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

Citation: *J. D. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 193

Tribunal File Number: GE-16-4469

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: October 11, 2017

DATE OF DECISION: October 31, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance benefits on August 9, 2016. On September 6, 2016, the Respondent disqualified the Appellant from receiving benefits after finding he had voluntarily left his employment without just case. The Appellant requested a reconsideration of this decision, and on November 10, 2016, the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on November 29, 2016.

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

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

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

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

c) The fact that the Appellant or other parties are represented.

[4] The following people attended the hearing: the Appellant and his representative, L. D..

[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] On August 9, 2016, the Appellant made an initial claim for benefits and a benefit period was established effective July 31, 2016. The Appellant indicated that the reason for which he left his employment was shortage of work.

[7] On August 12, 2016, the employer issued a record of employment (ROE) that listed quit as the reason for issuing the ROE.

[8] On August 23, 2016, August 29, 2016 and September 1, 2016, the Respondent attempted to contact the Appellant concerning the reasons for his separation, and left messages on the first two attempts for the Appellant to return the calls.

[9] On September 6, 2016, the Respondent spoke with the employer, who confirmed that there was not a shortage of work or end of contract, but that the Appellant had resigned.

[10] On September 7, 2016, the Appellant told the Respondent that he quit his job because he was demoted from his position of manager to a position on the telephone.

[11] The Appellant sent a request for reconsideration to the Respondent dated October 11, 2016. The Appellant noted that the Respondent's decision was verbally communicated to him on September 26, 2016, but that no written decision had been issued. In his request, the Appellant reiterated that there were significant changes to his duties and that he was demoted. He stated that he tried to speak to the employer but kept getting the run around. He added that he got a pay cut and that the employer removed his bonuses. He stated that in the new position, there were less hours. The Appellant said that this created an unhappy workplace situation and that he was promised promotions but was later told that the position was no longer available, and that this created an antagonistic workplace. He said that the situation resulted in conflict between him and management. He noted the following decisions as being similar to his, in which the outcomes of the appeals were favourable: *X* CUB 72485, *Harlick* CUB 57228, *Montreuil* CUB 35206, *Montreuil v. Canada Employment and Immigration Commission and Canada (AG)*, A-868-96, *Patterson* CUB 46727, *Moser* CUB 50083 and *Laidlaw* CUB 57618

[12] In a letter dated November 1, 2016, the Respondent notified the Appellant that it was in the process of reviewing his request for consideration and asked that he contact it within 10 days of the date of its letter. The Respondent added that if it did not hear from the Appellant, it would proceed with its review and a decision would be made with the information on file.

[13] On November 7, 2016, the Appellant called the Respondent and reiterated that he had been demoted from the Training Manager position to a regular Customer Service Agent position. He stated that the employer told him that the change was due to less people being hired and that they no longer needed a Training Manager. The Appellant said that he was told that the

employer would likely be hiring more employees in the next six months and that he would be put back in the Training Manager position once new staff was hired. He said that his hours were reduced from 40 hours per week to anywhere between 30 and 40 hours per week. He indicated that there was no difference in pay or benefits, but that he was earning less money due to the reduction in work hours. The Appellant said that he spoke to his supervisor who advised him that nothing could be done as the business could not support having a Training Manager. He stated that when he went to work and saw that the following week he was scheduled as a phone operator, he left right away because he was upset and felt uncomfortable returning to work with his peers after having helped to train them. The Appellant said that he did not look for other work or think to request a leave of absence before quitting.

[14] On November 7, 2016, the employer told the Respondent that the Appellant said that he quit for personal reasons. The employer stated that the Appellant was never in a managerial role, but was asked to take part in their “One-Up” program which was designed to take employees out of their everyday roles on the phone and allow them to gain experience doing something different for a short time. The employer said that the Appellant was chosen for the program and put into this role for two months and that when he was put back in his regular role, he was extremely upset. The employer advised that the Appellant’s hours of work, rate of pay, and bonuses all remained the same and that his job title did not change. It said that the program is run quite often in the company, but that it does not have documentation regarding the details of the program or of the Appellant’s participation in it.

