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

Citation: *K. F. v. Canada Employment Insurance Commission*, 2018 SST 333

Tribunal File Number: GE-17-3642

BETWEEN:

K. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: March 15, 2018

DATE OF DECISION: April 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The Tribunal finds the Appellant voluntarily left his employment without just cause because he did not demonstrate he had no reasonable alternatives to leaving.

OVERVIEW

[2] The Appellant, a real estate appraiser, was nearing the age of 65 when he began discussing his retirement with co-workers and his employer. The Appellant was also experiencing stress with his workload. He and the employer agreed he would reduce his work by one day a week for a period of time. The Appellant and his employer later agreed on a date for the Appellant's last day of employment. Prior to finishing his employment, the Appellant and the employer signed a contract whereby if work within the Appellant's area of expertise came up in the 12 months after he left work the employer would call the Appellant in to work. No work was forthcoming. The Appellant applied for Employment Insurance (EI) benefits 5 weeks after he stopped working. The Respondent disqualified the Appellant from receiving benefits as it determined he had voluntarily left his employment.

ISSUES

1. Did the Appellant voluntarily leave his employment?

2. If so, did the Appellant have just cause to voluntarily leave his employment?

ANALYSIS

[3] Subsection 30(1) of the *Employment Insurance Act* (Act) provides that a claimant disqualified from receiving any EI benefits if the claimant voluntarily left any employment without just cause.

[4] The Respondent has the burden to prove the leaving was voluntary, and once established, the burden shifts to the Appellant to demonstrate he had just cause for leaving. To establish he had just cause, the Appellant must demonstrate he had no reasonable alternative to leaving,

having regard to all the circumstances (*Canada (Attorney General) v. White*, 2011 FCA 190; *Canada (Attorney General) v. Imran*, 2008 FCA 17). The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

Issue 1: Did the Appellant voluntarily leave his employment?

[5] Yes. The Tribunal finds the Respondent has proven the Appellant voluntarily left his employment pursuant to section 30 of the Act because he could have chosen to remain at work.

[6] To decide if the Appellant voluntarily left his employment, the question to be asked is whether the Appellant had a choice to stay or leave (*Canada (Attorney General) v. Peace*, 2004 FCA 56).

[7] The Appellant disputes the use of the phrase "voluntary leaving" to describe how his employment ended. He believed the phrase as used by the Respondent meant that he quit his employment and he does not view that to be the case. The Appellant submitted that he understood that at the age of 65, mandatory retirement would kick in and that is where he and the employer were headed. He started discussing retirement with co-workers while on coffee breaks. As he worked past age 65, the Appellant testified his production was diminishing. The Appellant's salary was based in part on his productivity and his productivity was discussed with the employer in quarterly review meetings. He began to find work stressful and to reduce the stress on the Appellant his workweek was reduced to four days a week. The Appellant stated he did not view his leaving employment as voluntary because his performance was down, his stress levels were up and if that had not been the case he would still be working. The Appellant viewed his "mutual agreement" with the employer on the date of his retirement to be limited to the actual date as a "breaking off point" and not as his agreeing to the actual retirement itself.

[8] The employer stated that it had filled out the Record of Employment (ROE) citing mandatory retirement as the reason for issuing the ROE because they thought it was their only option. The employer later stated to the Respondent that the Appellant had taken a voluntary retirement, he was a good worker, and they wished he had chosen to stay.

[9] The Tribunal finds the Appellant discussed his retirement with his co-workers, reduced his stress through a reduced work week, described his discussions with his employer as developing an "exit strategy" and agreed to a post-employment contract to be called in to work should it become available. The Tribunal finds these actions are evidence of his intention not to continue working full time with his employer. The employer stated that the appellant's retirement was voluntary and they wished he had chosen to stay. Therefore, the Tribunal finds the Appellant did have a choice to stay in his employment and, as a result, the Tribunal finds he voluntarily left his employment.

Issue 2: If so, did the Appellant have just cause to voluntarily leave his employment?

[10] To establish he had just cause, the Appellant must show that, having regard to all the circumstances, on a balance of probabilities, he had no reasonable alternatives to leaving his employment (*Canada (Attorney General) v. White*, 2011 FCA 190).

[11] The Tribunal finds pursuant to sections 29 and 30 of the Act the Appellant did not, having regard to all the circumstances, on a balance of probabilities, have just cause to voluntarily leave his employment as there were reasonable alternatives to leaving his employment when he did.

Did the Appellant's working conditions constitute a danger to health and safety?

[12] Section 29 of the Act states that a claimant has just cause for voluntarily leaving an employment if they had no reasonable alternative to leaving having regard to all the circumstances under Section 29 of the Act. Subsection 29(c) sets out a non-exhaustive list of circumstances for the Tribunal to consider when determining whether a claimant has just cause for leaving their employment, including working conditions that constitute a danger to health and safety (subsection 29(c)(iv)).

[13] The Tribunal finds the Appellant has not proven he had just cause to voluntarily leave his employment due to working conditions that constitute a danger to health or safety because the Appellant did not prove the stress he was experiencing with reduced productivity constituted a danger to his health and safety.

[14] The Appellant was employed as a real estate appraiser. He testified that he found it was taking him longer to accomplish tasks related to his work and this reduced productivity was causing him undue stress. However, the Appellant did not seek any medical advice or assistance to address his stress and did not receive medical advice to leave his employment. The Appellant stated that he and his employer worked through the stress by the employer allowing the Appellant to work a reduced work week and the Appellant continued to work under those conditions for a lengthy period of time. The Appellant testified he found the schedule of working four days a week to be beneficial to him. As a result, the Tribunal finds the work the Appellant was performing was not a danger to the Appellant's health and safety.

