Citation: *SS v Canada Employment Insurance Commission*, 2024 SST 684

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. S.
Representative:	J. Kyle Bienvenu
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (625868) dated November 2, 2023 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	In person
Hearing date:	February 21, 2024
Hearing participants:	Appellant Appellant's Representative Appellant's Legal Observer
Decision date:	March 1, 2024
File number:	GE-23-3463

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Appellant has shown just cause (in other words, a reason the law accepts) for leaving her job when she did. The Appellant had just cause because she had no reasonable alternatives to leaving. This means she is not disqualified from receiving Employment Insurance (EI) benefits on this claim.

Overview

[3] The Appellant, S. S., a worker in BC, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance regular benefits as of August 20, 2023 because she voluntarily left her employment with X (X) on August 22, 2023 without just cause within the meaning of the Employment Insurance Act. The Commission is of the opinion that voluntarily leaving her job was not her only reasonable alternative. The Appellant asserts that her decision to leave the position was based on her being "constructively dismissed" from her position. The Tribunal must decide if the Appellant should be denied benefits due to her having voluntarily left her employment without just cause as per section 29 of the Act.

Issues

[4] Issue # 1: Did the Appellant voluntarily leave her employment with X (X) on August 22, 2023?

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

Analysis

[5] The relevant legislative provisions are reproduced at GD4.

[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 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 she had just cause, the Appellant must demonstrate she 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.

[8] The test for determining whether a claimant had "just cause" under section 29 of the EI Act is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (**White 2011 FCA 190; Macleod 2010 FCA 301; Imran 2008 FCA 17; Astronomo A-141-97).** A claimant who leaves his/her employment must show that he/she had no other alternative but to do so. **Tanguay (A-1458-84)**

Issue 1: Did the Appellant voluntarily leave her employment with X (X) on August 22, 2023?

[9] Yes.

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

[11] 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).**

[12] At the time of leaving, it was the employer who made the decision. Both parties do not agree the Appellant voluntarily left this employment with X (X) on August 22, 2023.

[13] The Appellant here lived in BC where she worked for X (X) until August 22, 2023,

[14] She worked from home in a clerical position.

[15] The employer, as a software company, was experiencing severe financial challenges due to the lack of clientele. As a result, in April, 2023 the Appellant was informed of the employer's intention to reduce costs by asking her to reduce her hours. The employer changed his mind at that time and withdrew the request.

[16] However, when the employer's situation worsened, on August 22, 2023 the Appellant was informed of the employer's plan to, as of October 1, 2023, reduce her hours to 10 per week while increasing her hourly rate to $50 per hour.

[17] The Appellant responded by turning in her key fob and work from home equipment on August 23, 2023 then not showing up for work thereafter and bringing suit against the employer.

[18] While the Tribunal has no jurisdiction regarding the effects of constructive dismissal, a civil matter, it is necessary to determine voluntary leaving versus dismissal.

[19] Was the respondent dismissed from her employment?

> *It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.*

[20] David Harris summarizes the distinction between the two methods in his text Wrongful Dismissal,, (Toronto: Thompson Canada Ltd. 1989) at pages 3-4, 3-5 and 3-9:

§3.0 Dismissal

Summary: Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date

The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of the British Columbia Court of Appeal stated the law in this regard as follows
in Kalaman v. Singer Valve Co. (1997)

A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end at some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case.

§3.0A Dismissal versus Voluntary Resignation

Summary: The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation." ***Beggs v. Westport Foods Ltd. 2011, BCCA***

[21] The employer's plan to unilaterally change the conditions of the Appellant's employment contract are obvious. They were ending her present contract as of October 1, 2023.

