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

Citation: *M. W. v Canada Employment Insurance Commission*, 2019 SST 750

Tribunal File Number: GE-19-2174

BETWEEN:

M. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: July 10, 2019

DATE OF DECISION: July 12, 2019

DECISION

[1] The appeal is allowed. The Appellant had just cause to quit due to a more than significant change to her work duties. In all the circumstances of this case, she had no reasonable alternative but to quit. The disqualification of the Appellant from receiving EI benefits on the ground of quitting without just cause is rescinded.

OVERVIEW

[2] The Appellant accepted a job as a data entry clerk with a private company that provided services to a military base. Prior to starting work, she completed and submitted the necessary documents to obtain a security clearance, which was a condition of her job. At no time prior to starting work was she told how long obtaining the security clearance might take. On her first day on the job, she was told she could not do the data entry work, or even train or observe the work, as the clearance had not come in. Her supervisor told her she would have to do other tasks, but assigned few tasks. The Appellant had to ask around for work to do that did not involve data entry. The human resources manager told her after she started work that the clearance could take six months to a year to complete, perhaps longer. The Appellant asked other staff about how long it could take. She was told that one employee had been waiting for two years, and another three years plus. She discussed with the human resources manager the situation of having to do non-data entry work until the clearance came in. The manager was understanding of her position, but could not remedy the situation. The Appellant resigned on the fourth day of work. The Respondent denied her employment insurance (EI) benefits on the basis that she had quit without just cause.

ISSUES

[3] 1. Did the Appellant employee voluntarily leave her job?

2. Did the Appellant establish circumstances that could justify quitting?

3. Did the Appellant in all the circumstances have no reasonable alternative to quitting?

ANALYSIS

[4] The relevant legislative provisions are subsection 30(1) and paragraph 29(c) of the *Employment Insurance Act* (Act). The legislation uses the term 'voluntarily leave' to mean 'quit'.

[5] The onus of proving on a balance of probabilities that the employee voluntarily left her employment rests on the Respondent Commission; if the Respondent satisfies the Tribunal that the employee did voluntarily leave her employment, then the onus of proving, on a balance of probabilities, just cause for leaving rests on the employee (*Canada (A.G.) v. White*, 2011 FCA 190).

[6] "Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?" (*Canada (A.G.) v. Peace*, 2004 FCA 56).

[7] The test for just cause is, on a balance of probabilities and having regard to all the circumstances, did the employee have no reasonable alternative to leaving the employment (*Canada (A.G.) v. White*, 2011 FCA 190).

[8] A non-exhaustive list of circumstances that may justify quitting is set out in paragraph 29(c) of the Act. Other circumstances not listed may also justify quitting. Paragraph 29(c) of the EI Act is neither restrictive nor exhaustive, but subparagraphs (i) to (xiv) delineate the type of circumstances that must be considered (*Canada (A.G.) v. Campeau*, 2006 FCA 376).

[9] Remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job (*Canada (A.G.) v. Graham*, 2011 FCA 311).

[10] Only the facts that existed at the time the employee left the employment must be considered when assessing whether just cause has been proven (*Canada (A.G.) v. Lamonde*, 2006 FCA 44).

[11] While the employee may have left a job for good personal reasons, or for what she considers to be good cause, that is not the same as just cause under paragraph 29(c) of the Act (*Canada (A.G.) v. Imran*, 2008 FCA 17).

Issue 1: Did the Appellant employee voluntarily leave her job?

[12] Did the Appellant have the choice to stay at the job, or to leave?

[13] The Appellant had the choice to stay or leave, and made the choice to leave. This is not disputed by the Appellant, and was confirmed in her testimony. Therefore, she did voluntarily leave her job.

Issue 2: Did the Appellant establish circumstances that could justify quitting?

[14] Under paragraph 29(c) of the Act, there is a non-exhaustive list of circumstances that may justify quitting. Other circumstances may justify quitting. The Appellant must prove those circumstances.

[15] The Appellant did establish circumstances justifying quitting, namely a significant change in her work duties (Act, paragraph 29(c)(ix)).

[16] The sequence of events is important to determining this matter. The Appellant applied for this job about one and one-half months before being hired. The job ad outlined qualifications and duties related to data entry. It also stated "Must be able to obtain DND security clearance." The ad made no reference to the clearance being needed to start the work, or to alternate duties if the clearance had not been obtained by the start date. The Appellant received a job offer dated January 25, 2019, to start work on February 11, 2019. She accepted the offer. The offer outlined the terms and conditions of employment. The terms included the Appellant's primary function being data entry clerk; the terms did not specify any secondary functions. The terms stated that the employer may require a security clearance. The employer did so require, and the Appellant filled out and submitted her documents and fingerprints for a security clearance between January 25th and the first week of February.

