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

[TRANSLATION]

Citation: *K. M. v Canada Employment Insurance Commission*, 2019 SST 1669

Tribunal File Number: GE-19-3201

BETWEEN:

K. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Nathalie Léger

HEARD ON: October 9, 2019

DATE OF DECISION: November 13, 2019

Canada

DECISION

[1] The appeal is allowed. The Tribunal finds, having regard to all the circumstances, that the Appellant had just cause for leaving her employment because she showed that she left due to a significant change to her working conditions.

OVERVIEW

[2] The Appellant left her employment when the employer gave her a new schedule involving full-time work and evening shifts. The Appellant says that she had an agreement with the employer to work only part-time starting in September. She also says that the employer had promised her it would give her the morning shift, as it had done since the beginning of her employment. Because she was not available for the evening shift, namely because of returning to school, the Appellant left her job. The Tribunal must now determine whether she had just cause for doing so.

ISSUES

[3] Issue 1: Did the Appellant voluntarily leave her employment?

[4] Issue 2: If so, did she have just cause for voluntarily leaving her employment?

ANALYSIS

[5] Section 30 of the *Employment Insurance Act* (Act) states that a person will be disqualified from receiving benefits if they leave their employment without just cause. The Commission has the burden of proving that the leaving was voluntary. Then, the burden shifts to the Appellant to show that she had just cause for leaving her employment, having regard to all the circumstances.[1] Proof of these two elements must be on a balance of probabilities. In other words, it must be shown that it is more likely than not that each situation or event occurred as described.

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[1] *Canada (Attorney General) v White*, 2011 FCA 190 (CanLII). Section 29(c) sets out a non-exhaustive list of circumstances to consider.

Issue 1: Did the Appellant voluntarily leave her employment?

[6] In her claim for benefits, the Appellant claims that she was dismissed. However, the Record of Employment provided by the employer indicates code "E," that is, [translation] "Voluntary leaving/Return to school." The Appellant claims that the employer should have indicated as the reason for leaving [translation] "dismissal for schedule conflict," based on what she was promised by the employer's representative in discussions that were held before she left.

[7] The real issue in this file is not about voluntary leaving, but rather the justification for leaving. The Appellant admits that she could have kept her job if she had accepted the schedule offered by the employer but that she refused to report to work under this schedule.[2] Therefore, the Tribunal finds that the leaving was voluntary.

Issue 2: If so, did the Appellant have just cause for voluntarily leaving her employment?

[8] There are effectively two ways to understand this situation, which essentially depend on the evidence that will be retained. First, the evidence retained by the Commission focuses on the return to school as the reason for the qualification of voluntary leaving. Most case law acknowledges that, when an employee offers reduced availability that no longer corresponds to the employer's needs because of a return to school, it is equivalent to voluntary leaving.[3]

[9] That is how the Commission addressed the file, deciding that the fact that the Appellant did not adapt her availability to the employer's needs was the actual reason for leaving. The Appellant disagrees with this decision, submitting rather that the actual reason for leaving is the fact that the employer did not respect the schedule that it had promised her.

[10] The second way of understanding the situation focuses instead on the working conditions that the parties agreed on at the time of hiring. This is important because section 29(c) of the Act sets out a non-exhaustive list of circumstances that can justify voluntary leaving. Two of the elements mentioned in section 29(c) of the Act are significant modification of terms respecting wages and significant changes in work duties. If the employer did not respect one of these

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[2] *Canada (Attorney General) v Peace*, 2004 FCA 56 (CanLII).
[3] *Canada (Attorney General) v Côté*, 2006 FCA 219, A-562-04.

essential conditions of the employment contract, it will be possible to find that the Appellant had no alternative to leaving her employment.[4]

[11] That section states that a claimant has just cause for voluntarily leaving their employment if, having regard to all the circumstances, they have no alternative to leaving their employment. It is not a question of whether the Claimant had just cause for leaving her employment. The burden is heavier: it must be determined whether leaving her employment was the only possible alternative having regard to all the circumstances.

[12] The Appellant submits that she had no alternative to leaving her employment because she had told the employer several times that she would be available only part-time as of September, which it still accepted after discussions. The Appellant submits that, because the employer broke its promise at the beginning of the school year, she had no choice but to resign. However, the Commission submits that the Appellant could have discussed further with the employer before leaving and therefore that she had reasonable alternatives to leaving.

i) Facts essential to understanding the file

[13] The Appellant always maintained that her leaving was not voluntary. The factual situation of the business is important to understanding the file. The Appellant was hired when the business opened, in June 2019. At that time, she indicated on her hiring form that she was available to work [translation] "25 hours +" because she wanted to work part-time, but she was also available to replace people as needed. When she was hired, she clearly indicated that she was returning to school and that that was why she needed a part-time schedule.

