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

Citation: *R. S. v. Canada Employment Insurance Commission,* 2016 SSTADEI 323

Tribunal File Number: AD-15-48

BETWEEN:

R. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DECIDED On the Record

DATE OF DECISION: June 22, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 6, 2014, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that benefits under the *Employment Insurance Act* (EI Act) were not payable. In particular, the GD determined that the Appellant did not have just cause for voluntarily leaving his employment pursuant to sections 29 and 30 of the EI Act.

[2] An application for leave to appeal the GD decision was filed with the Appeal Division (AD) of the Tribunal on February 4, 2015 and leave to appeal was granted on September 15, 2015.

[3] A Notice of Hearing was sent to the parties setting a teleconference hearing at 9:30am Mountain Time on January 12, 2016. The Respondent attended but the Appellant did not.

[4] The AD Member waited for the Appellant to join. By 10:12am on January 12, 2016, the AD Member adjourned the hearing to determine why the Appellant had not attended and to provide the Respondent with an opportunity to file additional submissions.

[5] In a letter dated January 13, 2016, the Tribunal noted:

> The Appellant did receive notice of the hearing date and time, by telephone call with the Tribunal on January 4, 2016. He did not think he was required to attend the hearing on January 12, 2016.
>
> The Commission will provide written submissions by January 15, 2016, on the issue of the standard of review that the Appeal Division should apply to the decision of the General Division appealed from, in the light of recent Federal Court of Appeal decisions.
>
> For these reasons, after the submissions of the Commission are reviewed, the Appeal Division will decide whether this appeal will proceed on the written record or by rescheduling a hearing.

[6] The Appellant was contacted by the Tribunal on January 25, 2016 in order to verify his address and contact information.

[7] The hearing was rescheduled to April 19, 2016. A new Notice of Hearing was sent to the parties. It was sent to the Appellant by regular mail, email and courier. The Appellant called the Tribunal on April 1, 2016 to advise that he did not intend to attend the hearing. He did not wish to reschedule the hearing or to withdraw his appeal. He was advised that it was in his best interest to attend the hearing, but he repeated that he would not.

[8] On April 7, 2016, the AD Member cancelled the hearing and advised that a decision would be rendered in writing.

[9] This appeal proceeded on the record for the following reasons:

a) the refusal of the Appellant to attend a hearing;

b) the Member has determined that no further hearing is required; and

c) the requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[10] Whether the GD made erroneous findings of fact in a perverse or capricious manner or without regard for the material before it.

[11] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the matter to the GD for reconsideration, or confirm, rescind or vary the GD decision.

THE LAW

[12] According 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, 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.

[13] Leave to appeal was granted on the basis that the Appellant had set out reasons which fell into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraph 58(1)(c) of the DESD Act.

[14] Subsection 59(1) of the DESD Act sets out the powers of the AD.

SUBMISSIONS

[15] The Appellant made no submissions after leave to appeal was granted or for the hearing. In his application for leave to appeal, he submitted that there were errors in the GD decision related to failure to attempt to resolve workplace issues, excessive overtime and intolerable work hours, changes in his duties and his refusal due to health hazards, and the hours stated in his record of employment.

[16] The Respondent submitted that:

a) the GD considered the circumstances and reviewed both the Appellant's and the employer's versions of the situation providing reasons for giving credibility to the employer;

b) the GD determined that the Appellant had voluntarily left, applied the correct legal test to the facts of the case;

c) the GD decision is consistent with the legislation and jurisprudence;

d) the GD provided reasoning for its determination that just cause had not been proven pursuant to subsection 29(c) EI Act, namely that the Appellant had not returned to work after his dental work and did not call in. When he attempted to return to work he was

advised the employer considered he had quit which is confirmed by the fact the Appellant did not grieve this loss of employment with his union;

e) The GD decision is one of the reasonable outcomes given all the facts before it; and

f) There is no evidence that the GD acted impartially, erred in law or made an erroneous finding of fact in a perverse or capricious manner.

STANDARD OF REVIEW

[17] The Respondent submits that the AD must show deference to the GD on factual questions or questions of mixed fact and law and that the degree of deference that the AD accords to decisions of the GD should be consistent with the deference accorded to the former Board of Referees by the Employment Insurance Umpires. Since this appeal involves questions of mixed fact and law, the AD should show deference to the GD's decision.

[18] 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.

[19] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[20] However, in *Canada (AG) v. Paradis; Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of employment insurance decisions rendered by the GD.

