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

Citation: *Canada Employment Insurance Commission v. K. O.,* 2016 SSTADEI 198

Tribunal File Number: AD-14-159

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

K. O.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division Appeal

DECISION BY:: Mark BORER

DATE OF DECISION: April 12, 2016

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. The decision of the General Division member is rescinded and the determination of the Commission is restored.

INTRODUCTION

[2] On February 20, 2014, a member of the General Division allowed the appeal of the Respondent against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On December 1, 2015, a teleconference hearing was held. Both the Commission and the Respondent attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (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, whether or not the error appears on the face of the record; or
>
> (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.

ANALYSIS

[6] This case revolves around the application of the law and jurisprudence regarding voluntarily leaving one's employment.

[7] The Commission has appealed against the decision of the General Division member on the basis that the member ignored the jurisprudence of the Federal Court of Appeal as well as the uncontested evidence in determining that the Respondent had just cause for leaving her employment.

[8] The Respondent, in her written submissions, repeated many of the arguments she successfully made to the General Division member and asks that the appeal be dismissed.

[9] In his decision, the General Division member found that the Respondent had shown just cause to leave her employment because she had a reasonable assurance of employment in the immediate future. Explaining his findings, the member stated at paragraph 34 that "[the Respondent] would have a position once she finished her university course…". On this basis he allowed her appeal.

[10] Subsection 30(1) of the *Employment Insurance Act* (the Act) states that a claimant is disqualified from receiving benefits if they voluntarily left their employment "without just cause". Subsection 29(c) adds that just cause will exist where "the claimant had not reasonable alternative to leaving… having regard to all of the circumstances".

[11] As noted above, the General Division member found that she had shown just cause for leaving because she had the reasonable assurance of employment in the immediate future.

[12] With respect, this betrays a fundamental misunderstanding of what constitutes a reasonable assurance of another employment in the immediate future. I note that the Respondent needed to complete a course and pass an exam before being hired, as opposed to leaving work because she thought (correctly or otherwise) that she had a job waiting for her.

[13] To be clear, one cannot be said to have a "reasonable assurance" of another employment if one must pass a university course and then an exam in order to be hired. The fact that the Respondent did indeed find such work after eventually passing the exam (on a second attempt, some months later) is irrelevant.

[14] In Canada (Attorney General) v. Lessard, 2002 FCA 469, the Federal Court of Appeal found that failing to correctly understand the meaning of "reasonable assurance" and "the immediate future" constitutes an error of law. As the Court stated at paragraph 15:

> "As regards the "immediate future", we know first that the future employment was conditional on completion of a course, and second that the time lapse in question was thirteen weeks. Both of these observations are inconsistent with the idea of the "immediate future".

[15] Because of the above, I find that the Respondent did not have a reasonable assurance of employment in the immediate future. By finding to the contrary, the General Division member failed to correctly consider and apply the relevant jurisprudence and erred in law.

[16] This failure is particularly noteworthy because this is not the first time that this file has come before me. On the previous occasion, in October 2013, I found that the board of referees (the predecessor to the General Division) **had made exactly the same error** as was made here, and ordered that the file be heard again. The instant appeal resulted from that new hearing.

[17] It is with great concern that, although my previous decision can be found in the record at Exhibit GD2-2, the General Division member does not seem to have taken on board my statement of the law at paragraph 12:

> "The job referred to the Board was conditional on completing a course and passing an exam. As the Federal Court of Appeal has held [in *Lessard,* cited above] that this does not constitute "a reasonable assurance of another employment in the immediate future", the Board's finding to the contrary constitutes an error of law."

[18] Essentially, as the General Division member's decision must be overturned, this means that through no fault of the parties over two years of time and resources have been wasted. Because of this, I will not return the matter for a new hearing as I might otherwise have done, but will instead give the decision that the General Division member should have given.

[19] I find that a review of the evidence in the file and the submissions of the parties admits of only one possible conclusion: that the Respondent left her employment without showing just cause and that the General Division erred by not so finding. I find that, based upon the evidence, the Respondent had reasonable alternatives to leaving (such as remaining employed).

[20] This decision cannot stand.

CONCLUSION

[21] For the above reasons, the appeal is allowed. The decision of the Board is rescinded and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division