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

[TRANSLATION]

Citation: *B. M. v Canada Employment Insurance Commission*, 2019 SST 824

Tribunal File Number: GE-19-2163

BETWEEN:

B. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: June 28, 2019

DATE OF DECISION: July 9, 2019

DECISION

[1] The Appellant is not eligible for Employment Insurance benefits because she voluntarily left her employment without just cause.

[2] The Appellant did not knowingly make false or misleading statements about her termination of employment. The penalty is rescinded.

[3] The notice of violation is rescinded.

OVERVIEW

[4] The Appellant, B. M., worked for the business X for many years. This employment ended on July 28, 2017, when the business's operations were taken over by the firm XX. The Appellant was automatically transferred to this new business, and she started working for her new employer on August 5, 2017. The Appellant worked for half the day and then left the workplace. She submits that she was unable to work standing all day, as her new employer required her to do. The Appellant immediately applied for Employment Insurance benefits.

[5] The Canada Employment Insurance Commission assessed her claim. It found that the Appellant did not have just cause for leaving her employment because leaving was not the only reasonable alternative. The Appellant was therefore disqualified from receiving Employment Insurance benefits. The Commission also imposed on the Appellant an $816 penalty and a notice of very serious violation for having knowingly made false or misleading statements about her termination of employment.

[6] The Appellant now disputes the Commission's decision to the Tribunal. She submits that her new employer forced her to leave by imposing significant changes to her working conditions. She also argues that she did not knowingly make false statements.

ISSUES

[7] Did the Appellant voluntarily leave her employment at X?

[8] If so, did she have just cause for leaving her employment? In other words, was leaving the Appellant's only reasonable alternative?

[9] Could the Commission have imposed a penalty on the Appellant for having knowingly made false or misleading statements?

[10] Could the Commission have imposed a notice of very serious violation on the Appellant for having knowingly made a false or misleading statement?

ANALYSIS

Issue 1: The voluntary leaving

[11] A claimant cannot receive Employment Insurance benefits if they voluntarily leave their employment without just cause. A claimant is considered to have voluntarily left their employment with just cause if they show they had no reasonable alternative to leaving, having regard to all the circumstances.[1]

Did the Appellant voluntarily leave her employment at X?

[12] To answer this question, it is worth summarizing the undisputed facts:

a) The Appellant worked for X, a business that does tastings at X stores, for over 24 years.

b) Her employment for this employer ended on July 28, 2017, when the business's activities in X stores were taken over by X. The Appellant's position was automatically transferred to the new business.

[1] *Employment Insurance Act*, ss 29(c) and 30. See also *Green v Canada (Attorney General)*, 2012 FCA 313. This decision confirms that the onus is on the Commission to prove that the leaving was voluntary, and on the Appellant to show that she had just cause for leaving her employment.

c) The Appellant had sat on a stool while doing tastings for the past three years. Before the transfer of operations, employees were informed that the new employer would no longer allow them to sit on a stool while working.

d) The Appellant returned to work for her new employer on August 5, 2017, at the same X store where she normally worked.

e) She attempted to work all day without a stool, but she was unsuccessful due to severe leg pain. She left in the middle of the day and informed her employer that she would return if she could sit on a stool to work, as she had done before. The Appellant never returned to work.

[13] The Appellant considers that she did not leave her employment voluntarily, but rather that she was forced to leave her employment due to unreasonable changes to her working conditions that her new employer imposed on her.

[14] The issue of whether the Appellant voluntarily left her employment is a simple one: I must ask myself whether she had the choice to stay or to leave her employment.[2]

[15] I acknowledge that the Appellant did not cause the change in policy that prompted her to leave. However, the Appellant was also not dismissed or let go from her job—she chose to leave the workplace of her own accord, in the middle of her first day working for her new employer, when she had the option of staying.[3]

[16] I find that the Appellant voluntarily left her employment.

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

[3] According to case law (*Peace*), even a claimant that leaves their position due to an action by the employer in the form of a constructive dismissal will be considered to have left their employment voluntarily if the claimant had, in absolute terms, the choice to stay in their position.

Did the Appellant have just cause for leaving her employment? In other words, was leaving the Appellant's only reasonable alternative?

[17] I find that the Appellant did not have just cause for leaving her employment for the reasons that follow.

