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

Citation: *MS v Canada Employment Insurance Commission*, 2021 SST 69

Tribunal File Number: GE-20-2418

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: John Noonan

HEARD ON: January 13, 2021

DATE OF DECISION: January 19, 2021

Canada

OVERVIEW

[1] The Appellant, M. S., a former worker in X, was upon reconsideration by the Commission, notified that having examined his claim, which became effective on February 2, 2020, they are unable to pay him Employment Insurance regular benefits starting February 9, 2020 because he voluntarily left his job with X. on January 31, 2020 without just cause within the meaning of the Employment Insurance Act. The Commission is of the opinion that voluntarily leaving his job was not his only reasonable alternative. The Appellant asserts that he left this job as he was expecting to be paid more than he was and he thought he was being laid off. The Tribunal must decide if the Appellant should be denied benefits due to his having voluntarily left his employment without just cause as per section 29 of the Act.

PRELIMINARY MATTERS

[2] The conditions brought on by the pandemic were taken into consideration regarding the Appellant's late appeal, inability to contact medical offices, etc., but not as reasons for just cause for leaving his employment on January 31, 2020. I can only base my decision on the circumstances in place when the Appellant quit his employment, in this case, long before the current pandemic became an issue.

DECISION

[3] The appeal is dismissed.

ISSUES

[4] Issue # 1: Did the Appellant voluntarily leave his employment X. on January 31, 2020?

Issue #2: If so, was there just cause?

ANALYSIS

[5] The relevant legislative provisions are reproduced at GD-4.

[6] A claimant is disqualified from receiving EI benefits if the claimant voluntarily left any employment without just cause (Employment Insurance Act (Act), subsection 30(1)). Just cause

for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances (Act, paragraph 29(c)).

[7] The Respondent (Commission) has the burden to prove the leaving was voluntary and, once established, the burden shifts to the Appellant to demonstrate he had just cause for leaving. To establish he had just cause, the Appellant must demonstrate he had no reasonable alternative to leaving, having regard to all of the **circumstances (Canada (Attorney General) v. White, 2011 FCA 190; Canada (Attorney General) v. Imran, 2008 FCA 17).** The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means it is "more likely than not" the events occurred as described.

Issue #1: Did the Appellant voluntarily leave his employment with X. on January 31, 2020?

[8] For the leaving to be voluntary, it is the Appellant who must take the initiative in severing the employer-employee relationship.

[9] When determining whether the Appellant voluntarily left his employment, the question to be answered is: did the employee have a choice to stay or leave (**Canada (Attorney General) v. Peace, 2004 FCA 56).**

[10] Both parties here agree the Appellant voluntarily left this employment with X. on January 31, 2020 therefore I agree and find same.

Issue #2: If so, was there just cause?

[11] No.

[12] When contacted by a representative of Service Canada the Appellant here had indicated that he was working for the employer during the state of emergency in X and his job was requiring him to work 12 hour days with no break. He was unable to travel back home and finding a place to stay in X on $15.00 per hour was unreasonable. He had thought he was being laid off (GD3-20 to GD3-21).

[13] The Appellant further advised that he was expecting the job to be different and to pay more. He had worked for the employer previously in 2016 and was making $17.00 per hour but when he was hired this time he was only paid $15.00 per hour. He could not afford to move to X to continue to work for the employer on the smaller wage. He spoke to his supervisor about the pay issue but the employer indicated that $15.00 per hour were all they were offering. The Appellant did not seek other employment prior to leaving (GD3-22).

[14] Subsequently, the employer was contacted and was advised of the reasons given by the Appellant. After the Appellant received his first paycheque he inquired why he was not making $21.00 per hour and it was explained that he was hired at $15.00 per hour. The Appellant contacted the employer the next day and indicated that he had to go back home for another job. The employer had to hire someone else to replace him (GD3-23).

[15] When again contacted, the Appellant stated that he disagreed that he was never informed of what his earnings would be, he did not have a job to go home to, he was just returning home. There was no other reason for leaving he just quit (GD3-24).

[16] "More credibility is given to the initial statements because the claimant provided information more candidly than the subsequent statements which were provided with the intent of overturning a previous unfavourable decision." as supported by **Canada (AG) v. Gagné, FCA A-385-10.**

[17] I am giving more weight to the initial statements given by the Appellant than to the other submissions given by him for his leaving his employment. That being said, the onus is on the Appellant, not the employer, to initiate any attempt to mitigate, with the employer, any situation by seeking reasonable alternatives before placing himself in an unemployed situation needing the support of the EI program.

