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

Citation: *H. S. v Canada Employment Insurance Commission*, 2019 SST 852

Tribunal File Number: GE-19-1639

BETWEEN:

H. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: May 30, 2019

DATE OF DECISION: May 31, 2019

Canada

DECISION

[1] The appeal is allowed. The Canada Employment Insurance Commission has not proven on the balance of probabilities that the Claimant voluntarily left her employment.

OVERVIEW

[2] The Claimant worked for X as a General Helper in the kitchen until November 5, 2017, when she was laid off. She made a claim for regular employment benefits and started to receive benefits. A few days later, the Claimant was recalled to work as an on-call employee. Work was sporadic and the Claimant decided to commence PAB studies to become a X. The classes were on weekends. The Claimant consulted with her employer in early December and the Claimant was advised that there was not a problem with maintaining her on-call status and working only on weekdays. The Claimant worked on-call between December 2017 and mid-February 2018 when her husband became gravely ill. Thereafter she did not work in the latter part of February and March 2018. In April her employer issued a record of employment which indicated that the Claimant had quit her employment. The Claimant was unaware that this record of employment had been issued. It was only in June 2017 that the Claimant learned through the Commission that the employer had issued a record of employment stating that she had quit.

[3] The Commission disqualified the Claimant from receiving employment insurance benefits because the Commission decided that the Claimant had voluntarily left X without just cause. This resulted in an overpayment of benefits. The Claimant appealed this disqualification to the Social Security Tribunal and argues that she did not voluntarily leave her employment.

PRELIMINARY MATTERS

[4] At the outset of the hearing, I clarified with the Claimant that I only have jurisdiction to determine whether or not she voluntarily left her employment without just cause. I advised the Claimant that I did not have jurisdiction to make any determinations regarding the topic of allocation of earnings that had also been before the Commission. The Claimant understood the manner in which I had circumscribed my jurisdiction and we proceeded with the hearing.

ISSUES

Issue 1: Did the Claimant voluntarily leave her employment with X?

Issue 2: If yes, did the Claimant have just cause for voluntarily leaving her employment because she had no reasonable alternative to leaving?

ANALYSIS

[5] A claimant is disqualified from receiving benefits if she voluntarily leaves any employment without just cause.[1] A claimant can establish just cause for voluntarily leaving if she can prove that leaving her employment was the only reasonable alternative in the circumstances.[2]

[6] The Commission has the burden to prove that the leaving was voluntary. Then, the burden shifts to the claimant who must prove that she had just cause for leaving.[3] The burden of proof for both the claimant 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 Claimant voluntarily leave her employment with X?

[7] To determine if a claimant left work voluntarily, the Commission must prove on the balance of probabilities that the claimant took the initiative to sever the employer-employee relationship.[4]

[8] I find that the Claimant did not voluntarily leave her employment.

[9] The Commission relies upon the employer's statement to support its decision that the employer voluntarily left her employment. The employer states that the reason the Claimant quit is because the employer wanted her to work on the weekends but that the Claimant refused to work on the weekends because she was taking classes on Saturdays and Sundays. The employer stated that the work schedule of employees is determined by the collective agreement and therefore the Claimant was required to work three shifts per month on the weekends. The

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[1] Section 30 of the *Employment Insurance Act*.
[2] Paragraph 29 (c) of the *Act*.
[3] *Green v Canada (Attorney General*), 2012 FCA 313.
[4] *Coté v Canada (Attorney General)*, 2006 FCA 219.

employer provided a list of dates in February and March where the Claimant was contacted to work and either did not respond to the call or declined work.

[10] The Claimant testified that she and her husband both work at X. As a full-time permanent employee, the Claimant stated that her work schedule required her to work five days a week and she worked three weekends out of four. The Claimant testified that both she and her husband were laid off on November 5, 2017, and they decided that the Claimant would try to branch into another field of work so that they would not both find themselves unemployed in the future. The Claimant therefore decided to attend classes on the weekends to train to become a X. Thereafter, the Claimant testified that she was recalled to work as an on-call employee. She testified that she started her weekend studies on December 2, 2017. Before she commenced her studies, the Claimant testified that she called Service Canada to ensure that there was no problem with attending school on weekends and collecting employment insurance benefits. The Claimant testified that she also spoke to the human resources manager to ensure that there was no problem with her not being available to work on weekends while she was an on-call employee. The Claimant testified that the human resources manager encouraged her to pursue her studies and did not advise her that there was an issue with her going to school on the weekends. She testified that in December, January and February she worked when called by her employer. In mid-February, the Claimant's husband was severely ill. Because he is also an employee at X, the Claimant regularly communicated with the human resources manager to provide doctors' notes explaining her husband's absence from work between February 26, 2018, and April 10, 2018. The Claimant testified that the human resources manager advised her to take the time that she needed to take care of her husband. The Claimant was adamant that at no time the human resources manager advised her that her absence from work to take care of her husband put in jeopardy her employment status or that she would have been considered to have abandoned her work. The Claimant advised that she was not called by the employer for work in April or May. In June, she learned that the employer had issued a record of employment on April 12, 2018, stating that she had quit her job. The Claimant stated that she was shocked to learn this as she had never understood that her employment status was in jeopardy despite having spoken with the human resources manager on multiple occasions in February and March. The Claimant also stated that she was never warned by her employer that they were questioning her desire to continue working for them, was unaware of any rules or policy that would deem her to have