[18] First, I acknowledge that the employer made changes to the Appellant's working conditions. The Appellant has functional limitations and, due to leg pain, she had to work sitting on a stool provided by her previous employer for the majority of her shifts for the last three years.

[19] When the activities of X were transferred to X, employees from the former business were moved to the new one. The employees did not really have a say; their jobs were transferred, and they automatically became subject to the rules of their new employer.

[20] However, the new employer's way of doing things was different from that of the former employer. X prohibited employees from sitting on a stool while they offered tastings. This meant that the Appellant now had to carry out her shifts standing and immobile.

[21] The Appellant could not easily adapt to these new requirements. She is 73 and has severe osteoarthritis; she is simply unable to work standing for eight hours without sitting down.

[22] The morning of August 5, 2017, the Appellant attempted to work an entire day for her new employer, standing without a stool. She was unsuccessful. After four hours, the Appellant was experiencing pain and had to leave her workplace. She never returned to work after that, except to collect her last paycheck.

[23] Based on the above, I acknowledge that the Appellant may have had a good reason for leaving her employment. However, when determining whether a claimant had just cause for leaving their employment, the issue is not whether the claimant acted reasonably in leaving their employment.[4] Rather, I must ask myself whether leaving was the only reasonable alternative, having regard to all the circumstances.

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[4] *Canada (Attorney General) v Laughland*, 2003 FCA 129.

[24] I find that the Appellant has failed to show that leaving was the only reasonable alternative.

[25] First, the new employer's requirements were not a surprise. The employer had met with the Appellant and her colleagues before they started work at X, and it had told them they would no longer be able to use a stool while working.[5] The Appellant therefore had time to consult with her new employer and examine possible alternatives.

[26] Next, the employer repeated numerous times that it was willing to provide a stool to employees that presented a medical certificate indicating an incapacity.

[27] At the hearing, the Appellant stated that she did not know she could have obtained a stool and kept her job by providing her employer with a medical certificate. In my view, this claim is highly implausible. Indeed, this contradicts previous statements the Appellant made to the Commission, as well as statements by the employer,[6] both of which show that the Appellant was aware of the requirement to provide a medical certificate to obtain a stool. Furthermore, the Appellant consulted with a doctor to obtain a medical certificate a few weeks before she left. The medical certificate on file explicitly states that the Appellant needed a stool to work.[7] This shows that the Appellant was aware that she could obtain a stool if she provided her employer with a medical certificate; otherwise, this information would not appear on the document. It is also worth noting that the Appellant never submitted this medical certificate to her employer.

[28] Therefore, the Appellant could have continued to work for her employer with the help of a stool if she had provided the medical certificate, and everything suggests that she knew this. Furthermore, I note that the employer was rather patient because it waited until September 22 before concluding that the Appellant no longer wanted her position and closing her employee file.[8]

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[5] Based on statements at the hearing, the Appellant knew for several months that the new employer prohibited the use of stools.
[6] GD3-107 and 129.
[7] GD3-17.
[8] GD3-117.

[29] The Appellant submits that the employer never contacted her after she left to follow up on her status. The employer, however, submits that it contacted the Appellant several times to find out where she was. In any event, I find that the burden of proof was on the Appellant to take the necessary steps to keep her job if she wanted to, because she was the one who left her position on August 5, 2017. I do not accept the Appellant's arguments that she was unable to contact her employer because the telephone number had changed. The evidence shows that the Appellant had other ways of contacting her employer than by telephone (by Messenger[9]). Furthermore, the Appellant could have gone to her workplace if she wanted to speak to someone in charge.

[30] I acknowledge that the employer's new policy prohibiting the use of stools was strict. Indeed, it is a significant change from the former policy, and this change was likely to affect a large number of employees. I find, however, that the implementation of this new policy was part of the new management's rights and that it is reasonable to ask employees to work standing. Many employees working in the service industry must stand during their shifts. Moreover, the employer was prepared to accommodate employees that were unable to respect the new policy, on presentation of a medical certificate.

[31] In summary, I find that the Appellant had reasonable alternatives to leaving her employment. For example, she could have provided the medical certificate required by her employer to obtain a stool for her shifts.

