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

Citation: *E. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 388

Tribunal File Number: AD-15-1082

BETWEEN:

E. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 7, 2016

DATE OF DECISION: July 20, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On September 4, 2015, the General Division of the Tribunal determined that the Appellant left his employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (*Act*).

[3] The Appellant requested leave to appeal to the Appeal Division on October 2, 2015. Permission to appeal was granted on October 15, 2015.

TYPE OF HEARING

[4] The Tribunal held a teleconference 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 and his representative, Samantha Clarke, were present at the hearing. The Respondent was represented by Warren Dinham.

THE LAW

[6] Subsection 58(1) of *the Department of Employment and Social Development Act* (*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 when it concluded that the Appellant did not have just cause to leave his employment pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

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

- He was struggling with depression as a result of being harassed in the workplace by another employee without any support from his supervisor;

- He had no other choice but to leave his position to try to improve his mental health and regain his dignity;

- He made complaints about the two instances of harassment to his team leader and to the recruiter and nothing was done to investigate the issue or provide peace of mind to the Appellant as he struggled with daily psychological stress and fear of what could happen to embarrass and harass him in the workplace from day to day;

- There is significant evidence that was not considered by the General Division, more specifically, the text exchange between the Appellant and his team leader at Hewlett Packard;

- The text message furthers the position of the Appellant showing that he had just cause for leaving his employment as a result of the harassment he experienced during his employment;

- The text message from the Appellant's team leader was sent on February 26, the day after he submitted his resignation. He expressed remorse after the Appellant decided to leave his position. This shows that there was no investigation underway or hope of rectifying the matter on behalf of the Appellant;

- It is an unreasonable expectation to require the Appellant, who is suffering from psychological harassment and depression, to subject himself to further mistreatment in the workplace;

- Furthermore, it is unreasonable to expect a person suffering from psychological harassment to wait indefinitely for assistance with an instance of workplace harassment that was taking a toll on his mental health;

- The email sent to the recruiter explained the reasons for the Appellant's departure from the position. Although in the email, the Appellant states that he left his job voluntarily, it is important to take note that he had just cause for leaving within the meaning of the *Act*.

[9] The Respondent submits the following arguments against the appeal:

- Subsection 29 (c) of the *Act* indicates that just cause exists if, having regard to all the circumstances, the claimant had no reasonable alternative to leaving or taking leave from the employment.

- The Appellant did not have just cause for leaving his employment with TekSystems Canada on February 25, 2015 because he failed to exhaust all reasonable alternatives prior to leaving;

- Considering all of the evidence, a reasonable alternative to leaving would have been to wait for the employer to resolve the issue or remained employed until more suitable employment was secured;

- The Appellant's displeasure with the recruiters approach to resolve the issue does not amount to harassment and does not support that the Appellant's employment was so intolerable that he had no other alternative but to leave his employment;

- The General Division reviewed the evidence, applied the correct legal test to the issue of voluntarily leaving and made a clear finding of fact on the issue before it.

- It is the Appellant's responsibility to submit all evidence he wants to provide and there is nothing in the file indicating that he was prevented to do so;

- The General Division committed no error in its decision; that its findings were reasonable and compatible with the evidence, jurisprudence and legislation that was before it; that there is nothing to suggest that its decision was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

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

[11] The Respondent submits that the applicable standard of review for questions of law is correctness and the applicable standard of review for questions of mixed fact and law is reasonableness - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[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*." 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 (AG)*, 2015 FCA 274.

[15] 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

[16] The Appellant essentially pleads that he left his employment because he made complaints about two instances of harassment to his team leader and to the recruiter and nothing was done to investigate the issue or to provide him peace of mind as he struggled with daily psychological stress and fear of what could happen to embarrass and harass him in the workplace from day to day. He therefore meets the circumstances mentioned in section 29(c) (i) s sexual or other harassment. He argues that he had no other reasonable solution but to leave his employment when he did.

[17] As mentioned by the General Division in its decision, whether one has just cause to voluntarily leave an employment under section 29(c) of the *Act* depends on whether the Appellant had no reasonable alternative to leaving having regard to all the circumstances.

[18] In the present case, the General Division came to the conclusion that the Appellant had reasonable alternatives to leaving his employment when he did. He could have taken vacation time or a leave of absence. He could have discussed the situation with his employer, continued working and could have waited for resolution to the issues. He could have found other employment before he quit.

[19] The evidence before the General Division demonstrates that the Appellant sent his employment agency recruiter an email message advising him of the harassing situation, then unhappy with the lack of immediate response sent his resignation hours later the same day. The following day, the recruiter asked the Appellant for details about the event and offered to speak with the manager, but the Appellant declined and said “no this is my final decision to resign” instead of letting the recruiter investigate and possibly resolve the issues and maintain his employment (GD3-9, GD3-19).

[20] The Tribunal is not convinced from the evidence before the General Division that the working conditions of the Appellant were so intolerable as to leave him no option but to resign immediately. No supportive medical evidence was filed. The Appellant could have finished his short term work assignment considering that there was only two weeks remaining before the end of the contract.

[21] In regards to the argument that the General Division prevented the Appellant from filing a text message (AD3-8), the Tribunal finds that no prejudice was suffered by the Appellant since the content of the text message was described by the Appellant to an agent of the Respondent during an interview and was reproduced in the docket of appeal before the General Division (GD3-28).

[22] Furthermore, the Tribunal is not convinced that the text message demonstrates that there was no investigation underway or hope of rectifying the matter on behalf of the Appellant and that he had a good relationship with his colleagues and that he was not the difficult one. The content of the text message simply does not support such an interpretation.

[23] As mentioned at the appeal hearing, the Tribunal does not have the authority to retry a case or to substitute his or her discretion for that of the General Division. The Tribunal's

jurisdiction is limited by subsection 58(1) of the *DESD Act.* 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.

[24] The Tribunal finds that the decision of the General Division is consistent with the evidence before it and that it complies with the law and the decided cases. There is no reason for the Tribunal to intervene.

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division