work and therefore because of his wife’s schedule there would be a 30 minute timeframe where they would have no childcare.

[19] The Tribunal read the employer statements in (GD3-36) which stated that normally the schedule is the same at the return and that the Appellant home agent always working from home. The Appellant responded that he no longer able to work from home, as the requirement to have a quite work environment no longer existed with a small child.

[20] The Appellant stated that he knew the job requirements when he took the job in February of 2013. The Appellant stated that the employer (GD3-37) stated that they had tried to schedule him two times for training but he always gave reasons why he could not come back, was one because he was on vacation and the other he was on a medical leave, but both those times he was not advised he was scheduled for training. The Appellant confirmed the employer did offer him the flexibility over the next six months, but there was no flexibility as his wife would not have been able to get the time off and he could not find care for the week. He stated he would not leave his child with his drug addicted bipolar sister, or his elderly less than capable mother. He stated he has no childcare available for 37 ½ hours, during the day to take the course.

[21] The Appellant confirmed that in (GD3-38) the employer offered him the two schedules and they would have worked but what wouldn't work was that he had to take the week of training. He stated he was never offered to take it remotely as stated in the email. He stated had he been offered this he would have continued working and completing his course.

SUBMISSIONS

[22] The Appellant submitted that:

a) He has just cause pursuant to paragraph 29(c)(v) of the Act "obligation to care for a child";

b) He was not able to return to work and take the required one week course because he had no one to care for his child; and

c) Another reason he left his employment was to go to school which he did not have authorization to do.

[23] The Respondent submitted that:

a) The Appellant initially advised the Commission on his application filed on April 16, 2016 that he quit his employment because he was taking training and upon completion he was assured employment. Subsequently the Appellant advised the Commission that after his parental leave his employer changed his work schedule and with the change he

was unable to return to work as the new schedule would require them to obtain daycare, which none was available. The Appellant stated that without daycare he was unable to return to the employer because he was required to attend 5-days of training held in the office;

b) The Appellant did not have just cause for leaving his employment on April 3, 2106 because he failed to exhaust all reasonable alternatives prior to leaving. A reasonable alternative would have been to discuss with the employer the flexibility in the schedules offered. Additionally, consideration to the alternative that his wife take care of the child for the one week he was required to take training in the office;

c) The Commission finds the Appellant's first statement to be credible, that he left his employment in order to purse a training opportunity which had the possibility of employment upon completion. This reason is considered a personal choice to end employment;

d) The evidence supports that the Appellant started his training before he was expected to return to work after his parental leave; he was required to return to his employer on April 4, 2016 and he commenced training on March 15, 2016. The Commission submits this is compelling evidence of the Appellant's true reason for leaving his employer;

e) The new employment cannot be considered assured since it is contingent on passing his exams and certainly not in the immediate future considering the training is ending in March 2017;

f) The Commission is mindful of subsection 29(c)(v) of the Act, obligation to care for a child, which provides for just cause when there are no reasonable alternatives other those for one to leave one's employment. The Commission argues that the Appellant was not without alternatives since his employer offered 2 different schedules around his wife's schedule which would have relieved the necessity for daycare; and

g) The Appellant indicated he was unable to attend the required one week of training due to lack of daycare and the Commission finds that the employer offered a 6 month window of time to take the required training yet he said no; the Commission submits the

employer offered flexibility and the Appellant chose not to consider any reasonable solutions; and

h) The Commission submits considering the Appellant's contention that he is unable to work at home due to lack of childcare then it matters not whether a virtual training environment was available.

ANALYSIS

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

[25] The Tribunal must decide whether the Appellant should be disqualified pursuant to sections 29 and 30 of the Act because he voluntarily left his job without just cause. Subsection 29(c) of the Act provides that an employee will have just cause by leaving a job if this is no reasonable alternative to leaving taking into account a list of enumerated circumstances including 29(c)(v) obligation to care for a child or a member of the immediate family; (vi) reasonable assurance of another employment in the immediate future. The test to be applied, having regard to all the circumstances, is whether the claimant had a reasonable alternative to leaving his employment when he did.

[26] In *Rena-Astronomo* (A-141-97), which confirmed the principle established in *Tanguay* (A-1458-84) according to which the onus is on the claimant who voluntarily left an employment to prove that there was no other reasonable alternative for leaving the employment at that time, MacDonald J.A. of the Federal Court of Appeal (the Court) stated: "The test to be applied having regard to all the circumstances is whether, on the balance of probabilities, the claimant had no reasonable alternative to leaving his or her employment."

[27] The Act imposes a duty on a claimant not to deliberately cause the risk of unemployment to occur. A claimant who has voluntarily left his employment and has not found other employment is only justified in acting in this way if, at the time he left, the circumstances existed which excused him from thus taking the risk of causing other to bear the burden of his unemployment. A claimant is responsible to exhaust all reasonable alternatives prior to placing themselves in a position of unemployment.

