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

Citation: *M. R. v. Canada Employment Insurance Commission and X Hotel Inc.*, 2018 SST 1160

Tribunal File Number: GE-17-3728

BETWEEN:

M. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X Hotel Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: March 22, 2018

DATE OF DECISION: April 30, 2018

Canada

DECISION

[1] The appeal is dismissed. The Respondent has proven the Appellant voluntarily left her employment and the Appellant has not proven she had just cause to leave her position.

OVERVIEW

[2] The Appellant worked as a cook in a hotel lodge located on the coast of Labrador. She began work on July 2, 2017, and was paid until August 11, 2017. The Appellant claims that four months before starting work she discussed with her employer that she would be taking holidays in the month of August. The employer claims there was no such discussion and it did not want her to take holidays in August. When the Appellant returned from her August holidays the employer issued a Record of Employment (ROE) stating the Appellant had "Quit." The Appellant later claimed she left her employment due to a significant change in her duties. The Respondent disqualified the Appellant from receiving benefits as it determined she had voluntarily left her employment. The Tribunal must decide if the appellant voluntarily left her employment and, if that is the case, whether she had just cause for leaving her employment.

PRELIMINARY MATTERS

[3] The Tribunal may, on its own initiative or if a request is filed, add any person as a party to the proceeding if the person had a direct interest in the decision in accordance with subsection 10(1) of *Social Security Tribunal Regulations* (SST Regulations). On February 16, 2018, the Tribunal determined the employer had a direct interest and added the employer as a party to the appeal because the claimant and the employer provided conflicting information.

[4] The Appellant and the employer did not attend the hearing. If a party fails to appear at the hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing in accordance with Subsection 12(1) of the SST Regulations.

[5] Furthermore, documents are deemed communicated, if sent by registered mail or courier, on the date recorded on the acknowledgement of receipt, or the date the document was delivered to the last known address of the party (subsection 19(1) and (2), SST Regulations) .

[6] The Appellant and the employer did not appear at the teleconference hearing scheduled for March 22, 2018, at 10:30 a.m. NST. Evidence from Canada Post indicates the Notice of Hearing was delivered to the Appellant and the employer, on March 16, 2018, and was signed for by the Appellant's son and the employer, respectively. The date and time of the hearing were verified and were correct.

[7] Fifteen minutes after the scheduled start time of the hearing, Tribunal staff telephoned the Appellant and left a voice mail message requesting she contact the Tribunal. The staff member called the Appellant a second time and was told by a person other than the Appellant that she was at work and must have forgotten about the hearing. Tribunal staff left a telephone message for the employer requesting they contact the Tribunal as soon as possible. As of date of writing, neither the Appellant nor the employer contacted the Tribunal.

[8] The Tribunal is satisfied that the Appellant and the employer received the notice of hearing. As a result, the Tribunal proceeded in the parties' absence in accordance with subsection 12(1) of the *Social Security Tribunal Regulations.*

ISSUES

1. Did the Appellant voluntarily leave her employment?

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

ANALYSIS

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

[10] The *Employment Insurance Act* (Act) provides that a claimant is disqualified from receiving any EI benefits if they voluntarily left any employment without just cause (subsection 30(1)).

[11] The Respondent has the burden of proving the leaving was voluntary, and once voluntarily leaving is proved, the burden shifts to the Appellant to demonstrate she had just cause for leaving. 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 her employment?

[12] 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 FCA 56).

[13] The Tribunal finds the Respondent has met the legal test and proved the Appellant voluntarily left her employment because she could have chosen to remain at work.

[14] In a handwritten note attached to her application for EI benefits, the Appellant initially stated that she had not quit her employment. She never used the word "quit" with her employer. When she came back to work from her holidays she was told there was no work for her and was given her ROE in a sealed envelope. She opened the envelope when she got home and was shocked to find the ROE said "Quit."

[15] The Respondent submitted that based on the evidence on file the employer's statement that the claimant was denied her request for month of August off holds more credibility. The employment was in the hotel industry where it is reasonable to consider that one of the busiest times of year would include the summer months of July and August as one of tourism's peak seasons. A full complement of staff would be required during this time.

[16] The Appellant submitted a document showing the months of July and August 2017 with her name and another employee's name on various dates as proof she was approved to go on holidays in August. The calendar shows the Appellant's name on sixteen days in July with four of her shifts occurring on weekend days. This calendar does not show the Appellant's name on any day for the month of August. The owner of the hotel lodge stated to the Respondent the claimant does not work on weekends. The Respondent disputed the calendar's validity.