[15] On November 7, 2016, the Respondent notified the Appellant that it was unable to pay him employment insurance benefits from August 31, 2016 to September 2, 2016, because he was not in Canada and that because he was on vacation, that he could not prove his availability for work.

[16] On November 9, 2016, the Appellant told the Respondent that he had been formally promoted to manager and was in the role for over a year before being demoted to Customer Service Agent. He confirmed that he resigned and cited personal reasons, but said that he referenced the demotion in his resignation email. The Appellant provided the Respondent with a copy of the email resignation dated August 1, 2016. In the resignation email, the Appellant

spoke of his disillusionment with the company and described the circumstances surrounding the firing of a Team Leader with whom he had a relationship. The Appellant also referenced his expanding role at the company and that his current role included “supporting the entire floor with questions, permissions, technical support, and leadership advice, as well as taking escalations for the entire floor, calling customers back who demanded escalations when I wasn’t available, running meetings for both the floor and streamline (on a daily basis), watching the floor in a leadership capacity when [Team Leaders] need to go on break or take their lunch, occasionally listening to agents’ calls and completing then coaching back quality evaluations, and all sorts of other odds and ends”. In the email, the Appellant referred to the experience of the agents and their frustration in dealing with unnecessary changes and constant pressure from management to get things right. The Appellant said that he was being “put back on the phones” and that the employer wanted “fresh blood” as floor support, and that he considered this to be a demotion. He indicated that his termination from the company should be considered constructive dismissal and that his ROE should reflect this.

[17] On November 9, 2016, the Respondent spoke to the employer who advised that the Appellant was still classed as a Customer Service Agent while taking part in their “One-up” program. The employer added that it typically rotated individuals in and out of the program and that the Appellant had already served his tenure in the program. The employer said that there was a change in the compensation structure in January 2016, but that there was not a specific decrease in actual employee wages. It stated that after this change, it entered into contract negotiations with its client for increased wages for its employees, but that when word got out concerning the negotiations, the employees assumed that it meant a raise would follow immediately.

[18] On November 10, 2016, the Respondent notified the Appellant that in order for his separation to be considered just cause for quitting his position, he was required to prove that he exhausted all reasonable alternatives and that he did not have just cause for quitting his position. The Respondent notified the Appellant that it was maintaining its original decision.

[19] On November 29, 2016, the Appellant filed a notice of appeal with the Tribunal.

[20] On May 5, 2017, the Respondent clarified that no initial letter of decision was sent to the Appellant informing that it had determined that he voluntarily left his employment without just cause. It said that although the Appellant spoke to the Respondent on September 7, 2016, the supplementary record of the claim does not indicate whether he was informed of the decision at that time.

[21] On May 23, 2017, the Appellant filed additional submissions with the Tribunal in response to the Respondent's response to the Tribunals request under section 32 of the Act in which he disputed the Respondent's statement that he did not respond to its requests for additional information. The Appellant stated that he went out of his way to communicated with the Respondent. He said that he believed that the Appellant had not followed the Act and the *Employment Insurance Regulations* (Regulations).

[22] At the hearing, the Appellant testified that he was originally hired to work on the phone as a Customer Service Agent, that he would respond to calls from customer inquiries, and that he was guaranteed 30 hours of work per week. He said that the shifts were assigned based on performance and that when he started he was working generally 3:30 p.m. to midnight, but by the time he left the Customer Service Agent role, he was working Monday to Friday, 8:00 a.m. to 4:00 p.m. The Appellant testified that based on his performance, he was promoted in January 2015, when an operations manager asked him to be a Streamline Support Supervisor and that in this role, he would train agents on how to answer phone calls and he would answer their questions as they were taking phone calls in a live environment. He said that he also took calls when customers asked to speak to a manager and he would run meetings in the mornings and answer any questions.

