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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. V. L.*, 2016 SSTADEI 94

Tribunal File Number: AD-15-272

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

V. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON February 11, 2016

DATE OF DECISION: February 16, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision is rescinded, and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On April 23, 2015, the Tribunal's General Division found that:

- The disentitlement imposed under sections 18 and 50 of the *Employment Insurance Act* (Act) and subsection 9.001 of the *Employment Insurance Regulations* (Regulations) was not justified.

[3] On May 14, 2015, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted by the Appeal Division on June 22, 2015.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- The fact that the parties' credibility was not one of the main issues;
- The cost-effectiveness and expediency of the hearing choice;
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] At the hearing, the Appellant was represented by Louise Laviolette. The Respondent attended the hearing and represented herself.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) The General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must determine if the General Division erred in fact and in law by finding that the disentitlement imposed under sections 18 and 50 of the Act and subsection 9.001 of the Regulations was not justified.

SUBMISSIONS

[8] The Appellant submitted the following arguments in support of its appeal:

- The General Division erred in fact and in law by finding that the Respondent was entitled to benefits in accordance with paragraph 18(1)(*b*) of the Act, which applies to sickness benefits.

- The Respondent never claimed sickness benefits. Moreover, there is no evidence on file to show that the Respondent was "incapable of work because of illness, injury, or quarantine".

- The General Division also erred in fact and in law in its decision in this case.

- Workplace preventative withdrawal benefits are paid to employees under a provincial law when performing duties related to a particular job could endanger the health of an employee, an unborn child, or of a nursing mother. In some cases, if the employer is unable to staff the employee in a different position, the employee can lose their job. This person does not have a disability, but could have become disabled if they were not granted a preventative withdrawal.

- In this case, the Respondent has confirmed several times that she was on protective withdrawal from her job, but that she was capable and available to perform office duties for her employer; however, her employer could not accommodate her request. She did not look for work elsewhere.

- In order to be eligible for regular benefits under paragraph 18(1)(*a*) of the Act, a claimant must prove that they are capable of and available for work and unable to obtain suitable employment.

- Subsection 50(8) of the Act states that, to prove that a claimant is available for work and unable to obtain suitable employment, the Appellant may require the claimant to prove that they are making reasonable and regular efforts to obtain suitable employment. The criteria for determining what constitutes a search for suitable employment can be found in subsections 9.001 to 9.004 of the Regulations.

- In this case, the evidence showing that the Respondent was on protective withdrawal from her employment as an electrician, that her employer had no light work to offer her, and that she did not seek employment elsewhere because she would lose her income replacement benefits if she worked for another employer, is not being disputed.

- For these reasons, the Appellant states that the Respondent had failed to prove that she was available for work and that the General Division had committed an error in allowing her appeal.

- Despite the fact that the Appellant had misguided the Respondent in this case, the Supreme Court of Canada states that benefits cannot be paid in contravention of the Act.

[9] The Respondent submitted the following arguments against the Appellant's appeal:

- She understands the Act and agrees with the new rules regarding job searching. However, she feels that her situation places her in a separate category, that there should be a rule for pregnant women on preventative withdrawal, and that she should be eligible for Employment Insurance during this gap without being required to look for another job.

- Her employer put her on preventative withdrawal because he did not want to offer her lighter duties, despite the fact that she wanted to continue working and was willing and available to work.

- She did not conduct a job search because she was going back to work for her employer at the end of her pregnancy. She would have lost her regular and CSST benefits had she found another job.

STANDARDS OF REVIEW

[10] The Appellant submits, and the Tribunal agrees, that the Federal Court of Appeal ruled that the applicable standard of review for a decision of the Board of Referees (now the General Division) and the Appeal Division (now the Appeal Division) on a question of law is correctness – *Martens v. Canada (A.G.*), 2008 FCA 240, and that the applicable standard of review for a question of mixed fact and law is reasonableness – *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[11] When it allowed the Respondent's appeal, the General Division concluded the following:

> [*Translation*]
> [39] In light of the facts and the submitted evidence, the Appellant was entitled to benefits within the meaning of paragraph 18(1)(*b*) because she had proven that she would have been available for work had she not been unable to work.

[12] With due consideration, the General Division's decision cannot be maintained given the reasons below.

[13] The evidence shows that the Respondent had never applied for sickness benefits. Furthermore, there is no evidence on file that shows that the Respondent was "incapable of work because of an illness, an injury, or quarantine" within the meaning of paragraph 18(1)(*b*) of the Act. There is no medical certificate submitted as evidence that the Respondent was unable to work for health reasons. The General Division also acknowledges this lack of evidence in its decision (page 10, par. 36 of the decision).

[14] The Respondent also confirmed on several occasions that she was on preventative withdrawal from her job, but that she was able to and available for office work with her employer, who could not accommodate her, and that she was not looking for work elsewhere so as to not lose her benefits (GD3-20, GD3-42 to 45, GD2-1 to 2).

[15] In order to be eligible for regular benefits under paragraph 18(1)(*a*) of the Act, a claimant must prove that they are capable of and available for work and unable to obtain suitable employment.

[16] Contrary to the General Division's findings, the Tribunal is of the opinion that the evidence shows that the Respondent failed to prove her availability for work within the meaning of the Act.

[17] The General Division therefore erred in allowing the Respondent's appeal.

[18] The appeal is allowed, the General Division's decision is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division