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

Citation: *A. L. v. Canada Employment Insurance Commission*, 2018 SST 355

Tribunal File Number: GE-17-3627

BETWEEN:

A. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Glen Johnson

HEARD ON: April 26, 2018

DATE OF DECISION: April 26, 2018

Canada

PERSONS IN ATTENDANCE

Appellant: A. L., and her representative, R. L.

DECISION

[1] The appeal is allowed. The Tribunal finds that the Appellant did not voluntarily leave her employment on August 4, 2017, and she is not disqualified from receiving EI benefits pursuant to section 30 of the *Employment Insurance Act* (*Act*).

OVERVIEW

[2] The Appellant worked as an accountant at a business (employer) until August 4, 2017. She made an initial claim for regular employment insurance (EI) benefits.

[3] The Appellant claims she was left work due to a shortage of work on account of the sale of her employer's business. The employer claims that the Appellant was dismissed from employment.

[4] The Respondent determined at the initial level that the Appellant was dismissed from employment because of her own misconduct and on reconsideration the Respondent determined that the Appellant is disqualified from receiving EI benefits because she voluntarily left employment without just cause when voluntarily leaving her employment was not her only reasonable alternative. The Appellant appealed the Respondent's decision to the Social Security Tribunal (Tribunal).

FORM OF HEARING

[5] The hearing was held by teleconference for the following reasons:

a) The information in the file, including the need for additional information;

b) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[6] Did the Appellant voluntarily leave her employment without just cause as defined by sections 29 and 30 of the *Employment Insurance Act* (*Act*) which warrants a disqualification from EI benefits?

EVIDENCE

[7] In her application for EI benefits (GD3-3), the Appellant indicated that she worked from February 26, 2016 to August 4, 2017 as an accountant at a business which was for sale and left due to a shortage of work when the business did sell.

[8] The employer issued a record of employment (ROE) for the Appellant and indicated that the reason for issuing the ROE was code E, "*quit*" (GD3-15), then later changed the ROE to dismissed as the reason for separation.

[9] The employer told the Respondent that the Appellant was greedy and tried to blackmail the employer (GD3-17). The employer acknowledged that the business was sold with a closing date of September 30, 2017 and that the employer and Appellant were negotiating terms of severance (GD3-20).

[10] The Appellant told the Respondent that she denies trying to blackmail the employer, but was aware of the sale of the business effective September 30, 2017 and she was negotiating terms of severance with her employer while offering to assist with a transition of the business to the new owner. (GD3-18).

[11] A number of emails were exchanged between the employer and the Appellant concerning the negotiation of the Appellant's terms of severance.

[12] On July 26, 2017 the Appellant was aware of the sale of the employer's business effective September 30, 2017 and she expressed concern in an email to the employer dated July 26, 2017 about her future employment at the business and asked for a specific amount of money to assist with the transition to new ownership of the employer's business (GD2A-24). In the email she said "*If we do not come to an agreement, unfortunately, I have no choice but to give my 2 week notice*".

[13] The Appellant told the Respondent that she did not intend to give the employer a notice to quit in the email of July 26, 2017, she intended to negotiate with her employer for severance terms and she did not intend to quit until she found another job. She said her employer interpreted her email as a resignation so as to potentially create financial savings by paying her a lower severance pay amount (GD3-29).

[14] In a series of emails from July 28, 2017 to July 31, 2017 between the Appellant and employer it became apparent that they were unable to agree on severance terms for the Appellant (GD2A-26, GD3-23 and GD2A-27).

[15] An email from the employer on July 28, 2017 states that the employer decided to interpret the Appellant's email of July 26, 2017 as a resignation, pay the Appellant 2 weeks' severance pay and advise her that her last day of work was August 4, 2017 (GD2A-27). The employer said "*It is clear we cannot come to an agreement and I accept your 2 weeks' notice*".

[16] The Respondent initial determined that the Appellant lost her employment because of her own misconduct and imposed a disqualification from EI benefits (GD3-28). In a denial of the Appellant's request for reconsideration the Respondent said there was a disqualification from EI benefits because the Appellant voluntarily left employment on August 4, 2017 when she had reasonable alternatives to leaving, considering all the circumstances (GD3-94).

