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

Citation: *A. H. v. Canada Employment Insurance Commission,* 2016 SSTADEI 367

Tribunal File Number: AD-15-1209

BETWEEN:

A. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 7, 2016

DATE OF DECISION: July 13, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the disqualification is set aside.

INTRODUCTION

[2] On September 30, 2015, the General Division of the Tribunal determined that:

> - The Appellant left her employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (the "*Act*").

[3] The Appellant requested leave to appeal to the Appeal Division on November 9, 2015, after receiving communication of the General Division on October 14, 2015. Permission to appeal was granted on November 17, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal.
- The credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present at the hearing and represented by Stan Zigelstein. The Respondent was represented by Warren Dinham.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (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;

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.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and/or in law when it concluded that the Appellant did not have just cause to leave her employment pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- the Appellant submits that the General Division did not give due consideration to all the circumstances of the case;

- if the General Division had given due consideration to all the circumstances affecting her, the General Division would have concluded she was entitled to receive benefits;

- the General Division analysis does not refer to the Appellant's and husband's medical problems and the necessity of the Appellant's health benefits which would be unavailable in retirement if the Appellant remained employed past December 31, 2014;

- furthermore, the General Division erroneously concluded there was no direction or encouragement from management for the Appellant to retire when she did.

- the September 27, 2012 letter incentivized eligible employees to retire before December 31, 2014, with the carrot of ongoing health and dental benefits and conversely penalized eligible employees who wished to retire after December 31, 2014;

- in light of their failing health, she had no reasonable alternative to leaving her employer and securing extended retiree health and dental benefits, which would be unavailable to her and her husband had she remained employed past the December 31, 2014 cut-off date.

[9] The Respondent submitted the following arguments against the appeal.

- the General Division did not err in law in making its decision. The General Division based its decision on a correct interpretation of sections 29 and 30 of the *Act*;

- when a claimant voluntarily leaves his/her employment ,the burden is on the claimant to prove that there was no other reasonable alternative to leaving when he did;

- the Federal Court of Appeal has indicated that it is not sufficient for the claimant to prove he was reasonable in leaving his employment; reasonableness may be good cause but it is not necessarily just cause. It must be shown that after consideration of all the circumstances, the claimant had no other reasonable alternative to leaving his employment;

- in the present case, the General Division heard the oral testimony of the Appellant, reviewed the documentary evidence and applied the relevant provisions of the legislation and case law to the facts of the case.

- the General Division determined that while it was sympathetic to the Appellant's circumstances, she did not meet the requirements to be eligible to receive benefits;

- the decision of the General Division to uphold the disqualification would appear to fall entirely within the parameters of the above mentioned legislation and jurisprudence and as a result is not an error in either the interpretation or application of the law;

- the General Division did not base its decision or order on an erroneous finding of fact that it had made in a capricious manner without regard of the material before it.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the standard of review for questions of law is correctness and for questions of mixed fact and law is reasonableness - *Canada (AG) v. Hallee*, 2008 FCA 159.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it 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 further indicated that:

> "[n]ot 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 Court concluded that "[w]he[n] it 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 as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada*, 2015 FCA 274.

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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] The Appellant is appealing the General Division decision dated September 30, 2015.The issue under appeal was whether or not the Appellant had had voluntarily left her employment without just cause pursuant to sections 29 and 30 of the *Act*.

[18] Based on the information on file, the Respondent concluded that the Appellant could not be paid benefits because she had voluntarily left her employment without just cause. On September 30, 2015, the General Division dismissed the appeal of the Appellant on the basis that the Appellant voluntarily left her employment for personal reasons since she could have continued working for the employer.

[19] The facts of the present case are not in dispute. An initial claim for benefits was established effective 04 January 2015 (GD3-3 to GD3-16). On her application for benefit, the Appellant indicated that she retired because the company said that if she retired on December 31, 2014, she would receive her heath benefit coverage for a lifetime (GD3-7). The Appellant provided a copy of the employer's notice dated 27 September 2012 confirming that as a result of the corporate acquisition of Alcon Canada Inc., retiree extended health and dental plans where to be discontinued effective January 1, 2015 (GD3-19 to GD3-21).

[20] Whether one had just cause to voluntarily leave an employment depends on whether she had no reasonable alternative to leaving having regard to all the circumstances including several specific circumstances enumerated in section 29 of the *Act*. The burden of establishing just cause rests on the Appellant.

[21] Although the General Division correctly stated the applicable legal test, the Tribunal finds that it failed to apply said test to the facts of the case and ask itself if the Appellant, having regard to all the circumstances, had no reasonable alternative to leaving her employment. Therefore, the test was not applied and interpreted correctly.

[22] Furthermore, the General Division ignored the evidence before it when it concluded that there was no direction or encouragement from management for the Appellant to retire when she did.

[23] The Tribunal is therefore justified to intervene and render the decision that should have been rendered by the General Division in the present case.

[24] The Tribunal finds that there was a significant modification of terms and conditions by the employer in regards to the Appellant's health benefits attached to the pension from her employment. A decision had to be made on or before December 31, 2014 in order to be entitled to the life time health benefits through her employer.
Contrary to the conclusions of the General Division, she was clearly directed into adopting a course of conduct which was not of her own choosing.

[25] That is analogous to a change in wages or salary and is a circumstance to be taken into account in determining whether, having regard to all the circumstances, the Appellant had no reasonable alternative to leaving her employment.

[26] In light of the Appellant's and her spouse's failing health, she had no reasonable alternative to leaving her employer and securing extended retiree health and dental benefits, which would be unavailable, had she remained employed past the December 31, 2014 cut-off date.

[27] Given her advanced age (63 years at the relevant time), she could not be reasonably expected to work more than two years past the December 31, 2014 cutoff date. Had the company policy offering retiree extended health and dental benefits not been discontinued for those who were otherwise eligible and retiring after December 31, 2014, the Appellant would likely have remained with her employer for as long as her age and health permitted - her retirement was therefore forced by change in company policy.

[28] The Tribunal finds that the Appellant, having regards to the circumstances of the potential loss of important health and dental benefits, her age and her approaching eligibility for retirement, did not have any reasonable alternative to leaving her employment when she did.

CONCLUSION

[29] The appeal is allowed and the disqualification is set aside.

Pierre Lafontaine
Member, Appeal Division