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

[TRANSLATION]

Citation: *N. D. v Canada Employment Insurance Commission*, 2019 SST 814

Tribunal File Number: GE-19-933

BETWEEN:

N. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: April 24, 2019

DATE OF DECISION: April 30, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked for several months as a day labourer for the company X. His job was to clean masonry. As a young adult, his goal was to pursue a career in the construction industry. In response to a job posting, he applied for and obtained a labourer position with construction company X. At the same time, he earned his competency certificate from Québec's construction commission, Commission de la construction du Québec (CCQ). Once he began working for X, he resigned from his job with X.

[3] Things did not go as the Appellant had hoped and he was laid off because of a shortage of work about two months after he was hired. The Employment Insurance Commission (Commission) decided that the Appellant did not have just cause for leaving his employment because he failed to show he had exhausted all reasonable alternatives before leaving.

ISSUES

[4] The Tribunal must decide the following issues:

1. Did the Appellant have reasonable assurance of another employment in the immediate future?

2. Was the Appellant's voluntary leaving the only reasonable alternative in his circumstances?

ANALYSIS

[5] 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). The Appellant admitted into evidence that he did leave his employment. 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 be entitled to Employment Insurance benefits. The person must show this.

[6] Section 29(c) of the Act contains a non-exhaustive list of circumstances that may justify a person voluntarily leaving their employment. I considered the Appellant's reasons for leaving in my analysis by answering the following questions:

Issue 1: Did the Appellant have reasonable assurance of another employment in the immediate future?

[7] The circumstances that give a person just cause for leaving their employment include, in section 29(c)(vi) of the Act, a situation where a person leaves their employment when they have reasonable assurance of another employment in the immediate future.

[8] For the reasons that follow, I find that the Appellant satisfied the conditions in section 29(c)(vi) and had reasonable assurance of another employment in the immediate future. I therefore find that his leaving was justified.

[9] The Appellant was working 30 to 40 hours per week as a day labourer for X. The Appellant stated that he liked his work, but that he wanted to enter the construction industry. He also stated that he knew the construction industry offered much better conditions, including social benefits, a higher salary, and vacation as well as opportunities to do work that is interesting. A friend who already worked for X told him the employer was looking for labourers. The Appellant also saw a job posting on the company's Facebook page.

[10] The Appellant stated that he had contacted X and was told to show up the same evening. The Appellant stated that he had met with X and X, the company owners. The meeting lasted about 10 minutes. The Appellant said that the two owners told him they needed labourers, particularly in asbestos decontamination, and that they had several months' worth of work for him. They then told him that he would first do the 150 hours required to obtain his certificate from the CCQ, but that there was nothing to worry about because there would be lots of work for him.

[11] The Appellant started working for X on June 22, 2018, a few days after the meeting. The Appellant submits that he completed training in asbestos decontamination on June 21, 2018, before even beginning his employment. This was separate from his labourer certificate that he would obtain only after he had completed 150 hours of work. He was assigned to work 40 hours per week at a construction site. After working at both jobs for about a week, the Appellant decided to leave his employment with X.

[12] The Appellant obtained his labourer competency certificate from the CCQ over the summer, once he had completed his 150 hours. He continued to work. The Appellant told the Tribunal about a situation that had occurred towards the end of August 2018 that suggests a conflict had arisen between the employer and the Appellant. The employer submits that, following an attendance issue, the Appellant had been moved to the bottom of the call list. He was then laid off because of a shortage of work. It appears that the employer phased out the Appellant because the Appellant is convinced that there was enough work for him. Based on the evidence, including the Appellant's testimony, it seems his attitude was not the best, but we must not draw conclusions about it because this incident is irrelevant to the present case. However, it does help to establish context. Based on this evidence, I accept that the Appellant lost his employment with X due to a combination of circumstances and not because it was seasonal employment. I accept that there was always work available for Xbut that it had been assigned to other employees.

[13] The Commission submits that the Appellant did not have just cause for leaving his employment with X. The Commission is of the view that the Appellant accepted an employment with a guarantee of 150 hours only so he could obtain his competency certificate. The Commission finds that the Appellant took a risk in hoping to be able to continue to work after the guaranteed 150 hours. Finally, the Commission submits that leaving stable employment for seasonal employment is not just cause for leaving an employment within the meaning of the Act.