[17] The Appellant testified that when she sent an email of July 26, 2017 to the employer she was still hopeful that terms of severance could be agreed upon. She is of the view that she was dismissed from employment, but not caused by her own misconduct.

SUBMISSIONS

[18] The Appellant submitted that:

a) She was employed to August 4, 2017 and left due to a shortage of work on account of the sale of her employer's business;

b) She did not intend to resign from employment until she had found another job, but left when she and her employer were unable to negotiate an agreement on severance terms.

[19] The Respondent submitted that:

a) The Appellant is disqualified from receiving EI benefits because on August 4, 2017 she voluntarily left employment without just cause within the meaning of the *Act*;

b) The Appellant made a personal decision to voluntarily leave work without cause by quitting when negotiations did not go her way and put herself in the position of being unemployed;

c) The Appellant had reasonable alternatives to leaving employment when she did, such as maintaining employment until another job was found.

ANALYSIS

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

[21] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work (*Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 SCR 29).

[22] Subsection 30(1) of the Act provides for a disqualification from receiving benefits because a claimant voluntarily leaving employment without just cause. The onus of establishing the claimant left voluntarily is upon the Commission, then the onus of establishing just cause shifts to the claimant (*Green v. Canada (Attorney General*), 2012 FCA 313).

[23] The Tribunal must first determine whether the Appellant voluntarily left employment. The question to be asked is whether there was a choice to stay or leave *Canada (Attorney General) v. Peace*, 2004 FCA 56).

[24] The Tribunal finds that the employer chose to terminate the Appellant's employment, brought about through the sale of the employer's business and it was not the Appellant who chose to leave.

[25] Where a claimant left her employment due to a misunderstanding, there is a significant question of whether the termination could be said to be voluntary (*Bedard v. Canada (Attorney General*), 2001 FCA 76).

[26] The Appellant claims she left employment by reason of a shortage of work caused by the sale of her employer's business. She submits that the employer improperly interpreted her email of July 26, 2017 as a resignation when she did not intend to resign and instead unsuccessfully attempted to negotiate severance terms.

[27] The Tribunal finds that in the Appellant's email of July 26, 2017 to the employer the Appellant expressed an intent to negotiate severance terms with her employer while being aware that the employer's business was sold effective September 30, 2017. This is confirmed by her statement to the employer, "*If we do not come to an agreement, unfortunately, I have no choice but to give my 2 week notice*".

[28] The employer claims, in an email to the Appellant on July 28, 2017 (GD2A-27), that the Appellant's email of July 26, 2017 was a resignation from employment and then purported to accept the resignation; however, the Tribunal finds that the separation from employment was created by a shortage of work brought about by the sale of the employer's business and the employer's indication to the Appellant that her last day of work was to be August 4, 2017.

[29] The Tribunal finds that the Appellant expressed her intent to negotiate acceptable severance terms with the employer in an email of July 26, 2017 and negotiations failed as of July 28, 2017 when the employer chose to advise the Appellant that her last day of work was August 4, 2017, to which she complied.

[30] The employer said "*It is clear we cannot come to an agreement and I accept your 2 weeks' notice*", which the Tribunal finds to be the employer's decision to terminate the Appellant's employment.

[31] The Tribunal finds that the Respondent's onus of voluntarily leaving employment is not met (*Green*); it was the employer who terminated the Appellant's employment given the sale of the employer's business and an inability to successfully negotiate severance terms with the Appellant. The Appellant did not leave employment voluntarily as a result of her own choice (*Peace*).

[32] Given the Tribunal's finding that the Appellant did not voluntarily leave employment it is not necessary for the Tribunal to address the issues of just cause for leaving employment or whether the Appellant had reasonable alternatives to leaving, given all the circumstances

CONCLUSION

[33] The Tribunal finds that the Appellant did not voluntarily leave employment on August 4, 2017, and a disqualified from receiving EI benefits pursuant to section 30 of the *Employment Insurance Act* (*Act*) is not warranted.

[34] The appeal is allowed.

Glen Johnson
Member, General Division - Employment Insurance Section

HEARD ON:	April 26, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. L., Appellant R. L., Representative for the 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.