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

Citation: *K. A. v. Canada Employment Insurance Commission,* 2016 SSTADEI 353

Tribunal File Number: AD-15-877

BETWEEN:

K. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON: March 29 and April 21, 2016

DATE OF DECISION: July 4, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	K. A.
Representative for the Respondent (Commission)	Carole Robillard

INTRODUCTION

[1] On June 30, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant voluntarily left her employment without just cause within the meaning of the *Employment Insurance Act* (EI Act) and dismissed her appeal. The Appellant attended the teleconference hearing held before the GD on June 24, 2015. No one attended on behalf of the Respondent, but it had filed written representations.

[2] The Appellant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 4, 2015. Leave to appeal was granted on December 16, 2015, but it was limited to one possible erroneous finding of fact.

[3] The Appellant had filed a renewal claim for employment insurance (EI) benefits effective March 23, 2014. She had been employed with a home support agency until November 21, 2014. This appeal relates to her departure from that employment and whether it was a voluntary leaving as defined in the EI Act and as determined in the applicable jurisprudence.

[4] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal;

b) The information in the file, including the need for additional information; and

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

[5] The appeal hearing commenced as scheduled, on March 29, 2016. During the hearing, the Appellant referred to a complaint before the Labour Board which was settled by an

agreement between her and her former employer. This document was not in the record before the GD or presented as evidence to the GD. The hearing was adjourned in order to give the Appellant an opportunity to file a copy of this document and the Respondent to review it. The hearing was reconvened on April 21, 2016 and completed.

ISSUES

[6] Whether the AD can consider evidence not adduced before the GD, in the form of a settlement agreement as described above.

[7] Whether the GD made an erroneous finding of fact - specifically the finding that the Appellant "submitted a verbal resignation and went home" - in arriving at its decision dismissing the Appellant's appeal before the GD.

[8] Whether the AD should 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.

THE LAW

[9] 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.

[10] Leave to appeal was granted on the following basis (reference to paragraphs of the Leave to Appeal Decision):

> [4] The Applicant submitted in support of the Application that there were errors in the GD decision, including those related to:
>
> a) The GD's finding that she "submitted a verbal resignation and went home";
>
> […]
>
> [17] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant asserts errors of fact, as discussed in paragraphs [4] a), [11] and [12] above, and provides an explanation on how the GD is said to have based its decision on these erroneous findings of fact that were made in a perverse or capricious manner or without regard for the material before it.
>
> [18] Considering the arguments raised by the Applicant and my review of the GD decision and docket, I am satisfied that the appeal has a reasonable chance of success on this one ground, namely, subparagraph [4] a).

[11] The powers of the AD include but are not limited to substituting its own opinion for that of the GD. Pursuant to subsection 59(1) of the DESD Act, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

SUBMISSIONS

[12] The Appellant's submissions can be summarized as follows:

a) She did not leave her employment, she was dismissed;

b) On November 9, 2014, she had an unpleasant meeting with her supervisor (D. Halloran);

c) She worked the rest of that day, that night, the next day and for two weeks;

d) She tried to speak to the supervisor many times between November 10 and 13, 2014; on November 13, 2014, the supervisor agreed to meet her on November 19, 2014;

e) On November 19, 2014, she met with her supervisor and was told that November 21, 2014 was her last work day;

f) She applied elsewhere for jobs but was bad-mouthed by her former supervisor;

g) She filed a Labour Board complaint, which resulted in a signed agreement with the employer; and

h) She was told that with the agreement, she would receive EI benefits.

[13] The Respondent submitted that:

a) The AD hearing is not a *de novo* hearing;

b) The GD did not make an error in its conclusion that the Appellant's loss of employment was a result of her voluntarily leaving without just cause within the meaning of the EI Act;

c) The GD finding that the Appellant "submitted a verbal resignation and went home" even if erroneous does not make a difference;

d) The triggering factor to the Appellant's loss of employment was her verbal resignation;

e) The fact that the resignation was not in writing does not make it any less a resignation;

f) The fact that the Appellant tried to retract the resignation and the employer did not accept the retraction of the resignation does not change the resignation into a dismissal;

g) The burden is on the Appellant to prove just cause;

h) There are no grounds proven for an appeal before the AD;

i) The settlement agreement was reviewed and it does not change the Commission's position; and

j) The appeal should be dismissed pursuant to subsection 59(1) of the DESD Act.

[14] The Employer was not an added party in this appeal.

STANDARD OF REVIEW

[15] The Respondent submits that the applicable standard of review for mixed questions of fact and law is that of reasonableness.

[16] The Federal Court of Appeal has determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.)*, 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 (Board) is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[17] 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.

[18] However, in *Canada (A.G.) v. Paradis; Canada (A.G.) 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.

