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

Citation: *V. D. v. Canada Employment Insurance Commission*, 2018 SST 331

Tribunal File Number: GE-17-2555

BETWEEN:

V. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: March 6, 2018

DATE OF DECISION: April 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The Tribunal finds the Appellant had just cause to voluntarily leave her employment because she demonstrated she had no reasonable alternatives to leaving

OVERVIEW

[2] The Appellant worked in a remote fly-in community as an instructor teaching life skills in a program sponsored by two band councils and a technology institute. Adult participants enrolled in the program received a monetary top-up provided they did not miss more than three days. The Appellant was responsible for taking attendance and discontinuing or expelling, those participants from the program who did not meet the attendance requirements. The Appellant discontinued two participants from the program, one threatened the Appellant and the other reacted violently. The Appellant feared for her safety and, after flying home for a weekend, decided she could not return to her employment. The Tribunal must decide if the Appellant had just cause to voluntarily leave her employment.

ISSUES

Issue 1: Did the Appellant voluntarily leave her employment?

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

ANALYSIS

[3] Subsection 30(1) of the *Employment Insurance Act* (EI Act) provides a claimant is disqualified from receiving any employment insurance benefits if they voluntarily left any employment without just cause. Subsection 29(c) of the Act states just cause for voluntarily leaving an employment exists if the claimant had no reasonable alternative to leaving, having regard to all the circumstances; the paragraph goes on to give a non-exhaustive list of specific circumstances .

[4] The burden of proof is on the Commission to show that the applicant had left her employment voluntarily. Then the burden shifts to the Appellant to show that she had “just cause”,

in all of the circumstances, in leaving her employment. (*Green v. Canada (Attorney General)* 2012 FCA 313)

Issue 1: Did the Appellant voluntarily leave her employment?

[5] Yes. The Tribunal finds the Respondent proved the Appellant voluntarily left her employment pursuant to section 30 of the *Employment Insurance Act* (the Act).

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

[7] The Appellant testified that she left her employment when she did not return to work from a weekend visit to her home community. The Application for Benefits states the Appellant quit. The Record of Employment filed by her former employer states the Appellant abandoned her position and the Appellant confirms she left her position and did not return. The Tribunal finds that the Appellant had a choice to stay at or leave her employment and she decided to leave her employment.

Issue 2: Did the Appellant have just cause to voluntarily leave her employment?

[8] Yes. The Tribunal finds there was a danger to the Appellant's health and safety when she was threatened by course participants. She expressed her fears for and concerns about her safety to her employer, and the employer failed to provide an adequate response. As a result, having regard to all the circumstances, the Tribunal finds the Appellant had just cause for voluntarily leaving her employment pursuant to subsection 29(c) of the Act.

[9] To establish she had just cause, the Appellant must show that, having regard to all the circumstances, on a balance of probabilities, she had no reasonable alternative to leaving her employment (*Canada (Attorney General) v. White*, 2011 FCA 190). The Tribunal finds the Appellant has met this test.

[10] The Appellant testified she was hired to deliver a life skills course in a remote fly-in community. The course was sponsored by an institute of technology, the local band council and a greater area band council. Her employer was the institute and her direct supervisor was an

employee of the institute. When she arrived in the community to teach she received little support in that the Band Manager, who as the liaison for the program was regularly not present, the student materials were not available and there was little guidance from the employer on how to administer the participant attendance.

[11] The adult participants received a monetary top-up provided they attended the course. Absences of more than three days would result in the participant being discontinued, or expelled, from the program and losing the monetary top-up. The Appellant could decide at her own discretion which absences to report and when to discontinue a participant from the program. The Appellant was responsible for telling participants they had been discontinued.

[12] The Appellant testified several participants appeared to be impaired while in her class. One participant was removed from the course for selling alcohol on the premises. Two incidents when the Appellant discontinued participants from the course caused the Appellant to be gravely concerned for her safety. One participant threatened the Appellant and another became aggressive towards the Appellant and the Band Manager.

[13] The Appellant was subject to aggressive sexual advances by a female participant that included unwanted gifts and sexual text messages. When this participant was discontinued, she yelled and threatened the Appellant with “payback”. The Appellant had to walk past this participant’s house on her way to and from her place of employment and testified that she felt unsafe doing so on her own.

[14] The Appellant reported this incident to her employer. The Appellant asked her direct supervisor if she should call the police. She was told not to call the police and was advised to take some measures to ensure her safety. Her boyfriend was visiting the community for a week and was able to walk her back and forth to work. After he left there was no one to accompany her. The Appellant thought her supervisor would discuss the incident with the institute’s vice-president. There is no evidence to indicate this discussion took place. The Appellant contacted Occupational Health and Safety (OHS) about the incident and was told she did not need her employer’s permission to call the police. There is no evidence the Appellant filed a complaint with OHS or that the agency investigated the incident.

[15] In the second incident, a male participant and his wife were discontinued due to their absence from the course. In the presence of the Appellant, the female Band Manager informed the participant that he and his wife were discontinued. The participant argued with the Appellant and started swearing and yelling, the Band Manager responded to the outburst saying “call the cops” which provoked more yelling and swearing from the male participant, who then stormed out of the building but later returned to attend a lecture delivered by another person.

[16] The classroom was initially set up at the local public school. But due to the number of school closures and a participant selling alcohol on those premises it was moved to a board room in the Band Office. At the Band Office there was a front door and back door. If the participants used the front door they would be seen by the Band Manager and not allowed into the program if they were discontinued. Following this second incident the back door was supposed to be locked to prevent participants from getting to the classroom unseen but this did not happen.

