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

Citation: *S. C. v Canada Employment Insurance Commission*, 2019 SST 282

Tribunal File Number: GE-19-616

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: March 6, 2019

DATE OF DECISION: March 14, 2019

Canada

DECISION

[1] The appeal is dismissed. The Appellant has not proven that he had just cause to leave his employment. There were other reasonable alternatives.

OVERVIEW

[2] The Appellant was employed as a cook at a fast food chain for approximately 15 years. The Appellant quit his employment due to dangerous working conditions because the hot oil was burning his hands. The Appellant also quit because of health reasons and his age. The Appellant applied for employment insurance regular benefits. The Canada Employment Insurance Commission (Respondent) disqualified the Appellant from receiving benefits determining that the Appellant did not have just cause to leave his employment as there were other reasonable alternatives such as, securing alternate employment or obtaining direction from his physician to quit his employment. The Respondent appealed to the Social Security Tribunal noting that he left his employment due to dangerous working conditions, health reasons, harassment from a colleague and the employer discriminated against him because of his age.

PRELIMINARY MATTERS

[3] Neither the Appellant, nor the Respondent participated in the teleconference hearing on March 6, 2019. The Tribunal waited 25 minutes past the appointed time and then proceeded to conclude the hearing.

[4] The Appellant filed his Notice of Appeal with the Tribunal on January 24, 2019 and authorized the Tribunal to correspond with him by email by providing an email address (GD2-2). The Tribunal emailed the Appellant a copy of the Notice of Hearing and other documentary evidence on February 20, 2019. On February 27, 2019, the Tribunal contacted the Appellant by telephone to confirm that the email sent was received. The Appellant advised that he did not receive the previous email which was sent to his daughter’s email address. He requested that the Tribunal send it to his email address. As a result, the Tribunal sent the Notice of Hearing and documentary evidence to the Appellant’s email address on February 27, 2019.

[5] If a party fails to appear at a hearing, the Tribunal may proceed in their absence if they are satisfied that the party received Notice of Hearing (ss.12(1) of the *Social Security Tribunal Regulations*). There is no indication in the record that the email was returned to the Tribunal as undeliverable and no further contact with the Appellant. Therefore, I am satisfied that the Appellant received the Notice of Hearing and proceeded in his absence.

ISSUES

[6] Issue 1: What was the reason for separation from employment?

[7] Issue 2: Did the Appellant have just cause to leave his employment due to harassment at work? Were there other reasonable alternatives?

[8] Issue 3: Did the Appellant have just cause to leave his employment due to age discrimination? Were there other reasonable alternatives?

[9] Issue 4: Did the Appellant have just cause to leave his employment for health reasons or due to dangerous working conditions? Were there other reasonable alternatives?

ANALYSIS

[10] Claimants are disqualified from employment insurance benefits where they voluntarily leave any employment without just cause (s. 30(1) of the Act). Claimants must prove that they had just cause for voluntarily leaving employment and that in the circumstances they had no reasonable alternative to leaving that employment (s.29 of the Act).

[11] The Respondent must prove that the Appellant voluntarily left his employment. The burden then shifts to the Appellant to prove that he had just cause for doing so (*Canada (Attorney General) v. White,* 2011 FCA 190).

[12] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work (*Canada (Canada Employment and Immigration commission)* v. *Gagnon,* [1988] 2 SCR 29).

[13] The question is not whether it was reasonable for the claimant to leave their employment, but rather whether leaving the employment was the only reasonable course of action open to them, having regard to all the circumstances (*Canada (Attorney General*) v. *Laughland*, 2003 FCA 129).

Issue 1: What was the reason for separation from employment?

[14] I find that the Appellant quit his employment on October 30, 2018. This was not disputed between the parties and is consistent with his application for benefits and Record of Employment which both identify that he quit (GD3-7; GD3-24).

Issue 2: Did the Appellant have just cause to leave his employment due to harassment at work? Were there other reasonable alternatives?

[15] No, I find that the Appellant did not have just cause to leave his employment due to harassment at work because there was insufficient evidence to make that finding. There were also other reasonable alternatives such as, reporting his harassment concerns to his employer or a third party.

[16] I considered subsection 29(c)(i)of the Act: sexual or other harassment.

[17] The Appellant noted in his appeal forms that he was harassed by his colleague which caused him mental degradation (GD2-5). He wrote the following: "I also failed to mention the following in my first request for fear of judgement. There is an employee at [employer name removed] who would constantly give me strife. She would always give me a hard time, bullying and mocking me. I, on many occasions, had talked to a supervisor and manager about her and they acknowledged her misconduct but refused to resolve the situation".

[18] The Respondent submits that the Appellant has not provided any details about the harassment on his initial application or request for reconsideration forms (GD4-3). The Respondent further submits that he must show that he took reasonable steps taken to remedy the situation to satisfy just cause. The employer also told the Respondent that he had not reported any concerns to them (GD3-27).

[19] I was not persuaded that the Appellant was harassed by a colleague because he failed to provide any details, context or dates when the harassment occurred. Further, there was no evidence that he reported his harassment concerns to his employer, or a third party, when those concerns where reported and the outcome.

