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

Citation: *J. R. v Canada Employment Insurance Commission*, 2019 SST 245

Tribunal File Number: GE-18-3546

BETWEEN:

J. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: January 16, 2019

DATE OF DECISION: February 12, 2019

Canada

DECISION

[1] The appeal is allowed. The Canada Employment Insurance Commission ("Commission" or "Respondent") has failed to establish on the balance of probabilities that the Appellant voluntarily left his employment.

OVERVIEW

[2] The Appellant worked as a Learning Developer with X (Canada Inc.) ("Employer" or "X"). The Appellant met with the Human Resources Manager to discuss his annual performance review. During this meeting the Appellant raised several workplace concerns. Following this meeting, the Appellant had a brief discussion with his immediate Manager ("Manager"). Thereafter, the Appellant went home for the day. Before going to work the following morning, the Appellant sent an email to his Manager setting out his workplace requests and outlining certain commitments that he was prepared to adhere to in the workplace. Upon arriving at work, the Appellant learned that he no longer had access to his computer and was told to go home. He was paid two weeks of salary.

[3] Email exchanges between the Appellant and the Human Resources Manager following the Appellant's departure from the workplace show that there was a marked difference in their account and interpretation of the circumstances surrounding the Appellant's departure. The Human Resources Manager stated that the Appellant had, during their prior meeting, resigned from his employment and provided the Employer with two weeks of notice of his resignation. The Human Resources Manager stated in these email exchanges that the Appellant was provided two weeks of pay in lieu of his notice of resignation. However, the Appellant stated in these emails that he had not resigned during the prior meeting and was attempting to explore options to appease his workplace concerns. The Appellant stated in these emails that he was dismissed by his Employer and provided with two weeks of pay in lieu of notice of termination.

[4] The Appellant made an initial claim for regular employment insurance benefits with the Commission. The Commission disqualified the Appellant from receiving benefits because it concluded that he voluntarily left his employment without just cause. The Appellant sought reconsideration of this decision. On reconsideration, the Commission maintained the original

disqualification from benefits. The Appellant now has appealed the reconsideration decision before the Social Security Tribunal ("Tribunal").

ISSUES

[5] The Tribunal must determine 2 issues:

> **Issue 1:** Did the Appellant voluntarily leave his employment with X?
> **Issue 2:** If yes, did the Appellant have just cause for voluntarily leaving his employment because he had no reasonable alternative to leaving having regard to all of the circumstances?

ANALYSIS

[6] The *Employment Insurance Act* ("Act") disqualifies a claimant from receiving benefits if the claimant voluntarily left employment without just cause (section 30 of the Act). A claimant can establish just cause for voluntarily leaving if, he can prove that having regard to all of the circumstances, the claimant had no reasonable alternative to leaving his employment (subsection 29 (c) of the Act).

[7] The Commission has the burden to prove that the leaving was voluntary. If established, the burden shifts to the Appellant who must prove that he had just cause for leaving (*Green v Canada (Attorney General*), 2012 FCA 313). The burden of proof for both the Appellant and the Commission is a balance of probabilities, which means that it is "more likely than not" that the events occurred as described.

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

[8] The Tribunal finds that the Commission has not established on the balance of probabilities that the Appellant voluntarily left his employment.

[9] To determine whether the Appellant voluntarily left his employment, the Tribunal must examine whether the Appellant had a choice to stay or leave his employment (*Canada (Attorney General) v Peace*, 2004 FCA 56).

[10] Based on the information provided on the record and that Appellant's testimony at the hearing, the Tribunal finds that the following facts are undisputed.

July 26, 2018, meeting between the Appellant and the Human Resources Manager

- The Appellant approached the Human Resources Manager on July 26, 2018, to discuss his annual performance review. The Appellant used this opportunity to discuss concerns that he had with his working conditions, his relationship with his manager, the implementation of new software that would impact his tasks and the scope of the projects under his responsibility. During this meeting, the Appellant indicated that he wanted to change positions within the organization. The redundancy of the Appellant's position was also broached.
- Following this meeting, the Appellant returned to his desk.
- The Human Resources Manager contacted the Appellant's Manager to advise him of the conversation that he had with the Appellant.

July 26, 2018, meeting between the Appellant and his Manager

- Following the meeting with the Human Resources Manager, the Appellant and his Manager had a discussion in the parking lot. Sometime following the discussion, the Appellant left the workplace.