[32] Furthermore, because the Appellant had already known for some time that she could no longer use a stool as of August, she could have looked for other employment that better met her functional limitations before leaving.[10]

[33] I find that the Appellant did not show that leaving her employment was the only reasonable alternative, having regard to all the circumstances. Therefore, the Appellant did not

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[9] GD7.
[10] See *Canada (Attorney General) v White*, 2011 FCA 190. This decision confirms that claimants normally have an obligation to show efforts at making arrangements with their employer or seeking alternative employment before taking a unilateral decision to quit a job.

have just cause for leaving her employment and she is not eligible for benefits. The appeal on this issue is dismissed.

Issue 2: The penalty

Could the Commission have imposed a penalty on the Appellant for having knowingly made a false or misleading statement?

[34] The Commission may impose a penalty on a claimant for knowingly making false or misleading statements in their claim for benefits or for providing information they know is false or misleading.[11] The Commission must show that the claimant knowingly made a false or misleading statement.[12]

[35] To determine whether a false statement was made "knowingly," I must determine whether the Appellant had subjective knowledge of the fact that she was making a false or misleading statement.

[36] To determine whether the Appellant had subjective knowledge of making a false statement, I can take common sense and objective factors into consideration. For example, if the evidence shows that the Appellant responded incorrectly to a simple question when making her claim for benefits, she has the burden of explaining why she provided incorrect answers.[13]

[37] In this file, the Commission imposed an $816 penalty on the Appellant for having knowingly made false or misleading statements. Specifically, the Respondent alleges that the Appellant failed to declare her departure from X when she completed her bi-weekly online report.

[38] Indeed, the evidence on file indicates that the Appellant responded "no" to the question "Have you stopped working for an employer during the period of this report?" in her report covering the period from July 30 to August 12, 2017.[14] Since the Appellant stopped working for

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[11] Act, s 38(1).
[12] *Mootoo v Canada (Minister of Human Resources Development)*, 2003 FCA 206.
[13] *Canada (Attorney General) v Gates*, A-600-94; *Canada (Attorney General) v Purcell*, A-694-94; *Mootoo v Canada*, *supra*.)
[14] GD3-27.

X on August 5, I find that there is indeed a false statement in this file. The Appellant should have responded "yes."

[39] However, I find that this false statement was not made with full knowledge of the facts. Indeed, the Appellant went to work on August 5, 2017, to attempt to work standing for a full day for her new employer, but she was unsuccessful. She was able to work only a few hours before leaving due to pain in her legs.

[40] The Appellant submits that she saw this half-day as a failed attempt. She did not believe that she had actually worked for X, nor that she would be paid by her new employer for her time. Therefore, she had responded "no" when completing her report because she considered that her employment had ended on July 28, 2017, when operations had ended at X.

[41] In my view, the Appellant's explanations are plausible. Furthermore, I acknowledge that the Appellant may have been confused about the process to follow regarding her claim for Employment Insurance benefits. Her situation was unusual, and the Appellant had received few details about the transfer of activities from her former employer to her new one.

[42] I find that the Appellant did not knowingly make false statements to the Commission. The appeal on this issue is allowed, and the penalty is rescinded.

Issue 3: The notice of violation

Could the Commission have imposed a notice of very serious violation on the Appellant for having knowingly made a false or misleading statement?

[43] The Commission has the discretion to impose a notice of violation on a claimant that has received a penalty for knowingly making false or misleading statements. The Tribunal may not intervene in the Commission's decision to issue a notice of violation unless it determines that the Commission's discretion was exercised in a non-judicial manner.[15]

[44] The Act clearly establishes that a notice of violation may only be imposed on a claimant that committed a punishable offence (like knowingly making a false statement) and received a

[15] *Gill v Canada (Attorney General)*, 2010 FCA 182.

penalty for this offence.[16] In other words, if there is no penalty, there cannot be a notice of violation.

[45] The Tribunal previously determined that the penalty imposed on the Appellant must be rescinded, because she had not knowingly made false statements. Since the penalty was rescinded, the Appellant no longer meets the conditions to receive a notice of violation.

[46] The appeal on this issue is allowed, and the notice of violation is rescinded.

CONCLUSION

[47] Regarding the voluntary leaving, the appeal is dismissed.

[48] Regarding the penalty, the appeal is allowed. The penalty is rescinded.

[49] Regarding the notice of violation, the appeal is allowed. The notice of violation is rescinded.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	June 28, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	B. M., Appellant Jean-Christian Blais (counsel), Representative for the Appellant

[16] Act, s 7.1(4).