



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. K. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 194

Tribunal File Number: GE-17-458

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Rodney Antonichuk

HEARD ON: July 14, 2017

DATE OF DECISION: October 19, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance benefits on October 11, 2016. On November 28, 2016 the Respondent disqualified the Appellant from receiving benefits after finding he had voluntarily left his employment without just cause. The Appellant requested a reconsideration of this decision, and on December 30, 2016 the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on January 24, 2017.

[2] The Tribunal must decide whether the Appellant is disqualified from benefits pursuant to section 30 of the *Employment Insurance Act* (Act) for voluntarily leaving his employment without just cause.

[3] The hearing was held by Videoconference for the following reasons:

- a) The fact that the credibility may 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.

[4] The following people attended the hearing:

- S. K. – Appellant
- S. L. – Appellant's wife

[5] The Tribunal finds that the Appellant has not proven that he had just cause for voluntarily leaving his employment. The reasons for this decision follow.

EVIDENCE

[6] An initial claim for employment insurance benefits was established effective October 30, 2016. In the application for benefits the Appellant indicated that he was laid off from his employment due to a shortage of work.

[7] The Record of Employment from 1703671 Alberta Ltd (Pulse Air) indicates that the claimant worked from April 21, 2016 to October 5, 2016 and that he quit.

[8] When the Respondent contacted the Appellant on November 1, 2016 he indicated that he had quit due to medical reasons. He stated that he had a hand injury and that this job involved typing and due to his injury he was no longer able to do his job. He further stated that he did not have a medical note from this doctor stating that he should quit his employment rather he just made the decision to quit on his own.

[9] The Respondent contacted the Appellant on November 16, 2016 to obtain additional information. The Appellant stated that he advised his employer that he was having problems with his hand but they would not do anything to help him. The Appellant stated that he requested leave from his employer but he was denied. The Appellant further stated that he was forced to call in sick to get time off to see the doctor because his employer would not allow him leave for appointments. The Appellant stated that he tendered his resignation on September 15, 2016 and gave his employer three weeks' notice. The Appellant stated that he called in sick one day sometime the week of September 23rd in order to go see his doctor. The doctor stated the Appellant should take a week off and gave the Appellant some medication. The Appellant returned to work and left his employment on October 10.

[10] On November 17, 2016 the Respondent contacted the Appellant's employer. The employer was asked if she knew why the Appellant had quit. The employer indicated that she did not really know. She stated that the last month of work the Appellant had wanted time off and the employer could not give him the days off that he wanted as another employer had suddenly quit and she had no one to cover the Appellant and the suddenly empty position. The employer stated that the Appellant then began calling in sick instead of coming in. She stated that she never knew when he was going to show up.

[11] The employer stated that the Appellant had asked for some days off and the employer had to say no because she did not have the coverage for his position. She stated that the week of holidays overlapped with other time. After that the Appellant just started calling in sick saying it was a hand injury. The employer stated that this hand injury issue suddenly just came up. She

stated that he had never brought this issue up before and it was only brought up 3 weeks before the Appellant left.

[12] The employer was asked about modified duties for the Appellant and his hand issues if he had asked about that. The employer stated that when she had said no to the holiday the claimant put in his resignation. The Appellant indicated that the Appellant had given his notice when the vacation was not approved and then called in sick telling the employer about his hand injury.

[13] In reviewing the employer's records she indicated that the Appellant gave his resignation on September 15 and that his resignation was due to work related reasons. The notice was for two weeks and his last day was to October 7, 2016. The employer stated that after the Appellant submitted his resignation he started calling in sick. The Appellant then stated that he was advised to stay off work until September 30 for medical reasons. The employer was asked if there was any modification that could be done to the position to make the work easier on the Appellant's hand. The employer stated that the claimant worked as a medical office assistant and there was not much that could be done to change the nature of his job. The employer indicated that the Appellant could have asked for a medical leave but never submitted such a request he just tendered his resignation.

[14] On November 25, 2016 the Respondent once again contacted the Appellant. The Respondent indicated to the Appellant that the employer had said he asked for time off as vacation in advance because he had people visiting, and then called in sick for those days after it was denied. The Appellant stated it was not that day only. He stated he was not feeling well and was getting married. The Appellant was asked for clarification. He stated that's the day his mom and dad came from back home. He stated he was not feeling well at that time, and was under pressure for marriage. He stated he saw a doctor that day as well. He stated he was not feeling well and everything was on his shoulders and had to call his parents from back home. He stated it was hard to handle alone, so he had requested 1 or 2 days.

