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

Citation: *AS v Canada Employment Insurance Commission*, 2020 SST 1175

Tribunal File Number: GE-20-1139

BETWEEN:

A. S.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: April 30, 2020

DATE OF DECISION: May 5, 2020

Canada

Decision

[1] The appeal is allowed. This means the Claimant is not disqualified from receiving employment insurance (EI) regular benefits. The Claimant has shown just cause for voluntarily leaving his employment when he did because he had no reasonable alternatives to leaving.

Overview

[2] The Claimant responded to a flyer advertisement for a position making bath product. He attended an on-boarding session where his production abilities were tested. He then attended a training session where he was shown how to make the bath product. He had a one-day orientation day and the next day he was tasked with warehouse work for the whole day. The following morning he left a message for the employer that he would not be returning because warehouse work was not what he applied for or was hired to do. The Commission looked at the Claimant's reasons for leaving his job, determined that he voluntarily left his employment and disqualified him from receiving EI benefits. The Claimant disagrees with the Commission's decision. He says that he had good reasons to quit his job.

Potential Added Party

[3] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. Usually, the Tribunal sends the employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal did not send the employer a letter because its administrative services are temporarily interrupted due to the public health emergency. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

Issue

[4] I have to decide if, under the *Employment Insurance Act*, the Claimant had just cause to voluntarily leave his employment. This decision takes two steps. First, I have to see if he chose to leave his job. Second, I have to see if he had just cause for leaving.

Reasons for my decision

[5] The law says that if you quit your job without just cause, you cannot receive EI benefits.[1]

The Claimant voluntarily left his employment

[6] The courts have said that to determine if a claimant voluntarily left his employment the question to be answered is whether he had a choice to stay in or to leave his employment.[2]

[7] The Claimant testified that he telephoned the employer and left a message that he would not be returning to work. I see no evidence to contradict this. This means the Claimant voluntarily left his employment.

The Claimant had just cause to voluntarily leave his employment

[8] The parties, that is the Claimant and the Commission, do not agree that the Claimant had just cause for leaving his job when he did.

[9] The law says that a Claimant has just cause to leave a job if he had no reasonable alternatives to quitting.[3] The Claimant has to prove this.[4] Having a good reason for leaving a job is not enough to prove just cause.

[10] When I decide this question, I have to look at all of the circumstances that existed at the time that the Claimant left his job. The circumstances I have to look at include some set by law.[5] After I decide which circumstances apply to the Claimant, he then has to show that there was no reasonable alternative to leaving his job at that time.[6]

[11] One of the reasons the Claimant said that he left his job was because he did not get to do the work he was hired to do but was instead assigned other work. Significant changes in work

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[1] *Employment Insurance* Act, section 30(1). This is how I refer to the law that applies to this appeal.
[2] *Canada (Attorney General) v. Peace*, 2004, FCA 56. This is how I refer to the Court's decisions that I must apply to this appeal.
[3] *Employment Insurance Act*, section 29(c), and *Canada (Attorney General) v White*, 2011 FCA 190.
[4] *Canada (Attorney General) v White*, 2011 FCA 190 says that you have to show it is more likely than not that you had no reasonable alternative.
[5] *Employment Insurance Act*, section 29(c).
[6] *Employment Insurance Act*, section 29(c).

duties[7] is a circumstance set out in law as an example to be considered when determining if a claimant had just cause for leaving their employment.

[12] The Claimant testified that he responded to a job ad on a flyer handed out at the bus station. The job was seasonal and involved the production of a consumer bath product. He went to an unpaid on-boarding session where he performed five tasks designed to test his ability to produce the product. He was then selected to attend a training session to produce the product. The Claimant testified he next attended an unpaid 1 hour training session on the production line, with approximately 11 others, where they were taught how to make and package the product. He said that he asked a lot of questions about the work and the production process. He was told when they used up the raw materials one of them would go get the material as needed. This fetching was done on a rotational basis. As the product was made it would be placed in boxes that once filled he would place on a conveyor belt. This activity was described by the supervisor as some lifting. After this session, he was offered the job producing the bath product. The Claimant then attended a paid orientation session with the others where he was shown videos, and given information about the rules and labour laws.

