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

Citation: *ER v Canada Employment Insurance Commission*, 2019 SST 1728

Tribunal File Number: GE-19-2227

BETWEEN:

E. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: September 5, 2019

DATE OF DECISION: September 25, 2019

Canada

DECISION

[1] The appeal is allowed. The Appellant did not voluntarily leave her employment at RW & Co and, therefore, cannot be disqualified from receipt of employment insurance benefits (EI benefits) for doing so. Nor did the Appellant lose her employment due to her own misconduct.

OVERVIEW

[2] The Appellant established a claim for regular EI benefits effective June 28, 2015 after she was laid off from her retail sales job at RW & Co on July 2, 2015. She returned to work part-time for RW & Co while on claim, but that employment ended after her last day of work on October 18, 2015. When the employer reported on her Record of Employment that she quit, the Respondent, the Canada Employment Insurance Commission (Commission), imposed a disqualification on her claim as of October 18, 2015 for voluntarily leaving her employment without just cause. The Appellant asked the Commission to reconsider its decision, arguing that the employer had over-hired and no shifts were offered to her after her last day of work on October 18, 2015, despite her repeated requests for hours. She eventually gave up and moved from Calgary to Ontario after the Christmas holidays. The Commission maintained the disqualification, but revised the start date of the disqualification to December 20, 2015. The Appellant appealed to the Social Security Tribunal (Tribunal). The Tribunal dismissed her appeal.

[3] The Appellant then appealed to the Appeal Division of the Tribunal (the AD). The AD set aside the dismissal and referred her original appeal back to the Tribunal for a new hearing before a different Member.

[4] The new hearing took place on September 5, 2019 by videoconference.

ISSUES

[5] Is the Appellant disqualified from receipt of EI benefits because she voluntarily left her employment at RW & Co without just cause?

[6] Is the Appellant disqualified from receipt of EI benefits because of misconduct in the form of job abandonment?

ANALYSIS

[7] A claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can establish "just cause" for leaving: section 30 *Employment Insurance Act* (EI Act). Just cause exists where, having regard to all of the circumstances, on balance of probabilities, the claimant had no reasonable alternative to leaving the employment (see *White 2011 FCA 190, Macleod 2010 FCA 301, Imram 2008 FCA 17, Astronomo A-141-97, Tanguay A-1458-84*).

[8] The initial onus is on the Commission to prove the Appellant left her employment voluntarily; once that onus is met, the burden shifts to the Appellant to prove she left her employment for "just cause" (see *White, (supra); Patel A-274-09*).

[9] In point of fact, section 30 of the EI Act provides for an indefinite disqualification from EI benefits on two related grounds: when a claimant is dismissed by their employer due to their own misconduct ***or*** voluntarily leaves their employment without just cause. The Federal Court of Appeal in *Borden 2004 FCA 176* explained the importance of this linkage as follows:

> "In *Attorney General of Canada v. Easson, A-1598-92, February 1, 1994*, this Court made it clear that "dismissal for misconduct" and "voluntarily leaving without just cause" are two notions rationally linked together because they both refer to situations where loss of employment results from a deliberate action of the employee. The Court went on to add that the two notions have also been linked for very practical reasons: it is often unclear from the contradictory evidence, especially for the Commission, whether the unemployment results from the employee's own misconduct or from the employee's decision to leave. In the end, since the legal issue is a disqualification under subsection 30(1) of the Act, the finding of the Board or the Umpire can be based on any of the two grounds for disqualification as long as it is supported by the evidence. There is no prejudice to a claimant in so doing because the claimant knows that what is sought is a disqualification from benefits and he is the one who knows the facts that led to the seeking of the disqualification order."

The issue therefore becomes whether a disqualification under subsection 30(1) of the EI Act is warranted – on either of the two grounds for disqualification – based on the evidence before the Tribunal.

Issue 1: Did the Appellant voluntarily leave her employment at RW & Co?

[10] Where a disqualification is being considered for voluntarily leaving an employment without just cause, the Tribunal must first decide if the claimant, in fact, ***voluntarily*** left the employment.

