



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *L. R. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 111

Tribunal File Number: GE-17-1

BETWEEN:

L. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: July 12, 2017

DATE OF DECISION: July 14, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. R., the Claimant, participated in the hearing by teleconference.

INTRODUCTION

[1] The Appellant filed an Employment Insurance claim to start on July 10, 2016. On August 17, 2016, the Respondent, the Canada Employment Insurance Commission (Commission), notified the Claimant that he was not entitled to regular Employment Insurance benefits because he voluntarily ended his employment working for A. L. on December 10, 2015, without just cause as defined in the *Employment Insurance Act* (Act). The Commission added that given that the benefit period started on July 10, 2016, the Claimant was not entitled to benefits only as of this date.

[2] On November 22, 2016, following the Claimant's request for a reconsideration decision, the Commission notified him that it was upholding its decision regarding his voluntary departure from his employer, A. L. The Claimant appealed that decision to the Social Security Tribunal of Canada (Tribunal) on December 23, 2016.

[3] The hearing of this appeal was held by teleconference for the following reasons:

- a) The complexity of the issue or issues.
- b) The information in the file, including the need for additional information.
- c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The Claimant appealed the Commission's decision regarding his voluntary departure from his employment under ss. 29 and 30 of the Act.

EVIDENCE

[5] The evidence on file shows the following:

- a) A document from the Ministère de la sécurité publique providing details about the sentence. The Claimant was incarcerated from December 10, 2015, to July 9, 2016 (GD3-17).
- b) The Claimant confirmed that he left his job because he was in prison from December 10, 2015, to July 9, 2016. Upon his release, he went to see his employer, but the employer had had to hire another employee. As soon as this other employee found another job, he was to come back to work for him (GD3-18).
- c) The employer indicates that he had indicated leave without pay, based on a recommendation by a Service Canada agent. She knew that L. R. was not going to be available for a few months, but she did not know his return date. She hired another employee. This employee knew that this was temporary, but without an end date. As soon as A. L. found another job, the employer would rehire L. R.. The employer also considered hiring the two employees at the same time (GD3-19).
- d) The Claimant says that he could no longer be present at work because he was incarcerated from 10-12-2015 to 09-07-2016. His employer had to hire someone to replace him. This new employee was only supposed to help out, because he had his sights on a new job. However, he did not get the new job and he still works for his employer. A. L. did not want to dismiss this new employee to rehire him. However, he was sure that he would be rehired for next March (GD3-26).
- e) The employer states that the Claimant could no longer be present at work because he was in prison. The employer had to hire someone to replace the Claimant, so he considered it a voluntary departure on his part. He had told the Claimant that as soon as he got out of prison, he could rehire him, if necessary. For the moment, the other employee had not found another job, so he kept him employed. The employer was able to hire L. R. in August and in September because he needed his help. He did a little

mechanical work and drove his old truck. He is looking to buy another truck in March 2017 and he plans to rehire L. R. then (GD3-27).

[6] In his testimony at the hearing, the Appellant submitted the following evidence:

- a) The Claimant argues that this was not a voluntary departure because he was obligated to go into custody. He indicates that he was found guilty but he did not have a good lawyer. He believes that he should have been entitled to Employment Insurance benefits during his incarceration and afterwards, but he was refused these benefits because he did not have enough hours.
- b) The Claimant indicates that he is appealing the two decisions (two requests) rendered by the Commission. He indicates that his employer gave him back work hours because he wanted to help, but even though he obtained the missing hours, his benefits were refused again.
- c) He indicates that, following his incarceration, he must rejoin the job market and that Employment Insurance benefits would give him a hand. He was incarcerated from December 10, 2015, to July 9, 2016. He should be entitled to benefits upon leaving prison.
- d) He reports that he had to re-mortgage his house in order to pay for his lawyer during the proceedings. He filed an appeal in order to get help with his benefits.

