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

Citation: *B. S. v Canada Employment Insurance Commission*, 2018 SST 1359

Tribunal File Number: GE-18-2177

BETWEEN:

B. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: September 17, 2018

DATE OF DECISION: October 17, 2018

DECISION

[1] The appeal is allowed. The Appellant did not voluntarily leave his employment at X and, therefore, cannot be disqualified from receipt of employment insurance benefits (EI benefits) for doing so. Nor did the Appellant lose his employment due to his own misconduct.

OVERVIEW

[2] The Appellant established a claim for regular EI benefits effective March 6, 2016. The Respondent, the Canada Employment Insurance Commission (Commission), subsequently became aware the Appellant worked 14 hours at X operated by X (X) between March 16 – 20, 2016. Although the Appellant reported the hours and earnings from this employment on his biweekly claimant report, he did not report that he quit the employment, as was later stated on the ROE issued by the employer. The Commission imposed an indefinite disqualification on the Appellant from March 20, 2016 for voluntarily leaving this employment without just cause. The Appellant argued he was only getting part-time hours and the employer had told him there would be no increase in his hours, and that it did not make sense for him to commute after he moved farther away from the store; and that he was unable to work a night shift due to a health issue. The Commission maintained the disqualification and the Appellant appealed to the Social Security Tribunal (Tribunal)

ISSUES

[3] Is the Appellant disqualified from receipt of EI benefits because he voluntarily left his employment at X without just cause?

[4] Is the Appellant disqualified from receipt of EI benefits because of misconduct in the form of job abandonment?

ANALYSIS

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

[6] A claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can establish "just cause" for leaving: section 30 *Employment Insurance Act*

(EI Act). Just cause exists where, having regard to all of the circumstances, on balance of probabilities, the claimant had no reasonable alternative to leaving the employment (see *White 2011 FCA 190, Macleod 2010 FCA 301, Imram 2008 FCA 17, Astronomo A-141-97, Tanguay A-1458-84*).

[7] The initial onus is on the Commission to prove the Appellant left his employment voluntarily; once that onus is met, the burden shifts to the Appellant to prove he left his employment for "just cause" (see *White, (supra); Patel A-274-09*).

[8] Section 30 of the EI Act in fact provides for an indefinite disqualification for benefits on two related grounds: when a claimant is dismissed by his employer due to his own misconduct ***or*** voluntarily leaves his employment without just cause. The Federal Court of Appeal in *Borden 2004 FCA 176* explained the importance of this linkage as follows:

> "In *Attorney General of Canada v. Easson, A-1598-92*, February 1, 1994, this Court made it clear that "dismissal for misconduct" and "voluntarily leaving without just cause" are two notions rationally linked together because they both refer to situations where loss of employment results from a deliberate action of the employee. The Court went on to add that the two notions have also been linked for very practical reasons: it is often unclear from the contradictory evidence, especially for the Commission, whether the unemployment results from the employee's own misconduct or from the employee's decision to leave. In the end, since the legal issue is a disqualification under subsection 30(1) of the Act, the finding of the Board or the Umpire can be based on any of the two grounds for disqualification as long as it is supported by the evidence. There is no prejudice to a claimant in so doing because the claimant knows that what is sought is a disqualification from benefits and he is the one who knows the facts that led to the seeking of the disqualification order."

The issue then becomes whether a disqualification under subsection 30(1) of the EI Act is warranted – on either of the two grounds for disqualification – based on the evidence before the Tribunal.

Issue 1: Did the Appellant voluntarily leave his employment at X?

[9] Where a disqualification is being considered for voluntarily leaving an employment without just cause, the Tribunal must first decide if the claimant, in fact, ***voluntarily*** left the employment.

[10] The mere fact that the Appellant's Record of Employment (ROE) indicates he "quit" is not determinative of this question. For the leaving to be ***voluntary***, there must be credible evidence that the Appellant himself took the initiative to sever the employment relationship. The Tribunal finds there is no such evidence in the Appellant's case.