[23] The Appellant testified that in September 2015, his girlfriend who was a team leader with the employer was fired, that she believed that it was because of her relationship with the Appellant, and that relationships between employees were frowned upon by upper management. He said that at the same time, his senior operations manager wanted to demote him, but his supervisor intervened. He said that it became clear as time went on that management had a grudge against him. He stated that in January 2016, the employer deducted a $1 per hour bonus from the employees and that it promised them after they complained, that they would be getting

substantial raises. The Appellant said that in February 2016, he interviewed to be an in-class trainer and went to an interview and was told he would learn the results within a week, but did not hear for almost two months, at which time he asked the boss what happened and was told that the employer was not hiring for that position anymore. He said that he believed that if his relationship had been as good as it had been in the past with the employer, he would have been hired for the job. He described the atmosphere at work as on in which there was no support from upper management or instructions on how he should deal with future changes.

[24] Concerning his final day at work, the Appellant explained that employees usually got three weeks' notice of what their shifts would be, but he went to work and saw that he was scheduled to work 3:30 p.m. to midnight on Monday, and that he would be back on the phones, without having had any real conversation with an operations manager to say that changes would be made effective immediately. He said that he was probably already going to quit at that time, but that on that day, an operations manager told him that he was spying on an agent because he did not like the way she behaved and wanted her gone. The Appellant said that he warned the agent to be careful, but was chastised by the agent's manager for doing so. He said that the next day he wrote his letter of resignation.

[25] The Appellant said that he had expressed to his managers in the months before he decided to resign that he was not going to go back to the role of answering calls because he would consider it a demotion and it would be inappropriate, but the managers would just brush him off without giving him a direct answer. He said that the One-Up program was an informal name for the role he was in, but when he was told he would be in the program, he was told he was a Streamline Support Manager and that the people he trained thought of him as their manager.

[26] The Tribunal asked the Appellant why in his initial claim for benefits he indicated that he lost his employment due to shortage of work given that he submitted an email resignation to the employer in which he detailed his reasons for resigning. The Appellant said that he was looking for what would fit best and did not find anything that he should have chosen, and that he did not want to make it seem like he quit and he was not directly dismissed or suspended. When pressed, he said he guessed that he did quit, he did leave, but he thought he was forced out, so

thought it was more of a constructive dismissal. When asked to describe the One-Up program, the Appellant said that that when new agents were taking phone calls and had questions on their phone calls, they would ask him, he would respond to requests from customers to speak to a manager, and he would run meetings every morning and at the end of the day. He said that he was told that he was selected to be part of the program based on his ability, and that it was the same for other employees who got this role, specifically that they were noticed by management and management wanted them to pass on their traits to new hires. When asked if employees were permanently assigned to the program, the Appellant said not necessarily, that sometimes it did not work out and people were put back on the phones from time to time, but that he was in the role for 18 months straight. The Appellant confirmed that he expected to be promoted at the end of the program.

[27] The Appellant denied the employer’s statement to the Respondent that while he was participating in the One-Up program, his hours of work, rate of pay, bonuses and job title remained the same. He said that in January 2016, a year after he was in the role, they lost a $1 bonus, that he was guaranteed 40 hours a week, but confirmed that there was no raise in the new role. Concerning his statement to the Respondent that after being demoted to his old position, there was no reduction in pay and benefits, when asked whether this was not an indication that he was never promoted or demoted, the Appellant said that he was a manager, he trained people, took phone calls as a manager and had authority to make decisions as a manager and that when one is demoted, one is not a manager. He added that he would now be working side by side with people he had trained as a manager which was very embarrassing and a clear step back. He said that he understood that he had been promoted even without a pay increase. The Appellant did not agree that the One-up program was a developmental opportunity, but said it was a step up. He confirmed that when he got the new role, that he did not get a job offer, and that he did not have any evidence given to him in writing concerning the job. When asked about the job interview that he attended and whether someone else got the job, the Appellant said that he did not know, but that he believed that there were people who did get hired, although he was told the employer was not hiring for the position anymore.