SUBMISSIONS OF THE PARTIES

[7] The Appellant argues that:

- a) The Claimant indicates that he has requested a review of his file because he did not leave his employment voluntarily. He indicates that he was required to do so, because he was being incarcerated on December 10, 2015. His employer rehired him on December 2, 2016, but he has had no income since August 2016.

- b) He indicates that he believed that he was entitled to Employment Insurance because he paid his dues and because he did not quit voluntarily.
- c) Benefits would help him upon his return to the job market after his time in prison.

[8] The Respondent argues that:

- a) Subsection 30(2) of the Act provides for an indefinite disqualification when a claimant voluntarily leaves an employment without just cause. The test to apply is whether the claimant had a reasonable alternative to leaving his employment when he did, having regard to all the circumstances.
- b) An employee who is unable to work as a result of his own incarceration has lost his employment as a result of his own misconduct and, in cases where the employer has taken no steps to dismiss that person, this is considered a voluntary departure. The Commission is still of the opinion that it does not matter whether the case is one of loss of employment through misconduct or voluntary separation without just cause provided that a disqualification would be warranted in either case.
- c) In this case, the Commission found that the Claimant's prolonged absence supported the finding that the Claimant had left his employment. The Claimant stated that it was not by choice that he left his employment; he was forced to do so due to his incarceration. The Claimant was incarcerated as a result of his actions: more specifically, the alleged offences for which he was incarcerated and that prevented him from attending work. It was his conduct that led to his arrest. The Claimant is responsible for the offence that he committed and that prevented him from honouring his contract of employment.
- d) The Claimant explains that his employer had to hire someone to replace him, but the employer could not dismiss the other employee without giving him the time to find another job. The performance of services is an essential condition of the employment contract. An employee who, through his own actions, can no longer meet that condition and as a result loses his employment, cannot force others to bear the burden of his unemployment.

- e) The Claimant indicates that he has always worked, but he found himself in unfortunate circumstances. The Claimant was responsible for his own misfortune because he was found guilty of an offence and incarcerated. This made him incapable of continuing with his employment; this is not considered a justification under the law.
- f) Actions constituting a summary conviction or indictable offence and resulting in a conviction under the Criminal Code are actions liable to lead to disentitlement under the law to the extent that it prevents the employee from meeting the essential condition of employment and leads to the dismissal of that employee.
- g) The Claimant argues that while he was working, he paid for Employment Insurance and that he is entitled to these benefits because he did not quit working voluntarily. Making contributions to Employment Insurance does not in itself give him the right to receive benefits. It is a right that an insured person may exercise, like for any insurance policy, and entitlement depends on the various conditions established by the Act.
- h) In this case, the Commission found that the Claimant did not have just cause for leaving his employment on December 10, 2015, because he failed to show that he had exhausted all reasonable alternatives before leaving. In light of all of the circumstances at hand, a reasonable alternative would have been to not commit the actions that led to his incarceration.
- i) Therefore, the Claimant failed to prove that he had just cause to leave his employment within the meaning of the Act.
- j) The Commission based its decision on Federal Court decisions that confirmed that claimants who voluntarily leave their employment have an obligation to prove that there was no reasonable alternative to immediately leaving their employment (*Canada (AG) v. White*, 2011 FCA 190).
- k) In this case, the Claimant put himself in a position of unemployment by committing acts for which he was incarcerated and that prevented him from honouring his contract.

ANALYSIS

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

[9] According to s. 30(1) of the Act, 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.

[10] In *White*, the Court established that the Commission has the burden of proof to demonstrate that it was indeed a voluntary departure. The Claimant must then demonstrate, on a balance of probabilities, that he had no reasonable alternative to leaving (*Canada (Attorney General) v. White*, 2011 FCA 190).

[11] The Claimant argues that he did not quit his job voluntarily. He indicates that he did not have a choice in the matter because he was incarcerated from December 10, 2015, to July 9, 2016.