[13] The Claimant described the work site as a large warehouse. When the Claimant reported to work he was selected by a supervisor to be a "floater" to perform warehouse work. The other 11 people he trained with were assigned to produce the bath product. The supervisor who selected the Claimant for the floater work was not one of the supervisors who trained him to make the bath product. The Claimant was told he had to replenish two types of boxes on a conveyor belt. But in between replenishing he was carted off to do all different areas in the warehouse. The Claimant testified the supervisor who assigned him to the floater role was constantly telling the Claimant what to do. Once the Claimant finished a task, the supervisor would have him do another task. He could not catch his breath; he had to be busy every second. This did not seem to be the case for everyone else. While he was doing the warehouse work, the Claimant was able to see the others he had trained with remained at their workstations making the bath product throughout the day. The Claimant said there were four or five other people in the warehouse doing the same floater work as he was.

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[7] *Employment Insurance Act*, section 29(c)(ix)

[14] The Claimant spoke to the supervisor over the lunch break. He said to her this is not something that is fair. He told her he was uncomfortable in the role. That the floater role was not mentioned to him in the training or orientation. He asked her if there was someone else who could do the floater job. He asked if he could do what the others were doing, that is, making the bath product. The supervisor told him that there was no option for him to do anything else. The Claimant testified that he also spoke to one of the supervisors who trained him to make the bath product. The Claimant said to that supervisor the floater role was not mentioned in training. That supervisor replied that he did not think someone from the Claimant's group would be selected to do a different role.

[15] A representative of the employer told the Commission that Claimant was hired to work in the department producing the bath product. His job was to make the product, pack the product in boxes and put the product in kits. The job requirement stated the claimant was required to lift 50 pounds but the boxes were not heavier than 15 pounds. This evidence, and the Claimant's evidence, tells me that the Claimant was hired to make the bath product. He was not hired to perform the work required of the floater role. As a result, I find that the Claimant has established that there was a significant change work duties and that he left his job for that reason.

[16] The Claimant testified that he believed that he was selected for the floater role because he is a gay black man though he was not "leaning on that." Discrimination on a prohibited ground within the meaning of the *Canadian Human Rights Act*[8] is a circumstance set out in law as an example to be considered when determining if a claimant had just cause for leaving their employment. The Claimant said he had experienced this feeling before but it was difficult to explain. He found it odd that he was selected for the floater role. It was upsetting that the supervisor was over him, he did not feel the need to be handled. The Claimant said his selection to do the floater role was arbitrary which brings the question of why was he selected to do the floater work when it was not mentioned. The Claimant testified that he did not contact anyone in the company about his feelings and he made no effort to contact any outside authority about his feelings.

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[8] *Employment Insurance Act*, section 29(c)(iii). The prohibited grounds of discrimination under the *Canadian Human Rights Act* include: race, national or ethnic origin, colour, religion, age, sex (including pregnancy), sexual orientation, marital status, physical or mental disability (including dependence on alcohol or drugs), and pardoned conviction.

[17] The appeal file shows the Claimant did not indicate that he left his job due to discrimination until after he was denied his EI benefits. As part of the reconsideration process he told the Commission that he felt singled out in being the one selected for the floater role and "perhaps it was discrimination issue." The Commission did not discuss the allegation of discrimination with the employer in an interview that it conducted following its interview of the Claimant. The employer provided a job description that speaks to diversity in the workplace. The job description states that accommodation can be requested as part of the recruitment process. When he was advised that his EI benefits continued to be denied after reconsideration the Claimant again stated that he believed it to be a racial issue. I can only consider the circumstances that existed at the time the Appellant left his employment when determining whether just cause existed.[9] I accept that the Claimant believed he was treated unfairly in that he was the only one from the group that he trained with who was assigned the floater work. However, I find that the Claimant has not established that he left his job due to discrimination because he has not provided sufficient evidence that he left his job for this reason.