Events of July 27, 2018

- The following morning, the Appellant wrote an email to his Manager before going into work. The email was titled "Avoiding Brexit". In this email, the Appellant proposed options that would assist with improving his working environment, reinforced the need for certain working methods and outlined commitments that he proposed to follow. The Appellant proposed that the director of the department intervene to arbitrate.
- The Appellant then went to work. Upon entering the building the Appellant learned that he was locked out of his computer. The Appellant spoke separately with his Manager and with the Human Resources Manager. The Human Resources Manager advised the Appellant that he should go home and that he would be paid two weeks of salary.

- Following the Appellant's departure from the workplace, the Appellant wrote an email to the Human Resources Manager and copied his Manager and the director of the department. The email was sent at 1:32 PM on July 27, 2018, and is entitled "Re: X Contract – dismissal". In this email the Appellant summarized his understanding of the circumstances surrounding his departure from the Company. The Appellant wrote, "I understand from our discussion today that I will be dismissed without prejudice, with severance pay of 10 working days *(sic)* notice period + 6 days *(sic)* vacation allowance. With the true and accurate statement on my record of Employment that the job description has reduced for operational reasons, due to implementation of Powerpoint slide-template software".
- In the same email, the Appellant wrote, "3) [f]or the record, and for the avoidance of doubt, I have not resigned. I have requested that the downgrading of the job description is acknowledged and, if I cannot be reassigned to a role appropriate to my skills and experience, I be dismissed on the above basis."
- The Human Resources Manager responded to this email on July 30, 2018, stating that during the meeting of July 26, 2018, the Appellant had advised him that he was leaving in two weeks.

[11] The Appellant and the Respondent have diverging evidence on several critical points relating to the Appellant's departure from X. The Tribunal finds, based on the record and the testimony provided during the hearing that the Respondent has not established on the balance of probabilities that the Appellant voluntarily left his employment.

- ***Did the Appellant voluntarily leave his employment by giving an ultimatum on July 26, 2018 or by asking to be dismissed?***

[12] The Tribunal finds that the Respondent has not proven on the balance of probabilities that the Appellant voluntarily left his employment by giving an ultimatum during his conversation with the Human Resources Manager on July 26, 2018 or by asking to be dismissed.

[13] The Respondent argues that during the conversation on July 26, 2018, the Appellant provided the Human Resources Manager with an ultimatum and therefore initiated the end of the employment relationship. The Respondent relies on the statement of the Human Resources

Manager that the Appellant advised him on July 26, 2018, that would resign, in two weeks, if he was not moved to another position within the organization or was not laid off due the implementation of the new PowerPoint slide template software. Given that no other opportunities were available within the organization, the Respondent argued that the Appellant initiated the end of the employment relationship because the end state could only be dismissal or a resignation. The Respondent also relies on an email sent by the Appellant on July 27, 2018, entitled "Re: X Contract – dismissal" and an email sent on November 1, 2018, to support the argument that the Appellant had submitted an ultimatum that he would leave unless he was laid off or moved to another position, thus initiating his departure from X.

[14] The Appellant testified that on July 26, 2018, he advised the Human Resources Manager that he would "need to consider his options" if his work situation did not improve. In the email of July 27, 2018, the Appellant described the conversation with the Human Resources Manager in the following manner, " […]I told you [Human Resources Manager] privately that these issues were serious and I would resign if they could not be resolved within a few weeks. But I clearly stated that I was not resigning that day." In his email of November 1, 2018, the Appellant described the conversation that took place on July 26, 2018, using the same words as those used in his email of July 27, 2018.

[15] The Tribunal finds that the Appellant's testimony concerning the conversation of July 26, 2018, was very detailed. The Appellant testified that 80 percent of the discussion focused on his positive performance review. The balance of the time was spent discussing his workplace concerns and attempting to explore options that were available to him, both within the organization (another position within the organisation, dealing with the implementation of the new software) and potential avenues for exiting the organization (redundancy of his role, potential resignation). The Appellant testified that the discussion was cordial and open.