[12] The Commission argues that employees who are unable to work as a result of their incarceration lose their employment as a result of their own misconduct, and, if the employer took no measures to dismiss the employee in question, it will be considered a voluntary departure. The Commission still argues that it does not matter whether the case is one of loss of employment through misconduct or voluntary separation without just cause provided that a disqualification would be warranted in either case. The Commission found that the Claimant's prolonged absence supported a finding that the Claimant had left his employment. The Claimant stated that he did not quit his job by choice; he was obligated to do so because of his incarceration. The Claimant was incarcerated as a result of his actions: more specifically, the alleged offences for which he was incarcerated and that prevented him from attending his work. His conduct led to his arrest. The Claimant is responsible for the offence that he committed that prevented him from honouring his contract.

[13] The Tribunal has considered the situations in which a claimant is justified in leaving his employment under s. 29(c) of the Act. The Tribunal has noted that incarceration does not justify leaving employment voluntarily.

[14] The Tribunal also takes into consideration that the concept of just cause according to s. 29 of the Act is not synonymous with “reason” or “cause.” In fact, it is not sufficient for the claimant to prove that they were reasonable in leaving their employment. Reasonableness may constitute “good cause” without necessarily constituting “just cause” within the meaning of the Act (*Tanguay v. Employment Insurance Commission*, FCA A-1458-84).

[15] Furthermore, in *Djalabi*, the Federal Court of Appeal indicated as follows:

“The real issue is whether the claimant voluntarily committed the acts that led to his incarceration, and therefore whether he voluntarily placed himself in a situation that would prevent him from keeping his employment (Reasons, at pages 2 and 3). In the Umpire’s view, a recognizance is not a sufficient basis for a finding on a balance of probabilities that the claimant voluntarily committed the acts that resulted in his incarceration (Reasons, at page 3). The essence of his reasoning can be found in the following excerpt (*ibid.*):

[...] in the absence of evidence established on a balance of probabilities showing that the claimant voluntarily committed acts that, consequently, prevented him from keeping his employment, one cannot find that there was misconduct or even a decision to voluntarily leave his employment. He was allegedly incarcerated at that time, through no fault of his own, for reasons that were not proven. [...]

Because the evidence shows, according to the applicable standard, that the claimant’s conduct led to his incarceration and to the loss of his employment, it follows that the Board of Referees failed to take into account the evidence in reaching the opposite conclusion and that the Umpire should have intervened.

For these reasons, I would allow the application for judicial review, set aside the Umpire’s decision and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the Commission’s appeal must be allowed on the grounds that the claimant voluntarily left his employment without just cause within the meaning of sections 29 and 30 of the Act.” (*Canada (Attorney General) v. Ahmat Djalabi*, 2013 FCA 213)

[16] The Tribunal finds that the Claimant’s situation is similar to the situation in *Djalabi*. The Claimant was incarcerated because he was found guilty and obligated to quit his job for this reason. The Tribunal therefore takes into consideration the Court of Appeal finding indicating that the evidence shows that it was the Claimant’s behaviour that led to his incarceration and to

the loss of his employment. For this reason, the Claimant left his employment voluntarily because he committed the acts that led to his incarceration.

[17] The Tribunal has also taken into consideration the fact that the Claimant indicates that he has “paid his dues” and, as a result, is entitled to Employment Insurance benefits. Furthermore, he indicates that his benefits would help him reintegrate into the job market and that he had to re-mortgage his house.

[18] The Tribunal’s role is to apply the Act, and the Tribunal cannot amend it simply to please the Claimant who feels wronged. The Act establishes the specific criteria that a claimant must meet to be eligible for benefits and, for determining eligibility, it is not based on the fact that a claimant has contributed to the Employment Insurance program for a number of years. In spite of the Claimant’s difficulties, the Tribunal cannot modify the Act.

[19] Based on the evidence and observations presented by the parties, the Tribunal finds, on the balance of probabilities, that the Claimant has not proven that his voluntary departure was the only reasonable solution because it was the Claimant’s own actions that led to his incarceration and, therefore, his voluntary departure. The Tribunal finds that the Claimant did have reasonable alternatives to leaving his employment.

CONCLUSION

[20] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

APPENDIX

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 or common-law partner or a 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.