[18] The Claimant is recorded as telling the Commission another reason that he left his job was that he found the work physically demanding and he was not able to do the heavy lifting and moving. The Claimant testified that he did not say "that in this way." He said that he felt overly used. He was able to do what he was asked to do. The supervisor's attitude was to be busy for the whole day. That was not the case for everyone else. Based on the Claimant's testimony, I find the Claimant has not established that he left his job due to being unable to physically perform the work due to medical issues.

[19] The Commission says the Claimant did not have just cause for leaving his employment because he failed to exhaust all reasonable alternatives prior to leaving. It says considering all of the evidence, reasonable alternatives to leaving would have been: ask the duration of the floater role; learn whether he would be expected to do this full time; discuss his feelings of discrimination with his supervisor; request a transfer if he was unhappy; speak to a doctor if he was unable to do the work; or request a leave and begin searching for other work prior to quitting.

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[9] *Canada (Attorney General) v. Lamonde*, 2006 FCA 44

[20] The Claimant testified that he was “not leaning on” his allegation of discrimination. The evidence tells me that he did not leave his job due to discrimination. As a result, I find the alternative of discussing his feelings of discrimination with his supervisor is not a reasonable alternative.

[21] The Claimant testified that he was able to do the work. As a result, I find that consulting with a doctor is not a reasonable alternative.

[22] The Claimant testified that he asked the supervisor if he could do the same work as the others. The supervisor replied that there was no other option but to do that work. He said that the supervisor was abrupt with him. The Claimant also spoke to the supervisor who trained him. That supervisor said he was surprised the Claimant had been selected from his group to do the floater work. As a result, based on these two discussions I find that the Claimant exhausted the reasonable alternatives of asking how long the floater role would last and whether he would have to do it full time.

[23] The employer told the Commission that if the Claimant did not like being a floater, or did not feel comfortable rotating jobs he could have asked for a transfer to a different department. The Claimant testified the work site was a large warehouse which included the area where the bath product was made. There is no evidence that another department existed where the Claimant could have transferred. The Claimant told the supervisor that this was not fair, he asked if someone else could do the job, he was uncomfortable with the role. The supervisor replied that there was no option for him to do anything else. This negated any transfer option. Nonetheless, I find that by asking the supervisor if someone else could do the floater job the Claimant was in effect asking for a transfer. Accordingly, I find that the Claimant exhausted this reasonable alternative.

[24] The Record of Employment in the appeal file shows that the Claimant worked 11 hours over the course of two days. He said he was paid for the orientation day where he and others watched videos and were told about the rules and labour laws. The next day he started work and was placed in the floater role. When he asked about doing other work he was told there was none. The position was seasonal. I find that requesting a leave of absence would not be a reasonable alternative in these circumstances as it would not resolve the fact that the Claimant

was performing work he was not hired to do.

[25] A claimant has an obligation, in most cases, to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job.[10]

[26] The Claimant testified that he was looking for work before he went to the unpaid onboarding and unpaid training where he learned how to make the bath product. He said that when he finished the full day of floater work at the warehouse he went home and looked on the Indeed website for work. The bath product job was minimum wage and he said minimum wage work is not that hard to find. He waited until the next morning before telephoning the employer to say he would not be returning to work. I find that by looking for work before he started the job, and before he notified the employer that he would not be returning the Claimant has exhausted this reasonable alternative.

[27] It is not sufficient for a claimant to demonstrate that he meets one of the circumstances set out in section 29 of the *Employment Insurance Act*. To establish he had just cause for leaving his employment, the Claimant must also demonstrate that he had no reasonable alternatives to leaving his employment when he did.[11] The Claimant has done so. Accordingly, I find the Claimant's decision to leave his employment meets the test of having just cause to voluntarily leave employment as required by the Act and case law described above.

Conclusion

[28] The appeal is allowed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	April 30, 2020
METHOD OF PROCEEDING:	Teleconference

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

[11] *Canada (Attorney General) v White*, 2011 FCA 190*; Canada (Attorney General) v. Imran*, 2008 FCA 17

APPEARANCES:	A. S., Appellant