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

[TRANSLATION]

Citation: *E. P. v Canada Employment Insurance Commission*, 2019 SST 816

Tribunal File Number: GE-18-2805

BETWEEN:

E. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: December 17, 2018

DATE OF DECISION: January 24, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant works in the construction industry. The Appellant made a renewal claim for Employment Insurance benefits effective February 18, 2018. He admits to leaving his employment with X on February 16, 2018. He states that he left because the employer failed to comply with the collective agreement and because there was a failure to meet the conditions of employment, specifically regarding wages. The Employment Insurance Commission (Commission) however determined that the Appellant did not have just cause for leaving his employment according to the *Employment Insurance Act* (Act). The Appellant was therefore disqualified from receiving benefits.

ISSUES

[3] The Tribunal must decide the following issues:

a) Did the Appellant experience a significant modification of terms and conditions respecting wages or salary?

b) Was the Appellant in a situation where the employer's practices were contrary to law?

c) Did the Appellant have no reasonable alternative to leaving his employment?

ANALYSIS

[4] The overarching issue the Tribunal must analyze is whether the Appellant had just cause for leaving his employment according to the *Employment Insurance Act* (Act). Generally, a person who leaves their employment voluntarily is disqualified from receiving Employment Insurance benefits (section 30 of the Act). However, the Tribunal acknowledges that sometimes a person may have just cause for voluntarily leaving their employment and qualify for Employment Insurance benefits. The onus is on the person to establish this.

[5] Section 29(c) of the Act contains a non-exhaustive list of circumstances that may give a person just cause for voluntarily leaving their employment. The Tribunal has considered the Appellant's reasons for leaving in its analysis by addressing the following issues:

Issue 1: Did the Appellant experience a significant modification of terms and conditions respecting wages or salary?

[6] One of the circumstances listed in section 29(c) of the Act that gives a person just cause for leaving their employment is the significant modification of terms and conditions respecting wages or salary (section 29(c)(vii)).

[7] The Tribunal finds that, in this case, the Appellant experienced a significant modification of terms and conditions respecting wages or salary because there was a failure to meet his conditions of employment.

[8] The Appellant argues that, during his discussion with the boss of X, they came to an agreement about the employment contract, and it was agreed that he would work 80% of the time in the new-construction sector and 20% in the renovation sector. He explains that workers in the new-construction sector are covered by the collective agreement, which provides much better benefits, including higher wages, travel expenses, insurance, vacation pay, employee benefits, and other working conditions. The Appellant notes that workers in the renovation sector are not covered by any collective agreement.

[9] The Appellant says that everything went well for the first two or three weeks and that the employer complied with the agreement (80% new construction and 20% renovation). However, he states that, after that time, he was assigned to more renovation work and less new-construction work. He states that, around December, he was spending 100% of the time on renovation work. He says that he spoke to his employer and that his employer told him that it was only a short phase and that things would change.

[10] The Appellant testified that, when he was doing renovation work, he was earning about $10 an hour less than in the new-construction sector.

[11] Although I am not bound by umpire decisions, I share Judge Rouleau's view in CUB 65136 that failing to meet the conditions established at the time of hiring amounts to a change in work duties. In this particular case, but for the same reasons, failing to meet the conditions of employment amounts to a significant modification of terms and conditions respecting wages or salary. A worker cannot be penalized for accepting employment in good faith by relying on the terms agreed when they were hired. I give significant weight to the Appellant's testimony and note that the information he had received from the employer when he was hired did not correspond to the actual working conditions experienced on the job. In its only statement to the Commission, the employer alleged that it did not recall promising the Appellant that a percentage of work would be new-construction work. I find this evidence to be unconvincing.

[12] I accept that, after the Appellant's first two or three weeks of work, the working conditions were very different from what had been agreed when he was hired. I find that this difference in the working conditions constitutes a significant modification of terms and conditions regarding the Appellant's wages or salary under section 29(c)(vii) of the Act.

Issue 2: Was the Appellant in a situation where the employer's practices were contrary to law?

[13] Section 29(c)(xi) of the Act states that, when the practices of an employer are contrary to law, a person has just cause for leaving their employment.

[14] In this case, I find, on a balance of probabilities, that the employer had practices that were contrary to law because it failed to comply with the Appellant's collective agreement.

[15] To date, the Federal Court of Appeal has not given any decision specifically on this type of circumstances surrounding voluntary leaving. However, I find it reasonable to conclude that the employer's failure to comply with the provisions of the collective agreement can be framed as a practice that is contrary to law. I find that, in this case, the Appellant has demonstrated that the employer did comply with certain clauses of the collective agreement and, therefore, that it did not comply with the law that governs its employer-employee relationship.

[16] The Appellant argued that the employer failed to comply with the collective agreement regarding pay. I note that article 21.02 of the collective agreement for the residential sector, which was submitted into evidence, indicates that [translation] “[w]ages shall be paid in full, in cash or by cheque payable at par, no later than Thursday of each week before the end of an employee’s standard work day. With the employee’s consent, however, the employer may pay the wages by means of a bank transfer.” The Appellant indicated several times and repeatedly testified that he had sometimes received his pay only on Fridays and by direct deposit. In fact, the employer did not deny paying its employees on Fridays, but it says that that happened on only one or two occasions. Therefore, it has been established that the employer was indeed in breach of the collective agreement. I note from the evidence that the Appellant was paid a few times on Fridays, which is not allowed, and that, on other occasions, he received his pay in his bank account Thursday evenings, which is also not allowed because that is after the work day ends.

[17] The Appellant also argues that the employer did not comply with article 23.04 of the collective agreement in terms of accounting for his travelling time. The Appellant states that, each day, he took the company vehicle to X, picked up a co-worker on the way, and drove to the job site, which was most often construction sites in the Québec City area. He was the one who drove.