[15] The Appellant was asked if he requested the days off and then called in sick when they were denied. The Appellant stated it was not on that date. He stated it was September 23. He stated after that he was off for 5 days, and provided his employer a doctor's note for 1 week off. He stated that was the reason his doctor requested, and he submitted that note to the doctor

already. The Appellant stated that he submitted his resignation on September 15th. The Appellant was asked if he had seen his doctor before he gave his resignation. The Appellant stated the employer had already hired another. The Appellant was asked to confirm that he gave his notice and then the employer hired someone else. He said yes, within 2 or 3 days. He stated that at that time he was not in too much pain. He stated it was after he resigned that she gave him more work and there was more pain and then he went to the doctor.

[16] The Appellant was asked if he gave his notice because he had a little bit of pain but not so much that he would go to the doctor. The Appellant said yes. The Appellant stated that at that time he felt ok, until September 23 when he had too much work and too much pain. He stated that before the time of September 15 it was all good no problem. The Appellant was asked how come he was quitting his job on September 15 if it was all good. The Appellant said it was already a little painful. He stated that the employer then gave him more work and hired someone else within 2 or 3 days. He stated his intention was already to leave his position. He stated he cannot come to work and give a good reason. The Appellant resigned because he believed from what his coworkers were saying that the employer was going to give him more work and make his quit. He stated that as of September 15th she was giving him more work, and he was applying to a lot of positions. He stated because he had these interviews he could leave, but he didn't get that position from the other place. The Appellant was asked about the job at the other place. The Appellant stated the position was already cancelled because they didn't want people anymore. He stated the basic thing was he would leave and have to start over there. The Appellant confirmed that he had not been offered the job.

[17] On November 25, 2016 the Respondent once again contacted the Appellant. The Appellant stated that he was dealing with medical issues but his employer would not support him. He called in sick and ended up taking a week off at the doctor's request and stated that he gave them a medical certificate. The Appellant further stated that he ended up quitting because his hand was hurting but he did not speak with a doctor prior to making this decision.

[18] The Appellant made a request for reconsideration of the Respondent's decision to disqualify him for voluntarily leaving his employment without just cause. In support of his request for reconsideration, the Appellant argued that his employer was giving him more and

more work despite the fact that he was having a problem with his hand. The Appellant felt that his employer was giving him more work than he could handle in hopes of getting him to quit. The Appellant further contends that when he asked for time off to see his doctor but his employer refused. The Appellant also stated that he was unable to book his doctor's appointment outside of his work hours.

[19] In speaking to the Respondent on December 30, 2016 the Appellant stated that the main reason that he quit his job was because he asked for time off to go to the doctor and it was denied because his employer told him the office was too busy for him to be away. The Appellant stated that he could not work in that environment, it was the worst employer that he had ever worked for since coming to Canada and he wasn't going to die on the job when his hand was so sore. The Appellant was asked if he could have made his doctor appointment outside of work hours and he stated that his doctor worked the same hours as the Appellant did. The Appellant then went on to state that he had to wait over month for his last pay cheque, that he had to ask in order to use the restroom, not being granted leave to go to appointments, visit with his parents or get married. The Appellant was also asked why he did not get a medical note, discuss medical leave with the employer or secure another job before quitting and he stated that he did give his employer a medical note for one week off. The Appellant also stated that his hand was better and that he could type and again stated that the main reason that he quit was because his employer would not grant him time off to go to appointments.

[20] In the Appellant's written statement to the Tribunal on January 24, 2017 the Appellant stated that his employer had wanted him to quit so they created a situation that caused him to leave voluntarily. The Appellant also stated that his employer was greedy and that it took them 45 days for them to send him his last pay cheque.

Oral testimony

[21] The Appellant began his testimony stating that his employer did not allow him to go to the washroom, have lunch out or go to see his family doctor. He stated that he felt his employer expected him to do two jobs, his regular job and also to train new employees at the same time. The Appellant stated that he tried his best to do both jobs but after one month he asked his supervisor if they could hire another employee so that the workload would not be so intense. The

Tribunal also heard how employees had quit and were not replaced so the Appellant found that he had to cover those positions as well.