[11] The mere fact that the Appellant's Record of Employment (ROE) indicates she "quit" is not determinative of this question. For the leaving to be ***voluntary***, there must be credible evidence that the Appellant herself took the initiative to sever the employment relationship. The Tribunal finds there is no such evidence in the Appellant's case.

[12] The Appellant testified as follows:

- She started working as a sales clerk at the RW & Co store in the Chinook Mall in Calgary in early 2015.
- She never got more than 22 hours/week, but the hours she did get were fairly regular: "always" Saturdays and Sundays, with a few days during the week.
- Starting in September 2015, she slowly stopped getting as many hours and shifts.
- When she went "a full week with zero hours" in October 2015, she "got nervous" called the store manager, "A.", to "see if everything was OK with my employment or whether something had happened."
- A. told her that "everything was great", but they didn't have the hours to give her and she wasn't the only one this was happening to.
- In August 2015, she had started a 4-month training course in emergency medical response (EMR). The course was mostly very heavy "book work", with "a few night classes" that were held from 8 – 10pm and a couple of days of practical training each week.
- The EMS course did not conflict with her employment at RW & Co, because she was available 5 days out of 7 and the store was open 7 days a week.

- There was a period of about a month when she was working and going to school at the same time, and there were “no issues”.

- But after that full week with no hours, she never got any more work at RW & Co.

- She tried to get more shifts. She “called in regularly” and spoke to “whatever supervisor was working that day” to see if she could come in and help in the store or if anybody had called in sick that she could fill in for. She was always told “No”, they didn’t need anybody and they were sending people home.

- She was not working anywhere else.

- After 2 weeks of no work, she called A. again and was told she needed to come in to the store and complete a new time sheet “with the Manager” to confirm her availability and make sure it was acceptable to the store and met the store’s needs.

- She went in to the store and filled out a new time sheet with A.. She spoke with A. again and was told “everything was good”, but she still did not receive any shifts.

- Two weeks later – it was now a month with no work – she called A. again. A. told her “I don’t have a time sheet from you”. The Appellant reminded A. she had completed a new time sheet in the store – with A. – approximately two weeks earlier. A. said she couldn’t find it. They agreed the Appellant would come in to the store the next day and complete another time sheet with A..

- She went in to the store the very next day but was told A. had gone home early. The Appellant filled out another time sheet with the supervisor on duty that day and was told “everything was OK”.

- She still did not receive any shifts.

- She made one more phone call to A.at the end of December 2015. By this time, it had been almost 3 months with no work and she hadn’t even worked during the busy Christmas retail season, although she had made it clear she still wanted to work and was still calling the store and asking for shifts.

- A. was “very vague” and once again said she didn’t have a time sheet for the Appellant. This was the same excuse as before. She told A. she had “filled one out twice” and “didn’t know what else I could do”.

- She asked A. outright if she was going to get any more hours. A. answered: “I don’t know.” Then there was an awkward silence. So she asked A. about a transfer to another store or even to a store in Ontario, which was where her parents lived. A.’s answer was “a quick, hard ‘NO’”, with no explanation as to why.

- After that, she asked A.; “Where does this leave us?” A. responded with a “very sarcastic and harsh-sounding ‘I don’t know’”.

- Everything was very vague and the Appellant was feeling intimidated. It was clear A. was not prepared to offer the Appellant any reassurance about hours in the future, so she just ended the call.

- She never quit her job.

- She never resigned.

- She never told A. she was not available for work.

- She had been looking for other work over the past 3 months – without success. She did get a couple of job interviews in November, one at a physiotherapy clinic and one at Bank of Montreal to be a telephone banking assistant, but nothing came of either one.

- The Appellant started to think she would be better off going home to Ontario. Her EMR training course had ended in early December 2015, and she was worried about her mother’s deteriorating health. She also no longer had any income or employment to support herself in Calgary.

- Without any hours or income from her employment at RW & Co, the Appellant had been asking her parents to send her money for groceries and rent (she was renting a bedroom in a friend’s house). But her parents couldn’t afford this and it was very hard on them. They could not have continued to send her money indefinitely.