[28] The Federal Court of Appeal reaffirmed the principle that where a claimant voluntarily leaves his employment, the burden is on the claimant to prove that there was no reasonable alternative to leaving when he did (*Canada (AG) v. White*, 2011 FCA 190 (CanLII)).

[29] In this case, there is no dispute from the evidence of the Appellant's application for benefits and his oral evidence that he voluntarily left his employment. Thus, the onus is on the Appellant to prove he had no reasonable alternative to leaving and that he exhausted all reasonable alternatives available prior to leaving.

[30] The Appellant argues that he has just cause pursuant to paragraph 29(c)(v) of the Act "obligation to care for a child" as he was not able to return to work and take the required one week course because he had no one to care for his child.

[31] The Respondent presents the argument that the Commission is mindful of subsection 29(c)(v) of the Act, obligation to care for a child, which provides for just cause when there are no reasonable alternatives other those for one to leave one's employment. The Commission argues that the Appellant was not without alternatives since his employer offered 2 different schedules around his wife's schedule which would have relieved the necessity for daycare. The Appellant indicated he was unable to attend the required one week of training due to lack of daycare and the Commission finds that the employer offered a 6 month window of time to take the required training yet he said no; the Commission submits the employer offered flexibility and the Appellant chose not to consider any reasonable solutions. The Respondent further argues that considering the Appellant's contention that he is unable to work at home due to lack of childcare then it matters not whether a virtual training environment was available.

[32] The Tribunal finds a claimant will have just cause for quitting his employment if there is an "obligation to care for a child". A parent can leave employment to look after a child if no other reasonable arrangement can be made that would enable the parent to work and care for the child. Despite the fact that an obligation to take care of one's child can provide just cause, a claimant must still demonstrate that he or she had no reasonable alternative to leaving.

[33] The Tribunal finds from the employers evidence on the file that they were willing to work with the Appellant to accommodate his situation by offering him alternative schedules and more so the flexibility of taking the training.

[34] The Tribunal finds from the Appellant's oral evidence that the proposed schedule changes would have been acceptable and that the employer did in fact offer him the flexibility of taking the week training in the next 6 months; however the there was no flexibility on his part to do so because he does not have child care.

[35] The Tribunal finds from the Appellant's oral evidence that there was only himself or his wife that was able to care for the child and that the child was on a waiting list for daycare; however the Appellant did not provide any evidence that he made any serious attempts to seek any other babysitting services such as temporary daycares, private babysitting service and that he could show that he was unable to hire someone for the one week necessary to attend the course. The Tribunal finds the Appellant was given a six month window to find a solution to his day care issues, but he made a choice to quit his employment without doing so.

[36] The Tribunal finds from the Appellant's oral evidence that his wife would not be able to take a week off; however he testified that his wife never even enquired to the possibility, which would have been a reasonable alternative. The Tribunal finds the fact that there was the flexibility of a six month window the spouse may have been able to come up with a time frame that her employer would have accommodated her.

[37] The Tribunal relies on (*Canada (A.G.) v, Yeo* 2011 FCA 26 (CanLII)) which states: "Claimants for unemployment insurance benefits have the burden of proving their entitlement. Mr. Yeo therefore had to adduce evidence to prove on a balance of probabilities that, in all the circumstances, he had no reasonable alternative other than to leave his employment, in order to discharge his parental responsibilities".

[38] The Tribunal is entitled to accept hearsay evidence, as we are not bound by the same strict rules of evidence as are the Courts (*Canada v. Mills*, A-1873-83 FCA).

[39] The Tribunal finds the evidence of the employer to be credible and the evidence of the emails supports that the employer made serious efforts after speaking to the Appellant to

accommodate the Appellant's situation by giving him two options to work as well as providing him with a on option of taking the training in the next six months which the Tribunal finds would have been reasonable alternatives.

[40] The Tribunal finds the employers evidence further in the email that if they had some virtual training set up this would be a good option as well as having the Appellant train during his hours may be an option, demonstrates that the employer would have been willing to provide the Appellant with further options.

[41] The Appellant argues that these options were not conveyed to him and had they been he would have stayed working and continued with his course.

[42] The Tribunal finds from the Appellant's evidence that if he could have taken the training remotely he would have continued working; contradicts the Appellant's statements that he could no longer work from home as his home was no longer met the requirements of a home office.

[43] The Tribunal finds there is no evidence to support that the employer was requesting the Appellant to longer work from home. In fact the employers evidence supports there was no changes to the Appellant's working conditions when he was to return to work. He would remain a home agent. Therefore the Tribunal finds the Appellant could have also continued to work from his home as he had in the past and work to find a time to take the level 2 training within the next 6 months.

