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

Citation: *T. N. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 73

Tribunal File Number: GE-16-3653

BETWEEN:

T. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: April 27, 2017

DATE OF DECISION: May 30, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant applied for employment insurance benefits on April 8, 2016. She was disqualified from receiving benefits at the initial level, and the Respondent maintained this decision at the reconsideration level. The Appellant's appeal to the Tribunal was filed late, but an extension of time within which to bring the appeal was allowed.

[2] The Tribunal must decide whether the Appellant voluntarily left her employment without just cause, within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The hearing was held by videoconference because of the information in the file, including the need for additional information, the fact that an interpreter might be present, the fact that she would be represented, and the availability of videoconference in the area where the Appellant resides. 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.

[4] The Appellant attended the hearing with her brother, who was her designated representative (Representative). He did not attend in the capacity of an interpreter. The Tribunal is satisfied that the Appellant understood the proceedings, since she was asked at the hearing if she understood English and she replied without hesitation in the affirmative. On the few occasions when her accent made it hard to understand her, the Tribunal requested clarification, and she provided it.

[5] This appeal is dismissed, since the Appellant did not prove that she had just cause for leaving her employment voluntarily. The reasons for this decision follow.

EVIDENCE

[6] On April 5, 2016, the Appellant left her job. She filed an initial claim for benefits, and a benefit period was established, effective April 10, 2016.

[7] In her application, she stated that she quit her job because of “too much pressure and getting stressed out,” with no one specific person responsible for her decision to quit, nor any final event precipitating her departure (GD3-7). She did not look for another job before leaving, because she was sick at home. She stated, as found at GD3-8, that she spoke to her supervisor (“he was OK with me quitting), and the Human Resource Manager (she said OK”).

[8] On April 28, 2016, she told the Respondent that the “job was very hard, always pushing every single day,” and after ten years she could not take it anymore. She also said she was assigned to work with chemicals, and she was too stressed to continue (GD3-19).

[9] On May 3, 2016, the employer asserted to the Respondent that the Appellant had never complained once in ten years that the work was too hard. The employer believed the Appellant left because of a sexual harassment complaint filed by her sister. She said the Appellant called in sick for the same three days that her sister was on paid leave while her complaint was being investigated, and then her sister called in on the day she was to return just before the shift started, to say that neither of them would be returning. The Appellant did not call in herself (GD3-20).

[10] Later that day, the Respondent asked the Appellant to respond to the employer’s comments, and she authorized her brother to call in on her behalf. The Respondent told him that just cause was not found, since a reasonable alternative would have been to speak to the employer before leaving, or to the Ministry of Health or Ministry of Labour. The record of this conversation does not show that the Appellant’s brother made any rebuttal statements (GD3-21).

[11] Through correspondence dated May 6, 2016, the Respondent informed the Appellant that she was not eligible to receive benefits, because she had left her employment voluntarily without just cause within the meaning of the Act, since “voluntarily leaving was not your only reasonable alternative (GD3-22).”

[12] The Appellant filed a reconsideration request, which was received by the Respondent on May 20, 2016 (GD3-23 to GD3-24). On her request, she said she quit because of medical reasons, and had been feeling sick for years. She enclosed a letter from her doctor dated May 3,

2016 (GD3-25), that states, taking into account that some words on this handwritten note are unclear, that she “has had headaches, sleepiness - worked with electric line having chemicals that made her headache, difficulty to sleep. also has hypertension… so she quit her job for regaining health (*sic*).”

[13] She also stated on her request: “I did not know the company’s policy for leaving due to my poor English skills.”

[14] In the interview on June 24, 2016, as part of the reconsideration process, the Appellant told the Respondent that “she works around chemicals all the time,” and it gives her headaches, although she never requested sick leave. She said she visited the doctor before she left her job, but “never spoke to him about quitting” and he never suggested it. She asserted that she complained to the quality control department at work about the chemicals, but not to her supervisor or manager (GD3-26).

