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

[TRANSLATION]

Citation: *Z. S. v Canada Employment Insurance Commission*, 2019 SST 220

Tribunal File Number: GE-18-3333

BETWEEN:

Z. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: January 14, 2019

DATE OF DECISION: January 16, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked as an early childhood educator at the daycare centre X ("the daycare") until May 22, 2018, when her employment ended. The employer submits that the Appellant voluntarily left her employment by resigning.

[3] After reviewing the record, the Canada Employment Insurance Commission determined that the Appellant had voluntarily left her employment without just cause. Therefore, the Appellant was disqualified from receiving benefits for this reason.

[4] The Appellant disputes the Commission's decision. She submits that she did not resign from her employment and that, instead, she wanted to get a reassignment or a preventive withdrawal because of pregnancy-related risks and risks associated with her duties as an educator. She believes that her employer dismissed her because she was pregnant.

ISSUE

[5] Did the Appellant voluntarily leave her employment at the daycare centre X?

ANALYSIS

[6] A claimant who voluntarily leaves their employment without just cause is disqualified from receiving Employment Insurance benefits (section 30 of the *Employment Insurance Act* (Act)).

[7] However, just cause for voluntarily leaving an employment exists if the claimant had no reasonable alternative to leaving, having regard to all the circumstances (section 29(c) of the Act).

[8] It is up to the Commission to prove that the Appellant's leaving was voluntary and up to the Appellant to show that she had just cause for leaving her employment (*Green v Canada (Attorney General)*, 2012 FCA 313).

[9] Therefore, as a first step and before considering the issue of just cause, the Tribunal must first determine whether there was a situation of voluntary leaving in this case.

Did the Appellant voluntarily leave her employment at the daycare?

[10] The Tribunal finds that the Appellant did not leave her employment voluntarily, for the following reasons.

[11] The employer submits that the Appellant came to work on May 21, 2018, to inform it that she was pregnant and that she wanted to leave her employment. The next day, she handed in a resignation letter confirming that she was leaving. The employer submits that, later the same day, the Appellant's husband came to the daycare and asked to see the resignation letter his wife submitted. Once he had the document, he crumpled it up and bumped into the on-site staff as he left. The employer submits that it filed a complaint with the police regarding this event. The Appellant and her husband were then informed not to come to the daycare anymore in person (GD3-27, 39, and 49). Two other people (the parent of a child and a police officer) confirmed that they witnessed the May 22 incident (GD3-40 and 50).

[12] The Appellant in turn states that she went to the daycare on May 21 to inform her employer that she was pregnant. Following advice from her doctor, she asked to be reassigned to other duties or put on a preventative leave of absence because of specific risks associated with working as an early childhood educator during pregnancy.[1]

[13] In response, the Appellant argues that the employer asked her the finish the week so that it could find a new educator, and the Appellant agreed to this. The next day (May 22), she worked a normal day. At the end of the day, her husband came to the premises to get an

[1] In Québec, there is a program set up by the labour standards, equity, and occupational health and safety commission, CNESST, called "For a Safe Maternity Experience," which requires employers to reassign or temporarily remove pregnant women from work if they are exposed to certain risks and if they provide a medical certificate confirming that these risks exist. People who qualify for this program may be eligible to receive CNESST compensation. See sections 40 and 41 of an *Act respecting occupational health and safety* (Québec).

explanation from the daycare director about the procedures for receiving a salary or benefits during his spouse's preventive withdrawal. According to the Appellant, her husband had a heated conversation with the director because he and the employer did not agree on certain points. He left the premises, crumpling up the document containing the information and procedures about preventive withdrawal.

[14] Overnight, the Appellant received an email from the director with little explanation informing her not to come to the daycare anymore (GD3-42). The Appellant argues that she never told her employer that she wanted to resign and that she never prepared any resignation letter. She argues instead that she informed the parents of the children in her group that she was preventatively stopping work and that she would be returning at the end of her maternity leave. She believes that she was dismissed because of her pregnancy.

[15] The Tribunal notes that the employer has maintained in its conversations with the Commission that the Appellant had resigned from her employment. However, the Tribunal notes also that neither of the two witnesses cited by the Commission (GD3-40 and 50) seem to have seen the contents of the document that was crumpled up by the Appellant's husband during the May 22 incident. The employer argues that it was a resignation letter, but no one else can testify to that.

