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

Citation: *P. G. v. Canada Employment Insurance Commission*, 2016 SSTADEI 116

Date: February 29, 2016

File number: AD-15-930

APPEAL DIVISION

Between:

P. G.

Applicant/Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

Decision on the record, dated February 29, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 21, 2015 the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Appellant's appeal from a reconsideration decision of the Canada Employment Insurance Commission (Commission).

[2] The Commission (Respondent) had denied the Appellant's claim for employment insurance (EI) benefits because he had been determined to have voluntarily left his employment without just cause. His claim was denied on reconsideration.

[3] The GD dismissed his appeal, finding that the Appellant had quit his job voluntarily and that he failed to demonstrate "just cause" for leaving his employment within the meaning of the *Employment Insurance Act* (EI Act).

[4] The Appellant received the GD decision on July 29, 2015. He filed an application for leave to appeal (Application) to the Appeal Division (AD) of the Tribunal on August 18, 2015, within the 30 day limit.

[5] The Respondent submitted written representations, conceding on the merits of the matter, and recommended that leave to appeal be granted and that the appeal be allowed.

ISSUES

[6] The parties are requesting a decision from the AD based on the concession filed by the Respondent. The role of the AD is to determine whether the Respondent's concession meets the requirements of the law.

[7] The AD must decide if the appeal has a reasonable chance of success.

[8] If the appeal is determined to have a reasonable chance of success, the AD must decide whether to dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

LAW AND ANALYSIS

[9] According to subsections 56(1) and 58(3) of the DESD Act, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[10] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[12] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division. It states:

> The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[13] Subparagraph 29(c)(ii) of the EI Act states: 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, including any of the following: (ii) obligation to accompany a spouse, common-law partner or dependent child to another residence.

Application for Leave to Appeal

[14] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[15] The Appellant relies on errors of law and errors in the findings of fact. He submits, in particular, that:

a) The GD ignored or dismissed jurisprudence in support of the appeal; and

b) The GD based its decisions on erroneous findings of fact, in particular in paragraphs [18], [37] and [38] of the GD decision, which findings were made in a perverse or capricious manner or without regard for the material before it.

[16] The Appellant's reasons for appeal fall within paragraphs (b) and (c) of subsection 58(1) of the DESD Act.

[17] The Respondent agrees that leave to appeal should be granted and, in addition, that the appeal should be allowed. In particular, the Respondent submits that:

a) In light of Federal Court of Appeal jurisprudence relating to a decision to accompany a spouse who is moving, it was incorrect in its submissions before the GD that to be considered a reasonable alternative to leaving, the Appellant should have secured alternate work prior to quitting his job;

b) The GD's finding "it would not be an unreasonable alternative for the spouse to move to X and for the Claimant to join her as soon as he had secured a job as a pharmacy technician in X or the surrounding area" was in error;

c) The Tribunal's case law supports the position that the Appellant had just cause for voluntarily leaving his employment pursuant to subparagraph 29(c)(ii) of the EI Act (obligation to accompany a spouse);

d) The GD erred when it failed to consider and apply the principles established by the jurisprudence submitted by the Appellant's representative; and

e) With regards to the second issue that the Appellant has not accumulated the number of hours of insurable employment required by section 7 of the EI Act, since voluntarily leaving his employment without just cause, the Commission submits that if the AD accepts the concession, this issue becomes a 'moot' point.

[18] Considering the possible errors in findings of fact (made in a perverse or capricious manner or without regard for the material before it) and possible errors of law, and my review of the GD decision and docket, I am satisfied that the appeal has a reasonable chance of success.

[19] Therefore, I grant the application for leave to appeal.

Merits of the Appeal

[20] The Respondent has submitted that the applicable standard of review for mixed questions of fact and law is reasonableness.

[21] The Federal Court of Appeal has determined, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[22] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal recently suggested that this approach is not appropriate when the Appeal Division of the Tribunal is reviewing appeals of employment insurance decisions rendered by the General Division.

[23] I am uncertain how to reconcile this seeming discrepancy. In addition, it is the Respondent's submission that the applicable standard of review is that which was enunciated in earlier Supreme Court of Canada decisions such as *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (para. 26) and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (paras. 51 and 53-54).

[24] I also note that, overall, the Supreme Court of Canada appears to be leaning towards reasonableness in most cases unless the statutory scheme provides otherwise: *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, and *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57.

[25] The statutory scheme of the Tribunal does not state the internal standard of review when the AD is reviewing a decision rendered by the GD.

[26] Given that the Federal Court of Appeal has held, in numerous cases, that correctness is the standard to apply for issues of law, I will review the GD decision on the basis of correctness on the law and reasonableness on issues of mixed fact and law.