[14] I do not agree with the Commission's reasoning. First, the Appellant waited until he was officially employed with the masonry company, X, for a full week before leaving his employment with X. Therefore, I find that he acted diligently. Furthermore, I accept that the Appellant left one seasonal employment for another seasonal employment. Therefore, it cannot

be said that the Appellant put himself in a more precarious situation with one employer than with the other. In fact, I believe the opposite is true. The Appellant made the leap into the construction industry not only because he wanted to improve his working conditions, but also because he had responded to a job posting as well as discussions with the employer about the considerable amount of work available in the field. During their meeting, the employer confirmed verbally that he would not have to worry about not working I also give significant weight to the job offer entered into evidence, which states that X was looking for labourers to work in decontamination for a year or more. This concrete evidence corroborates the Appellant's version and contradicts the employer's statement to the Commission. I understand that the employer did not want to commit by stating that it had guaranteed the Appellant hours. However, it is more than likely that the employer led the Appellant to believe he would not have to worry about not working.

[15] I therefore note from the evidence that, although it offered no guarantee, the employer X led the Appellant to believe that he would have work for several months—maybe even a year. I find the idea that the construction industry is seasonal is becoming increasingly outdated. An increasing number of workers in this industry are working year-round. The Appellant testified that X had year-round contracts and that it was therefore possible to work year-round. That is what the Appellant expected to do.

[16] The Appellant stated that he would never have left Xhad he known that the employment with X would guarantee him only 150 hours.

[17] I give significant weight to the Appellant's testimony where he explained his situation in detail without exaggeration or embellishment. I also give significant weight to the fact that the Appellant had every reason to believe that he was leaving an entry-level job for an employment with better conditions that would last more than a year. Therefore, it was not seasonal employment as the Commission claims.

[18] I note from the evidence that the Appellant had assurance of another employment, which he carried out for several weeks. The prospects for this new employment were interesting and promising. Although it was not permanent employment as such, the employer had led him to believe that he would not have to worry about being employed. This is an important point. I am

of the view that it is the responsibility of the insured not to deliberately provoke a risk of unemployment. I find that is not the Appellant's case. He was diligent in not leaving his employment with X before formally obtaining employment with X He had more than reasonable assurance of another employment—he was certain of it. He therefore satisfied his obligations as an insured person.

[19] I agree with the Appellant that whatever happens after a person is hired cannot be held against them. When a person has reasonable assurance of another employment, they cannot be penalized for circumstances beyond their control if they find themselves again unemployed. I also note that the *Digest of Benefit Entitlement Principles*, which does not have the force of law but proves a useful tool for the Commission, states "The fact that the promised employment did not come about or ultimately proved to be short term should not count against the person if he or she acted in good faith." The Federal Court of Appeal affirmed this application of the Act in *Tanguay*, A-1458-84.

[20] I am of the view that, in this case, the Appellant acted in good faith. Although I am puzzled by his attitude about the situation that resulted in his layoff because of a shortage of work, it does not change the fact that he left his employment with X in good faith with assurance that he had found a better employment that would offer him work for a longer period.

[21] Consequently, I find on a balance of probabilities that the Appellant meets the requirements of section 29(c)(vi) of the Act and that his voluntary leaving was justified.

[22] The Appellant submits that, in the case of equally balanced evidence, the Appellant must be given the benefit of the doubt in accordance with section 49.1 of the Act. The Tribunal wishes to point out that section 49(2) of the Act provides that the **Commission** must give the benefit of the doubt to the claimant if the evidence on each side of the issue is equally balanced. This section concerns the rules of evidence to which the Commission is bound, but which do not apply to the Tribunal. It would be an error for the Tribunal to appropriate this section.

Issue 2: Was the Appellant's voluntary leaving the only reasonable alternative in his circumstances?

[23] Generally, for just cause for leaving employment to exist, a person must not only show that they left because of exceptions stated in section 29(c) of the Act. 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; *Bell*, A-450-95; *Landry*, A-1210-92). In fact, Judge Letourneau recalled 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 constituted an error of law (*Canada (Attorney General) v Hernandez*, 2007 FCA 320).

[24] However, I find that the notion of "only reasonable alternative" does not apply to a person who leaves their employment with reasonable assurance of another employment. The reason for this exception is simply because it is difficult, if not impossible, to contend or conclude that a person who voluntarily leaves employment to occupy different employment is doing so necessarily because leaving is the only reasonable alternative in their case, which the Federal Court of Appeal acknowledged (*Canada (Attorney General) v Marier*, 2013 FCA 39; *Canada (Attorney General) v Langlois*, 2008 FCA 18; *Canada (Attorney General) v Campeau*, 2006 FCA 376).

[25] Since I have found that the Appellant had reasonable assurance of another employment in the immediate future, I will not address the notion of "only reasonable alternative."

CONCLUSION

[26] The appeal is allowed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	April 24, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. D., Appellant Maxime Gilbert, Representative for the Appellant