SUBMISSIONS

[28] The Appellant submitted that he disagrees with the Respondent's interpretation of the Act and the Regulations. He said that he believes that the Act provides for an individual's right to employment insurance if the workplace becomes poisoned and antagonistic and that the Act and Regulations are clear that decisions by management to reduce one's salary, to demote without cause, to not keep promises of promotion are a form of constructive dismissal. The Appellant submitted that the Respondent is incorrect in saying that the Appellant was asked to provide more information by mail and refused to provide it and that the Respondent not sending the initial decision letter to the Appellant indicates that the file was not appropriately considered. He argued that his relationship with the employer had deteriorated and that the work environment had become antagonistic and poisonous so he was right to submit a resignation letter and call it constructive dismissal. The Appellant submitted additional decisions for the Tribunal's consideration including *Liggatt* CUB 66311, *X* CUB 74457, and *J.V.* CUB 79453.

[29] The Respondent submitted that because the Appellant did not respond to its request for additional information, it rendered its decision with the facts on file on September 6, 2016, but there is no indication if he was informed of the decision when he called on September 7, 2016. It said that the Appellant did not have just cause for leaving his employment because he failed to exhaust all reasonable alternatives prior to leaving, such as continuing to work until more suitable employment was lined up. It argued that the Appellant said that he was demoted from his management role back to his regular position and that his pay and hours of work decreased, however, the employer clarified that the Appellant was taking part in a program that allowed employees to gain experience in other roles, and that when his time in the program expired, he was moved back to his regular role. The Respondent stated that the Appellant's ROE pay period details shows consistent bi-weekly earnings for the last 34 weeks of his employment. It said that the Appellant did not start looking for a new job until after he had already quit even though he indicates that his "disillusionment" with the company began as of September 2015.

ANALYSIS

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

[31] The Tribunal notes that the Respondent included evidence concerning a disentitlement to employment insurance benefits because the Appellant was not in Canada and could not prove his availability for work. The Tribunal also notes that the issue under appeal is only the Respondent's reconsideration decision concerning voluntarily leaving employment without just cause. Section 113 of the Act states that a person who is dissatisfied with a decision of the Commission made under section 112 of the Act may appeal the decision to the Social Security Tribunal. Because there is no reconsideration decision as referred to in section 112 of the Act concerning the disentitlement for not being in Canada, the Tribunal does not have jurisdiction to deal with this portion of the Appellant's submissions.

[32] The Tribunal also notes that the Respondent failed to send an initial letter of decision to the Appellant informing him that it had determined that he voluntarily left his employment without just cause. The Appellant submitted that the Respondent's error indicates that it did not appropriately consider his file and that it did not follow the Act and Regulations. The Tribunal is guided by the Federal Court of Appeal in the decision *Desrosiers v. Canada (AG)*, A-128-89, that confirmed the principle established in *Desrosiers* CUB 16233 that an error which does not cause prejudice is not fatal to the decision under appeal. The Appellant said that the Respondent verbally communicated its initial decision to him on September 26, 2016, and he requested reconsideration of that decision, after which he exercised his right of appeal to the Tribunal. The Tribunal therefore does not accept the Appellant's submission that the Respondent did not consider his case appropriately and did not follow the Act or Regulations; rather the Tribunal finds that the Respondent's error in not sending its initial decision letter to the Appellant does not cause prejudice.

[33] Subsection 30(1) of the Act states that a claimant is disqualified from receiving any benefits if the claimant voluntarily left any employment without just cause. 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.

[34] The burden of proof is on the Commission to show that the leaving was voluntary. Then, the burden of proof shifts on the claimant to demonstrate just cause for so leaving.

> *Green v. Canada (AG)*, 2012 FCA 313; *Canada (AG) v. White*, 2011 FCA 190; *Canada (AG) v. Patel*, 2010 FCA 95

Voluntarily leaving employment

[35] The Tribunal finds that the Appellant voluntarily left his employment. The Respondent's evidence in the form of the ROE from the employer indicates that the Appellant quit.