[21] The Federal Court of Appeal, in *Canada (AG) v. Maunder*, 2015 FCA 274, referred to *Jean, supra* and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the AD to decisions of the GD. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan*.

[22] In the recent matter of *Hurtubise v. Canada (AG)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the AD which had dismissed an appeal from a decision of the GD. The AD had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The AD had concluded that the decision of the GD was "consistent with the evidence before it and is a reasonable one…" The AD applied the approach that the Federal Court of Appeal in *Jean, supra,* suggested was not appropriate, but the AD decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[23] There appears to be a discrepancy in relation to the approach that the AD of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the GD, and in particular, whether the standard of review for questions of law and jurisdiction in employment insurance appeals from the GD differs from the standard of review for questions of fact and mixed fact and law.

[24] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

ANALYSIS

Background

[25] The Appellant worked for this employer from May 2013 to October 2013. His last day of work was October 8, 2013. He asked for time off to get dental work done. He was expected to return to work on October 10, 2013. He did not and the employer considered that he had abandoned his job.

[26] The Appellant filed an initial claim for employment insurance benefits in November 2013. The Commission denied the claim because it determined that the claimant voluntarily left his employment without just cause. The Appellant requested reconsideration and the Commission maintained its decision of March 3, 2014.

[27] The Appellant appealed to the Tribunal. The GD dismissed the Appellant's appeal finding that he had not proven just cause to voluntarily leave his employment in accordance with the EI Act.

Leave to Appeal

[28] The decision granting leave to appeal noted the following possible errors of fact in the GD decision:

a) failure to attempt to resolve workplace issues;

b) excessive overtime and intolerable work hours;

c) changes in his duties and his refusal due to health hazards; and

d) the hours stated in his record of employment.

[29] The Application pointed to paragraphs [13] to [15] and [19] of the GD decision as the ones containing erroneous findings of facts.

[30] I note that the Appellant did not add to the submissions made in the Application, as he declined to attend a hearing before the AD.

GD Decision

[31] To be a reviewable, a finding of fact must be erroneous and be made in a perverse or capricious manner or without regard for the material before it: subsection 58(1)(c) of the DESD Act.

Paragraph [13]

[32] The error asserted by the Appellant is that the workplace issues were not resolvable.

[33] The GD noted that "it is the claimant's responsibility to attempt to resolve these workplace issues and failing that, the claimant must demonstrate that he had no reasonable alternative but to leave his employment." This statement was not an error in a finding of fact.

[34] In its analysis at paragraphs [14] to [21] the GD concluded that the Appellant did not demonstrate that he had no reasonable alternative.

Paragraph [14]

[35] The error asserted by the Appellant relates to the sentence "He explained that this was the time when the employer was rolling back the work hours because everyone was getting burned out". The Appellant's position is that "everyone" is misleading because it was only the receivers and that was two people, him and one other individual.

[36] The GD's finding was not perverse or capricious or without regard to the material before it. This sentence referred to the Appellant's oral evidence.

Paragraph [15]

[37] The Appellant argues that he did not take the opportunity to work indoors because of health hazards.

[38] The GD's finding was that "he did not attempt the new job and therefore it cannot be said that the new job was unsuitable" and "the change in the claimant's duties does not show just cause for voluntarily leaving".

[39] These findings were correct. The Appellant did not take the job to work indoors. He did not change his duties to the indoor duties and, therefore, "change of duties" cannot be the basis for his voluntary leaving.

Paragraph [19]

[40] The Appellant argues that the indoor jobs did not give him an opportunity to pursue his apprenticeship and that he was working intolerable hours.

[41] The GD's finding was that the Appellant had "not shown that his working conditions were so intolerable that he was left with no choice but to leave when he did" and "he made the decision to not return to work and he did so without first fulfilling his obligation to find new employment before leaving".

[42] The Appellant had argued before the GD that he worked too many hours and excessive overtime and the GD noted these arguments in its decision.

[43] The GD found that excessive overtime was resolved at the time the Appellant became unemployed. This finding of fact was based on the evidence and was not made in a perverse or capricious manner or without regard to the material before it. It was based on the Appellant's evidence.

No Reviewable Error

[44] The Appellant's submissions in this appeal re-argue the facts and arguments that he asserted before the GD.

[45] The GD is the trier of fact, and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[46] It is not my role, as a Member of the AD of the Tribunal on this appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew.

[47] The Appellant has not identified any erroneous findings of fact which the GD made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

CONCLUSION

[48] Considering the submissions of the parties, my review of the GD decision and the appeal file, I find that no reviewable error was made by the GD.

[49] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division