[17] The Tribunal finds the calendar cannot be relied upon as proof the employer allowed the Appellant to go on holidays in August. The Tribunal finds the calendar was provided months after the Respondent denied the Appellant EI benefits and the Appellant has demonstrated with

her statements regarding the significant change in her duties, detailed below, that she is willing to provide evidence that is supportive of her position but is not entirely accurate. The employer's owner stated the Appellant was not given holidays in August. The manager stated the Appellant had been hired on the understanding that she would not be taking holidays in August like she had in the past and the Appellant had agreed to those conditions and was not given the month of August off for holidays. In addition, there is no indication as to when the calendar was prepared or by whom.

[18] The employer stated to the Respondent the Appellant was told if she took holidays in August she would be considered a quit. The employer completed the ROE with Quit as the reason for separation.

[19] The Tribunal finds the Appellant did not have approval to leave her employment and take holidays during the month of August because the evidence, in particular the calendar, submitted by the Appellant is not credible. The statements of the employer's owner and manager with respect to the Appellant being told she could not have holidays in August are preferred because the Appellant was hired to work during the summer months when it could be expected that the hotel lodge would be at its busiest due to tourism.

[20] In an interview held with the Respondent following the request for reconsideration the Appellant confirmed she had quit her employment. The Appellant had the choice to stay or leave her employment. The Tribunal finds that the Appellant made the choice to leave her employment when she took her holidays. As a result, the Tribunal finds the Respondent has proven the Appellant voluntarily left her employment.

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

[21] To establish she had just cause to leave her employment, the Appellant must demonstrate, on a balance of probabilities, she had no reasonable alternative to leaving her employment, having regard to all of the circumstances (*Canada (Attorney General) v. White,* 2011 FCA 190; *Canada (Attorney General) v. Imran,* 2008 FCA 17).

[22] The Tribunal finds the Appellant did not, having regard to all the circumstances, on a balance of probabilities, have just cause to voluntarily leave her employment as there were reasonable alternatives to leaving her employment when she did.

Was there a significant change in the Appellant's work duties?

[23] The Tribunal finds the Appellant has not proven she had just cause to voluntarily leave her employment due to significant changes in working conditions because the Appellant's statements regarding the changes in the work she was required to perform are not credible.

[24] 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. Subsection 29(c) provides a non-exhaustive list of circumstances for the Tribunal to consider when determining whether a claimant has just cause for leaving their employment, including significant changes in work duties (29)(c)(ix).

[25] The Appellant must show that there were significant changes in her work duties. There is, in most cases, an obligation 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 (Attorney General) v. White*, 2001 FCA 190)

[26] The Appellant claimed in her reconsideration request to the Respondent there were significant changes in her work duties. In her submission she stated she had been hired as a cook to prepare meals as ordered and to ensure the kitchen was clean and well run. The Appellant stated that her duties were increased to include dishwashing, serving tables, taking payment for food, front desk reception including checking in and checking out guests and being available overnight to guests who had any issues with their rooms. The Appellant stated she did not feel comfortable doing these duties and spoke to her employer a number of times, but there was no change in her duties. She wrote "I therefore felt that I had no other choice but to leave this employment as I was not preforming (sic) the work that I was hired to do in an efficient and proper manner and I was constantly overwhelmed with what I was expected to do. I was hired to be a cook." There is no mention, in this submission by the Appellant, of returning to work from

holidays to find that an ROE had been issued to her showing a "Quit" as the reason for issuing the ROE.

[27] The Respondent contacted the employer about the Appellant's statements on the change in her duties. The owner of the hotel lodge was away; however, the manager for the hotel lodge stated that she was familiar with the Appellant and her situation. The manager stated there was no change in duties; the Appellant had worked for the hotel lodge previously and was aware when business was slow that she could be doing anything within the hotel.

[28] The Respondent noted the Appellant's stated reasons for leaving her employment had changed from when first she first applied for EI, during the reconsideration process and upon her appeal to the Tribunal. The Appellant confirmed to the Respondent she sought assistance from her local provincial Member of the House of Assembly (MHA), when she filed her request for reconsideration. The Appellant told the respondent the "MHA told her that was better for her to take the road to tell the commission that she had quit her job due to a change in her duties as the best bet for the decision to be overturned." In her appeal the Appellant went back to her initial statement that she did not quit but was terminated after returning from an approved leave.

[29] The Respondent submitted that it regarded the Appellant's first statements to be more credible. Citing the decision of the Federal Court of Appeal in *Bellefleur v. Canada (Attorney General)*, 2007 FCA 201) the Respondent submitted "it is stated that the jurisprudence has been consistent in the fact that more weight must be given to initial statements rather than subsequent statements following an unfavorable decision to the claimant."