[36] Although in his initial claim for employment insurance benefits the Appellant indicated that he lost his employment due to shortage of work, he clarified at the hearing that he did quit, but thought he was forced to do so. He submitted an email to the Respondent that he sent to the employer on August 1, 2016, in which he indicated he was tendering his resignation effective immediately, after which he detailed the reasons for his resignation. The Appellant argued that his termination from his employment should be considered constructive dismissal and submitted that the Act and Regulations are clear that decisions by management to reduce one's salary, to demote without cause, and not to keep promises of promotion are a form of constructive dismissal.

[37] The Tribunal does not accept the Appellant's suggestion that because he considers that the employer constructively dismissed him, he did not voluntarily leave his employment. Although the Appellant was not pleased with having to return to his position on the telephone as a Customer Service Agent, and he referred to the workplace as having become poisoned and antagonistic, the Tribunal finds that there is insufficient evidence to conclude that the employer wanted to get rid of him and that he did not have a choice to continue in his employment. The Tribunal is supported in this conclusion by the Federal Court of Appeal decision *Canada (AG) v. Peace*, 2004 FCA 56 that held that under subsection 30(1) of the Act, the determination of whether an employee has voluntarily left his employment is a simple one, and that the question to be asked is did the employee have a choice to stay or to leave. Accordingly, the Tribunal finds that the Appellant voluntarily left his employment.

Just cause for leaving Employment

[38] The Federal Court of Appeal has held that in order to establish "just" cause, it must be shown that after considering all of the circumstances, on a balance of probabilities, the claimant

had no reasonable alternative to leaving. Finally, the burden of proof is on the claimant to demonstrate just cause for leaving voluntarily.

> *Tanguay v. Canada (Unemployment Insurance Commission)*, A-1458-84; *Canada (AG) v. MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306; *Canada (AG) v. White*, 2011 FCA 190

[39] The Tribunal finds that the Appellant has not demonstrated that he had just cause for voluntarily leaving his employment. The Appellant contends that he was demoted from his position, that his hours of work were cut resulting in less pay, and that he no longer received bonuses. He testified that the employer fired his girlfriend, and that she believed it was because of their relationship, since relationships between employees were frowned on by upper management. He said that at the same time, the senior operations manager wanted to demote him, but his direct supervisor intervened. The Appellant spoke of an unhappy workplace and conflict between himself and management and that when he saw that he was to return to his regular position as a Customer Service Agent, he quit right away. He submitted that his relationship with the employer had deteriorated and that the work environment had become antagonistic and poisonous which led to his resignation.

[40] The Appellant said that he was promoted to a manager position in January 2015 based on his performance, but that he was then demoted to his previous position after 18 months. He described his role in the manager position as being one in which he trained new agents, responded to their questions, took customer calls escalated from agents, and ran daily meetings. He said that the new agents looked to him as their manager. The Appellant confirmed that he had been selected to be part of the One-Up program based on his performance and when asked to describe the program, the Appellant reiterated his description of his role in the manager position. Although the employer told the Respondent that the One-Up program was a rotational program designed to get employees out of their everyday roles on the phone and allow them to gain experience doing something different for a short time, the Appellant stated that he did not agree that the program was a developmental opportunity but said that it was a step up, even though he never received a formal job offer for or pay raise associated with the position.

[41] The Tribunal finds that there is insufficient evidence to conclude that the Appellant was promoted and finds that based on his performance, the Appellant was selected to participate in a program that took him away from his regular duties for a finite period as described by the employer. Although the Appellant insisted that he had been promoted, he confirmed the Respondent's evidence from the employer that he did not receive a raise in the new role although there was an increase in pay as a result of increased hours of work. Because of the Appellant's acknowledgement of the One-Up program and his participation in it, his evidence that he did not receive a formal job offer for the role that he fulfilled in the One-Up program, and because he told the employer that he did not want to go back to his role answering calls because he would consider it a demotion, the Tribunal finds that it is more reasonable to conclude that the program was a temporary one used by the employer to reward and develop employees. On this basis, the Tribunal gives more weight to the Respondent's evidence in the form of information from the employer, than to the Appellant's evidence that he was promoted to the position of manager.