[19] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 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*.

[20] In the recent matter of *Hurtubise v. Canada (A.G.)*, 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."

[21] 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.

[22] 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

New Evidence

[23] The Appellant wishes to rely on Minutes of Settlement between her and her former employer, dated and signed in October 2015.

[24] The Tribunal must first determine whether the new evidence that the Appellant wishes to adduce can be received by the AD. There is no dispute that the new evidence was not adduced before the GD.

[25] Federal Court of Appeal decisions have held that:

a) Umpires should never receive new evidence: *Canada (A.G.) v. Taylor*, [1991] F.C.J. No. 508, *Canada (A.G.) v. Hamilton*, [1995] F.C.J. No. 1230, *Brien v. Canada (EIC)*, [1997] F.C.J. No. 492, *Canada (A.G.) v. Merrigan*, 2004 FCA 253, and *Karelia v. Canada (MHRSD)*, 2012 FCA 140;

b) Umpires were allowed to receive new evidence as long as it was "new facts" under (former) section 120 of the EI Act: *Canada (MEI) v. Bartone*, [1989] F.C.J. No. 21, *Canada (A.G.) v. Wile*, [1994] F.C.J. No. 1852, *Canada (A.G.) v. Chan*, [1994] F.C.J. No. 1916;

c) Umpires could consider new evidence that was not "new facts" in relation to a breach of natural justice: *Velez v. Canada (A.G.)*, 2001 FCA 343; and

d) Umpires could, in an exceptional case, consider new evidence that was not "new facts", on the basis of former section 120 of the EI Act or otherwise: *Dubois v. Canada (EIC)*, [1988] F.C.J. No. 768, and *Canada (A.G.) v. Courchene*, 2007 FCA 183.

[26] In *Rodger v. Canada (A.G.)*, 2013 FCA 222, the Federal Court of Appeal was faced with an appellant who tried to adduce new evidence before the Umpire, tried to adduce the same new evidence as new facts on the basis of a rescind or amend application of the original Umpire's decision and later tried to adduce new evidence before the Federal Court of Appeal. The Federal Court of Appeal decision held:

> 26 Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. R.*, 2003 FCA 317, [2003] 4 C.T.C. 206 (F.C.A.) at paragraph 5). This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.
>
> 27 As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.
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> 43 As noted in *Canada (Attorney General) v. Chan* (1994), 178 N.R. 372 (Fed. C.A.) at paragraph 10 (*Chan*), reconsideration under this section of the *Act* should remain a "rare commodity", and an Umpire should be careful not to let the process be abused "by careless or ill-advised claimants". As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[27] Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, subsections 266-267, the Office of the Umpire was been replaced by the AD of the Tribunal.

[28] To determine whether the AD can receive the new evidence requires a four part analysis, as follows:

a) Is the AD able to rescind or amend a decision of the GD?

b) Is the new evidence “new facts”?

c) If the new evidence is not “new facts”, is the new evidence in relation to a breach of natural justice?

d) If the new evidence is not “new facts”, are there other exceptional circumstances such as in the *Dubois* or *Courchene* cases?

(a) Is the AD able to rescind or amend a decision of the GD?

[29] Paragraph 66(1)(a) of the DESD Act states that a decision may be rescinded or amended “if new facts are presented” or if the Tribunal is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[30] The AD may rescind or amend a decision made by it but may not rescind or amend a decision of the GD. An application to rescind or amend a decision of the GD would need to be brought to the GD of the Tribunal.

[31] Given that there is a one year time limit within which an application to rescind or amend must be made, it may be too late for the Appellant to bring an application before the GD. In the circumstances, I will discuss the remaining questions.

(b) Is the new evidence “new facts”?

[32] In the *Chan* case, the Federal Court of Appeal stated that reconsidering a decision on the basis of new facts should be a rare occurrence:

> ¶ 11 Reconsideration of a decision by an umpire on the basis of "new facts" having been submitted is and should remain a rare commodity. Unemployment insurance claimants are given an exceptionally large number of opportunities to challenge the decisions affecting them and umpires should be careful not to let the reconsideration process be abused by careless or ill-advised claimants. (…)

[33] The new evidence that the Appellant seeks to adduce is in the form of Minutes of Settlement from a Labour Board matter between her and her former employer. The Appellant relies on this document to show that she did not voluntarily leave her employment.

[34] There is a difference between new facts and new evidence supporting facts already known. As stated in *Chan, supra*: “A different version of facts already known to the claimant, mere afterthoughts or the sudden realization of the consequences of acts done in the past are not new facts.”

[35] Evidence available at the time of the hearing before the GD, but not produced, cannot be considered as a new fact: *Velez, supra*.

[36] “New facts” must have occurred after the decision was rendered or occurred prior to the decision but could not have been ascertained by diligence: *Chan, supra*.