[11] The Appellant testified as follows:

- He never quit his job at X. The employer simply refused to schedule him for any hours after March 20, 2016.
- When X doesn't want you – for any reason, they don't fire you. They just reduce your shifts to 2 or 3 hours per week, and then down to 0 hours and you never work for them again. Many people quit when this happens.
- He had previously worked for this particular X franchisee from May 2015 to January 2016. He was hired in May 2015 on a part-time basis to supplement the hours he was getting at a job placement he had obtained through an employment agency called "Great Connections". By January 2016, he was getting the equivalent of full-time hours at the placement, and often had to work shifts longer than 12 hours. This meant he could no longer work his second job at X, and so he quit X.
- His ROE from the first time he worked for this employer is at GD5-2. It shows he worked steadily between May 2, 2015 and January 24, 2016.
- When his placement ended on March 8, 2016, he went back to the X and asked to be put on the schedule again so he could earn "money to survive".
- But the Manager didn't want the Appellant to come back to work for him.
- The Manager told the Appellant he would not get full-time hours because "you're going to quit again". The Manager reminded the Appellant he had previously quit, and further reminded him of a shift he had failed to show up for and was paid $0 on his ROE as a result (see GD5-2).
- The Appellant knew the Manager didn't like him, but said he would take whatever hours he could get.
- As a "flex time" worker, the Appellant would only be called in if the employer needed someone to cover for a full-time employee who was sick or on vacation, or it was a particularly busy holiday period.

- The Manager gave him two shifts between March 16 – 20, 2016.
- In order to find out when he was scheduled to work next, the Appellant had to physically go to the store and look at the posted schedule, or call in and get somebody to tell him if he was on the posted schedule.
- When he finished his second shift on March 20, 2016, the schedule was not yet posted for the coming week. The Appellant called on the 21st, 22nd, 23rd, and left messages asking to be called if he was scheduled for work. He also telephoned some of his friends who worked full-time at the store and asked them to check and see if he was scheduled to work. They checked, and told him NO.
- He did have a conversation with one of the store supervisors about potentially working the night shift, but the Appellant cannot work nights because of health issues.
- He was moving at the time, but about a week later, he spoke with the Manager who confirmed he did not put the Appellant on the schedule. The Manager also told him that the employer had recently hired and trained new workers for spring/summer, and they would be given priority for scheduling.
- Although he didn't want to spend $7 on public transit just for the trip to look at the schedule, the Appellant did continue to call and speak with friends working there over the next two weeks to see if he was put on any shifts. He never was.
- This employer knew the Appellant was already trained and did good work, and had recently given him many steady hours (see ROE at GD5-2). While he initially picked up two shifts, it was clear to the Appellant that the Manager had no intention of scheduling him the second time round.
- He never quit. He just never worked for this employer again because he was never scheduled for work again. That was how the employment ended.
- He continued his job search efforts and found part-time work starting in July 2016, which he reported on his EI claimant reports. He found a full-time job before his EI claim finished.

[12] The Tribunal acknowledges the Appellant's statement on his Request for Reconsideration that he "left" his job with X (GD3-45), but notes this document was prepared in response to the

Commission's decision letter of April 12, 2018 advising he was retroactively disqualified from EI benefits "because you voluntarily left your job at [X] on March 20, 2016 without just cause" (GD3-42). The Tribunal also acknowledges the similar statement by the Appellant that was documented in the reconsideration file (GD3-47), but notes that the Appellant was specifically being interviewed by the Commission's agent about voluntary leaving. The Tribunal accepts the Appellant's testimony that he expected to be given additional hours by the employer, but that it eventually became apparent the employer simply wasn't going to schedule him again and so he looked for and found other work. This is in keeping with the Appellant's contemporaneous reporting of his hours and earnings from this employment on his claimant report for the relevant period (see transcription of claimant report at GD3-14 to GD3-20). The Tribunal also notes there is no evidence the Appellant was ever scheduled for work again after March 20, 2016 and failed to show up for a scheduled shift, or that he resigned, or that he otherwise advised the employer he was leaving the employment. Indeed, it is apparent from the ROE at GD5-2 that if the Appellant had failed to show up for a scheduled shift, the employer would not have hesitated to input $0.00 in the pay period. There is no such entry in the ROE at GD3-34, even though it wasn't even issued until May 2, 2016 – two months after the Appellant's last shift. For these reasons, the Tribunal gives greatest weight to the Appellant's testimony at the hearing and finds that the Appellant did nothing to initiate the severance of his employment at X. Rather, this employment came to an end simply because the employer never scheduled him for any more shifts after March 20, 2016.

[13] The Tribunal therefore finds the Appellant did not voluntarily leave his employment at X and, therefore, cannot be disqualified from receipt of EI benefits for doing so.

Issue 2: Did the Appellant abandon his job at X?

[14] An employee who is absent from work without permission or who fails to make contact with the employer after being absent from work without permission may be considered to have abandoned their employment. Such conduct may be considered as voluntarily leaving an employment without just cause.