abandoned her work and was never contacted to return any of her employee cards when the employer issued the record of employment in April. The Claimant testified that she did not receive any form of notice from the employer that her job was at risk. Nor did she receive a letter of termination informing her that she had abandoned her position.

[11] I find the Claimant's testimony to be credible and sincere. I accept that she took precautionary measure to speak to her employer before starting her training program on the weekends and that she sought reassurances that her studies would not compromise her on-call position with her employer. The Claimant's on-call status is confirmed by the record of employment from the period from November 17, 2017, until February 13, 2018, which shows that the Claimant worked sporadically during the period. I therefore reject the employer's explanation that the Claimant was deemed to have quit her job because she could not meet the full-time job requirements that included working on the weekends and that the employer could not accommodate her request to be exempt from weekends due to collective agreement requirements. The evidence supports the Claimant's position that she was on-call at the time and did not need to adhere to the rigid scheduling requirements of the full time work schedule. Moreover, the pattern of working hours indicated on the record of employment discredits the employer's statement that the Claimant refused to be placed on the on-call list.

[12] Moreover, I accept the Claimant's position that the employer was aware that she would have limited availability on weekends due to her courses. This is not a situation where an employee unilaterally reduced her work availability and asked the employer to accommodate her. Nor is this a situation where an employee simply abandoned work. Rather, I find that this is a situation where an on-call employee sought assurances that her reduced availability would not compromise her on-call employment status and the employer accepted the situation. The record of employment shows that on some weeks during the on-call period, the employee worked and, on others, she did not.

[13] The Claimant acknowledged in the hearing that at the end February and in March she refused some calls to work. However, I accept the Claimant's testimony that she had informed her employer that she was taking care of her husband who was very ill. I also accept the Claimant's detailed testimony of her conversations with the human resources manager about her

husband's condition and the assurances from the human resources manager that the Claimant should take care of her husband. At the hearing, the Claimant stated that she was baffled that the human resources manager told her to take the time required to take care of her husband but then appeared to have forgotten and deemed her to have abandoned her job. The Claimant produced two medical notes that she sent on her husband's behalf to the human resources manager at X. The first medical note is dated February 26, 2018, and the second is dated March 19, 2018. The Claimant testified that she spoke with the human resources manager when she sent these documents to the employer. The Claimant said that each time she was told to take care of her husband and was never advised that her work status was in peril because of her absences from the workplace or her decision to refuse shifts when she was called. I find that the dates on the medical notes corroborate the Claimant's testimony that she was in contact with the employer during the months of February and March.

[14] In addition, I accept the Claimant's testimony that she was unaware that there was a requirement to accept and work a certain number of shifts otherwise the employer would consider that she had abandoned her position. The Commission did not provide any excerpt from the collective agreement to support that employees must maintain their on-call status by working a certain number of hours during a given period. Moreover, the employer's statements do not provide any information about the Claimant's on-call status. Although the employer does provide evidence that in February and March the Claimant refused shifts when she was called, I accept that the employer was aware of the reasons behind the Claimant's absence from work and did not advise her that she needed to work a minimum number of shifts, failing which she would be considered to have quit.

[15] In short, I find that the Claimant did not initiate the end of the employment relationship and did not have the choice to stay or leave her employment.[5] Consequently, I find that the Commission has not proven on the balance of probabilities that the Claimant voluntarily left her employment.

[5] *White v Canada (Attorney General*), 2011 FCA 190.

Issue 2: Did the Claimant have just cause for voluntarily leaving her employment because she had no reasonable alternative to leaving?

[16] Given my findings that the Commission has not demonstrated that the Claimant voluntarily left her employment, it is not necessary to consider this issue.

CONCLUSION

[17] The appeal is allowed.

Christianna Scott

Member, General Division - Employment Insurance Section

HEARD ON:	May 30, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	H. S., Appellant