[20] I also preferred the Appellant's initial statements over his subsequent statement because he spoke to the Respondent on three separate occasions and failed to mention any harassment concerns at the workplace (GD3-28; GD3-29; GD3-35). I do not accept his argument that he did not raise his concerns for fear of judgment because he openly discussed his concerns about the alleged dangerous working conditions. The court has also found that when a claimant failed to mention harassment in the initial declaration, there was no error made by favouring this declaration to subsequent declarations (*Cundle* v. *Canada (Human Resources Development),* 2007 FCA 364).

[21] The obligation is on a claimant, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job, which would have been reasonable alternatives (*Canada (Attorney General)* v. *White*, 2011 FCA 190). Further, another reasonable alternative would have been to speak with his physician to discuss his options if his mental health was affected due to the alleged harassment. Therefore, I find that the Appellant did not have just case to leave his employment due to harassment based on subsection 29(c)(i) of the Act.

Issue 3: Did the Appellant have just cause to leave his employment due to discrimination? Were there other reasonable alternatives?

[22] No, I find that the Appellant did not have just cause to leave his employment due to discrimination because there was insufficient evidence to make that finding. There were also other reasonable alternatives such as, reporting his concerns to his employer or a third party.

[23] I considered subsection 29(c)(iii)of the Act: discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act.*

[24] The Appellant noted in his appeal forms that his employer discriminated against him based on his age (GD2-5). The Appellant wrote that he was promised a job as a cashier, however his employer later rejected him because of his age and appearance, preferring a younger female.

[25] The employer told the Respondent that the Appellant quit his job because he said he was getting too old for the job and did not get the promotion he wanted as a shift manager (GD3-27). The employer further noted that there were no positions available and that he was not proficient in English, which was a requirement.

[26] I was not persuaded that the Appellant was discriminated based on age because he was not offered or promoted to a different position. There was insufficient evidence from the Appellant to show that he met the requirements or qualified for the other roles. Furthermore, the employer reported that the Appellant said he was getting too old for the job, which I note was also consistent with the Appellant's statement to the Respondent that he was too tired to do that type of work (GD3-28). This suggests that Appellant felt that he was too old and tired for his role but it was not the employer's conduct or actions discriminating against him based on his age.

[27] A reasonable alternative to leaving his employment would have been to discuss his concerns with his employer, or a third party. Therefore, I find that the Appellant has not proven that his employer discriminated against him based on age and it does not constitute just cause for leaving his employment based on subsection 29(c)(iii) of the Act.

Issue 4: Did the Appellant have just cause to leave his employment for health reasons or due to dangerous working conditions? Were there other reasonable alternatives?

[28] No, I find that the Appellant did not have just cause to leave his employment for health reasons or due to dangerous working conditions because the nature of his employment exposed him to certain elements and he had accepted those conditions for several years. There were also other reasonable alternatives available to the Appellant such as discussing his concerns and seeking an accommodation from the employer, or any other third party, including his physician.

[29] I considered subsection 29(c)(iv) of the Act: working conditions that constitute a danger to health or safety.

[30] The Appellant reported safety concerns at his workplace in his appeal (GD2-5). He noted that working as a fry cook was dangerous because he was exposed to hot oil and excessive heat with minimum protection. He said that he has endured multiple bums, hot flashes, injuries and is no longer able to withstand such injuries because he is getting older.

[31] The employer told the Respondent that being splashed by oil is a common occurrence for people who work with the deep fryer (GD3-27). The employer noted that all staff have the occasional drop of oil that hits their hand but that they wear gloves for protection. The employer stated that the Appellant never complained about any safety issues and did not report any work injuries.

[32] I was not persuaded that there were safety concerns or dangerous working conditions at work because the Appellant worked as a fry cook for several years and accepted those working conditions at the outset. There is no evidence that the working conditions had not changed, or worsened. The Appellant was also provided with safety gear, specifically gloves to protect his hands from the hot oil and heat. There was insufficient evidence to establish that he ever reported his concerns or injuries to his employer or his physician, when he reported it and the outcome.

[33] The court has no just cause to leave an employment where a claimant left his employment because he feared there were dangerous working conditions without discussing with employer whether measures could be instituted to reduce this fear (*Canada (Attorney General*) v. *Hernandez*, 2007 FCA 320).

[34] The court has also found that remaining employed until a new job is secured is generally a reasonable alternative to taking a unilateral decision to quit a job (*Canada (Attorney General*) v. *Graham*, 2011 FCA 311).

[35] I find that the Appellant could have reported his concerns to his employer, or a third party, or secured other employment elsewhere, he could have discussed his concerns with his physician because these were all reasonable alternatives. Therefore, I find that the Appellant has not proven that he had just cause to leave his employment working conditions that constitute a danger to health or safety based on subsection 29(c)(iv) of the Act.

CONCLUSION

[36] Having regard to all the circumstances, individually and cumulatively, I find that the Appellant has not proven that he had just cause to leave his employment for any of the above reasons because there were several other reasonable alternatives. Therefore, the Appellant is disqualified from receiving benefits pursuant to subsection 30(1) of the Act.

[37] The appeal is dismissed.

Solange Losier

Member, General Division - Employment Insurance Section

HEARD ON:	March 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	None