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

[TRANSLATION]

Citation: *L. P. v Canada Employment Insurance Commission*, 2018 SST 1163

Tribunal File Number: GE-17-3353

BETWEEN:

L. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: May 22, 2018

DATE OF DECISION: July 5, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant worked for many years at the airport as a passenger service agent. After a collective bargaining process, X employees had the choice of accepting a three-year salary freeze or taking advantage of a voluntary severance payment. The Appellant chose to leave with the offered severance payment. However, she stated that she saw no other option and that difficult working conditions, notably the obligation in recent years to do managerial tasks and the unpleasant work environment, forced her to quit. The Employment Insurance Commission (Commission) found that the Appellant's leaving was a personal choice and that it was not the only reasonable alternative.

ISSUES

[3] The Tribunal must decide the following issues:

1- Why did the Appellant really leave her employment?

2- Does leaving an employment to accept a severance payment constitute just cause within the meaning of the Act?

ANALYSIS

[4] The relevant legislative provisions are reproduced in an annex to this decision.

[5] The Tribunal must determine whether the Appellant had just cause for leaving her employment according to the provisions of section 29 of the Act. To answer that question, the Tribunal analyzed the following questions:

Issue 1: Why did the Appellant really leave her employment?

[6] Section 29(c) of the Act contains a non-exhaustive list of circumstances that may justify a person voluntarily leaving their employment. In this case, the Appellant submits that she had a significant change in her work duties, which constitutes one of the good causes listed in the Act (section 29(c)(ix) of the Act). She also submits that she left because she experienced workplace harassment and because of the uncertainty and the difficult work environment.

[7] For the following reasons, the Tribunal finds that the real reason for the Appellant's leaving her employment was to take advantage of the severance payment the employer offered.

[8] The Appellant indicated that she worked at X Airport as a passenger service agent for more than 15 years. She indicated that her employer was X for many years, but management changed a few times between 2012 and 2015 until the company came under X, which was her employer when she left.

[9] She stated that, around 2009, the employer imposed training for all passenger service agents so that they could all manage departures, but previously those tasks were assigned to separate positions. The Appellant said that she tried but that she did not like this combination of tasks at all. It caused her a lot of stress. She explained that the departure management tasks entail many responsibilities for which each minute counts, including overseeing a flight's departure, making sure the plane leaves on time, performing a number of checks, thinking of several details, making announcements to passengers, manoeuvring the jetway on the deck, and so on.

[10] The Appellant indicated she worried about the changes so much that, soon after, her doctor gave her a medical note imposing limitations, which she gave to her employer. She indicated that she worked as an agent for a number of months without completing departure management tasks. However, she stated that, one day, the employer decided to no longer accept the accommodations and required all employees to be more flexible. The Appellant does not remember the exact dates or the duration, but she confirmed that she had to resume completing departure management tasks for a few years before the termination of her employment. She stated that always having to ask her supervisors for help upset her.

[11] The Commission submits that, after its conversations with the Appellant, she raised some conflicts at work but still confirmed that her reason for leaving was the severance payment.

[12] The Tribunal notes that the Appellant raised significant changes in her work duties for the first time at the hearing. In her notice of appeal, the Appellant described in detail the circumstances surrounding her leaving but never mentioned the changes in her work duties. Instead, she cited the company's instability as her reason for leaving and heavily emphasized the assurance human resources staff gave that those who received the severance payment would be eligible for Employment Insurance benefits. Although the Tribunal accepts that the Appellant's work duties may have changed in recent years, the Tribunal finds that the Appellant's statements reveal that that was not the real reason for her departure.

[13] Furthermore, the evidence reveals that the changes in the Appellant's work duties arose a few years before her departure and that she successfully adapted to those changes by taking on fewer work hours and by giving hours to her co-workers. The Appellant also testified that, before the severance option was offered, she had not considered leaving her employment, which clearly shows that her difficulties with the task changes in recent years were not the main reason for her decision to leave.

[14] In terms of the Appellant's allegation of harassment, the Tribunal also accepts the possibility that the Appellant experienced workplace harassment in the past. However, she admitted that she had not experienced harassment for some time when she left her employment. As a result, it is probably not the reason that drove her to leave. The Tribunal notes that only the facts that existed at the time a claimant left their employment must be taken into account (*Lamonde*, 2006 FCA 44). The harassment the Appellant experienced a few years before she left can therefore not be one of the reasons for her leaving.

[15] Following the analysis of the evidence on file and the Appellant's testimony, the Tribunal is of the view that the Appellant left her employment to accept the severance payment. The other reasons that may have influenced her choice are secondary reasons for which the Appellant would not have left her employment in the absence of the severance payment.