[42] Given the Tribunal's finding concerning the temporary nature of the Appellant's role in the One-Up program, it finds that, as submitted by the Respondent, the Appellant failed to exhaust all reasonable alternatives prior to leaving. In addition to his characterization that he was demoted from his job, the Appellant referred to a number of other issues with the employer. However, the Tribunal finds that there is no evidence to show that the Appellant's working conditions were such that they constituted just cause for his immediately leaving his employment, even given his characterization of the work environment to be poisonous and antagonistic. It is clear that the Appellant wanted to move beyond his Customer Service Agent position and he is to be commended for that. He testified that he attended an interview for another job, but was told later by the employer that the position would not be filled. Although the Appellant suggested that he would have been hired for the position if his relationship with the employer was as good as it had been in the past, there is insufficient evidence to conclude that the employer took deliberate action to deny the Appellant the job for which he attended the interview. Indeed, the Appellant testified that he did not know if anyone had been hired, even though he added that he believed that there people who did get hired. The Tribunal finds that the Appellant could have waited for other opportunities to be promoted rather than leaving his employment when he did.

[43] The Appellant testified that it was on his final day of work that he saw on the schedule that he would be back on the phones, without having had any real conversation with an operations manager to say that the changes would be made effective immediately. The Tribunal notes that the employer gave the Appellant an explanation for the change and that he would be put back in the manager role once new staff was hired in the next six months, and that the Appellant also spoke to his supervisor who explained that the business could not support having a training manager. The Tribunal finds that in this circumstance, given his interest in the role he had in the One-Up program, the Appellant could have waited for another opportunity to be a part of the program in the future. The Tribunal also finds that given the Appellant's stated discomfort with returning to his regular position on the phone, he could have sought alternate employment before leaving his employment.

[44] The Appellant stated that the reduction of his work hours as a result of being put back on the phones would also mean that his wages were reduced. The Tribunal acknowledges that subparagraph 29(c)(vii) of the Act states that 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 significant modification of terms and conditions respecting wages or salary. However, the Tribunal has already found that the Appellant worked temporarily in a program after which he was to return to his original role for which he was guaranteed fewer hours of work than in the program. The Tribunal does not find that there was a significant modification of terms and conditions respecting wages or salary; rather the Appellant benefitted temporarily from more hours of work while part of the One-Up program, and although he continued at the same rate of pay in the program, by virtue of the increased hours, his wages increased.

[45] The Appellant spoke of having a $1 per hour bonus being taken away in January 2016. The employer told the Respondent that there was a change in the compensation structure in January 2016, but said that there was not a specific decrease in actual employee wages. The employer also stated that when word got out concerning contract negotiations, employees assumed that a raise would follow immediately. Indeed, the Appellant testified that the employer promised its employees substantial raises. The Tribunal accepts the Respondent's evidence from the employer because it judges the employer to be objective and neutral in terms of the outcome

of this appeal. Accordingly, the Tribunal gives more weight to the Respondent's evidence of a change in compensation structure in January 2016 that did not result in a specific decrease in actual employee wages, than to the Appellant's evidence of losing a bonus. Therefore, the Tribunal does not find that there was a significant modification of terms and conditions respecting wages or salary.