[17] The Appellant reported for work on February 11, 2019. She was informed by her supervisor, Barb, and by the manager of human resources, Jen, that she could not perform her duties as a data entry clerk in the absence of a security clearance. They could not provide her with a time frame for when she might be able to perform those duties. The next day she asked Jen for the time frame, but Jen could not estimate how long it might take to get the clearance.

Later, Jen said the time frame could be six months to a year, but it depended on individual circumstances. The Appellant had also asked several fellow employees about how long the security clearance could take. They referred to two employees who had been working for two and three years respectively, who were still waiting for their clearances. The two had been hired for data entry positions, but were cleaning rooms in the barracks, a different part of the base from the area where the Appellant was working. The Appellant did not speak to these two employees directly.

[18] Due to the lack of a clearance, the Appellant spent her work hours doing cleaning, helping throw out items, looking for other work to do, and playing euchre when there was no work. Her supervisor Barb was not assigning work to her. She did ask to observe or train on the data entry system, but was not allowed to because of her lack of a clearance.

[19] On February 14, 2019, the Appellant spoke to Jen, the human resources manager, about her employment. She stated that she would not have taken the job if she had known that she would have to wait for a security clearance before being allowed to do the work she was hired for. Remaining in the job not doing the duties she was hired for was holding her back in her job search, as she visited prospective employers personally with her resumé to give her a better chance over simply applying online. She raised the issue of a leave of absence, but Jen did not offer one. The Appellant was frustrated by not being allowed to do the work she was hired for, by the lack of other work, and by the one-hour drive during her four days of work. The drives had been difficult due to winter storms and road closures each day. The Appellant had been receiving EI prior to starting this job. She and Jen discussed the option of the Appellant remaining on EI and resigning from the job. Jen suggested that the Appellant check with the Commission before making a decision. She did call the Commission at an 800 number. The agent she spoke to said she had just cause to quit. She did not have the name of the agent, and the Respondent has stated that records are not kept for these inquiry conversations with the Commission's call centre. Following that conversation, the Appellant did decide to quit, and gave a handwritten resignation letter to Jen.

[20] The chronology is important to three issues. First, whether there was a substantial change in work duties. Secondly, whether the Respondent's submission challenging the Appellant's

credibility succeeds. Thirdly, whether the Appellant's conversation with a Commission agent at a call centre on February 14th has an impact on her rights in this case.

[21] First, when the Appellant was unilaterally prevented by the employer from carrying out any of the duties for which she was hired, and required instead to do totally unrelated duties, and to seek out work from other employees, there was definitely a significant change in work duties. To state it more forcefully, there was a total change in work duties. The Respondent submitted that there was no change in the Appellant's pay or her hours of work. That is irrelevant to this case as that relates to paragraph 29(c)(vii), a significant modification of terms and conditions respecting wages or salary, rather than to paragraph 29(c)(ix), significant changes in work duties. The Respondent further submitted that the Appellant was not demoted, and this was just a temporary situation. While those can be factors in assessing a change in work duties, they are peripheral to the substantive cause for quitting: a substantial change in work duties. They do not assist the Respondent's position in this case. Being hired as a skilled person, then being prevented from doing the skilled work and being required to do unskilled work, if you can find it, looks like a demotion. To place an employee in that position for a period of probably six months or more hardly qualifies as temporary in these circumstances. The Respondent further submitted that "Unless the situation is improper or unreasonable, changes in the tasks and duties of an unspecialized person do not constitute just cause for voluntarily leaving employment." The characterization of the Appellant as an unspecialized person is not consistent with the qualifications for her job: high school diploma; minimum of five years experience in data entry; knowledge of Microsoft Office and computer programs relating to inventory control; and DND security clearance.

[22] This conclusion is not changed by the fact that the Appellant did not have her security clearance by February 11th. She did not know how long a clearance might take. She had not been told by the employer prior to starting the job how long it might take. The employer did know. It had two employees who had been waiting for two and three years respectively. Jen gave the Appellant an estimate of six months to one year. In this case, it was the employer who was responsible for the Appellant finding herself in the situation of not being allowed to perform the work duties she was hired for. This made the situation "improper or unreasonable" within the Respondent's submission quoted in the previous paragraph. As a result, that submission has

been turned around, and the changes in the Appellant's duties were, according to that submission, just cause for voluntarily leaving employment.

[23] The Respondent also submitted that the changes in the Appellant's duties were not shown to be "so intolerable that she needed to leave immediately without securing new employment." That statement is an error of law, and cannot stand. As stated in *Chaoui v. Canada (A.G.)* 2005 FCA 66, requiring proof that conditions were intolerable "went beyond the requirements of paragraph 29(c) of the Act and imposed a burden that ultimately renders that paragraph meaningless."