Issue 2: Does leaving an employment to accept a severance payment constitute just cause within the meaning of the Act?

[16] Now that the Tribunal has determined that the Appellant's reason for leaving was to retire and take advantage of the severance payment, the Tribunal must decide whether the Appellant had just cause to leave her employment according to the *Employment Insurance Act* (Act). Generally, a person who leaves their employment voluntarily is disqualified from Employment Insurance benefits (section 30 of the Act). However, the Act states that a person may sometimes have just cause for voluntarily leaving an employment and qualify for Employment Insurance benefits. The onus is on the person to establish this.

[17] For the following reasons, the Tribunal finds that the Appellant has failed to establish that she had just cause to leave her employment.

[18] It is section 29(c) of the Act that states that circumstances may justify a claimant's voluntarily leaving an employment, in which case they would remain entitled to Employment Insurance benefits. The circumstances surrounding voluntarily leaving to retire or to accept a severance payment are not in the list of the grounds stated in section 29(c) of the Act. Although this list of reasons is not exhaustive (*Campeau*, 2006 FCA 376; *Lessard*, 2002 FCA 469), the Tribunal finds that leaving to accept a severance payment constitutes a personal choice and does not constitute just cause within the meaning of the Act. The Tribunal relies on the basic principle that it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke the risk and not to transform what was only a risk of unemployment into a certainty (*Langlois*, 2008 FCA 18; *Tanguay*, A-1458-84).

[19] Furthermore, to determine that the Appellant had just cause for leaving her employment, she must also show that, having regard to all the circumstances, she had no reasonable alternative but to leave (*Canada (Attorney General) v Patel*, 2010 FCA 95 (*Patel*); *Bell*, A-450-95; *Landry*, A-1210-92). In fact, Judge Letourneau recalled in the *Hernandez* decision that, along with the exceptions cited in section 29 of the Act, a decision-maker must consider whether voluntarily leaving their employment was a person's only reasonable alternative and that failing to do so constituted an error of law (*Hernandez*, 2007 FCA 320).

[20] In this case, the Tribunal recognizes that the Appellant's workplace changed significantly in recent years and that she no longer felt well at work. The Tribunal also acknowledged that, given the uncertainty that lingered over the future of the company, the Appellant may have made the best decision for her in the circumstances. However, the Tribunal finds that the choice the Appellant made, as good as it is, is a personal choice. Choosing to remain at the employment would have been just as reasonable if she had wanted to continue. The Appellant stated that, if she had known that she would not qualify for benefits, she might not have left. This supports the finding that she had other reasonable alternatives. The Federal Court of Appeal has specified that, in cases of voluntary leaving, 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, having regard to all the circumstances (*Laughland*, 2003 FCA 129). In other words, it is not sufficient for a claimant to prove that they were reasonable in leaving their employment. Reasonableness may be "good cause," but it is not necessarily "just cause" (*Tanguay*, A-1458-84). The Tribunal accepts that the Appellant's reason is good and reasonable, but it did not constitute the only reasonable alternative because she could have remained employed and continued to manage by working fewer hours than her co-workers worked, for example. Furthermore, if the Appellant was no longer comfortable in her position because of the increased pressure of recent years, she had the option of looking for other employment before leaving, which she did not do. Instead, she seized the opportunity to take a severance payment, which is a personal choice among other reasonable options, and regardless of the motivations that led the Appellant to choose that option, she had other alternatives. The founding principles of the Employment Insurance program are unfortunately not to support the cost of citizens' personal choices (*Gagnon*, A-1059-84; *Astronomo*, A-141-97; *Martel*, A-1691-92; *Campeau*, 2006 FCA 376).

[21] The Tribunal notes that the Appellant reiterated several times her frustration with receiving seemingly incorrect information from her employer that recipients of severance pay would be entitled to Employment Insurance benefits. Unfortunately, any incorrect information that the Appellant may have received does not change the existing Act and its provisions. The Tribunal empathizes with the Appellant because she may not have had all the accurate information before making her decision. However, the Tribunal must apply the Act according to

the law in force, without discretion for the Appellant's circumstances. The Appellant should have researched her rights and obligations herself before making the important decision to leave her employment.

[22] The Tribunal finds, based on all the evidence and on the balance of probabilities, that the Appellant did not have just cause for voluntarily leaving according to the Act because she failed to show that leaving was the only reasonable alternative in her circumstances. Disqualification is imposed.

CONCLUSION

[23] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	May 22, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. P., 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.