Decision of the GD

[27] The GD decision stated:

> [35] The Claimant's representative has submitted Federal Court of Appeal and Canada Umpire Benefit decisions to support his position that the Claimant had an obligation to follow his wife. However, the Tribunal finds the submitted jurisprudence does not reflect the facts of this case. This Claimant and his wife mutually made a decision to relocate for personal reasons and therefore there was no obligation for the Claimant to follow his wife.
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> [36] The Tribunal is guided by the Federal Court of Appeal in **Canada (AG) v. White, 2011 FCA 190** wherein the court reaffirmed the principle that where a Claimant voluntarily leaves his employment, the burden is on that Claimant to prove that there was no reasonable alternative to leaving when he did. The Tribunal finds the Claimant has not met that burden.
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> [37] The Claimant has stated that his wife worked from 2 to 7 weeks in remote areas of Northern BC. Therefore it is logical to assume that they have had periods of separation. As a consequence it would not be an unreasonable alternative for the spouse to move to X and for the Claimant to join her as soon as he had secured a job as a pharmacy technician in X or the surrounding area. The evidence supports the Claimant quit his job on June 12, 2104 and was hired by a pharmacy in the X area on August 18, 2014. While the separation would have been approximately 8 weeks, a week longer that the spouse's work had required of her, periods of separation were something that the Claimant and his spouse had done regularly.
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> [38] The Tribunal finds that any person has the right to quit their employment and relocate whenever they desire. It is clear to the Tribunal that this relocation was one of personal choice albeit for many good reasons. Therefore, the Claimant cannot expect employment insurance (the taxpayer) to underwrite the risks associated with this personal choice.
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> [39] Having regard to all the circumstances, the Tribunal finds that the Claimant has failed to demonstrate "just" cause for leaving his employment with Vancouver Coastal Health within the meaning of the Act.

[28] The jurisprudence cited by the GD included *Tanguay* (A-1458-84), *Landry* (A-1210-92), *Canada (AG) v. White*, 2011 FCA 190, and *Devuyst* (CUB 45378).

Error of the GD

[29] The GD did not consider Federal Court of Appeal jurisprudence which affirmed Umpire decisions which held that in a situation of one spouse moving to accompany another, the principle of considering 'whether the reasonable alternative of not changing places of residence before being assured of other employment' no longer holds: *Canada (AG) v. Rust*, 1996 Carswell Nat. 436 and *Canada (AG) v. Mullin*, 1996 Carswell Nat. 434.

[30] In *Rust, supra*, the claimant had voluntarily left her employment in order to move with her husband when he retired and moved for health reasons. The Umpire held that while it was the Commission's policy that a spouse cannot bring himself or herself under the just cause provision as set out in section 28(4)(b) of the EI Act, as it was then ("obligation to relocate to accompany a spouse or dependent child to another residence"), unless the spouse has relocated for employment, the liberal interpretation of the statute covered the claimant having had an obligation to relocate to accompany her spouse, and she did not need to establish that she had relocated for employment. The Federal Court of Appeal affirmed this decision.

[31] In *Mullin, supra*, the claimant voluntarily left her employment in order to move with her husband when he relocated to seek work in another province. The Board found that she had just cause and cited the clause related to "obligation to relocate to accompany spouse". The Umpire dismissed the Commission's appeal, stating:

> In the circumstances of this case, however, I am not concerned with the reasonableness of Mr. Mullin's decision to move, regardless of whether he made that decision alone or, as was probably the case, after discussions with his wife.
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> The issue is whether, Mr. Mullin's decision having been made, Mrs. Mullin's decision to accompany her husband was just cause. The "obligation" mentioned in paragraph 28(4)(b) of the Act is, I hope, a recognition of the norm that spouses live together.
>
> I cannot conclude that the Board erred in law.

The Federal Court of Appeal agreed with the decision rendered by the Umpire.

[32] The principle established in these cases is: where a claimant establishes that he or she has an obligation to accompany a spouse, common-law partner or dependent child to another

residence, it is not necessary to consider whether there is a reasonable alternative (specifically that of not changing places of residence before being assured of other employment).

[33] The GD did not consider this principle. On the contrary, the GD found that "it would not be an unreasonable alternative for the spouse to move to X and for the Claimant to join her as soon as he had secured a job as a pharmacy technician in X or the surrounding area".

[34] I find that the GD erred in law in failing to consider Federal Court of Appeal jurisprudence and the principle established in those cases, and that it erred in mixed fact and law when it made the latter finding.

[35] Therefore, the AD is required to make its own analysis (*Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33 (CanLII) at para. 8) and decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD, confirm, reverse or modify the decision.

[36] I find that the *Rust* and *Mullin* cases are applicable to the current situation and that the Appellant's decision to accompany his wife and move to X in the circumstances did constitute just cause.

[37] Given all of the above and the submissions of the parties, I allow the appeal.

CONCLUSION

[38] The application for leave to appeal is granted.

[39] The appeal is allowed, and the disentitlement imposed for voluntarily leaving is removed.

Shu-Tai Cheng
Member, Appeal Division