[24] Secondly, the Respondent's submissions challenged the Appellant's credibility on the basis that her version of relying on advice from a Commission agent in making her decision to quit, did not stand up to scrutiny. The Respondent submitted that the Appellant had "stated many times that the decision to quit was made mutually between herself and her employer, without having received advice from the Commission." That quoted statement is poorly supported by the documents in the Reconsideration file. The Supplementary Record of Claim at GD18 and 19 refers to the Appellant meeting with the human resources manager, reaching a mutual agreement that the Appellant should move on, and then the manager suggested the Appellant call the Commission. That is the strongest support for the Respondent's submission. The Respondent's reference to another Supplementary Record of Claim at GD34 and 35 contains several statements by the Appellant, as noted by the Respondent. The Appellant is recorded as saying she did not want to stay in the job even if she would not receive EI benefits. The submission then ignores further statements recorded in that Supplementary Record of Claim: the Appellant's two statements about discussions with the human resources manager about getting an opinion on whether she could continue EI benefits if she did quit; and the Appellant's two statements that she would not have left the job if she wasn't able to claim benefits. The submission also ignores the Appellant's statement in her request for reconsideration that she made the call to the Commission prior to quitting. It also ignores that in three conversations with the employer, the Respondent never asked for or obtained information about the discussions between the Appellant and the human resources manager on the topic of a mutual understanding with the Appellant about quitting, or on the topic of the Appellant calling the Respondent about continuing EI benefits. It also ignores the Appellant's statements in her notice of appeal that

she discussed with the human resources manager that she should speak to the Commission prior to resigning. These considerations undercut the attack on credibility. The Appellant's testimony was clear: she discussed quitting with the human resources manager prior to making a decision on quitting, checked with the Respondent about continuing EI benefits and received a positive answer, then she quit. I accept the Appellant's testimony in preference to the Respondent's submissions, based on the weak support for its position as noted above.

[25] Thirdly, on the issue of whether the Appellant's conversation with a Commission agent at a call centre on February 14th has an impact on her rights in this case, the law is clear. The reliance by the Appellant on erroneous advice from the Respondent, thus inducing her into error about her eligibility for benefits, does not permit the Tribunal to refuse to apply the law, even on the grounds of equity (*Nadji v. Canada (A.G.)*, 2016 CF 885; 2016 FC 885 (CanLII)). This case must therefore be decided on the basis of the legal principles set out above. The erroneous advice by itself does not give the Appellant a legal basis to overturn the Respondent's decision.

Issue 3: Did the Appellant in all the circumstances have no reasonable alternative to quitting?

[26] On a balance of probabilities and having regard to all the circumstances, the Appellant must prove that she had no reasonable alternative to leaving the employment.

[27] In all the circumstances involved in this case, the Appellant had no reasonable alternative to quitting.

[28] The Respondent put forward the following as reasonable alternatives: remain working at the job, while looking for other work and waiting for her security clearance; request a leave of absence to attend job interviews; move closer to the workplace; or carpool.

[29] With respect to remaining at the job while looking for other work (including seeking leaves of absence) and waiting for her security clearance, the principle is that remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job (*Canada (A.G.) v. Graham*, 2011 FCA 311). In this case, there was more. The Appellant was hired to perform a job requiring knowledge of computer programs and inventory control. She had the qualifications and experience for that job.

Unknown to her, she would not be permitted to do that job until her security clearance arrived. Unknown to her, the time frame for the clearance arriving could be six months or more, even up to three years. In the interim, she would have to ask other employees for unskilled tasks that might or might not be available for her. She did not just up and quit. She talked to the human resources manager about her situation, and to the Commission about EI benefits, before deciding to quit. To a person like the Appellant, with her skills, experience and work ethic, it was intolerable to remain in the job on a make-work basis, with uncertainty about the time frame before being able to perform the duties for which she was hired, or any duties remotely close to them. She found herself in a situation where the employer was in breach of its promise respecting her work duties, and forced her to work at other non-skilled duties, for a period that was likely to be more than temporary. In these particular circumstances, there was no reasonable alternative to quitting.

[30] With respect to moving closer to the workplace, that was not a reasonable alternative. The workplace was in a remote area on a military base. The Appellant lived in a town one hour's drive away. She lived with her spouse near that town, where he had a business. She was looking for work primarily in that town and its immediate area. In these circumstances, especially during the six-month probationary period of the employment, moving closer was not a reasonable option.

[31] With respect to carpooling, none of the other employees lived near the town where the Appellant lived. Carpooling was therefore not available, and thus not a reasonable alternative.

[32] Another possible reasonable alternative had been explored by the Appellant in her job interview. She asked if there was an office of the employer in her town. The employer's nearest office was in Toronto, a greater distance from her residence than the military base where the job was located. The employer could not send the Appellant to another military base, as it was a private corporation without the authority to transfer its employees to another base.

[33] For all the reasons set out above, the Appellant has met the test of having just cause for quitting her job. Her appeal is allowed, and the disqualification of the Appellant from receiving EI benefits on the ground of quitting without just cause is rescinded.

CONCLUSION

[34] The appeal is allowed.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	July 10, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. W., Appellant