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

Citation: *Canada Employment Insurance Commission v. W. P.*, 2016 SSTADEI 378

Tribunal File Number: AD-14-281

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

W. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Mark Borer

HEARD ON May 12, 2016

DATE OF DECISION: July 18, 2016

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a General Division member allowed the Respondent's appeal 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 May 12, 2015, a teleconference hearing was held. The Commission and the Respondent each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (the DESDA), 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 voluntary leaving.

[7] In their submissions, the Commission argues that the General Division member erred by finding that the Respondent had just cause for leaving his employment. Although they

recognize that if he had stayed the Respondent would have been unable to continue to collect the pension he had been receiving, they submit that leaving was a personal choice that the employment insurance fund should not be forced to cover. They also argue that ss. 29(c)(vii) of the *Employment Insurance Act* (the Act) only covers terms and conditions respecting wages or salary, and thus is not a basis for the General Division finding that the Respondent had just cause for leaving. They ask that their initial determination that the Respondent did not have just cause for leaving his employment be restored.

[8] For his part, the Respondent supports the decision of the General Division member. He admits that his pension may not technically be wages or salary, but submits that if he had stayed in his job his total income would have dropped considerably for the same work. Because of this, he asserts that he did not leave his job simply for personal reasons and had just cause to leave his employment. He asks that the appeal be dismissed.

[9] The facts of the case are not in dispute. The Respondent's Employer was the Department of National Defence (DND). At the time of his hiring, he was receiving a pension from a previous DND position of approximately $28,000 per year, which he was explicitly permitted to collect. Eventually, however, the government changed the law so that no DND employee could continue to do so and that any such persons would also be required to contribute towards the pension plan once again. In the Respondent's case, this new required contribution was $6,000 per year and would reduce the Respondent's income and net salary accordingly. The parties agree that from the Appellant's point of view this was an unexpected change which took place after the Respondent started working.

[10] After correctly stating the law, the General Division member found that given the circumstances the Respondent had no reasonable alternative to leaving. In doing so, the member relied upon ss. 29(c)(vii) to support his finding that the Respondent had shown just cause and allowed the appeal.

[11] The case law surrounding voluntary leaving is well established. In *Canada (Attorney General) v. Lessard*, 2002 FCA 469, the Court held at paragraph 10 that:

> It is clear that a claimant who wishes to rely on section 29(*c*) is not required to show that he is in one of the circumstances expressly listed in that paragraph. The list is in fact only by way of illustration (the paragraph reads "including") of the general rule that a claimant can present evidence that "having regard to all the circumstances" he "had no reasonable alternative to leaving".

[12] Therefore, contrary to the suggestion of the Commission in their written submissions (in the first paragraph of AD5 -3) and again during the hearing, it is settled law that it is not necessary for the circumstances faced by the Respondent to be perfectly reflected in ss. 29(c) of the Act.

[13] That being said, I completely agree with the Commission that the employment insurance regime does not, except in very particular circumstances, compensate claimants who leave their employment for personal reasons. As a rule, claimants who find themselves unemployed through no fault of their own will receive benefits while those who have brought about their own unemployment will not.

[14] For purposes of those who leave their job voluntarily, ss. 29(c) of the Act sets out in effect an exception which allows a claimant to collect benefits even after having left their job by choice.

[15] The reason for this is not hard to see: Parliament understood that it would be unjust and not in keeping with the objectives of the program to force claimants to remain at a job that was intolerable or where an unacceptable situation suddenly came into being.

[16] In this case, the member’s findings are clear: in the specific circumstances of this case the Respondent had no reasonable alternative to leaving because of the large gross income loss that would have resulted by staying.

[17] The member came to this conclusion based upon the uncontested evidence that the Respondent would lose $28,000 per year and have his salary reduced by an additional $6,000 in mandatory pension payments if he stayed. After citing ss. 29(c)(vii), the member found that the Respondent did not leave his employment for personal reasons, but because he stood to suffer a large drop in his income for doing the exact same work. The member also noted that the Respondent did not in any way cause or endorse the legal changes that resulted in his predicament, and could do nothing to reverse the decision.

[18] It is trite law that the General Division is the primary trier of fact, not the Appeal Division. It is the General Division that is tasked with hearing evidence, determining the law, making findings of fact, applying the law to those facts, and coming to a conclusion.

[19] By contrast, the role of the Appeal Division is to perform an oversight function purely as set out in ss. 58(1) of the DESDA. This means that I cannot intervene simply because I may disagree with the General Division's decision. Rather, I may only intervene if a ss. 58(1) error has been made.

[20] I find that the member's conclusion falls within the range of possible acceptable outcomes, and was based upon the law and the evidence. It cannot be said to have been made in a perverse or capricious manner or without regard to the evidence.

[21] After listening to the Commission's arguments and considering their written submissions, I am not convinced that the member erred. In my view, as evidenced by the decision and record, the member conducted a proper hearing, weighed the evidence, made findings of fact based upon the evidence, established the correct law, and came to a conclusion that was intelligible and understandable.

[22] This appeal must therefore fail.

CONCLUSION

[14] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division