[15] She further asserted that following her sister’s harassment complaint, on the day her sister was due to return to work, “both sisters felt that the other employees were giving them dirty looks,” according to the record of that interview at GD3-26. “They felt insulted and felt they were being picked on. They left that day together.”

[16] The Respondent called the employer that same day to request a response to the Appellant’s claims. The employer reported that she had worked as an assembler making pool filters, but maintained that she had never worked with chemicals, and was rarely around industrial glue. She had never complained of this issue, or asked for sick leave. (GD3-27).

[17] Later that day, the Appellant insisted that she had been working near chemicals, and asserted that the employer was lying. She said she never spoke to her employer, because she did not think they would care. She did not file a health and safety complaint, because she did not know she could. She did not ask for sick leave, or regular leave. She visited a doctor after she quit, because the Respondent said she needed a medical note; she had often gone before, but never asked for a note (GD2-28).

[18] According to the Respondent’s record of her comments about her sister’s harassment complaint, she asserted that “when they returned they felt mistreated and that people were

giving them dirty looks…after 10 years of working there, they should not be treated this way. This was the first time this had happened.” (GD2-28).

[19] She stated that she had looked for other work, but only when she took days off to do so. In general, she was working hard, and had no time to search for work (GD2-28).

[20] The reconsideration decision, dated June 24, 2016, upheld the original finding of voluntary leaving without just cause (GD3-29 to GD3-31).

[21] The Appellant sent her Notice of Appeal to the Respondent in error; it was filed late with the Tribunal on October 13, 2017 (GD2-1 to GD2-9; GD2A1 to GD2-5). An extension of time to file her appeal was granted on February 23, 2017.

[22] At the hearing, she explained that her job was to assemble filters, and she had to push a heavy trolley every day to take her assembled filters to a storage area. She maintained that the general smell of chemicals in the workplace made her feel ill, afterwards explaining that the core of the filter she had to assemble had a “little bit” of a smell. She later asserted that the core had a “very strong smell.”

[23] She told the Tribunal that she had first complained to the “safety community” before Christmas (2015). She later said she had complained many times, but no-one did anything.

[24] She made the following statements about her health issues: she had been feeling sick for a couple of months before she left because she could not sleep, so she went to the doctor to get some pills; she had been sick for “maybe about a year,” but did not go to the doctor because she did not want to complain; she had complained at work that she had been feeling sick for two or three years.

[25] She confirmed that she had spoken to her team leader, and a safety representative, but not to a supervisor or manager. She stated that she had not asked for any medical leave, but took all the six sick days she was allowed every year.

[26] She first maintained that “I go looking for a job every day” before she quit, explaining that she faxed her resume everywhere. Then she stated that she started looking for a job the “next day” after she quit.

[27] She stated that on the day she quit, she made her decision because of what happened to her sister. She asserted that after her sister's complaint, she felt frightened she might be a victim of harassment as well, especially if her sister left, and then she would be all alone at work.

[28] Her Representative submitted that the other issues had built up over the years his sister had worked with the company, but she left mostly because of what happened to her sister.

SUBMISSIONS

[29] The Appellant made the following submissions:

a) She was stressed at work because the work was heavy, and she was "pushing every day." She was assigned to working with chemicals, and it was making her sick, causing frequent headaches. After ten years, she could no longer handle it.

b) She had tried complaining to the "Safety Community" at work, but was denied so many times that she never complained to her employer, because they would not care.

c) She had not asked for sick leave, but she had visited the doctor before she quit. She only got a doctor's note after she left because the Respondent told her she needed one.

d) She was treated badly after her sister made a sexual harassment complaint, with people giving them dirty looks, and picking on them. She was scared she would be harassed as well.

e) She had looked for other work before quitting whenever she had time off, but not on a regular basis because she was working so hard at her job.