[44] The Tribunal relies on CUB 60896 where Umpire Guy Goulard states "It is well established in the jurisprudence (CUBS 24160, 47929, 54259 and (A-479-94)) that child-care problems are not just cause for leaving one's employment.

[45] The Tribunal relies on CUB 54259 where The Honourable R.J. Martin states "There is a consistent if not voluminous line of authority to the effect that child-care problems are not just cause for leaving an employment. I quote the decision in Howe, CUB 47929, rendered by Judge Grant acting as an Umpire, at page 3 of which he states the following:

> *As much as I sympathize with the claimant, the jurisprudence of the Federal Court of Canada clearly indicates that quitting one's job to look after children because a*

babysitter is not available or one's salary is not sufficiently high is not considered as just cause.

[46] The Tribunal sympathies with the Appellant's situation and once again relies on CUB 60896 where the Umpire quoted Justice Marceau who wrote:

> *"This is a law whose basic purpose, very simply put, is to help those members of the work force who lose their employment and are unable to find immediately another one in replacement. Unemployment insurance is not universally available.*
>
> *That there should be better economic support for people raising children, particularly when those children have special needs, is a proposition most people would have no hesitation agreeing with and no doubt this lack of adequate support creates a greater hardship on women than men since women have the primary role in child care.*
>
> *Nevertheless, it is beyond the jurisdiction of the Umpire or of any Court to fashion social welfare legislation out of existing Acts of Parliament which are not addressed to solving this problem."*

[47] The Tribunal does not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (AG) v. Levesque*, 2001 FCA 304).

[48] The Tribunal relies on (*Canada (A.G.) v. Knee* 2011 FCA 301) which states:

> *However, tempting as it may be in such cases (and this may well be one), adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.*

[49] The Tribunal relies on (*Canada (A.G.) v. Landry* A-1210-92) where the Court concluded that it is not sufficient for the claimant to prove he was reasonable in leaving his employment, but rather the claimant must prove that after considering all of the circumstances he had no reasonable alternative but to leave his employment.

[50] The Tribunal finds from the evidence supports that the Appellant failed to exhaust all reasonable alternatives available to him. The Tribunal finds a reasonable alternative would have been to return to work following his parental leave and continue to work from home and discuss further with his employer his options to take the level 2 training within the 6 months' time frame.

[51] The Appellant also argued another reason he quit was to take a course of instruction.

[52] The Respondent argues that the Appellant initially advised the Commission on his application filed on April 16, 2016 that he quit his employment because he was taking training and upon completion he was assured employment. The Commission finds the Appellant's first statement to be credible, that he left his employment in order to purse a training opportunity which had the possibility of employment upon completion. This reason is considered a personal choice to end employment. The evidence supports that the Appellant started his training before he was expected to return to work after his parental leave; he was required to return to his employer on April 4, 2016 and he commenced training on March 15, 2016. The Commission submits this is compelling evidence of the Appellant's true reason for leaving his employer.

[53] The Respondent further argues that the new employment cannot be considered assured since it is contingent on passing his exams and certainly not in the immediate future considering the training is ending in March 2017

[54] The Tribunal finds from the Appellant's oral evidence that this was another reason for quitting. The Appellant testified that the course was not authorized and that he did not speak to anyone prior to taking it. He confirmed that he would be offered a job with Investors Group providing he passed the course. He confirmed he was allowed a year to complete the course.

[55] The Tribunal finds the evidence supports that the Appellant was not authorized to take a course and made a personal decision to do so. Unfortunately the Tribunal cannot alter the requirements and must adhere to the legislation therefore; the Appellants decision was a personal choice which is not just cause within the meaning of the Act.

[56] The Tribunal cites (*Canada v. Macleod* (A.G.) (A-96-10)) which confirms it is settled law that voluntarily leaving one's employment to undertake studies does not constitute "just

cause": (*Canada (A.G.) v. Mancheron*, 2001 FCA 174 (CanLII)), 109 A.C.W.S. (3d) 538 at para. 2. Consequently, neither the umpire nor the board could reasonably conclude, on the record, that the claimant had just cause for leaving his employment.

[57] The Tribunal finds from the Appellant's oral evidence that any future employment was contingent on passing the course, which he had a year to complete; therefore the Tribunal finds that these conditions and time lines cannot support the Appellant had just cause pursuant to paragraph 29(c)(vi) reasonable assurance of another employment in the immediate future.

[58] Under subsection 30(1) of the Act, an employee is disqualified for receiving EI benefits if he loses his job as a result of misconduct, or voluntarily leaves his job without just cause.

[59] The Tribunal finds that an indefinite disqualification be imposed pursuant to subsection 30(1) of the Act because the Appellant voluntarily left his employment without just cause pursuant to sections 29 and 30 of the Act.

CONCLUSION

[60] The appeal is dismissed.

Teresa Jaenen

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.