[16] The Appellant argues instead that the document that her husband crumpled up on May 22 contained explanations and steps to take to receive compensation and a salary during her preventive withdrawal. In the Tribunal's view, this explanation is just as plausible. Furthermore, the Appellant still maintains that she had not resigned from her employment; she believes that she was dismissed specifically because the employer did not want to accommodate her or pay for her preventive withdrawal.

[17] During the hearing, the Appellant testified with confidence and provided clarification and important contextual evidence as part of the record. The Tribunal finds that the Appellant was honest when she argued that she had no intention of resigning and that she simply wanted to ask her employer to put her on a preventative leave of absence, in keeping with her doctor's advice.

[18] Furthermore, contrary to what the Commission submitted (GD4-4), it appears that the Appellant consulted a doctor on May 19, 2018, specifically for her preventive withdrawal, before meeting with her employer on May 21 to announce that she was pregnant. The medical certificate on file clearly indicates that the Appellant saw Dr. Hector on May 19 and that her preventive withdrawal came into effect the same day. The paper copy of the certificate was sent to the Appellant a few days later on May 29 after being approved by a second doctor (GD3-43). Therefore, it is likely that the Appellant chose to meet with her employer on May 21 specifically to discuss the preventive withdrawal that the doctor ordered on May 19 and not to talk about a resignation or permanent end of employment.

[19] Apart from the daycare director's version of events, there is nothing in the evidence that supports the position that there was a voluntary leaving. Even the conversations between the Appellant and her employer after May 22 do not clearly mention the Appellant's resignation. The daycare director instead informed the Appellant to stay away from the daycare because of the incident involving her husband. She also mentioned that the doctor must send her the papers (concerning the preventive withdrawal) and explained that it is up to the Appellant to apply to Québec's occupational health and safety commission, CSST, with the medical certificate (GD3-42).

[20] It appears that the severance of the employment relationship was caused or triggered by the unfortunate actions of the Appellant's husband during the May 22 incident. It was following this incident that the Appellant received the formal notice to stay away from the daycare, even though she did not participate in the incident and she was not directly responsible. In the Tribunal's view, if the Appellant's husband chose to act abruptly or aggressively in front of the daycare director, the Appellant should not have to pay the price.

[21] The Tribunal finds that the balance of probabilities leans slightly in the Appellant's favour. The evidence tends to show that the Appellant acted diligently by consulting a doctor about a preventive withdrawal before talking with her employer. The Tribunal finds that, by meeting with her employer on May 21, the Appellant probably wanted to be reassigned to other duties or preventatively taken off work, in accordance with the provincial legislative provisions and recommendations from her doctor. It was actually the employer who chose to end the

employment one day after being told about its employee's pregnancy and after an incident for which the Appellant was clearly not responsible.

[22] The Tribunal is of the view that the Commission has not met its burden of proving that the Appellant voluntarily left her employment. Since the Tribunal finds that there was no voluntary leaving, it is no longer relevant to continue analyzing this issue.

[23] As an aside, the Tribunal notes that the Appellant asked to receive maternity benefits in her initial application.[2] However, as the Commission argued (GD3-30), Québec already provides its own parental insurance plan, the QPIP. As the *Employment Insurance Regulations* state, if the Appellant is entitled to receive benefits under a provincial plan during and after her pregnancy, then she automatically becomes disentitled from receiving maternity or parental benefits under the federal Employment Insurance program.[3] In light of the Tribunal's decision about voluntary leaving, this still does not prevent the Appellant from receiving another type of benefit during her pregnancy, such as regular benefits, as long as she meets the legislative requirements for receiving that type of benefit.

[24] The Tribunal also notes that the Appellant travelled out of Canada for a long period after the end of her employment between July 7 and September 28, 2018 (GD3-48). A disentitlement from benefits could therefore be applied between these two dates, in accordance with section 37 of the Act. However, since this does not concern the current issue, the Tribunal makes no finding on that matter and leaves it to the Commission to address the issue of the period outside Canada.

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[2] GD3-3, these benefits are also called pregnancy benefits; see section 22 of the Act.
[3] *Employment Insurance Regulations*, s 76.09(1).

CONCLUSION

[25] The Appellant did not leave her employment voluntarily. The appeal is allowed, and the disqualification imposed by the Commission is overturned.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	January 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. S., Appellant