[18] Everyone has the right to leave / quit an employment but that decision does not automatically qualify one to receive EI benefits. It is inevitable that a person who has the right to receive benefits will be called upon to come forward and prove that he or she satisfies the conditions of the Act.

[19] In this case, the Appellant neither sought out any other employment, of which there was plenty for labourers during the clean up after the severe snowstorm, nor did he seek out medical advice prior to his quit and move.

[20] The Appellant, in his notice of appeal asserts that on January 31, 2020 he advised his supervisor that he was physically exhausted and needed a day off to rest and asked when to expect the job to wrap up. He advised the employer that he had a foot problem and asked for a day off. He was not sleeping well and his feet and legs were paining and felt he could not continue in his employment without a day of rest. The Appellant indicated the supervisor informed him he did not know when the job would be ending and that he needed workers to be there for their shift. The Appellant provided medical history with his orthotics issue and indicated that he was informed by the employer that he could not have a day off. He went to visit a registered massage therapist and was advised that he needed to begin resting his feet. The Appellant indicated that he did not quit his position he went home to rest his feet and body as he was medically instructed to do. He provided a medical note from his physician indicating that he has a long history of foot problems and saw the doctor on November 11, December 12 2019 and February 23, 2020. He provided a note from his registered massage therapist indicating muscle pain and fatigue due to repetitive strain (GD2-2 to GD2-22).

[21] It is noted that the Appellant's visit with his registered massage therapist occurred after he had quit his employment.

[22] The Appellant claims there was no management person during night shift to approach to request time off however on January 31, 2020 he was able to attend a therapist's office therefore could have contacted the employer regarding a day off or his rate of pay but chose not to. He also refers to speaking with his supervisor on that date in direct conflict to his previous statement regarding no management personnel being available.

[23] The Appellant was told upon hiring that there were no guarantees regarding length of job but now asserts he didn't know day to day when job would end. He knew the fluidity of the time when he was hired.

[24] Appellant worked 12 hour shifts as a spotter on a snow-clearing crew. He was experienced as a crew member and trained in safety.

[25] However, when applying for benefits and in subsequent conversations with Service Canada representatives, the Appellant never mentioned any medical issues leading him to quit his employment. He only cited that he was expecting the job to pay more and when it did not he quit and went home. (see 15 above)

[26] When contacted by a representative of Service Canada on March 20, 2020, the Appellant again indicated that he felt $15 per hour was unreasonable. When he complained, he believed he was getting a "lay off" but found out later the employer considered his leaving as a quit. I note here that, by law, the employer cannot submit false information on an ROE. They cannot cite lay off due to lack of work and then hire a replacement worker. Either there is work available or there isn't.

[27] The Appellant was contacted to discuss the employer's statements at GD3-38. He confirmed that he has worked similar schedules on previous jobs he had held however this position had a lot more walking. **He did not think about requesting a day off** and did not have time to submit the request as he was working night shift and the person to request the time off worked in the day shift. He confirmed that he did not seek medical advice before quitting his job, and later a doctor prescribed orthotic insoles which have since helped. He stated he was not advised to leave his position by a medical professional and denied being in the truck for half of his shift (GD3-39).

[28] The Appellant complained of not having a day off but confirmed that he never requested same. The employer stated that had such a request been made they would have acted upon it and arranged same.

[29] It was confirmed at the hearing that the Appellant had been prescribed orthodic aids prior to this employment and was wearing same.

[30] While the Tribunal can accept hearsay evidence I have to also assign what degree of weight to such evidence. There is no evidence, medical or otherwise, before me that would allow me to use stress or any other mental issue as just cause here.

[31] At the hearing, the Appellant's representative made a number of assertions which I will deal with here:

1) The Appellant called this employer, having worked for them in the past, to try to obtain work. He was hired the next day and told the job would last at least 7 days and maybe longer. He **assumed** he would be paid the same rate he had received when previously employed by this employer.

2) The Appellant was part of a three man crew clearing snow from city streets after a major storm. Crew included truck driver, snow blower operator and a spotter, the Appellant.

3) The Appellant worked 92 hours without a day off.

4) The Appellant was not comfortable speaking with Service Canada staff. His grandmother passed away on March 24, 2020 and he was contacted on the 25th at which time he was in no condition to deal with the questioning effectively.

5) Regarding the employer's statement that a good portion of the Appellant's work day was spent sitting in a truck, the representative stated this was false.

6) The Appellant informed the representative that the other members of his crew, the driver and the independent operator informed him of a pending layoff and he acted on this information.

7) Sitting in truck for extended periods caused the Appellant lower back pain.

