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

Citation: *D. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 368

Tribunal File Number: AD-14-359

BETWEEN:

D. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: June 7, 2016

DATE OF DECISION: July 14, 2016

Canada

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal against the previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On June 7, 2016, 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 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. The facts of the case are not disputed.

[7] The Appellant's Employer was the Department of National Defence (DND). At the time of his hiring, he was in receipt of a DND pension of approximately $49,000 from a previous DND position, which he was explicitly permitted to continue to collect. Eventually, however, the government changed the law so that no employee of DND could continue to collect a DND pension and that any such persons would also be required to contribute towards the pension plan once again. This would reduce the Appellant's income and net salary accordingly, and so the Appellant engaged in a job search and eventually voluntarily left his employment.

[8] In his submissions, the Appellant largely re-stated the arguments he had made to the General Division, noting that the loss of $49,000 and the fact that he would now once again have to contribute thousands of dollars to his pension was a serious financial blow. He continues to feel that his actions were entirely reasonable, since if he stayed in his job he would be doing the same work for far less pay, and noted that para. 29(c)(vii) of the *Employment Insurance Act* (Act) appears to be in his favour. He admits that a pension is not the same as wages per se, but argues that it is analogous and that the law should be flexible. He asks that his appeal be allowed.

[9] In their submissions, the Commission supports the decision of the General Division member. They agree with the member that the Appellant had alternatives to leaving his employment, and that he should have stayed in his job. They find no error in the member's decision, including his distinguishing of para. 29(c)(vii), and ask that it be upheld.

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

[11] Therefore, contrary to the submissions of the Commission 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.

[12] The General Division member, at paragraphs 29 and 30 of his decision, found that:

> "[The Appellant] stated that the overall picture of his situation, the surrendering of the pension to become a contributor to the pension plan as well as a loss of the indexing credits, must be considered as part of the overall reasons that would result in a significant modification of net income.
>
> The Tribunal believes that the above assumption is wrong. The Appellant speaks of a significant modification of terms and conditions respecting wages or salary… The Tribunal finds that the Appellant's pension income is not part of his wages or salary… The Legislation is very specific and neither [the Commission] nor a Tribunal has the authority to give a wide interpretation."

[13] With the utmost of respect to the General Division member, based upon the explicit comments in *Lessard* as noted above I cannot agree with his view.

[14] I also note that the member wrote at paragraph 37 of his decision that:

> "It has long been held that a claimant should not leave his employment without first securing another position."

[15] No particular section of the Act or decision of the Courts is cited for this proposition. I note that there are many cases (such as harassment or an unsafe work environment, for example) where just cause for leaving one's employment could be found without the claimant having secured alternative employment. This alone is enough to show that the above statement is not a correct assessment of the law.

[16] To be clear, it was (and is) entirely open to the member to consider the law and the evidence, to find that the Appellant had a reasonable alternative to leaving his employment, and therefore conclude that he did not have just cause as required by the Act.

[17] But to do so on the basis that the various examples in ss. 29(c) can only be pleaded by a claimant if they exactly match their circumstances, or that a claimant must have a new

job secured before leaving, are each errors of law which I am obligated to intervene to correct.

[18] The correct remedy for these errors is a new hearing before the General Division, so that the Appellant can give evidence and have the opportunity to make his case in full.

[19] This appeal must therefore succeed.

CONCLUSION

[20] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

Mark Borer
Member, Appeal Division