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

Citation: M. A. v Canada Employment Insurance Commission, 2019 SST 268

Tribunal File Number: GE-18-3638

BETWEEN:

M. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: January 17, 2019

DATE OF DECISION: March 4, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant is a personal trainer and fitness competitor, having won titles in competitions. She had an arrangement with X as a sponsored athlete promoting X nutritional products on an infrequent basis. The Commission (Respondent) identified X as the Appellant's employer, having received information and a Record of Employment (ROE) from X. The existence of an employment relationship between the Appellant and X is the main issue in dispute. At the time the relationship between the Appellant and X ended in August 2017, the Appellant was receiving employment insurance (EI) benefits after her employment with X ended earlier in 2017. A year after the relationship with X ended, the Respondent decided that the Appellant was not entitled to receive EI benefits after August 2017, as she had voluntarily left her employment with X without just cause. An overpayment resulted.

PRELIMINARY MATTERS

[3] The Appellant had not received a copy of the appeal docket, as it was returned to the Tribunal on January 11, 2019, by the post office as undelivered. The Tribunal notified her by phone of the hearing date. She stated that she wanted to attend the hearing. She had not seen the appeal docket prior to starting the hearing. I reviewed with the Appellant the nature of the documents in the appeal file (GD1 to GD6), and gave her the opportunity to review the documents copied onto the hard drive of my laptop (which was not connected to the VPN). In my presence, with the laptop screen visible to both of us, she did review the complete GD4, Respondent's representations, and X's statements to the Commission, and a text message, in the GD3 reconsideration file. She made notes of X's statements and the text message to refer to in her testimony. She did not wish to review other documents. The Appellant stated she was prepared to proceed with the hearing, rather than to adjourn to get a copy of the docket for review afterwards. I gave her the option to view other documents during the hearing if she wished, but she did not take up that opportunity.

ISSUES

[4] 1. Was the Appellant engaged in employment with X? 2. Did the Appellant voluntarily leave employment with X? 3. Did the Appellant have just cause for leaving employment with X?

ANALYSIS

[5] The onus of proving on a balance of probabilities that the claimant voluntarily left her employment rests on the Respondent; if the Respondent satisfies the Tribunal that the claimant did voluntarily leave her employment, then the onus of proving, on a balance of probabilities, just cause for leaving rests on the claimant (*Canada (A.G.) v. White*, 2011 FCA 190).

[6] Under sections 29 and 30 of the *Employment Insurance Act* (Act), the proper question is whether there was "any employment of the claimant during their qualifying period or their benefit period." (paragraph 29(a)). The proper test is to identify the elements of the relationship between the claimant and the alleged employer which implies finding some form of employment and the presence of a financial benefit or remuneration received or to be received by the claimant in exchange for the provision of services. The benefit or remuneration part of the test requires a finding of whether the claimant expected to derive any financial benefit from the employment, and not "some kind" of benefit independent of the employment. (*Canada (A.G.) v. Greey*, 2009 FCA 296).

[7] A person providing volunteer services to a business, but receiving no remuneration in exchange, is not in an employment relationship (*Canada (A.G.) v. Greey*, 2009 FCA 296).

[8] "Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?" (*Canada (A.G.) v. Peace*, 2004 FCA 56).

[9] The test for just cause is, on a balance of probabilities and having regard to all the circumstances, did the employee have no reasonable alternative to leaving the employment (*Canada (A.G.) v. White*, 2011 FCA 190).

[10] A non-exhaustive list of circumstances that may qualify as just cause for quitting is set out in paragraph 29(c) of the Act. Other circumstances not listed may also justify quitting. Paragraph 29(c) of the EI Act is neither restrictive nor exhaustive, but subparagraphs (i) to (xiv) delineate the type of circumstances that must be considered (*Canada (A.G.) v. Campeau*, 2006 FCA 376).

[11] Remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job (*Canada (A.G.) v. Graham*, 2011 FCA 311).

[12] Only the facts that existed at the time the employee left the employment must be considered when assessing whether just cause has been proven (*Canada (A.G.) v. Lamonde*, 2006 FCA 44).

[13] While the employee may have left a job for good personal reasons, or for what she considers to be good cause, that is not the same as just cause under paragraph 29(c) of the Act (*Canada (A.G.) v. Imran*, 2008 FCA 17

Issue 1: Was the Appellant engaged in employment with X?

[14] The proper test is to identify the elements of the relationship between the claimant and the alleged employer which implies finding some form of employment and the presence of a financial benefit or remuneration received or to be received by the claimant in exchange for the provision of services (*Canada (A.G.) v. Greey*, 2009 FCA 296).

[15] The Appellant was engaged in employment with X.

