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

[TRANSLATION]

Citation: *JB v Canada Employment Insurance Commission*, 2021 SST 79

Tribunal File Number: GE-21-74

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: February 3, 2021

DATE OF DECISION: February 4, 2021

Canada

DECISION

[1] The appeal is allowed.

[2] I find that the Appellant did not voluntarily leave her job at the X.

OVERVIEW

[3] The Appellant started working at the X on July 10, 2020. She was initially hired as a night clerk, but she held other positions and worked other shifts until she stopped working on August 31, 2020. The employer indicated "K-Other" as the reason for separation on the record. It notes that the Appellant voluntarily left her job because she refused to work the proposed shifts and wanted to receive Employment Insurance.

[4] The Appellant argues that she never left her job and that the employer, which did not want to dismiss her because it was not satisfied with her work, stopped giving her a work schedule.

[5] On December 22, 2020, the Canada Employment Insurance Commission (Commission) informed the Appellant that it could not pay her Employment Insurance benefits because she had voluntarily left her job on August 31, 2020, and because she had reasonable alternatives to leaving when she did.

[6] I have to decide whether the Appellant voluntarily left her job and, if so, whether she had just cause for doing so.

ISSUES

[7] Did the Appellant voluntarily leave her job?

[8] If so, did the Appellant have no reasonable alternative to leaving her job?

ANALYSIS

Did the Appellant voluntarily leave her job?

[9] To determine whether the Appellant voluntarily left her job, I have to answer the following question: Did the Appellant have the choice to stay or to leave her job?[1]

[10] The Commission says it is obvious that the reason for separation is voluntary leaving. It indicates that voluntarily leaving an employment includes refusing employment offered as an alternative to an anticipated loss of your usual employment. It argues that the Appellant was having difficulty working in the care department, which drove the employer to assign her to the dining room; that the Appellant allegedly failed to agree to this transfer; and that she did not have just cause for leaving her job under these circumstances.

[11] The employer initially told the Commission that the Appellant had voluntarily left her job because she was scheduled to work on certain days, for example, September 1, 5, 6, 7, 10, 11, 14, and 15, 2020, and did not show up.

[12] Emails that the Appellant provided to the Commission show that the manager moved the Appellant to an evening shift. On August 31, 2020, the Appellant was in training during that shift. The manager's email dated September 1, 2020, states:

> [translation]
> (...) Even though you told me that everything went well, comments about that evening aren't positive. I wanted you to try the evening shift so you could observe other tasks, a different routine, and a diverse work team. It's difficult for me to give you shifts in the care department. You remain on the callback list, and since you initially applied for the dining room department, I am transferring you to that department. If we have shifts to fill, we will contact you. (…)

[1] *Peace*, 2004 FCA 56.

[13] This email shows that the employer made this decision and that there were no scheduled shifts for the Appellant. The manager told the Appellant that she would contact her if she had a shift for her.

[14] The Appellant testified that the employer had never called her back to offer her a shift. According to her, the work schedule planned for September 2020 that the employer initially mentioned to the Commission was the schedule she had to work before she was moved to the evening shift in the care department. Then, as the emails from the manager show, no work schedule was proposed to the Appellant. One email even shows that the Appellant asked for her schedule, but she was told that it was not yet available.

[15] The Appellant explains that she asked for a Record of Employment to claim Employment Insurance benefits because she was expecting a reduction in her hours, but that she did not leave her job. She was on the callback list and was waiting for the employer to call her back.

[16] Even though the Commission argues that the Appellant left her job because she refused hours or that she failed to tell the manager that she accepted this transfer, it appears that the Appellant was not up to the task at the employer and that it moved her four times from department to department and to different shifts between July 10, 2020, and August 31, 2020. The email from the manager asks the Appellant to inform her if the transfer to the cafeteria on call does not suit her. After the trial run during an evening shift on August 31, 2020, the manager told the Appellant that comments were not positive, that she could not give her this position, and that she was therefore on the callback list.

[17] The emails that the Appellant provided to the Commission also show that she could not find her schedule and that she wrote to the manager to get it. The manager replied that there was a problem with the schedules and that they would be available the next day. As the manager mentioned in her email, she told the Appellant that she would call her back if she had a shift for her.

[18] Therefore, I agree with the Appellant’s version. She did not leave her job. Even though she asked for her Record of Employment because she was expecting a reduction in hours after

the email she got from the manager, she was waiting for the employer to offer her a future shift, which did not happen.

[19] As the Appellant testified, she has a feeling that, when she asked for a Record of Employment for her hours worked, the manager used this opportunity to provide her with a Record of Employment indicating voluntary leaving to [translation] "get rid of" her, since she was not a good fit for the job.

[20] Moreover, this Record of Employment provided by the employer indicates that the Appellant refused to work the proposed shifts. A version that the employer provided to the Commission also indicates that the Appellant refused to work the proposed shifts. However, that is not what the emails between the Appellant and the manager show. As the Appellant explained, the schedule planned for September 2020 was cancelled because she had been transferred to the evening crew, and she was waiting for a new schedule that never came. It is clear, from the series of emails that the Appellant provided, that the manager did not give the Appellant a new schedule, that she told her that she would contact her if she had a shift for her, and that she did not offer her a shift after August 31, 2020.

[21] The manager gave the Appellant a Record of Employment indicating "K" and noting that the Appellant did not want to work the proposed hours. I do not accept this version from the employer. This version is inconsistent with the series of emails that the Appellant provided, and the facts do not show that hours were proposed to the Appellant after August 31, 2020.

[22] Even though she got a Record of Employment, the Appellant thought that she still worked for the employer, first, because she had not been given her "4%," that is, her vacation pay, and second, because she still had her locker key. When she was hired, the employer explained that she would be charged $250 if she did not return the key at the time of separation.

[23] When she applied for benefits on November 4, 2020, the Appellant had not received her vacation pay or been charged for the key or asked to return it. The Appellant was waiting for the employer to call her back even though she found the work conditions difficult and had mentioned it to the employer. Among other things, there was harassment on the evening shift when she got there. One person was on sick leave, and the one who alleged harassment left their

job. The Appellant explains that the work atmosphere was difficult and that she had trouble adjusting. However, she is a hard worker, and she wanted to keep her job.

[24] I have to make this decision on a balance of probabilities. This means that, if it is more likely that the Appellant did not leave her job, I have to make that finding. Even though the contents of the telephone conversation or voicemail messages were not introduced into evidence and the manager notes the Appellant's refusal to work in the dining area, the employer was not at the hearing to give its version of events or to explain the contradictions in the versions it provided to the Commission and the emails it sent to the Appellant.

[25] While the Commission submits that the Appellant refused or failed to agree to the transfer to the dining room, the Appellant explains that she was in fact initially hired to work a night shift in the dining room and that she was willing to work in that department. She says that the employer was not satisfied with her work and that it did not want to return her to that department.

[26] I find that the Appellant did not voluntarily leave her job. The facts do not show that the Appellant refused a shift, as the employer alleges. The Appellant did not have the choice to stay in her job, since the manager did not provide her with a work schedule when she asked for it. She gave her a Record of Employment indicating a separation from employment, specifically voluntary leaving, and she never contacted the Appellant again to offer her a shift like she said she would.

[27] Since the Appellant did not voluntarily leave her job on August 31, 2020, she does not have to show that she had just cause for leaving.

CONCLUSION

[28] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	February 3, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	J. B., Appellant