[17] At the end of her last week of work the Appellant flew back to her home community for the weekend. She decided not to return to work because she feared for her safety. The employer emailed the Appellant on Monday, March 27, 2017, to see if she was at work. The Appellant replied no she would not be returning as she felt unsafe in the classroom and in the community. The Appellant described the threat made against her, other threatening incidents she had experienced and the lack of action taken by her employer to address her concerns.

[18] Before replying the Appellant asked her direct supervisor for the email address of the institute’s vice-president. She was told by her direct supervisor she was expected to express any concerns first to the direct supervisor. The Appellant obtained the vice-president’s email from human resources and copied the vice-president on her reply. The vice-president responded to the Appellant’s email stating that her direct supervisor and another person would be in touch “to talk about options.”

[19] According to the emails provided by the employer, the Appellant did not respond to the vice-president’s email and on March 31, 2017, the Employer issued a letter asking the Appellant to get in contact with her direct supervisor or she would be deemed to have abandoned her job.

[20] Consideration must be given to whether the fact that the appellant voluntarily left her employment as a result of fears she had of dangerous conditions at her work was the only reasonable alternative (*Canada (Attorney General) v. Hernandez,* 2007 FCA 320)

[21] The Appellant was frightened about retaliation from students and experiencing nightmares. She argues she had no choice but to leave her position because despite expressing her concerns about her safety to those responsible for the delivery of the program, their response was inadequate.

[22] The Respondent argued the Appellant did not pursue all reasonable alternatives prior to leaving her position. The Respondent stated it would have been reasonable for the Appellant to talk to her employer about her concerns and wait for resolution. The Respondent relies upon statements from the employer that it could have "looked into getting another staff for support or relocated the claimant to another location" as a reasonable alternative to the Appellant's leaving her position.

[23] The Tribunal finds the Appellant brought her concerns to her employer for resolution prior to leaving her position but there was no resolution. Initially she spoke to her direct supervisor about her concerns and was told by that supervisor not to call the police and to take measures to ensure her own safety. The Tribunal finds that this response is inadequate. The Appellant lived in the same community as the participants that she discontinued from the course. She would have to walk, without an escort, by these discontinued participants' homes on a daily basis as she walked to and from her lodgings to the work site. This could not be avoided. To expect an employee, living in a remote fly-in community where she has been threatened by a resident to provide her own measures to ensure her safety is not appropriate. The advice to not "call the cops" reinforced the requirement the Appellant was solely responsible for her safety and would not have her safety concerns addressed by the employer. In addition, there was no action taken to prevent discontinued participants from attending the course as evidenced by a discontinued participant attending a lecture after he was discontinued.

[24] The Tribunal must consider only the facts that existed at the time the Appellant left her employment when determining if the leave was justified (*Canada (Attorney General) v. Lamonde,* 2006 FCA 44).

[25] The response of the employer's vice-president to the Appellant when she was advised of the threat by one participant and the threatening behaviour of another participant was to refer the Appellant back to her direct supervisor for resolution. The Tribunal finds this response is inadequate as the Appellant was being told the only individual she could approach with her safety concerns was the individual who told her not to contact the police when she was threatened and to develop her own safety measures.

[26] The Tribunal finds that the Appellant did approach her employer with her concerns and her concerns were not addressed. As a result, the Tribunal finds there were no other reasonable alternatives given the circumstances and other alternatives such as ensuring the Appellant would not encounter students whom she felt had threatened her outside the classroom or in the community were not possible.

[27] The Tribunal finds the Appellant has demonstrated on a balance of probabilities, that there were no reasonable alternatives other than leaving her employment. When the employer became aware the Appellant would not be returning to the work location it emailed her and left messages on her cell phone. When the Appellant did not respond the employer sent a letter to the Appellant to "address your unauthorized absence from work." In the letter the employer stated it tried to contact the Appellant to "discuss your concerns and provide further support." The person to provide the support was the direct supervisor, who had left the Appellant to her own devices when it came to addressing her safety concerns. The letter does not make any mention that the employer would look into getting another staff for support or relocating the Appellant to another location. The Tribunal finds the Respondent's argument that reasonable alternatives existed fails because the employer took no steps to advise the Appellant of these alternatives nor is there any evidence to demonstrate the employer itself had taken steps to explore these options.

[28] Just cause is not the same as a good reason. The question is not whether it was reasonable for the Appellant to leave her employment, but rather whether leaving her employment was the only reasonable course of action open to her, having regard to all the circumstances (*Canada (Attorney General) v. Imran 2008 FCA 17*; *Canada (Attorney General) v. Laughland,* 2003 FCA 12).

[29] The Appellant stated she did search for alternative employment prior to leaving her position. She had applied for a social work position while she was employed teaching the life skills course. The Appellant has an obligation, in most cases, to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job (*Canada (Attorney General v. White*, 2011 FCA 190).

[30] The Appellant is responsible for proving just cause and she must show that she had no reasonable alternative but to leave her employment when she did. The Tribunal finds the Appellant's safety was threatened and the employer's response to that threat was inadequate. Having regard to all the circumstances, the Tribunal finds it was reasonable for the Appellant to determine the ongoing threat to her safety and any new threats to her safety would not be addressed and as a result there was no alternative but for her to leave her employment, other alternatives such ensuring the Appellant would not encounter students outside the classroom or in the community were not possible.

CONCLUSION

[31] The appeal is allowed. The Tribunal finds, having regard to all of the circumstances, the Appellant has proven just cause to have voluntarily left her employment pursuant to sections 29 and 30 of the Act.

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

HEARD ON:	March 6, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. D., 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