[46] Concerning his contention that the work environment was poisonous and antagonistic, the Appellant said that this was as a result of being promised promotions and after interviewing for a job, being told that the job was no longer available. He testified that after his girlfriend was fired, any conversations he had with the employer were cold and one-sided and that the employer was not receptive to what he had say. Although the Tribunal understands that the Appellant would have been concerned when his girlfriend was fired, and understandably unhappy at not being promoted, the Tribunal finds that his characterization of the workplace as poisonous and antagonistic is not supported by his evidence. The Tribunal acknowledges that based on the Appellant's reference to deterioration in the relationship with his employer, there may have been some unresolved conflict. However, in concluding that the Appellant could have taken steps to resolve the conflict with his employer before leaving his employment, the Tribunal is guided by the Federal Court of Appeal that held that the obligation is on a claimant, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job.

> *Canada (AG) v. White, 2011* FCA 190; *Canada (AG) v. Hernandez*, 2007 FCA 320; *Canada (AG) v. Murugaiah*, 2008 FCA 10

[47] The Appellant submitted a number of CUB decisions for the Tribunal's consideration. While the Tribunal is not bound by CUB decisions, it will comment on those cases submitted that it considers to be reasonably similar to the Appellant's as it relates to the issue decided by the Umpires. In *X* CUB 72485, the Umpire held that the Board had erred in making its decision to dismiss the claimant's appeal without having regard to the material before it, namely antagonism with her supervisor. The Tribunal finds that this case can be distinguished from the present case in that the Tribunal has concluded that the Appellant's characterization of the

workplace as antagonistic and poisonous is not supported by the evidence. The Tribunal finds that on the same basis, the Appellant's case is distinguishable from *Liggatt* CUB 66311

[48] In *Patterson* CUB 46727, the claimant's employer restructured its operation and her position was eliminated, and she was offered a new position in which the hours were reduced. The Umpire held that the material fact of the claimant's reduction of hours ought to have been taken into account as a "significant modification of terms and conditions respecting wages or salary". The Tribunal finds that this case is distinguishable from the Appellant's in that the Appellant was temporarily in a new role and was to resume his regular position. As such, the Tribunal has already found that his return to his regular position and the resulting reduced hours from the temporary position to the hours guaranteed in his regular position did not constitute a significant modification of terms and conditions respecting wages or salary.

[49] Similarly, in *Montreuil v. Canada Employment and Immigration Commission and Canada (AG)*, A-868-96, the Federal Court of Appeal allowed the claimant's appeal from the Umpire's decision because it did not disclose any grounds that would warrant his intervention in the Board's decision that the claimant had just cause to leave her employment because of the reduction in her salary. Again, the Tribunal has already found that there was no significant modification of terms and conditions respecting wages or salary; rather the Appellant benefitted temporarily from more hours of work that resulted in increased wages while part of the One-Up program.

[50] In *Moser* CUB 50083, the Umpire allowed the claimant's appeal because the facts disclosed that the claimant's job was eliminated, and while the employer offered him a new job, the hours were less favourable and the imposition of another probationary period would imply a lack of confidence the employer had in the claimant and could be taken as a method of eventually discharging him without the necessity for payment of any severance relating to his experience with the company. Again, the Tribunal has found in the present case that the Appellant was returning to his regular position, not to a position that was new. Although he testified that before being assigned to the One-Up program he was working 8:00 a.m. to 4:00 p.m. in his regular job, and that on return to his regular job he had been assigned to work from 3:30 p.m. to midnight, this was a shift that the Appellant testified that he worked on starting with

the employer. The Tribunal finds that there is insufficient evidence to conclude that the Appellant having to work from 3:30 p.m. to midnight was an indication of having to repeat a probationary period, and there no evidence before the Tribunal that the Appellant requested to work 8:00 a.m. to 4:00 p.m.; rather he voluntarily left his employment. The Tribunal finds that on the same basis, the Appellant's case is distinguishable from *J.V.* CUB 79453.

[51] Based on the foregoing, the Tribunal finds that the Appellant has not demonstrated that he had no reasonable alternative to leaving his employment when he did, and that he has not demonstrated just cause for leaving his employment under sections 29 and 30 of the Act.

CONCLUSION

[52] The appeal is dismissed.

Audrey Mitchell
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.