[16] The Tribunal finds that the primary focus of the discussion was not on the Appellant's imminent departure but rather on his past service with his Employer and how his workplace concerns could be addressed. Moreover, the Tribunal finds that the Appellant's position that he was endeavouring to explore multiple avenues within the organization is corroborated by his conduct after the meeting with the Human Resources Manager. After the meeting with the

Human Resources Manager, the Appellant spoke with his Manager in the parking lot about ways they could satisfy the Appellant within his current position. The Appellant's email to his Manager on the morning of July 27, 2018, enumerates a list of requests and commitments from the Appellant to work constructively within his current position of Learning Developer. In this same vein, The Tribunal accepts the Appellant's testimony that the email from the morning of July 27, 2018, was to further explore options within the workplace.

[17] During the hearing, the Appellant explained that although the title of the email, sent on the morning of July 27, 2018, "Avoiding Brexit" may appear to indicate that he was leaving the organization, this was an attempt at levity. Both the Appellant and his Manager were of British origin and often discussed the arduous negotiations associated with Brexit. The reference to Brexit was to describe "messy negotiations" which the Appellant felt was the present case. The content of the email supports the Appellant's testimony that he was seeking to find a working solution within his role as a Learning Developer. The Appellant asked his Manager, in this same email, if the Director of the department could assist with finding a solution when he states, "Perhaps we can ask A. to arbitrate?" The Tribunal finds that the Appellant's conduct is consistent with that of an employee who was actively engaged in trying to negotiate changes within the workplace to facilitate working within his role rather than that of an employee who has provided his Employer with an ultimatum.

[18] The Tribunal finds that although there is a difference between the Appellant's statement at the hearing regarding the "need to consider his options" and his statement in the email of July 27, 2018, neither of these statements amount to an ultimatum in the context of the discussions. The Tribunal finds that, underpinning both of these statements, is a level of complexity that is far more nuanced than that of a straight ultimatum. The Tribunal finds that the Appellant was an active participant in trying to seek a resolution to the workplace discussions, as evidenced by his conduct after the meeting with the Human Resources Manager. Given this context, the Tribunal finds that even the statement that the Appellant would resign if the issues could not be resolved within a few weeks cannot be considered to be an ultimatum because the Appellant himself was trying to seek a resolution and accept certain concessions himself rather than simply demanding that the Employer resolve a situation of impasse.

[19] Consequently, the Tribunal prefers the Appellant's more detailed testimony about the discussion that occurred on July 26, 2018, to the account provided by the Human Resources Manager because the Appellant's testimony is more consistent with the exploratory nature of the discussions that were occurring. The Tribunal finds that the Respondent overlooked the context of the discussions and hastily concluded that the Appellant had provided an ultimatum that would inevitably result in the resignation of the Appellant. The Tribunal finds that the Appellant did express his dissatisfaction with the workplace conditions, including the implementation of the new PowerPoint Slide program. However, the Tribunal finds that in the context of the discussion with the Human Resources Manager, the Appellant's expression of dissatisfaction was not synonymous with an ultimatum.

[20] Moreover, the Tribunal finds that the email from the afternoon of July 27, 2018, does not support the Respondent's argument that the Appellant initiated his departure from his Employer and voluntarily left his employment. The language used by the Appellant in this email is not consistent with the Respondent's argument that the Appellant **demanded** certain changes otherwise he would leave. The language in the July 27, 2018, email refers to **a request** "that the downgrading of the job description is acknowledged and, if I cannot be reassigned to a role appropriate to my skills and experience, I be dismissed on the above basis". The Tribunal finds that the Appellant's request to be dismissed due to the perceived redundancy of his role did not equate to the Appellant voluntarily leaving his employment because, despite the request, the dismissal could not be initiated by the Appellant.

- ***Did the Appellant voluntarily leave his employment on July 26, 2018, by resigning and providing two weeks of notice?***

[21] The Tribunal finds that the Appellant did not voluntarily leave his employment on July 26, 2018, by resigning and providing two weeks of notice.

[22] The Appellant testified adamantly that he did not resign from his position and did not provide two weeks of notice. The Human Resources Manager stated that the Appellant resigned and provided two weeks of notice.