[14] However, in June, her employer offered her a full-time schedule, pointing out that the business needed employees because it was just starting up. The Appellant always maintained that she accepted full-time work during the summer [translation] "to help out." She always insisted on the fact that she was returning to school in September and that, at that time, she would be available only part-time. The Appellant consistently submits that the employer therefore promised her a part-time schedule compatible with her studies.

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[4] *Lapointe v CEIC,* A-133-95 (FCA).

[15] The Appellant was trained to open the store. Her hours were between 5:15 a.m. and 2:00 p.m. That was the schedule the Appellant had all summer, which is confirmed by a copy of the schedules in the file. The issue arose at the end of the summer, in mid-August, when the employer asked employees to indicate their availability for the coming weeks.

[16] The Appellant indicated that she would be available to work only 25 hours per week, from Wednesday to Friday, to open, as announced at the time of hiring and consistently stated throughout the summer. This schedule would allow her to take classes Mondays and Tuesdays. The Appellant states that the employer told her it would give her that schedule no problem.

[17] However, not only was the schedule not respected, but the employer also indicated to the Commission that it never made that promise because the day [translation] "position" during the week is a position reserved for full-time employees only and that part-time employees [translation] "are there" to fill the evenings and weekends.

ii) Analysis

[18] A careful reading of the file, combined with the Appellant's testimony at the hearing, reveals some of the elements that have led the Tribunal to prefer the Appellant's testimony over the version of events the employer told the Commission.

[19] First, the employer in no way denies having been aware of the fact that the Appellant was returning to school in the fall and that she could therefore work only part-time. Although the employer indicates that part-time employees work only evenings and weekends, the employee manual on file that the Appellant submitted indicates instead that a part-time employee [translation] "is someone who usually works fewer hours than a full-time employee." Therefore, employment status is not related to the shift, but rather to the number of hours worked per week. This is contrary to the employer's claims.

[20] Second, the term [translation] "employer" used generically is misleading. Different actors played the role of employer in this case, which probably explains the inconsistencies between the different versions of events. First, there is the branch manager, who hired the Appellant and with whom most of the conversations about the schedule and return to school occurred. The branch

manager also signed the Record of Employment. Then, there is the director of operations, who provided the Commission with the employer's version of events and with whom the Appellant exchanged test messages that led to the termination of employment. It is important to note that, in that text message exchange, the director of operations indicated to the Appellant, when she stressed that she could not work based on the proposed schedule: [translation] "… when 'R' returns from vacation, you can talk about it in person… He gets back next Monday." This supports the fact that the branch manager is the person with the decision-making authority in such matters and that it is with him that these issues needed to be addressed.

[21] Nothing in the file indicates that the director of operations had personal knowledge of the discussions that took place on different occasions between the branch manager and the Appellant. So how could she know that no promise had ever been made? Her testimony is at most hearsay, compared to which the Appellant's direct and consistent testimony must be preferred.

[22] Finally, the Appellant's testimony about how important the requested schedule was for her is supported by the fact that, less than one month after the termination of her employment, she found a new job three days per week from 6:00 or 7:00 a.m. to 4:00 p.m. This schedule allowed to her attend her classes and respect her other commitments.

[23] Given all these elements, the Tribunal therefore accepts that the employer—the branch manager in this case—had made a promise to the Appellant about the number of hours and schedule that would be offered to her when she returned to school in September and that these were essential elements of the Appellant's employment contract.

[24] By offering the Appellant in September the choice between a full-time schedule and a part-time evening schedule, the employer modified one of the essential conditions of the Appellant's employment contract. This constitutes a significant change in the Appellant's work duties.[5]

[25] Based on the analysis of the circumstances of this file, the Tribunal determines that the

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

Appellant had no reasonable alternative to leaving in the circumstances.[6] The Appellant had discussed the situation on a number of occasions with the employer. Imposing another discussion when the promise that was made was not respected would be excessive and cannot constitute a reasonable alternative. Finally, remaining in the employment long enough to find another job also does not constitute a reasonable alternative because the Appellant could not work the hours offered by the employer without failing to meet other commitments she had made.

CONCLUSION

[26] The appeal is allowed.

Nathalie Léger
Member, General Division – Employment Insurance Section

HEARD ON:	October 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	K. M., Appellant

[6] *Employment Insurance Act*, s 29(c).