[30] The Respondent made the following submissions:

a) A reasonable option before quitting would have been to complain to her employer, or to the Ministry of Health or Labour.

b) She did not take sick leave, or get a doctor's note substantiating any work-related health issues until almost a month after she left her job.

c) She could have requested a leave of absence, so that she would have been able to look for another job before quitting.

d) She never mentioned her sister's complaint as a reason for leaving on her application for benefits, submitting that there was no one single event that led her to quit. She never mentioned the issue until the Respondent broached it, after obtaining this information from the employer.

ANALYSIS

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

[32] The Tribunal must first determine whether the Appellant left her employment voluntarily. The test for assessing voluntary leaving can be found 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?"

[33] Undoubtedly, the Appellant had a choice to stay. She does not dispute the fact that, as submitted by the Respondent, and corroborated by her employer, when she quit, it was she, and not the employer, who initiated the end of her employment. Tribunal finds, therefore, that the Respondent met its burden of demonstrating that she left her job voluntarily.

[34] Once the Respondent has shown that the Appellant left voluntarily, the onus shifts to the Appellant to show that she had "just cause" for leaving (*Attorney General of Canada v. White*, 2011 FCA 190).

[35] The test for determining whether the Appellant has "just cause" under section 29 of the Act is whether, having regard to all the circumstances, on a balance of probabilities, she had no reasonable alternative to leaving the employment. (*Attorney General of Canada v. White*, 2011 FCA 190).

[36] The Federal Court of Appeal, in *Tanguay v. Unemployment Insurance Commission*, A-1458-84, made a clear distinction between "good cause" and "just cause." Simply put, someone may have good reasons to leave, but this does not constitute "just cause."

[37] The Tribunal has considered the Appellant's various reasons for leaving, in order to consider all her circumstances. On her application, she cited "too much pressure and getting stressed out," stating that there was no one event making conditions so intolerable that she had to leave. A few weeks later, her account focused on physical stress: "pushing every single day" and being assigned to work with chemicals (GD3-19). In her reconsideration request, she argued medical issues. She later asserted she was treated badly after her sister's harassment complaint, and feared she would be harassed as well.

[38] This is not to say that the Appellant was prevented from offering additional reasons up to and during the hearing, or that her various statements were contradictory. However, the Tribunal questions why she did not mention at the outset a reason to which she later ascribed significant weight: her fear that she, too, could become the victim of sexual harassment at work, which is one of the non-exhaustive circumstances to consider when assessing just cause, as set out in paragraph 29(c)(i) of the Act.

[39] The Tribunal does not believe that this circumstance applies here since the Appellant never claimed she had been harassed, and her sister's complaint is not before the Tribunal. All the evidence shows is that an investigation took place—which the Appellant does not deny—which suggests that the company took such matters seriously, and would enforce its policies.

[40] The Tribunal notes that the Appellant did not wait to see how the situation would unfold following the investigation, which would have been a reasonable alternative to leaving right away. It is possible that the hostility she perceived might have subsided, and her fear of being a victim of harassment at some point in the future might have been allayed. After all, she had testified that this was the first time in 10 years that she had been treated this way (GD3-28), so there was no pattern of harassment on which she could justifiably base her fears.

[41] Instead of waiting, according to the employer's account, the Appellant's sister called in just before the shift started on the date she was due to return to work, to say that neither of them

would be returning (GD3-20). At GD3-26, the Appellant told the Respondent that "both sisters felt that the other employees were giving them dirty looks…and felt they were being picked on." However, the Tribunal finds that the Appellant could have returned to work to see whether the situation would improve after the investigation ended. Instead, she never returned at all.

[42] The Tribunal notes that the Appellant put significant weight on health challenges as a reason for leaving, blaming them to a great extent on her claim that she was "assigned to work with chemicals." This is a charge that her employer categorically refutes, and for which there is no evidence on the docket. Both parties agree that her job involved assembling pool filters. What is in dispute is whether any lingering smell from these products was at levels that could be said to cause "working conditions that constitute a danger to health or safety" under paragraph 29(c)(iv) of the Act.