[18] Article 23.04 of the collective agreement stipulates the following:

> [Translation]
> Time spent travelling to and from work prior to and after the standard working day is not part of the standard working day and shall not be remunerated, except in the case of an employee who drives the vehicle used to transport employees, for whom this time is included in the computation of working hours.

[19] I accept the Appellant’s testimony that he was the one who drove the vehicle used to get to the job sites. As a result, I find that he should have been paid for his working hours from when he left X in the mornings until he returned to the employer’s at the end of the day. Yet, this is not what happened. The Appellant stated that he shared his comments about this with his boss and that his boss said that no one had ever made such a request, that he did not pay for travel in

addition to supplying the vehicle, and that that was how his company operated. In an interview with the Commission about this issue, the employer responded, saying [translation] “It’s not true that travel was paid for decree-regulated construction and not paid when it wasn’t.” This inconclusive response neither confirms nor refutes the Appellant’s account, but I find it reasonable to believe from this statement that the employer was not paying its employees for travelling time. Once again, I find there was a breach of the collective agreement and, therefore, a practice that was contrary to law.

[20] Furthermore, the Appellant argued that, on a number of occasions, the employer required employees, including the Appellant, to supply certain tools. The Appellant argues that the employer failed to comply with the collective agreement, which states that the employer must supply the tools. He submitted into evidence Schedule F-2 of the agreement, which lists the tools that must be supplied by a carpenter-joiner. I find that the list is relatively short and that it shows that the employer must supply the tools, except if they are mentioned in that list. Having given significant weight to the Appellant’s testimony, I accept his account and find that the employer engaged in a practice that was contrary to law when it required the Appellant to supply tools other than those listed in Schedule F-2.

Issue 3: Did the Appellant have no reasonable alternative to leaving his employment?

[21] For just cause for leaving employment to exist, an appellant must not only show that they left because of exceptions stated in section 29(c) of the Act. Even if there are practices that are contrary to law and changes to their work duties, they must also show that, having regard to all the circumstances, they had no reasonable alternative to leaving (*Canada (Attorney General) v Patel*, 2010 FCA 95 (*Patel*); *Bell*, A-450-95; *Landry*, A-1210-92). In fact, Judge Létourneau noted 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 constitutes an error of law (*Canada (Attorney General) v Hernandez*, 2007 FCA 320).

[22] The Commission submits that the Appellant had reasonable alternatives open to him. Regarding pay, the Commission argues that the employer had said it was prepared to change when it made payments. It adds that the Appellant should have waited for the employer to make

the change. The Appellant however argues that he was patient and waited when his boss told him that he would do something but that later, in late January, the employer basically told him that it was not going to create two pay systems. Therefore, I do not see how waiting could be a reasonable option because the Appellant had already received confirmation from the employer that the pay system would stay the same.

[23] The Appellant said that, when he noticed in the morning of Friday, February 16, 2018, that his pay had still not been deposited, he did not have any money to fill his vehicle up with gas, so he was not able to show up for work. He states that his pay ended up in his account around 10:30 a.m. on February 15, 2018.

[24] Regarding practices of an employer that are contrary to law and the failure to meet the conditions of employment for the new-construction/renovation sector, the Commission submits that the employer and the Appellant had conflicting accounts and that their issue could be resolved by other authorities such as Commission de la construction du Québec [Québec's construction commission] (CCQ), or Commission des normes, de l'équité, de la santé et de la sécurité du travail [Québec's labour standards commission] (CNESST). The Commission is of the view that it is reasonable to expect a claimant to take steps with the appropriate authorities if they believe their rights have been violated. The Commission also submits that the Appellant could have waited to find other employment before leaving X.

[25] I find that the Commission made its findings quickly and suggests alternatives that are not reasonable. I recognize that the issue is not whether it was reasonable for the Appellant to leave his employment, but rather whether it was the only reasonable alternative open to him, 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). On the contrary, the Commission cannot expect the Appellant to choose unreasonable options before leaving.

[26] I find that the Appellant had no reasonable alternative to leaving. All of an appellant's circumstances must be taken into account. I give significant weight to the fact that the

Appellant's working conditions had been agreed when he was hired and that they were not met. I accept the Appellant's and his representative's explanations that employee unions in the construction industry file grievances only for disciplinary actions. Therefore, that option the Commission noted does not exist. The Appellant admitted that he certainly could have filed a complaint about his wages with the CCQ. However, he says that the CCQ unfortunately takes two to four years to resolve that type of issue. Under these circumstances, I cannot consider that to be a reasonable option, especially when there are various other frustrations about the job.

[27] I also give significant weight to the Appellant's situation regarding distance. The Appellant explained that he lived 77 kilometres from the employer. Because of this, he left his home very early in the morning, drove 77 km to X to then take the company vehicle and drive to Québec City to the construction sites. At the end of the day, he drove back. That makes for very long days and makes it difficult to find the opportunity to take steps to look for employment. Furthermore, it explains why remaining at the employment was not a reasonable option. I accept that the Appellant's statement that his conditions were indeed less beneficial in the renovation sector and that he would never have accepted the employment from the start if he had known that the employer was not going to comply with its agreement and not assign 80% of his time to new-construction work. In this context, considering altogether the employer's practices that were contrary to law, the failure to meet conditions of employment, and the difficulties with getting paid on time, I find it rather difficult to conclude that remaining at work was a reasonable alternative. I find that the circumstances stacked against the Appellant with his work for X meant that he had just cause to leave because he had no reasonable alternative to leaving.

CONCLUSION

[28] The appeal is allowed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	December 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. P., Appellant Antoine Berthelot, Representative for the Appellant