[22] The Appellant worked at a cardiovascular centre where he answered phones and booked patients for appointments with the clinics doctors. His job required the use of his hand and wrist as he had to use a computer keyboard all day. The Appellant explained that he had a workplace accident in October 2012 where he broke his arm working on a forklift. The Appellant felt that this was the reason for his arm/wrist pain. However he was not able to get to see his doctor to determine what the issue was due to the fact that his employer would not allow him time off during his doctors work hours. Instead the Appellant stated that when he told his employer about his hand pain she told him to take a break in the break room. The Appellant decided to take a sick day in order to see his family doctor since his employer would not allow him the time off. He indicated that his doctor told him to take one week off and return to work with modified duties. The Appellant requested modified duties from his employer but he was denied as his job involved using the computer and speaking on the telephone. Given the nature of his job there was nothing else that he could do that did not involve the use of his hand.

[23] The Tribunal heard that the Appellant had only one sick day from April through September. He stated that the pressure increased as his employer was opening another location and taking staff from his location to the new location so at the end there were only 4 people doing the work of 6.

SUBMISSIONS

[24] The Appellant submitted that;

- a) He was forced to leave his employment because he was working an administrative job and his hands were in pain from the work;
- b) he was refused time off to deal with this issue;
- c) His employer continued to give him more work than he could possibly do.

[25] The Respondent submitted that

- a) The Appellant did not have just cause for leaving his employment because he failed to exhaust all reasonable alternatives prior to leaving;
- b) Considering all of the evidence, a reasonable alternative to leaving would have been to request a leave of absence and/or obtain a medical certificate to support that he was required to leave this employment. Consequently, the Appellant failed to prove that he left his employment with just cause within the meaning of the Act.

ANALYSIS

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

[27] Section 30 of the EI Act provides that a claimant is disqualified from receiving any benefits if the claimant voluntarily left any employment without just cause. The burden of proof is on the Respondent to show that the leaving was voluntary. Then, the burden of proof shifts to the Appellant to demonstrate just cause for leaving (*Green v. Canada (Attorney General)*, 2012 FCA 313).

Did the Appellant voluntarily leave his employment?

[28] In the case at bar the documented evidence presented indicates that the Appellant submitted his letter of resignation to his employer on September 15, 2016. The Appellant gave the employer three weeks' notice and left his employment on October 5, 2016. The Appellant's letter of resignation indicated that he was leaving due to work related issues.

[29] The Tribunal finds that the Respondent has shown that the Appellant voluntarily left his employment.

Did the Appellant establish just case for leaving his employment?

[31] Having determined that the Appellant voluntarily left her employment the Tribunal now turns to the question of the Appellant having just cause for leaving. The test for determining whether the Appellant had just cause under section 29 of the EI Act is whether, having regard to

all of the circumstances, on a balance of probabilities, the Appellant had no reasonable alternative to leaving her employment (*Canada (Attorney General) v. White*, 2011 FCA 190)

[32] Section 29(c) provides just cause exists if the Appellant had no reasonable alternative to leaving, or taking leave, having regard to all of the circumstances “including the non-exhaustive list for the Tribunal to consider when determining just cause. The Tribunal must weigh all of the circumstances to determine whether there is just cause.

[33] The Respondent contends that the Appellant had numerous options available to him before quitting his employment. In reading the documented evidence the Tribunal finds that the Appellant had made attempts to attend to his family doctor due to his hand pain. The Tribunal was told that the Appellant’s employer would not allow him time off during the day to attend to his need for medical help. The Appellant further contends that the Appellant was encouraged to work through lunch and was even looked down if he went to take a break in order to get water.

[34] The Appellant contends that his hand started to get sore in early June due to the amount of typing that he was doing. The Appellant stated that he had broken his arm in an accident in 2012 and that it had not healed properly and while it had not given him any issues over the years the nature of his job made it difficult for him to rest his hand and because of this it started to pain him. The Tribunal heard how as the months went on the Appellant felt more pain. He also stated that he was unable to see his family doctor as his doctor’s office hours were the same as the Appellant’s work hours and he was not able to get his employer to give him time off in order to see his doctor.

[35] The Tribunal found the Appellant, in his testimony, to be a straight forward, confident individual. Given this impression of the Appellant the Tribunal finds that the Appellant made his case to his employer regarding his need to see a doctor and that his employer was aware of his hand pain. However the Tribunal also finds that the timeline presented does not make sense. The Appellant indicated that his hand pain started in June 2016 and it got worse and worse. The testimony from the employer indicates that the Appellant did not indicate that he was having troubles with his hand until the time of submitting his resignation on September 15, 2016.