Was there undue pressure by the employer on the Appellant to leave his employment?

[15] Subparagraph 29(c)(xiii) of the Act states that a claimant has just cause for voluntarily leaving an employment if the claimant had no reasonable alternative to leaving, having regard to all the circumstances, including if there was undue pressure by an employer on the claimant to leave their employment.

[16] The Tribunal finds the Appellant has not proven he had just cause to voluntarily leave his employment due to undue pressure by the employer because the process of his retiring from the employer took place over the course of eighteen months and the employer was willing to have the Appellant continue working after he left his employment.

[17] The Appellant testified the office was small and he could not say whether he went to his employer or his employer came to him to discuss his retirement. He stated his reduced level of production was discussed at quarterly review meetings. The employer did not discipline the Appellant for the reduced level of productivity. The Appellant understood that he was nearing 67 years of age and "something had to move."

[18] The Appellant testified he was not aware if the employer had a policy on retirement. He is a member of the Appraisal Institute of Canada and the Institute does not have a policy on retirement.

[19] The Appellant stated the discussion about setting the date for his last day of employment was about which date was best for him and best for the employer. The Appellant stated if he and

the employer had not agreed on a mutual date the employer would have decided on the date. The Appellant based this statement on his feeling that if his production continued to fall the employer would have to make a decision.

[20] The Tribunal finds the employer did not put undue pressure on the Appellant to leave his employment because there is no evidence to demonstrate the employer initiated the discussions concerning retirement, the Appellant and the employer were equal participants in the discussions, there is no evidence of a mandatory retirement policy and the Appellant did not tell the employer he had no desire to retire.

Did the Appellant have reasonable assurance of another employment in the immediate future?

[21] Subparagraph 29(c)(i) of the Act states a claimant has just cause for voluntarily leaving an employment if, having regard to all the circumstances, he had no reasonable alternative to leaving. This includes consideration of whether there was a reasonable assurance of another employment in the immediate future. The legal test for this circumstance is whether the reasonable assurance existed, "… the words 'reasonable assurance' … imply some measurable form of guarantee" (*Canada (Attorney General) v. Sacrey*, 2003 FCA 377).

[22] The Tribunal finds the Appellant has not proven he had a reasonable expectation of alternative employment in the future because the contract he and the employer signed did not guarantee a minimum amount of work. There is no evidence the contract required the employer to use only the Appellant's services as it continued to employ other real estate appraisers.

[23] The Appellant testified he and the employer signed a contract whereby if any work came up that required his expertise within the twelve months following his last date of employment the employer would call him in to perform the work. The contract was a way to ease into retirement. At the time the contract was signed the employer did not give the Appellant an estimate of the amount of work he might be called upon to perform.

[24] The Appellant testified that he had yet to receive any work under the contract. However, the Tribunal must consider only the facts that existed at the time the Appellant left his employment when determining if the leave was justified (*Canada (Attorney General) v. Lamonde*, 2006 FCA 44).

[25] The Tribunal finds the Appellant has not proven he had just cause to voluntarily leave his employment due to having a reasonable expectation of alternative employment in the immediate future because at the time he left his employment, the contract he and the employer signed provided that the Appellant would be called into work if work requiring his expertise arose. It did not guarantee the number of times he would be called in or hours of work and did not require the employer to use the Appellant's services exclusively as it continued to employ other real estate appraisers.

Did the Appellant have reasonable alternatives to leaving his employment?

[26] The question is not whether it was reasonable for the Appellant to leave his employment, but rather whether leaving the employment was the only reasonable course of action open to him (*Canada (Attorney General) v. Laughland*, 2003 FCA 129).

[27] The Tribunal finds rather than leaving his employment the Appellant had other courses of action available to him, in particular, the Appellant could have continued to take advantage of the employer's accommodation to work at a reduced work week. In light of this, the Tribunal finds the Appellant voluntarily left his position but did not have just cause to do so, and, having regard to all the circumstances, the Appellant had reasonable alternatives to leaving his employment.

The requirement for just cause

[28] There is a distinction between the concepts of "good cause" and "just cause" for voluntarily leaving. It is not sufficient for a claimant to prove they were reasonable in leaving their employment; reasonableness may be good cause but it is not just cause. It must be shown that, after considering all of the circumstances, the claimant had no reasonable alternative to leaving their employment (*McCarthy* A-600-93). The words "just cause" are not synonymous with "reason" or "motive" (*Tanguay v. Canada (Unemployment Insurance Commission*), A-1458-84).

[29] Although the Appellant may have felt he had a good reason to voluntarily leave his employment, a good reason is not necessarily sufficient to meet the test for "just cause" (*Laughland*).

CONCLUSION

[30] The Tribunal does not consider the reduced productivity and the stress levels the diminished productivity caused the Appellant to be a danger to the Appellant's health and safety. Nor does the Tribunal consider the ongoing discussions the Appellant had with the employer to be undue pressure by the employer on the Appellant to leave his job. The Tribunal does not find the twelve-month post-employment contract to meet the requirement of the Appellant to have a reasonable expectation of alternative employment in the immediate future. In addition, the Tribunal finds that a reasonable alternative would have been for the Appellant to have continued working a reduced work week. As a result, the Tribunal finds the Appellant has not demonstrated just cause for leaving his employment, having regard to all of the circumstances, as he had reasonable alternatives available to him and is therefore disqualified from receiving benefits pursuant to sections 29 and 30 of the Act.

[31] The appeal is dismissed.

Raelene R. Thomas
Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. F., Appellant

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.

Employment Insurance Regulations