[37] The question is not whether the Appellant was aware that the new evidence had to be produced at the GD hearing but whether the Appellant acting diligently could have produced this evidence: *Canada (A.G.) v. Hines,* 2011 FCA 252.

[38] Here, the new evidence which the Appellant seeks to adduce is in the form of a document which did not exist at the time of the GD hearing. The document is dated in October 2015, and the GD hearing was in June 2015. Therefore, it could meet the legal test of “new facts”, if it would have a major impact on the outcome of the case.

[39] Although the AD cannot rescind or amend a decision of the GD, it may be able to receive the document in another manner.

(c) Is the new evidence in relation to a breach of natural justice?

[40] The Appellant did not rely on a breach of natural justice in her application for leave to appeal.

[41] Also, the new evidence that the Appellant seeks to adduce is not in relation to a breach of natural justice. It cannot be received by the AD under the *Velez* exception.

(d) Are there other exceptional circumstances such as in the *Dubois* or *Courchene* cases?

[42] *Courchene, supra,* and *Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (FCA) related to documents that settled a labour or employment dispute between an EI claimant and his former employer. *Dubois, supra,* was affirmed in the *Courchene* case.

[43] In *Courchene*, the Umpire allowed in evidence of minutes of settlement that were not before the Board, by way of an application to rescind and amend. In *Boulton*, the agreement was in evidence before the Board. In *Dubois*, the Federal Court of Appeal noted that new evidence, in the form of a medical certificate, should have been allowed to be introduced before the Umpire where no rescind or amend application had been brought.

[44] Before me, the Respondent agreed that the AD could receive the new document. However, it argued that the Minutes of Settlement do not contradict the GD's finding on voluntary leaving.

[45] I note that the *Dubois*, *Courchene* and *Boulton* line of cases were decided within a regime that permitted an Umpire to rescind or amend a decision of the Board. As stated above, the AD cannot rescind or amend a decision of the GD. However, the AD has been considering a decision of the GD a reviewable decision using the same principles as that of a decision of the Board (appealed to the Umpire).

[46] Given the recent decisions in *Paradis*, *supra*, *Maunder*, *supra*, and *Hurtubise*, *supra* and the differences between section 66 of the DESD Act and former section 120 of the EI Act (rescind and amend provision), I am uncertain whether this line of cases is binding on the AD considering a decision of the GD.

[47] One reading of this line of cases is to limit their application to misconduct matters in which a settlement agreement between the claimant and the employer contradicted a finding of misconduct on the part of the claimant. However, some decisions of the AD have held that these cases are not limited in this manner: for example AD-14-99 (*C. B. v Canada Employment Insurance Commission*, 2016 SSTADEI 40).

[48] In the circumstances and until the Federal Court of Appeal rules to the contrary, I will seek guidance from the existing EI jurisprudence. On this specific issue, I will receive and review the new evidence of the Appellant.

New Document and Voluntary Leaving

[49] The Appellant submits that the Minutes of Settlement state that her former employer would not block her claim for EI benefits and that her former employer told her that it could not change the reasons for issuing - from "quit" to something else - in the ROE. Her position is that the Minutes of Settlement support the conclusion that she did not voluntarily leave her employment.

[50] The Minutes of Settlement include the following recitals:

> **WHEREAS K. A.** was employed with X as a casual Home Support Worker;
> **AND WHEREAS** K. A. ceased working on November 21, 2014;
> **AND WHEREAS** K. A. filed a complaint pursuant to the Nova Scotia *Labour Standards Code;*
> **AND WHEREAS** K. A. and X have negotiated mutually acceptable terms of separation;
> **AND WHEREAS** K. A. and X agree that the terms of settlement should be evidenced in writing in these Minutes of Settlement
> **NOW THEREFORE these** Minutes of Settlement witnessth that for and in consideration of the terms hereinafter contained, K. A. and X (hereinafter collective referred to as the "Parties") agree as follows:

[51] By the Minutes of Settlement, the Appellant and her former employer agreed to terms which include:

> 1. X shall pay to K. A. two weeks' wages plus 4% vacation pay, based on 26 hours per week at $17.95 per hour, in accordance with these Minutes of Settlement and subject to applicable deductions and withholdings.
>
> 2. K. A. acknowledges that the amount specified at paragraph 1 above is inclusive of all entitlements pursuant to the Nova Scotia *Labour Standards* Code, Nova Scotia *Human Rights Act,* the common law, employment contract or otherwise.
>
> 3. X shall issue an amended Record of Employment (ROE) to include the amount paid as outlined in paragraph 1 only. X will not amend Block 16 - "Reason for issuing this ROE" on the amended ROE. K. A. agrees that she is wholly responsible for any Employment Insurance (EI) repayment that may be required. X agrees that it will not participate in any appeal with respect to K. A. entitlement to EI benefits.
>
> 4. K. A. agrees to execute the attached Release and Confidentiality Agreement. K. A. agrees to return an original executed copy of these Minutes of Settlement and attached Release and Confidentiality Agreement to X. The payment of settlement