[43] The Tribunal finds her testimony at the hearing was inconsistent on what exactly bothered her, which leaves key questions unanswered. Was it the general smell at her workplace, because it was a facility that produced pool products? Was there a "little bit" of a smell from the filter core she had to handle, or was there a "very strong smell?" Was the smell dangerous?

[44] The Respondent submitted that the Appellant could have contacted the Ministry of Labour or Health to lodge a complaint, but the Tribunal notes that there is no requirement for provincial authorities to be alerted prior to quitting, for just cause to be found. However, in the absence of the information that such a complaint might have elicited, the Tribunal can only rely on the Appellant's testimony about her health issues, and on the medical evidence she submitted to support her claim that these issues were directly caused by an unhealthy working environment.

[45] Here, too, the Tribunal has found inconsistencies in her various submissions, which leaves a key question unanswered: Had she been feeling sick for a couple of months, "maybe about a year," two or three years, or had work-related health complaints plagued her for years?

[46] The Tribunal finds that the doctor's note, which the Appellant submitted almost a month after she quit, does not answer this question, since it appears to simply repeat what she told him.

It does not mention any previous visits to discuss her concerns, or indicate that he ever advised her to quit. She herself told the Respondent that she never discussed leaving with her doctor. The doctor's closing observation, "so she quit her job for regaining health," does not constitute advice to leave, even retroactively.

[47] The Tribunal concludes, therefore, that the Appellant has not met her onus to show that the danger to her health was such that she had no reasonable alternative to quitting when she did. The Tribunal has come to this conclusion since there is no objective evidence that her workplace posed a danger to her health (*Attorney General of Canada v. Caron*, 2003 FCA 254; *Her Majesty the Queen v. Dietrich* A-640-93).

[48] Similarly, the Tribunal can give little weight to the Appellant's assertions that she complained repeatedly to the "Health and Safety" community at work, since she provided no evidence to support this claim, which is an allegation that her employer categorically denies. The Tribunal gives more weight to the employer's denial than to her allegation, since the reliability of her evidence is called into question by the following inconsistency: on her application, she stated that she spoke to her supervisor and the Human Resource Manager before she quit, but she later told the Respondent that she had not consulted them about her concerns (GD3-26), an assertion that she repeated at the hearing

[49] The Tribunal notes that the Appellant was obligated to test out her premise that there was no point in complaining to management because nobody would care. According to the case law, she had a responsibility to first discuss her concerns with the employer, as a reasonable alternative to leaving (*Attorney General Canada v. Hernandez*, 2007 FCA 320). Instead, she confirmed that she left her job without taking this step. In fact, she did not even contact the employer to announce that she was quitting, leaving it to her sister to call instead.

[50] The Tribunal also notes the inconsistency between her statement to the Respondent that she searched diligently for other work before leaving—which she repeated at the hearing, but later retracted—and her earlier declaration on her application that she did not look for another job, since she was sick at home. The Tribunal accepts as most likely her final declaration on this issue at the hearing: that she began her job search the very "next day" after she quit. This leads

the Tribunal to conclude that if she did make any earlier efforts, they could only have been very cursory.

[51] After considering all the circumstances, the Tribunal is not convinced that the Appellant's working conditions were so intolerable that she had no reasonable alternative to leaving when she did. The Tribunal notes that the jurisprudence has upheld the "no reasonable alternative" test on numerous occasions (*Attorney General of Canada v. Graham*, 2011 FCA 311; *Attorney General of Canada v. Murugaiah*, 2008 FCA 10). The Tribunal therefore finds that the Appellant could have remained employed until she secured a new job, which is seen as a reasonable alternative to quitting (*Murugaiah*, *supra*; *Attorney General of Canada v. Campeau*, 2006 FCA 376).

[52] In conclusion, therefore, based on the evidence on the docket and the submissions of both parties, the Tribunal accepts the Respondent's position that the Appellant did not meet her burden of proving that she had just cause for voluntarily leaving her employment, within the meaning of sections 29 and 30 of the Act.

CONCLUSION

[53] The appeal is dismissed.

Lilian Klein
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.