[23] The Tribunal finds that the account from the Human Resources Manager about the events of July 26, 2018, is inconsistent with the Employer's record of employment. The Employer did not indicate "quit" on the Appellant's record of employment. Rather, the Employer wrote the code "K" which represents "other" as the reason for issuing the record of employment. In the notes on the record of employment, the Employer indicated, "J. R. felt that the role was beneath him, based on his experience, and not what he was hired to do". The record of employment further indicated that the last day of pay for the Appellant was July 27, 2018, which is inconsistent with the Human Resources Manager's statement that the Appellant was provided two weeks of pay in lieu of the two weeks of notice of resignation. Given these discrepancies, the Tribunal finds that the Appellant's consistent testimony denying that he resigned with two weeks of notice is more credible than the statement from the Human Resources Manager.

[24] Moreover, the Tribunal finds that the Respondent did not provide evidence to support its argument that the Appellant provided two weeks' notice to **both** his Manager and the Human Resources Manager. As per the finding above, the Tribunal does not accept that the Appellant provided two weeks of notice of his resignation to the Human Resources Manager. In addition, nowhere on the record is there evidence to support that the Appellant resigned from his employment during the conversation with his Manager on July 26, 2018. The record shows that the Manager stated that it was the Human Resources Manager "that told him that the claimant was giving him his two weeks' notice that he [Appellant] did not want to work here anymore". The record does not provide evidence that the Appellant informed his Manager that he was providing two weeks of notice of his resignation.

[25] During the hearing the Appellant testified that he was scheduled to go on vacation two weeks after the meeting of July 26, 2018. The Tribunal accepts the Appellant's argument that he would not have provided two weeks' notice of his resignation, knowing fully that he would nevertheless be away from the workplace during that time because he would be on vacation. The Tribunal finds that the impending vacation of the Appellant at the beginning of August 2018 supports the Appellant's position that he needed to consider his options and that the timeframe for consideration would be a "few weeks" as opposed to a fixed timeframe of two weeks.

[26] The Tribunal rejects the Respondent's argument that the Appellant "did in fact threaten to resign" and that "whether he [the Appellant] really intended to leave immediately or not, the employer pre-empted him and accepted his resignation". The Tribunal finds that there is a marked difference between an employee voicing that he is contemplating leaving his employment at an undetermined time in the future (particularly when there are ongoing discussions to address workplace concerns) and providing his employer with a notice of resignation. In the present case, Tribunal determines that the Appellant's conduct was consistent with the former situation and that on July 26, 2018, he advised the Human Resources Manager that he was considering, amongst other options leaving his employment. The Tribunal finds that this is not synonymous with the Appellant voluntarily leaving his employment.

[27] The Tribunal finds that the Appellant did not have the choice to stay or to leave and was compelled to leave his employment on July 27, 2018. It is uncontested that the Appellant was sent home by his Employer on July 27, 2018, and provided with two weeks of pay in lieu of notice. The Human Resources Manager is on the record having stated, that "they did not want him there, they told him to go home and they would pay him 2 week *(sic)* severance." The Manager stated that after his meeting with the Appellant in the parking lot on July 26, 2018, he "went upstairs and took away his [Appellant's] privileges, his access to his computer" and that "the claimant was so disgruntled he [the Manager] decided that he [the Manager]did not want him [Appellant] there anymore". This account is consistent with the Appellant's position that when he returned to work on July 27, 2018, he learned that he was locked out of his computer, he was told by his Manager that he was "no longer a fit", was instructed to go home and was told that he would be paid two weeks of pay in lieu of notice.

[28] The Tribunal finds that the Employer erroneously concluded that the Appellant had initiated the end of the employment relationship, pre-empted any further discussions around ongoing working conditions and severed the employment relationship with the Appellant.

[29] To determine whether the Appellant voluntarily left his employment, the Tribunal must examine whether the Appellant had a choice to stay or leave his employment (*Canada (Attorney General) v Peace*, 2004 FCA 56). The Tribunal finds that the Commission has not established, on the balance of probabilities, that the Appellant voluntarily left his employment with X. The

Tribunal finds that in the circumstances, the Appellant did not have a choice given the Employer's decision to send him home and end the employment relationship.

Issue 2: **Did the Appellant have just cause for voluntarily leaving his employment because he had no reasonable alternative to leaving having regard to all of the circumstances?**

[30] As the Tribunal determined that the Appellant did not voluntarily leave his employment, it is unnecessary to consider this issue.

CONCLUSION

[31] The appeal is allowed.

Christianna Scott

Member, General Division - Employment Insurance Section

HEARD ON:	January 16, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	J. R., Appellant Christopher Ware, Representative for the Appellant