> monies contemplated in Paragraph 1 is conditional on Atkin's execution and return of these Minutes of Settlement and attached Release and Confidentiality Agreement.
>
> 5. K. A. agrees to wholly discontinue her Labour Standards Complaint against X with respect to the cessation of her employment on November 21, 2014.
>
> 6. The Parties acknowledge that they have received independent legal advice in this matter, and that the terms of these Minutes of Settlement and attached Release and Confidentiality Agreement are understood and accepted freely and voluntarily by each of them.

[52] *Boulton*, *supra*, is authority for the proposition that a settlement agreement can constitute evidence that could rebut other evidence of misconduct in some circumstances and may be considered by the Umpire in appropriate cases.

[53] In *Boulton*, the Federal Court of Appeal referred to *Canada (A.G.) v. Wile* (A-233-94) and stated:

> The ratio of the *Wile* decision is that before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct which would contradict the position taken by the employer during the investigation by the Commission or at the time of the hearing before the Board.

Under the agreement in *Boulton*, all grievances were withdrawn as fully and finally resolved and the claimant was reinstated to his employment and then laid off in accordance with his seniority on the same date. The Federal Court of Appeal held that the agreement did not expressly or implicitly admit that the facts on file with the Commission were erroneous or did not accurately reflect the events leading to termination of employment and, therefore, that the terms of the agreement did not contradict the earlier finding of misconduct.

[54] In *Wile*, the settlement agreement contained the following sentence: “Neither party admits or alleges any fault for the unhappy differences that have arisen between them.” The Federal Court of Appeal held that this sentence could not be taken to nullify the basis for finding that the claimant lost his employment by reason of his own misconduct.

[55] In *Courchene*, the Umpire concluded that the minutes of settlement “contradict a finding of misconduct on the claimant’s part.” The Federal Court of Appeal held that the terms, taken

together, could reasonably be understood to contradict a finding of misconduct on the part of the claimant and referred specifically to:

> The letter of termination is replaced by a letter of resignation, the respondent's personnel file is expunged to eliminate all information related to the grievance, the Record of Employment is amended to indicate that the employer was terminated by mutual agreement and, also of considerable significance, the respondent is given meaningful compensation (12 weeks pay after 1½ years of employment).

[56] The terms of the Minutes of Settlement in the present matter are very different from the terms of the agreements in the *Boulton* and *Courchene* cases. The only mention of relevance to the reasons for job separation is in point 3 about the ROE. It states that the employer will not change the reasons for issuing the ROE. Therefore, the reason remains "quit".

[57] On the question of whether the Minutes of Settlement is evidence in respect of voluntary leaving which contradicts the position taken by the employer during the investigation by the Commission or at the time of the hearing, I answer in the negative.

[58] Applying the Federal Court of Appeal jurisprudence to the current matter, it is clear that the Minutes of Settlement between the Appellant and her former employer do not contradict the finding of voluntary leaving made by the GD.

Erroneous Finding of Fact

[59] The finding of fact which the Appellant alleges was erroneous and for which leave to appeal was granted is: "submitted a verbal resignation and went home."

[60] The Appellant argues that the finding is wrong because:

a) She could not resign verbally; a resignation has to be in writing;

b) She stayed at work after the verbal dispute with her supervisor: on the rest of that day, she worked that night, worked the next day and worked for two weeks; it was an error to find that she "went home";

c) She attempted to talk to her supervisor and was given the impression on the phone that they would work things out; and

d) Her supervisor dismissed her when they met in person.

[61] The Respondent submits that whether the Appellant went home right away or not is not relevant to the issue of voluntary leaving. The Appellant gave her verbal resignation, she may have tried to retract it and the employer did not accept the retraction, but it was no less a resignation.

[62] There is no dispute that the Appellant verbally resigned on November 9, 2014, during a discussion with her supervisor.

[63] I find that the whether the Appellant "went home" right after that discussion or not is not a finding upon which the GD based its decision. It also does not change the fact that the Appellant verbally resigned. Therefore, the GD finding that the Appellant: "submitted a verbal resignation and went home" was not an erroneous finding of fact as described in subsection 58(1)(c) of the DESD Act.

[64] The remainder of the Appellant's submissions in this appeal re-argues the facts and arguments that she asserted before the GD.

[65] 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.

[66] It is not my role, as a Member of the AD of the Tribunal on hearing 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.

[67] The Appellant has not identified any errors in law or 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

[68] 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.

[69] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division