- She returned to Ontario in early January 2016. But she never told anyone at RW & Co she had decided to move and remained available for work right up until the date of her move.

[13] When contacted by the Commission during the reconsideration process, the employer said that the Appellant's resignation was processed on December 22, 2015 (GD3-26). The Tribunal gives little weight to this evidence given the red flags in the employer's previous statements to the Commission. On June 20, 2017, the employer's Human Resources (HR) representative told the Commission that all they had on file was that the Appellant quit. But the HR representative said she would contact the store manager to see if they could remember why the Appellant quit. The HR representative subsequently advised that she had called the store manager, who couldn't remember but thought the Appellant quit because she was not available for shifts the employer needed her for. Leaving aside the fact that the store manager is unnamed and there is no way of knowing if A. was still the manager by this time (nearly two years later), this explanation is suspect because of the delay between the Appellant's final day of work and the issuance of the ROE. Even more troubling are the conversations the Commission had with the HR representative during the reconsideration process. This time, the HR representative advised that the un-named store manager could not recall if the resignation was in December. The HR manager also confirmed the employer had over-hired and that hours were limited between October to December but would have picked up in December; and that, according to the employer's "System Specialist", the resignation was processed by the assistant manager on December 22, 2015 (GD3-26). The Tribunal can only wonder about the basis upon which this un-named assistant manager processed a resignation by the Appellant.

[14] The Tribunal asked the Appellant if she knew why the employer would have told the Commission she resigned on December 22, 2015. The Appellant answered that she didn't know. She stated that she did not write a letter of resignation or fill out a resignation form or withdraw her time sheets or do anything that could have been taken as a resignation. The Appellant also stated that, after her last phone call with A. in late December 2015, she was confused and didn't know what her status was. She didn't know if she had been fired, but it was clear to her that she would not be getting any more work at the store. The Tribunal prefers the forthright and detailed evidence of the Appellant on this point.

[15] The Tribunal notes that the Record of Employment at GD3-12 and the earnings information provided by the employer at GD3-15 support the Appellant's testimony. This evidence shows that she only worked 29 hours and had 3 paycheques in the 14-week period between July 28, 2015 and October 18, 2015. It's difficult to believe the Appellant would have bothered to resign on December 22, 2015 when she had barely worked at all in the prior 6 months.

[16] The Tribunal also notes that the employer admitted to the Commission they had over-hired (GD3-26). It seems far more likely this was the real reason for processing an alleged resignation on December 22nd – in the midst of the busy holiday retail season.

[17] The Tribunal finds no credible evidence that the Appellant did anything to initiate the severance of her employment at RW & Co. Rather, her employment came to an end because the employer never scheduled her for any more shifts after October 18, 2015.

[18] The Tribunal therefore finds the Appellant did **not** voluntarily leave her employment at RW &Co and, as a result, she cannot be disqualified from receipt of EI benefits for doing so.

Issue 2: Did the Appellant abandon her job at RW & Co?

[19] An employee who is absent from work without permission or who fails to make contact with their employer after being absent from work without permission may be considered to have abandoned their employment. Such conduct may be considered as voluntarily leaving an employment without just cause.

[20] The Tribunal finds that the Appellant did not abandon her employment at RW & Co.

[21] The employer's evidence on the Appellant's separation from employment consists of the ROE and a single bald statement to the Commission that a resignation was processed on December 22, 2015. As stated above, the Tribunal finds the employer's evidence to be unreliable and unhelpful. Moreover, there is no evidence from the employer that the Appellant was ever scheduled for a shift that she failed to show up for, or that the employer was forced to find someone to cover for her when she allegedly failed to show up. It is reasonable to conclude from the ROE at GD3-12 that if the Appellant had failed to show up for a scheduled shift in

December 2015 – necessitating the processing of a resignation based on job abandonment, the employer would not have hesitated to input $0.00 for the pay period. Yet there is no such entry.

