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

[TRANSLATION]

Citation: *L. T. v. Canada Employment Insurance Commission*, 2016 SSTADEI 322

Tribunal File Number: AD-15-1220

BETWEEN:

L. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: June 9, 2016

DATE OF DECISION: June 22, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 9, 2015, the Tribunal's General Division found that the Appellant had voluntarily left her employment without just cause within the meaning of sections 29 and 30 of the *Employment Insurance Act* ("the *Act"*).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on November 6, 2015. Leave to appeal was granted on November 25, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by 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 information in the file, including the need for additional information; and
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant was present at the hearing and was represented by Alexis Roy. The Respondent was represented by Manon Richardson.

THE LAW

[6] Pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, (*DESD 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 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 whether the General Division erred in fact and in law in finding that the Appellant had voluntarily left her employment without just cause within the meaning of sections 29 and 30 of the *Act*.

ARGUMENT

[8] The Appellant's arguments in support of her appeal are as follows:

- The General Division found, in its analysis of paragraph 29 (b.1) (i) of the *Act*, that the Appellant had refused an employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurred when her employment ended;

- The General Division erred in law when it failed to consider that there had to be a real and legitimate anticipated loss of employment, and that the employment offered had to be valid and legitimate;

- The General Division's interpretation of the words "employment offered" and "anticipated loss of employment" caused the error in law;

- To find an anticipated loss of employment, there must have been a genuine, valid and legitimate loss of employment. If it is shown that an employee lost his or her employment illegitimately, there can be no retroactive anticipated loss of employment for the employee would be still be considered employed;

- To find an consider an offer of employment admissible, the offer must be valid and legitimate, in other words, the employment exists and can be offered to the person interested in accepting it;

- The employer could not cause the Appellant to lose her job under the collective agreement because she was a substitute and she had to continue performing her substitute duties until the incumbent of the position returned;

- In fact, the sick employee was still sick and had not resumed the position. Another employee took over the Appellant's position, in breach of paragraph 12.05 b) of the collective agreement;

- Under the collective agreement, the Appellant was justified in waiting to complete her substitute assignment until the incumbent of the position returned and no one could bump her. Her sudden job loss was therefore illegitimate;

- In addition, the bumping procedures provided in article 14 of the collective agreement apply exclusively to positions and not to substitutions;

- From the time the events began in October 2014, the Respondent has considered that the Appellant "left voluntarily" because she refused the employer's offer of a 27.5/hour position. However, for an offer to be valid, it must be legitimate;

- An important item of evidence was presented to the General Division in the form of a letter from the employer's (DERKO) personnel director, Richard Alain, who wrote on August 18, 2015, following the events of October and November 2014. He clearly stated that not only should the Appellant not have lost her employment, but the offer of employment made to the Appellant was not valid or legitimate;

- The General Division erred in finding that only the facts of the case known to the parties at the time of the events (and not the actual facts) had to be considered in interpreting paragraph 29 (b.l) (i) of the *Act*;

- Yet the General Division itself cited the decision in *Canada (AG) v. Lamonde*, 2006 FCA 44, at paragraph 38 of its decision, in which the Court states that only the facts existing at the time the claimant left the employment must be taken into account;

- Whether the actual facts of a situation are known a day, a month or a year later is immaterial to the fact that the facts to be considered are those present at the time of the event. In its analysis of the situation, the General Division bases its entire decision on the facts known only to the parties, and not on the actual facts present at the time of the event;

- In actual fact, the employer admitted on August 17, 2015 that the Appellant should never have lost the employment, and that the employment offered to her in October 2014 was not legitimate under the collective agreement.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The General Division did not err in law or in fact and it properly exercised its jurisdiction;

- The Appellant was present and was able to give her version of the facts. The General Division made a decision within its jurisdiction, and the decision is not patently unreasonable in light of the relevant evidence;

- To determine whether just cause for leaving an employment exists, it must be asked whether, on a balance of probabilities, the claimant had no reasonable alternative to leaving, having regard to all the circumstances;
- The Tribunal is not empowered to retry a case or to substitute its discretion for that of the General Division. The Tribunal's powers are limited by subsection 58(1) of the *DESD Act*.

- Unless the General Division failed to observe a principle of natural justice, erred in law or 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, and its decision is unreasonable, the Tribunal must dismiss the appeal.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the standard of review applicable in this case.