[16] The Appellant is a personal trainer and fitness competitor, having won titles in competitions. She began work as an employee with X in 2014. Her job was to assist customers with weight loss and fitness. As part of that work, but not as one of her job duties for X, she would recommend nutritional supplements to clients to use before and after their workouts. Initially, she had an arrangement with X to recommend its supplements at X. In 2015, X opened a store in North Bay. She ended her relationship with X, and entered into an arrangement with X as a sponsored athlete promoting X products at her work with X. The relationship between the Appellant and X was never committed to writing. Initially the arrangement was for her to

promote X products to her clients at X and on her social media, in exchange for which she would be able to purchase X products at cost. There were no discussions of being paid by X. The Appellant described the relationship as a partnership, not a job. Later in 2015, or in 2016, X asked her do demonstrations at its store, at an event at X, and at a home show. At that point, she had become a brand sponsorship ambassador for X, a manufacturer of supplements. Her arrangement with X was to receive free products in exchange for her promoting its products. As a result, the demonstrations she did with X were for X products only, not for other products sold by X. X also sold X products. She did these tasks on an infrequent basis, and did not expect to be paid for them, or expect to take on the role of a casual employee. The demonstrations, apart from those done at X, involved the Appellant attending at the location specified by X to show and promote the X products provided to her free, and to give free samples to potential customers. Most of the demonstrations took place in the X store. The demonstrations would last one or two hours, and occurred one to three times per year. X did start to pay the Appellant in May 2016 for her time spent at demonstrations. She was paid $20.00 per hour for her attendance, though she did not ask to be paid. She considered it volunteer work, as it would promote potential clients for her at X, where she was paid by commission for new clients she attracted, and for actual time spent with clients during their time at the X facility. She was free to say no to any request from X to do a demonstration. She was under no obligation respecting a minimum number of demonstrations, or minimum hours at a demonstration, or specific duties. If she agreed to do a demonstration, she could set the hours around her schedule with clients at X, or with other commitments. She received no direction from Xabout how to do her work. She did the demonstrations in her free time, so there was little risk of money loss to her.

[17] X ended the Appellant's employment in February 2017. With that job ended, she did not have the opportunity to promote products to her X clients. Her husband, X, also was let go from X in February 2017. He too did demonstrations for X, but payment for his time was made to the Appellant, not to X. After being let go from X, the Appellant continued doing demonstrations for X at their store, and learning about X products. This included two separate two-hour seminars in the summer of 2017, with X to learn about X products in Sudbury. In the summer of 2017, X began to set up a business to distribute nutritional supplements for another manufacturer. The Appellant helped X in this business. The Appellant lost her sponsorship with X in August 2017. In December 2017, X's business closed. It was the Appellant's potential

involvement in this business that led her to the end her relationship with X. X's business would be in direct competition with X. She therefore could not continue in the relationship with X.

[18] With respect to payments from X, the Appellant testified that she was at first paid by cheque. X changed the payment method to direct deposit to the Appellant's bank account, on advice that the payments had to go through the payroll system. The Appellant never received pay stubs, and was unsure if deductions had been taken. The Record of Employment (ROE) from X showed the gross amounts paid, all in multiples of $20.00 per hour. Following the hearing, the Appellant compared those six amounts on the ROE against her bank statements for the pay periods in question. She emailed the results to the Tribunal, stating that the bank deposits were for the gross amounts shown for each pay period on the ROE.

[19] The Respondent obtained from X the evidence it relies on in support of the existence of an employment relationship. X stated that it hired the Appellant as a casual on-call employee, who worked for a few hours each time he called her. She was paid for that work. X confirmed that the Appellant worked infrequently for demonstrations, and that she was a sponsored athlete for X, receiving free products from them. The ROE showed the first day worked as May 1, 2016, and the reason for issuing the ROE as "quit".

[20] Based on this evidence, the Appellant did receive remuneration from X in two forms. First, she received product from X at cost, from the beginning of the relationship. Secondly, she was paid for the hours she did do demonstrations, from May 1, 2016, forward. The second part of the test from *Greey* is satisfied.

[21] The more difficult question is whether the first part of the *Greey* test is satisfied. That part requires some form of employment. Paragraph 29(a) and subsection 30(1) of the Act (except paragraph (a) of subsection 30(1)) refer to "any employment", rather than to "insurable employment". Section 2 of the Act defines "employment" as "the act of employing or the state of being employed." That is the primary definition from the Shorter Oxford English Dictionary, 6th edition, 2007. There is no definition in the Act or in the Dictionary of the phrase "the state of being employed". Section 2 of the Act defines "insurable employment" by reference to section 5 of the Act, and defines "insured person" to include "a person who is or has been employed in insurable employment". To qualify for EI benefits under the Act, a claimant must be an insured

person, that is, a person engaged in insurable employment (Act, subsection 7(1)). Under paragraph 5(1)(a) of the Act, insurable employment includes employment by an employer under a contract of service. The contract of service is distinguished from a contract for service, which is not insurable employment. The contract of service is the traditional employer-employee relationship; the contract for service is usually referred to as an independent contractor relationship. Both types of relationship are caught by the broad term "any employment" in paragraph 29(a) and subsection 30(1) of the Act. The test for determining which type of contract a person has is whether the person is performing the services as his own business on his own account (a contract for service) or not as his own business on his own account (a contract of service) (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59). The test for distinguishing the two types of contract relies primarily on the following factors: the level of control over the person providing the services; whether the person provides their own equipment and staff; and whether the person assumes the risk of loss, or has the opportunity to profit from the activities.