[22] It is settled in law that a repudiation (negating) of a contract does not automatically terminate that contract. Instead, an act of repudiation confronts the innocent party with two choices - to affirm the contract and treat it as continuing or to accept the wrongful repudiation and treat the contract as at an end. Acceptance of the repudiation frees the innocent party from further performance and entitles that party to sue for damages immediately, even if the breach that constitutes the repudiation is anticipatory. Failure to unequivocally accept the repudiation means that the repudiation has no effect unless there is a continued refusal to perform. The contract continues to exist for the benefit of both parties and an action cannot be brought until one of the parties fails to perform: **Fletton Ltd. v. Peat Marwick Ltd. (1988)**

[23] The accepted test for constructive dismissal was set out by **Lambert J.A. in Farquhar v. Butler Bros. Supplies Ltd. (1988)**

> *A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end.* ***Reber v. Lloyds Bank Int.*** *The employee's decision must be made within a reasonable time. But he is entitled to a few days, or even a couple of weeks, to think it over.*
>
> *We should not get caught up in the use of words specific to the employment context like express dismissal or constructive dismissal, and then attach consequences to them. Constructive dismissal is simply another term for an employer's repudiatory conduct giving rise to the election to terminate by an innocent employee. The whole of the employer's conduct must be considered in arriving at a decision as to whether and when repudiation occurred, just as the whole of the employee's conduct must be considered in arriving at a decision as to whether and when the employee accepted the repudiation.*

[24] The notice given to the Appellant of her hours being reduced by 80% as of October 1, 2023 constituted an anticipatory breach of a fundamental term of her contract of employment and, as such, a repudiation of the entire contract. This repudiation was accepted by the Appellant, within a reasonable time, by her act of leaving the place of employment on August 23, 2023. **Farquhar v. Butler Brothers Supplies Ltd.(1988)**

[25] I find that the Appellant, based upon an anticipatory breach of a fundamental term of a contract of employment, reduction in hours of work by 80%, voluntarily left this employment.

Issue 2: If so, was there just cause?

[26] Yes.

[27] The Appellant here left her employment, as stated above, based upon an anticipatory breach of a fundamental term of her contract of employment.

[28] The Appellant responded by turning in her key fob and work from home equipment on August 23, 2023 then not showing up for work thereafter.

[29] The employer stated that the Appellant was never asked to return the key fob or other equipment she resigned without notice and without further discussion and / or counter offer.

[30] The Appellant, at her hearing, testified that she had, based on section 29 (c) of the Act, shown just cause for leaving when she did..

[31] There is also the assertion by the Appellant of constructive dismissal, addressed above in light of the employer's actions here.

[32] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are out of work. The Federal Court of Appeal considered the relationship between constructive dismissal and voluntary leaving.

[33] The court said that where an employee leaves their employment after being constructively dismissed, they have voluntarily left their employment. That is because an employee who wishes to claim constructive dismissal has a choice about whether to quit their employment. In other words, they have a choice about whether to stay or to leave. And where an employee chooses to leave their employment, they have quit.

[34] The Appellant cites section 29 (c)(x) *antagonism with a supervisor if the claimant is not primarily responsible for the antagonism* as a reason for her leaving her employment.

[35] I see no evidence of any antagonistic behavior on the part of either the employer or the Appellant. Everything seems to have been agreeable up to August 22, 2023, however, I opine that had the Appellant remained employed for the ensuing 6 weeks, the situation would have changed leading to confrontation regarding the employer's unilateral actions.

[36] The Appellant cites section 29 (c)(xiii*) undue pressure by an employer on the claimant to leave their employment*, as another reason for her leaving her employment.

[37] While the employer was, in fact, facing financial difficulties, there is ample evidence before me of a proposed major change to / rescinding of the Appellant's employment contract.

[38] Finally, the Appellant cites section 29 (c)(vii) *significant modification of terms and conditions respecting wages or salary,* as another reason for her leaving her employment.

[39] It has been shown that there was notification of a proposal by the employer to reduce the Appellant's number of work hours by 80% . There is no evidence before me that the employment contract in place since June 2018 was subject to change if the situation required.

[40] 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.

[41] I find that the Appellant had no reasonable alternatives available to her other than leave her employment with when she did. She could not have remained employed until she sought and found other, more suitable, employment.

[42] The words "just cause" in section 29 of the EI Act are not synonymous with "reason" or "motive". It is not sufficient for the claimant to prove that they were quite reasonable in leaving their employment. Reasonableness may be "good cause", but it is not necessarily "just cause" (**Tanguay A-1458-84).**

[43] Her leaving her employment when she does meet the allowable reasons outlined in section 29 (c) of the Act.

Conclusion

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

John Noonan

Member, General Division – Employment Insurance Section