[11] The Respondent submits that the standard of review applicable to questions of law is correctness, and the standard of review applicable to questions of mixed fact and law is reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50).

[12] The Tribunal notes that in *Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal states in paragraph 19 of its decision that when the Appeal Division "acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court."

[13] The Federal Court of Appeal proceeded to note that, "not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards," for the Federal Court and the Federal Court of Appeal."

[14] The Federal Court of Appeal concludes by stating that "when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act."

[15] The mandate of the Appeal Division of the Social Security Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[16] Consequently, unless the General Division failed to observe a principle of natural justice, erred in law or 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, the Tribunal must dismiss the appeal.

ANALYSIS

[17] When it dismissed the appeal of the Appellant, the General Division found the following:

> [Translation]
> [38] In *Lamonde*, the Court stated that only the facts that existed at the time the claimant left an employment must be considered when determining if one of the exceptions apply (*Canada (Attorney General) v. Lamonde* 2006 FCA 44).
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> [39] Accordingly, it was not the fact that her employer breached the collective agreement by bumping the claimant from her substitute position, nor the fact that the employer offered her a position that she may not have been able to hold that caused the claimant to refuse to accept the new position, since this information was unknown to her at the time of her refusal.
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> [40] Based on the *Employment Insurance Act*, the claimant must show that this was the only reasonable alternative.
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> [41] As mentioned at the hearing, the claimant does not dispute that she refused the position offered, but argues that she could not accept a position that was not legitimately offered to her by her employer.
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> [42] However, as mentioned, the claimant could not have known at the time of her refusal that she was not eligible for the position. Furthermore, the claimant stated that she refused the position because she did not want to work Saturdays. In the Tribunal's opinion, the claimant's refusal to accept the 23.5-hour position that required her to work on Saturdays was the reason for leaving the employment, and the claimant created her unemployment situation by refusing the position. Therefore, despite the fact that the employer could have withdrawn this job offer from the claimant, she was unaware of the fact at the time of her refusal. She could have agreed to fill this position, and a new unemployment situation might have been created if the employer had withdrawn its offer of this position on the ground that it violated the collective agreement. Nevertheless, accepting this position would have been a reasonable alternative within the meaning of the *Employment Insurance Act* since she could not have known that she was not entitled to fill this position because she did not know that the employer was not capable of removing her from her previous position.

> [43] Therefore, despite the fact that the employer breached the collective agreement by removing the claimant from her position and offering her a position she could not fill, it was unaware that the claimant would refuse this new position at the time it made her the offer, and the claimant was unaware that she could not fill it.
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> [44] Therefore, and considering the evidence and arguments presented by the parties, the Tribunal considers on a balance of probabilities, that the claimant's refusal of an employment offered as an alternative to the anticipated loss of her employment, connected with voluntary leaving under paragraph 29 (b.1) (i) of the *Act*, was not the only reasonable solution.

[18] The appellant complains intently that the General Division considered only the facts known to the parties at the time of the events on October 27, 2014 rather than the actual facts present at the time of the events. She argues that the actual facts ignored by the General Division are that the employer admitted on August 17, 2015 that the Appellant should never have lost her employment and that the employment offered to her in October 2014 was not legitimate under the collective agreement.

[19] In the Tribunal's opinion, the circumstances referenced in section 29 are those existing at the time that the Appellant refused the employment (*Canada (AG) v. Furey*, [1996] FC No. 971; *Canada (AG) v. Lamonde*, 2006 FCA 44.

[20] Accordingly, the General Division correctly determined that the Appellant did not have just cause to base her decision to leave her employment on events that came to light after she filed her claim for benefit. The fact that the employer admitted to its error later is immaterial to a determination of whether the Appellant had just cause to leave her employment when she did.

[21] The evidence before the General Division clearly shows that the Appellant said she had refused the position because she did want to work on Saturdays. The General Division did not err in finding that the Appellant's refusal to accept the 23.5 hour position requiring her to work Saturdays is the cause of her leaving her employment, and that the Appellant is the one who created her unemployment situation by refusing the employment in question.

[22] The case law has clearly established that a person who refuses an offer of employment when that person is unemployed or on the verge of becoming unemployed,

even if the conditions of the position offered do not match the person’s preferences, is considered to have left his or her employment voluntarily without just cause.

[23] The Tribunal finds that the General Division's decision is based on the material brought before it and is a reasonable decision consistent with the legislative provisions and case law.

[24] The Tribunal's intervention is unwarranted.

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division