[22] On the evidence in this case, the Appellant's relationship to X was a contract for service, thus not insurable employment, but still employment within the definition in paragraph 29(a) and subsection 30(1) of the Act. With respect to the first factor, the level of control by X, the Appellant's evidence is, for the most part, indicative of a lack of control and direction by X. She promoted X products at X and on social media on her own, without direction from X. She had no obligation to attend at any demonstration, as she could at any time refuse a request from X to attend. She was not directed on how to do the demonstrations. She was not required to work a minimum number of hours, or do a minimum number of demonstrations. She could leave a demonstration at any time, but would only be paid for the time there. The only matters suggesting control were the fact that X designated the locations outside X, and provided the products to use in the demonstrations, unless the Appellant brought products supplied to her free by X. The designation of the location was consistent with either traditional employment or independent contractor status. X supplying products was more consistent with a traditional employment relationship. With respect to the second factor, whether the person provides their own equipment and staff, the Appellant did not supply equipment, as a table to show products was provided by the venue. The Appellant did provide one staff person, her husband X. He was not paid separately by X for time he spent doing demonstrations or shows with the Appellant.

His work was included in the amounts paid to the Appellant. This is indicative of a contract for service relationship. If the Appellant was working in a contract of service, she would not receive pay for another person working with her. With respect to the third factor, whether the person assumes the risk of loss, or has the opportunity to profit from the activities, the risk of loss was minimal in this scenario, as the Appellant was incurring few expenses, so would likely not be in a loss position with respect to revenue. With respect to the opportunity to profit, the Appellant did have that opportunity due to the commission paid by X for new clients she brought into X. In addition, when at X, and after, the Appellant had the opportunity to profit from direct sales of free products from X, or sales of discounted products from X. With respect to other factors in support of the Appellant being in a contract for service, there was no deduction from the amounts paid to her by X for income tax, CPP or EI. In addition, while working with X, the Appellant entered into a sponsorship agreement with X. This was done on her own account, not at the direction of X.

[23] The broad scope of subsection 30(1) of the Act, applying to "any employment" captures both contracts of service and contracts for service. This is confirmed by the reference in paragraph 30(1)(a) to insurable employment with respect to qualifying for EI benefits in the future, in contrast to the phrase "any employment" in the opening of subsection 30(1). Thus, the relationship between the Appellant and X, being a contract for service, is included in the phrase "any employment" in paragraph 29(a) and subsection 30(1) of the Act. The first part of the test from *Greey* is satisfied.

[24] Since both parts of the *Greey* test have been met, the Appellant was engaged in employment with X.

Issue 2: Did the Appellant voluntarily leave employment with X?

[25] Did the employee have a choice to stay or to leave? (*Canada (A.G.) v. Peace*, 2004 FCA 56). Did she choose to leave?

[26] The Appellant did have the choice to leave, and did initiate the ending of her employment.

[27] The Appellant's husband was setting up a business that would compete with X. She was assisting her husband. The Appellant decided that it was not appropriate for her to continue in the relationship with X in light of her husband's business. She therefore ended the relationship with X, rather than X ending the relationship. That action by the Appellant constituted voluntarily leaving employment.

Issue 3: Did the Appellant have just cause for leaving employment with X?

[28] The test for just cause is, on a balance of probabilities and having regard to all the circumstances, did the employee have no reasonable alternative to leaving the employment (*Canada (A.G.) v. White*, 2011 FCA 190).

[29] The Appellant had just cause for quitting.

[30] The Appellant submitted as a ground of just cause subparagraph 29(c)(ix) of the Act, significant changes in work duties. In her notice of appeal, the Appellant refers to "major changes in the terms and conditions of my previous job", so that she "could no longer provide the same service as agreed with employer". She also referred to losing her position with X, so that she "no longer had a place to do demo's nor…product to sample. Nothing was the same. Everything changed. This is just cause…" This submission does not succeed. The significant changes in work duties must be initiated by the "employer", in this case, by X. The changes the Appellant relies on were not initiated by X, but by X and by X. The work duties with X remained unchanged by the loss of X and X. The work duties with X involved the Appellant attending at X sponsored demonstrations in order to promote products sold by X. Those duties did not change. The ground of significant changes in work duties to support just cause is not proven.

[31] On the facts of this case, there was just cause based on the Appellant's participation in her husband's distribution business. The common law now recognizes a duty applicable to all contracts, a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations (*Bhasin v. Hrynew*, 2014 SCC 71). The husband's business would be in direct competition with X, as both were in the business of distributing nutritional supplements. The Appellant could not honestly continue her contractual

obligations with X at the same time as she was assisting a direct competitor. She would also have been involved in a conflict of interest between her duty to X to promote its products, while at the same time having at least an indirect financial interest in the success of her husband's competing business. In those circumstances, the Appellant had no reasonable alternative to leaving the employment. The fact that the husband's business closed down in December 2017 is not relevant, as the Appellant left her employment in August 2017. Only the facts that existed at the time the employee left the employment must be considered when assessing whether just cause has been proven (*Canada (A.G.) v. Lamonde*, 2006 FCA 44).

CONCLUSION

[32] The appeal is allowed.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	January 17, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. A., Appellant