[36] The testimony from the Appellant on November 25, 2016 when the Appellant spoke to the Respondent was that the Appellant's hand pain did not get bad until September 23, 2016, a full eight days after the Appellant submitted his resignation. There is no mention of the Appellant having hand pain in June in the November conversation. In fact the Tribunal notes that the Appellant indicated at that time that he had a little bit of pain but not enough to need to go see a doctor. This testimony from the Appellant confirms what the employer said, that there was no indication from the Appellant about hand issues until the time of his resignation.

[37] The Appellant also stated that he had attempted many times to get his employer to hire more staff as they were down two employees at the Appellant's location and the strain on the Appellant was making his hand hurt even more. The Tribunal finds that the employer was well aware of the Appellant's situation and given that there is no record of any accommodations to the Appellant, specifically for his hand issue but generally for an accommodation for the work load, the Tribunal finds that the Appellant had reason to have concerns regarding his employment.

[38] The Tribunal notes that the Appellant had indicated in his statement to the Tribunal that he felt that his employer was making his job more and more difficult. The Appellant went on to state that he felt that his employer was doing this in order to get him to quit. The Appellant stated that he was questioned when he went to the washroom or for a water break. He stated that he had asked for some time off due to his hand pain and his employer said that she would think about it. He also stated that he had asked for a couple of days off and this was refused. Due to the refusal the Appellant was forced to call in sick so that he could do something about the pain in his hand.

[39] While the Tribunal finds that the work environment as described by the Appellant was difficult the Tribunal notes that the Appellant stated that they were down two employees. The Appellant stated that he had asked his employer to fill those positions as he had to cover for the missing employees and she had not done anything about it. The Appellant stated that his employer was doing this in order to get him to quit. The Tribunal finds that this scenario is difficult to comprehend. Given that the Appellant stated that they were down two employees already the Tribunal struggles to believe that the employer would be deliberately trying to get the Appellant to quit thus leading to three unfilled positions that the employer would have to contend with.

[40] The determining factor for the Tribunal is the Appellant's lack of medical guidance in regards to the Appellant's hand pain and his ability to work. While the Tribunal finds that the Appellant had hand pain it is troubled by the fact that the Appellant did not obtain any medical evidence regarding his hand before he quit his employment. The Appellant stated that he had difficulty in obtaining time off in order to go see his doctor about his hand. The request for holiday's and time off was not granted by the Appellant's employer so therefore he took it upon himself to use a sick day in order to see his doctor. The testimony from the Appellant indicated that his doctor told him to take a day off. The issue that the Tribunal has is that the Appellant indicated that he had tendered his resignation on September 15, 2016 and he did not see his doctor until the following week. The testimony from the Appellant indicates that the Appellant's family doctor told him to take a week off and gave him a prescription for medication. There is no documented evidence presented to the Tribunal to indicate that the Appellant was advised to quit his employment.

[41] The Tribunal has indicated that he had to quit due to his hand pain however the evidence clearly shows that the Appellant tendered his resignation before even seeing his family physician. As well the evidence indicates that the Appellant was advised to take a week off, which he did not do. There is also no indication from the evidence that the Appellant attempted to find modified duties with his employer. Given the work atmosphere the Tribunal assumes that the Appellant's employer would not have given him modified duties even if that was an option it is the responsibility of the Appellant to explore options.

[42] The Tribunal also notes that the employer had indicated in her statement to the Respondent that the Appellant could have requested medical leave in order to deal with his hand pain. Still there is no testimony from the Appellant that he asked his employer for medical leave once he visited his family doctor. Instead the Appellant completed his three week resignation period and ceased his employment.

[43] Given this information the Tribunal finds that the Appellant did not have just cause for leaving. While the Appellant did have issues in securing time off to visit his family physician the Tribunal finds that he did not exhaust all options in regards to his employment. Instead of first seeing his family doctor and determining his hand pain issues the Appellant decided to quit and

then take a sick day in order to see his doctor. His doctor indicated to him that he should take some time off and prescribed medication for his pain. Instead of returning to work and indicating this to his employer the Appellant just returned to work and finished his three week resignation period and left work. There was no attempt to save his employment and instead he just determined that he had to leave. While the Tribunal is sympathetic with the Appellant's frustration with his work environment and his employer the Tribunal finds that he did not show just cause in leaving his employment before determining all available options.

[44] For these reasons the Tribunal finds that the Appellant has not proven that he had just cause for leaving his employment.

CONCLUSION

[45] The appeal is dismissed.

Rodney Antonichuk
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.