[15] The Tribunal finds that the Appellant did not abandon his employment at X.

[16] The Commission's evidence on the issue of job abandonment consists of a single bald statement from the employer during the investigation stage that the Appellant abandoned his job when he did not show up for work again, without explanation (see GD3-37); and a further statement during the reconsideration process that the Appellant just didn't show up (GD3-48). However, there is no evidence from the employer that the Appellant was ever scheduled for a shift that he failed to show up for, or that the employer was forced to find someone to cover for the Appellant when he allegedly failed to show up for a shift. As stated above, it is apparent from the ROE at GD5-2 that if the Appellant had failed to show up for a scheduled shift, the employer would not have hesitated to input $0.00 in the pay period. Yet there is no such entry in the ROE at GD3-34, even though it wasn't even issued until May 2, 2016 – two months after the Appellant's last shift.

[17] The Tribunal notes that the information the Appellant provided during the reconsideration process (see Supplementary Record of Claim at GD3-50), namely that he asked for additional hours and was told he would not be given any hours, is consistent with his detailed testimony at the hearing. By contrast, the employer's statement that if the Appellant had stayed, he would have gotten more hours, is disingenuous and not supported by the employer's scheduling practice reflected on the ROE for the Appellant's prior period of employment (at GD5-2).

[18] The Tribunal finds that the Appellant did not abandon his job at X. As such, the Appellant cannot be disqualified from receipt of EI benefits for doing so.

Issue 3: Did the Appellant lose his job at X due to his own misconduct?

[19] Section 30 of the EI Act provides that a claimant is disqualified from receiving EI benefits if the claimant has lost or been suspended from their employment as a result of misconduct.

[20] The onus is on the Commission to prove that the Appellant, on a balance of probabilities, lost his employment at X due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[21] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act has been established by the jurisprudence from courts and administrative bodies that

have considered section 30 of the EI Act and enunciated guiding principles which are to be considered in the circumstances of each case.

[22] In order to prove misconduct, it must be shown that the Appellant behaved in a way other than he should have and that he did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be demonstrated that the Appellant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09*, *Mishibinijima A-85-06*, *Hastings A-592-06*, *Lock 2003 FCA 262*; and that the conduct will affect the Appellant's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

[23] As set out by the Federal Court of Appeal in *Macdonald A-152-96*, the Tribunal must determine the real cause of the claimant's separation from employment and whether it amounts to misconduct for purposes of section 30 of the EI Act.

[24] The Tribunal has already found that the Appellant did nothing to initiate the severance of the employment relationship and did not abandon his job. Rather, his employment came to an end simply because the employer never scheduled him for any more shifts after March 20, 2016.

[25] A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not merely on speculation and suppositions, and that it is for the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. There must be sufficiently detailed evidence before the Tribunal for it to determine how the employee behaved and to judge whether the behavior was misconduct: *Joseph v C.E.I.C A-636-85*.

[26] In the present case, there is no conduct identified by the employer as misconduct, merely a bald statement that the Appellant just didn't show up for work again. As set out in paragraphs 11 to 18 above, the Tribunal does not find this to be credible. The Appellant submits that the Manager simply did not want him back when he returned to X in March 2016, and was determined not to schedule him for any more hours. The Tribunal agrees this is likely the real

reason the Appellant's employment came to an end. The Tribunal also notes this was entirely beyond the Appellant's control, as he was already trained by this employer and looking to return to work.

[27] While the employer may well have come to the conclusion that it was no longer in its interests to schedule the Appellant for work after he returned in March 2016, it is not the role of the Tribunal to determine whether the steps taken by the employer were justified or appropriate (*Caul 2006 FCA 251*), but rather whether the conduct in issue amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[28] For the reasons set out above, there is no credible evidence that points to willful or reckless behavior on the part of the Appellant which he knew or ought to have known could have resulted in the termination of his employment. As such, the Commission has not satisfied the onus on it to prove that the Appellant lost his employment due to his own misconduct. The Tribunal therefore finds that the Appellant cannot be disqualified from receipt of EI benefits because he lost his employment due to his own misconduct.

CONCLUSION

[29] The Tribunal finds the Appellant did not voluntarily leave his employment at X and, therefore, cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act for doing so.

[30] The Tribunal further finds that the Appellant did not abandon his job at X or otherwise engage in conduct that could be considered misconduct for purposes of section 30 of the EI Act. As a result, the Appellant cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act because he lost his employment at X due to his own misconduct.

[31] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	September 17, 2018

METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	B. S., 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