Citation: *P. H. v Canada Employment Insurance Commission*, 2019 SST 850

Tribunal File Number: GE-19-1490

BETWEEN:

P. H.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: April 17, 2019

DATE OF DECISION: April 30, 2019

Canada

DECISION

[1] The appeal is allowed. The Commission has failed to prove the Claimant voluntarily left her employment.

OVERVIEW

[2] The Appellant, whom I refer to as the Claimant, advised her employer when she was hired in April 2018 that she needed some time off in August 2018 to help her adult child, who lived in another community and was expecting to give birth at the end of August. The Claimant advised her employer on August 8, 2018, that she would be leaving on August 11, 2018. After arriving in her daughter's community, the Claimant was hired for 7 weeks by her daughter to be a nanny for the child. The Claimant returned to her home community once the nanny position ended. She texted the employer to say she was available. The employer did not contact the Claimant with a schedule of hours and when the Claimant requested her Record of Employment (ROE) the employer indicated that the Claimant had quit on August 8, 2018. The Canada Employment Insurance Commission (Commission) disentitled the Claimant from receiving employment insurance (EI) benefits because it determined she voluntarily left her employment without just cause. In response to the Claimant's request for reconsideration, the Commission upheld its decision. The Claimant appeals the Commission's reconsideration decision to the Social Security Tribunal (Tribunal).

ISSUES

Issue 1: Did the Claimant voluntarily leave her employment?

Issue 2: If so, did the Claimant have just cause to leave her employment?

ANALYSIS

[3] The *Employment Insurance Act* (Act) provides that a claimant is disqualified from receiving any EI benefits if the claimant voluntarily left any employment without just cause.[1]

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[1] Act, section 30(1)

[4] The Commission has the burden to prove the leaving was voluntary and, once established, the burden shifts to the Claimant to demonstrate she had just cause for leaving. The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

Issue 1: **Did the Claimant voluntarily leave her employment?**

[5] I find that the Claimant did not voluntarily leave her employment. To determine whether a claimant voluntarily left her employment the question to be answered is whether the claimant had a choice to stay or leave?[2]

[6] The Claimant testified that she was hired as a bartender in a pub. The Claimant testified that her hours of work at the pub were not guaranteed. The Claimant would call the pub on a Sunday night to see what her hours would be for the coming week; in some weeks it could be Tuesday before the schedule was made known. The Claimant testified that when she did not have full shifts for the week she might get a call to fill in, the shifts were 6 hours or 12 hours and only one staff member worked on a shift.

[7] The Claimant testified that at the time she was hired, her daughter was expected to give birth in late August and she would need time off as she was planning to join her daughter in another community at the time of the birth. She stated there was no agreed upon date for the start of the time off and it was anticipated she would be away from work for two weeks. The Claimant stated that it was verbally agreed that she could take the time off in August. The Claimant's daughter requested that she come to the Claimant's community earlier than planned. The Claimant telephoned her employer leaving messages that she needed to leave earlier than planned. The employer responded to the messages after the Claimant's second telephone call. The Claimant testified that she told her employer on August 8, 2018, that she needed to leave early. She stated that she told her employer she would be leaving as soon as possible. The Claimant testified that left her home community on August 11, 2018. The Claimant stated that her employer made no objection to her going and that there was no discussion of a fixed return date. The Claimant testified that it was unpaid leave. When the Claimant arrived in her

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[2] *Canada (Attorney General) v. Peace*, 2004 FCA 56

daughter's community, she found out that her daughter and son-in-law had decided to hire a nanny to assist them for the six weeks following the birth. The Claimant participated in the interviews of potential employees. The Claimant's daughter and son-in-law determined that none of the candidates were suitable and decided to hire the Claimant as their nanny. The position started on September 2, 2018, and ended on October 19, 2018. The Claimant testified that she did let her employer know that she would be gone for an extended period and that she would be back to work. The Claimant testified it was her understanding she would have a position, whatever number of shifts that would be, once she returned to her home community.

[8] The Claimant testified that in the summer she had asked if it was possible for her to get some weeks with three full (12 hour) shifts because she had weeks when there were only 5 or 10 hours of work. The Claimant testified that if she had some weeks with 36 hours that would increase the weeks of EI benefits and the amount of EI benefits she could receive should there be a week with no work and she needed to claim EI. The Claimant stated that the employer responded that it could not give her the three full shifts and the Claimant was okay with that. The Claimant stated she did not give her employer any grief over it she just wanted to know for herself.

[9] The Claimant testified that she again requested the three full shifts in the fall before she came back to her home community. The Claimant testified that if she had some weeks of three full shifts at the pub she would be able to use those hours plus the hours she earned working as a nanny to claim EI if when she returned to her home community the hours of work were low.

[10] The Claimant testified she first asked for an ROE towards the end of September 2018. The Claimant stated that on October 18, 2018, the employer told her that she would check again later on the ROE. The Claimant testified that she again asked the employer if she could work three 12 hour shifts together in a week. The Claimant stated that she returned to her home community on October 19, 2018. She stated she texted the employer on October 20, 2018, that she was home and available for work. The Claimant testified that she did not receive a reply from the employer. The Claimant testified that on October 31, 2018, she again asked the employer for an ROE. None was forthcoming. She asked again for an ROE on December 6 and December 11, 2018. The appeal file shows the ROE was issued on December 20, 2018.

[11] The Claimant testified that her employer had not her told she could not work there any more. The Claimant testified that she was at the pub in December when a co-worker remarked it was funny the employer had not called her for a shift. She stated it was when she got her ROE and saw the reason for issuing was “E-quit” she thought “Oh, I’m done.”

[12] The Claimant submitted that there were six staff working at the pub as of August 8, 2018, and that only one person worked per shift. She submitted that it was not accurate for the employer to state that it had to hire another employee to cover her absence as there were enough employees available to take any shifts she may have missed.

[13] I find the Commission has not proven that the Claimant voluntarily left her employment. The employer told the Commission that when the Claimant was leaving in August she told the employer that she wanted three 12 hours shifts together. The employer stated to the Commission that it would not have been possible to accommodate that request as there was no guarantee of hours for the job. The employer told the Commission that they heard from the Client at the end of October and then again on December 6, 2018. The employer stated to the Commission that they could not wait for the Claimant to return, they had to hire someone else to work, which is why they would not put shortage of work on the ROE. However, the employer stated that the hiring of another employee was due another employee taking sick leave related to her pregnancy while the Claimant was on her leave. The ROE states the last day of employment was August 8, 2018. The evidence is clear the employer and the Claimant agreed that the Claimant would be taking an unpaid leave of absence after that last shift. The Claimant kept her employer informed of her daughter’s circumstances and that she would be gone for an extended period of time. While it is the case that the leave was expected to last two to three weeks there is no evidence the employer stated the Claimant was granted the unpaid leave to a specific date. Other than issuing an ROE in December 2018 that showed the reason for issuing as “E – Quit” the employer made no effort to advise the Claimant that the employment relationship had ended on August 8, 2018, the date of her last shift. As a result, I find that the Claimant and the employer understood that she would be returning to her position from the unpaid leave when she returned to her home community. The Claimant returned to her home community and advised the employer she was available for work. No work was forthcoming. As a result, I find that the Claimant had no choice to stay in or leave her employment as despite her efforts to return to work there was no

employment made available to her when she returned to her home community. Accordingly, the Commission has failed to meet its burden to provide sufficient evidence to meet the legal test that the Claimant had the choice to stay in or leave her employment because there is no evidence that such employment was made available to her after her leave of absence.

CONCLUSION

[14] The appeal is allowed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	April 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. H., Appellant