8) The representative cited circumstances covered in section 29(c) that she believed show just cause in this case, namely (iv), (viii) and (vi).

[32] Regarding 1) The Appellant never asked the employer, when he was hired, if his rate of pay would be $17 as he had received in the past. He just assumed it would be. The employer states that the Appellant was told by the lady who hired him the terms of employment, $15 per hour, 12 hours per day and no guarantee of hours after 7 days. There is no evidence before me to

show the Appellant questioned his rate of pay other than, according to his representative, discussing it with fellow crew members.

[33] Regarding 2) The Appellant was hired as a labourer / spotter which required him to be outside when the blower was operating and filling the dump truck. It is unclear where the Appellant spent his time when the truck left to dispose of its load of snow. This may become clearer below.

[34] Regarding 3) It is undisputed that the Appellant did indeed work these hours however many references have been made concerning a foreman / manager driving by regularly to check up on the crew's progress. The Appellant could have at any time during these visits requested time off to deal with any medical issues he was encountering. His representative opined that he did not want to bring up any medical issues with the employer as X is a small place and he did not want to jeopardize any future employment opportunities. He made the personal choice to not ask for time off to deal with his issues. It was also stated that there was nobody on the night shift that could authorize time off. This could be easily countered with a phone call to the employer's office during the day. A five minute call would not be detrimental to his rest as he has already submitted that he was up during the day having trouble sleeping.

[35] Regarding 4) The Appellant's representative testified that the Appellant was not in any condition on March 25, 2020 to respond properly to the questions posed by the Service Canada agent as his grandmother had passed away the previous evening. While I offer my sincere condolences to the Appellant and his family over the loss of a loved one, I must also note that on March 25, 2020 the Appellant confirmed all the information he had submitted on March 20, 2020 before the family loss.

[36] Regarding 5) & 7) There is conflicting evidence regarding time spent in truck by the Appellant. The Appellant submitted to his representative that he was on his feet outside except for "warm up" periods. The employer asserts that a good portion of the Appellant's shift was spent in a truck. The representative here testified that the Appellant was having lower back problems due to sitting in the truck for extended periods which seems to confirm the employer's statement.

[37] Regarding 6) The Appellant was not informed of any pending lay off by anyone authorized by the employer to do so. Acting on rumor does not constitute just cause for leaving one's employment. The Appellant could / should have sought confirmation regarding lay off when he approached the employer regarding his expected salary concerns.

[38] Regarding 8) iv *working conditions that constitute a danger to health or safety*, The Appellant knew the type of work he was hired for. His representative stated he is trained in safety therefore if he felt at any time he was in physical danger he was in a position to report same to the employer in an effort to attempt mitigation. He did not.

(viii) excessive overtime work or refusal to pay for overtime work, The Appellant was informed upon being hired that there would be no overtime rates of pay. Not being paid for lunch breaks and coffee breaks he did not take should have taken up with the employer. It is not reasonable to expect the employer to address issues of which he has not been made aware.

(xi) practices of an employer that are contrary to law, In the absence of any evidence before me that the employer was in contravention of any laws, I cannot find this assertion to be just cause.

[39] The representative here takes issue with the Commission's comments at GD4-4 regarding the submissions being made by a third party. I am sure that there was no ill will presented here but the representative is correct in her assertion that a representative is indeed a third party duly authorized by the Appellant to speak on his behalf.

[40] I find that the Appellant made a personal choice to leave his employment when he did and although it may have been a good cause for him, it does not meet the standard of just cause required to allow benefits to be paid.

[41] I find that the Appellant had reasonable alternatives available to him other than leave his employment with X when he did. He could have requested time off to rest and continued this employment and he could have sought out other employment prior to quitting. His leaving when he did not meet any of the allowable reasons outlined in section 29 (c) of the Act.

CONCLUSION

[42] Having given careful consideration to all the circumstances, I find that the Appellant has not proven on a balance of probabilities that he had no reasonable alternative to leaving his job. *The question is not whether it was reasonable for the Appellant to leave his employment, but rather whether leaving the employment was the only reasonable course of action open to him* (**Canada (Attorney General) v. Laughland, 2003 FCA 129).** Given the Appellant did voluntarily leave his employment, I find he had reasonable alternatives to leaving when he did and thus does not meet the test for having just cause pursuant section 29 or the provisions outlined in section 30 of the Act. The appeal is dismissed.

John Noonan

Member, General Division - Employment Insurance Section

HEARD ON:	January 13, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. S., Appellant (No direct testimony offered) Elizabeth Stacey-Kearley, Representative for the Appellant