[22] By contrast, the Appellant's evidence in her first conversation with the Commission (GD3-16), in her Request for Reconsideration (GD3-22 to GD3-23), and at the hearing has been consistent: she didn't quit her job - she made repeated requests to be scheduled for work, but no hours or shifts were given to her. The Tribunal also accepts the Appellant's forthright and sincere testimony that, after months of getting nowhere with her repeated requests for shifts, she was forced to consider moving back to Ontario because she had no reasonable alternative but to return to live with her parents when she could no longer support herself in Calgary. This move does not constitute job abandonment because it was never communicated to the employer, let alone even arranged until after the employer had processed the alleged resignation on December 22, 2015.

[23] The Tribunal finds that the Appellant did **not** abandon her job at RW & Co. As such, she cannot be disqualified from receipt of EI benefits for doing so.

Issue 3: Did the Appellant lose her job at RW & Co due to her own misconduct?

[24] Section 30 of the EI Act provides that a claimant is disqualified from receiving EI benefits if they have lost their employment as a result of misconduct.

[25] The onus would be on the Commission to prove that the Appellant, on a balance of probabilities, lost her employment at RW & Co due to her own misconduct (*Larivee A-473-06*, *Falardeau A-396-85*).

[26] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act has been established by the jurisprudence from courts and administrative bodies that have considered section 30 of the EI Act and enunciated guiding principles which are to be considered in the circumstances of each case.

[27] In order to prove misconduct, it must be shown that the Appellant behaved in a way other than she should have and that she did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be

demonstrated that the Appellant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the Appellant's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

[28] As set out by the Federal Court of Appeal in Macdonald *A-152-96,* the Tribunal must determine the real cause of the claimant's separation from employment and then whether it amounts to misconduct for purposes of section 30 of the EI Act.

[29] The Tribunal has already found that the Appellant did nothing to initiate the severance of the employment relationship and did not abandon her job. Rather, her employment came to an end because the employer never scheduled her for any more shifts after October 18, 2015.

[30] A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not merely on speculation and suppositions. It is for the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. There must be sufficiently detailed evidence before the Tribunal for it to determine how the employee behaved and to judge whether the behavior was misconduct: *Joseph v C.E.I.C A-636-85*.

[31] In the present case, there is no conduct identified by the employer as misconduct, merely a bald statement that the Appellant's resignation was processed on December 22, 2015 and speculation by an un-named manager who couldn't exactly remember what happened but thinks the Appellant resigned because she was not available to work. As set out in the analysis under issues 1 and 2 above, the Tribunal does not find this to be credible. The Appellant submits that the store manager at the time, A., was determined not to schedule her for any more hours. The Tribunal agrees this is likely the real reason the Appellant's employment came to an end. The Tribunal also notes this was entirely beyond the Appellant's control, as she was already trained by this employer and actively looking for shifts to work.

[32] The employer may well have been concerned about over-hiring and may have concluded it was no longer in its interests to schedule the Appellant for work after October 18, 2015. However, it is not the role of the Tribunal to determine whether the steps taken by the employer were justified or appropriate (*Caul 2006 FCA 251*), but rather whether the conduct in issue amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[33] For the reasons set out above, there is no credible evidence that points to willful or reckless behavior on the part of the Appellant which she knew or ought to have known could have resulted in the termination of her employment. As such, the Commission has not satisfied the onus on it to prove that the Appellant lost her employment due to her own misconduct. The Tribunal therefore finds that the Appellant cannot be disqualified from receipt of EI benefits because she lost her employment due to her own misconduct.

CONCLUSION

[34] The Tribunal finds the Appellant did not voluntarily leave her employment at RW & Co and, therefore, cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act for doing so.

[35] The Tribunal further finds that the Appellant did not abandon her job at RW & Co or otherwise engage in conduct that could be considered misconduct for purposes of section 30 of the EI Act. As a result, the Appellant cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act because she lost her employment at RW & Co due to her own misconduct.

[36] The appeal is allowed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	September 5, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	E. R., Appellant Lawrence Burns, Representative for the Appellant