[30] The Tribunal does not agree that *Bellefleur* stands for the proposition that initial statements are more credible than later statements. Rather, *Bellefleur* requires that where there is contradictory evidence a Tribunal must decide which contradictory evidence it prefers and the Tribunal must provide reasons why it prefers certain evidence. With respect to initial statements *Bellefleur* states:

> The Umpire also alleged, in my view rightly so, that the Board of Referees had ignored the initial spontaneous statements made by claimant which were later changed and adjusted in accordance with the statements of other individuals: *ibidem*, at page 3. This fact raised a significant issue regarding credibility which the Board of Referees had the role and the duty to assess to then make a finding and, above all, justify it.

[31] The Tribunal finds that if the circumstances related to a significant change in duties had been the real reason for quitting the Appellant would have said so from the beginning when she first applied for EI benefits. The Tribunal prefers the initial statements of the Appellant because individuals do not need to be prompted or coached to describe the reasons for leaving their employment as was the case when the Appellant sought the assistance of her MHA and changed her reasons for leaving her employment. As a result, the Tribunal finds the evidence is not credible with respect to the Appellant's statements regarding the reasons she left her employment.

[32] The Appellant readily admitted that she wrote the statement attached to her reconsideration request with the help of her local MHA as a way to improve her chances to have EI benefits approved. When asked by the Respondent about the difference in her reasons for separation from her employer she stated to the Respondent it was "just the hotel's word against hers and it will be better for her to go this way as directed by the MHA." The Appellant repeated to the Respondent her written statements about the change in duties but she did not explain the change in her reasons for leaving her employment other than to say that was the advice she was given.

[33] The Tribunal finds there was no significant change in the Appellant's duties.

Did the Appellant have reasonable alternatives to leaving her employment?

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

[35] The Appellant stated that she had told her employer she would be taking holidays in August. She stated she took the time off to spend time with her fourteen-year-old son, help him get ready for school and to take him to medical and dental appointments. She and her son needed to travel to the island of Newfoundland for these non-urgent appointments. She stated she worked until the end of July 2017. The Appellant was then off work on "banked time" and stayed at home for the first two weeks of August and then for the last two weeks of August.

[36] The Respondent submitted the Appellant did not exhaust all reasonable alternatives prior to leaving her employment. Reasonable alternatives to leaving would have been to talk to her employer and reschedule the trip to another date. The Respondent submitted the Appellant provided no evidence to show her son's medical appointments were urgent and could not be rescheduled to a time which was more favorable to the employer's business.

[37] The employer's manager stated a doctor visits the community every three weeks and if employees need to see a specialist, which required time to travel to the island, time off would have been allowed. However, the Appellant had not requested time off for this reason.

[38] The ROE shows the Appellant to have completed her last day of work on August 11, 2017, which would occur where an employee is not at work but on paid leave such as banked time off. As a result, the Tribunal finds that the banked time off was approved.

[39] As the medical and dental appointments were not of an urgent nature, the Tribunal finds that rather than leaving her employment the Appellant had other courses of action available to her. In particular the Appellant could have scheduled the appointments to occur while she was on her approved banked time off, travelled to the island during that time and returned to her employment on August 12, 2017. In light of this, the Tribunal finds the Appellant voluntarily left her position but did not have just cause to do so, and, having regard to all the circumstances, the Appellant had reasonable alternatives to leaving her employment.

The requirement for just cause

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

[41] The Tribunal finds that while the Appellant stated she took her holidays to spend time with her son, get him ready for school and transport him to non-urgent medical appointments as

the reason she left her employment these activities do not meet the test of just cause to voluntarily leave employment as required by the Act.

CONCLUSION

[42] The Tribunal finds the Respondent has demonstrated the Appellant voluntarily left her employment as she chose to take holidays, even though she was told that taking the holidays would be considered quitting. The Appellant also stated to the Respondent she quit her employment. The Tribunal does not accept that the Appellant had just cause to leave her employment due to significant changes in the Appellant's work duties because the Appellant's evidence was not reliable and she has not proven there were significant changes to her work duties. Therefore, the Tribunal finds the Appellant has not demonstrated just cause for voluntarily leaving her employment.

[43] The Tribunal finds it would have been a reasonable alternative for the Appellant to use her paid banked time off to spend time with her son, get him ready for school and to travel to the island of Newfoundland for his non-urgent medical and dental appointments. In addition, it would have been a reasonable alternative for the Appellant to talk to her employer to reach an agreement on when she could take holidays rather than making the decision without the employer's agreement. As a result, the Tribunal finds the Appellant has not met her burden of showing, having regard to all the circumstances, she had no reasonable alternative to leaving her employment when she did.

[44] The appeal is dismissed.

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

METHOD OF PROCEEDING:	Teleconference

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