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

Citation: *A. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 444

Tribunal File Number: AD-15-1336

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: August 29, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	A. M.
Representative of the Appellant	D. M. Representative for the Respondent
(Commission)	Elena Kitova

INTRODUCTION

[1] On November 10, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that benefits under the *Employment Insurance Act* (EI Act) were not payable.

[2] An application for leave to appeal the GD decision was filed with the Appeal Division (AD) of the Tribunal on December 10, 2015 and leave to appeal was granted on February 1, 2016.

[3] The GD had determined that the claimant (Appellant) voluntarily left his employment without just cause within the meaning of the EI Act and dismissed his appeal regarding a disqualification imposed pursuant to section 30 of the EI Act.

[4] Leave to appeal was granted on the grounds that the GD may have 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, i.e. paragraph 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).

[5] This appeal proceeded by Teleconference for the following reasons:

(a) The complexity of the issues under appeal;

(b) The fact that the Appellant or other parties are represented; and

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

ISSUES

[6] Whether the GD made an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it, in arriving at its decision dismissing the Appellant's appeal before the GD.

[7] 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

[8] According to subsection 58(1) of the DESD Act, the only possible 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.

[9] Leave to appeal was granted on the basis of erroneous findings of fact described as follows (reference to paragraphs of the leave to appeal decision):

> [4] b) In particular, the Applicant asserts that the GD made errors in its findings of facts, as follows:
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> > (1) The Applicant did not continue to work permanent part-time 25 hours a week throughout 2013 until his departure date: GD decision [81] and [82];
> >
> > […]

> (3) Maintaining his employment in X while attending a full-time program of study in X would have been impossible: GD decision [118];
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> (4) Asking the employer for an unpaid educational leave for 4 years would have been against the employer's policy on leaves of absence (a maximum of 6 months): GD decision [118] and [119];
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> […]
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> [13] No hourly wage reduction, continued regular part time 25 hours a week and to work 5 hours per day, five days a week: The Applicant submits that he was hired in 2008 to work 5 days a week for 5 hours a day, but that this schedule lasted for about one year and his work schedule evolved from 2009 to 2013. The specific error asserted is the GD's finding that the Applicant continued to work 5 hours a day, five days a week, when the number of hours worked a day and of days worked in a week had changed.
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> […]
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> [15] Requesting a leave of absence as a reasonable alternative: The Applicant argues that the GD assumed that a leave of absence would have been approved, when it would not have been. The employer's policy on leaves of absence was a maximum of 6 months leave. The Applicant's program of study was 4 years long and in X. "Remaining job attached" and resuming his duties in X during breaks in his program would have been impossible. Therefore, the Applicant asserts that the finding that requesting a leave of absence was a reasonable alternative was an error of fact made in a perverse or capricious manner or without regard for the material before it.
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> […]
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> [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] b)(1), (3) and (4), [13] and [15] above, and provides an explanation on how the GD is said to have based its decision on these erroneous findings of fact which were made in a perverse or capricious manner or without regard for the material before it.

[10] The legislative provisions relating to "just cause" for voluntary leaving within the meaning of the EI Act are set out in section 29. Subsection 29(c) states "just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances,

including any of the following: …" and paragraphs (i) to (xiv) set out a list of the circumstances.

[11] Paragraph 29(c)(vii) (significant modification of terms and conditions respecting wages or salary), 29(c)(vi) (reasonable assurance of another employment in the immediate future) and paragraph 29(c)(xiv) (any other reasonable circumstances that are prescribed) were discussed in the GD decision, among other paragraphs. It is generally accepted that paragraphs (i) to (xiv) of subsection 29(c) are not exhaustive. A claimant need not necessarily fit into one of these categories in order for there to be a finding of "just cause": *Canada (A.G.) v. Lessard*, 2002 FCA 469; *Canada (A.G.) v. Campeau*, 2006 FCA 376.

[12] The wording "if the claimant had no reasonable alternative to leaving" is the crux of the issues on appeal before the AD.

[13] 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

[14] The Appellant submitted that he had no reasonable alternative to leaving his employment when he did and that his decision to move to X, British Columbia to start a doctorate program in naturopathic medicine was a reasonable one. As to the specific errors in the findings of fact made by the GD:

(a) He had just cause under paragraphs 29(c)(vii) and (xiv);

(b) His hours and salary were changed and reduced from the time he was hired in 2008; he had been reduced to shorter shifts and did not control his own work schedule;

(c) Because his hours were reduced, he looked for an alternative to working at the Scarborough Hospital; it led to his application to and decision to attend the doctorate program;

(d) He could not have requested a leave of absence from his employment, because his four year program of study exceeded the maximum amount of time allowable for a leave of absence;

(e) It was impossible to maintain employment in X during program breaks, given the limited break time and the distance and travel costs between X and X; and

(f) He actively looked for work in X, but the GD found that there was no evidence that he applied for work in the period of September to November 2014.

[15] The Appellant also submitted that he has always maintained that he was available for work and that he did not acquiesce on the issue of availability.

[16] The Respondent submitted that the Appellant left his employment to attend a program of study and that this was a personal decision which does not fall within the circumstances contemplated by subsection 29(c) of the EI Act. More specifically, the Respondent argued that:

(a) None of the jurisprudence relied upon by the Appellant is sufficiently close to the current situation to be applicable or persuasive;

(b) Federal Court of Appeal jurisprudence that is applicable supports the GD's findings;

(c) The Appellant did not leave his employment because of reduced work hours; he left in order to attend a program of study in X; therefore, if the GD erred on the findings related to work hours (that there was no hourly wage reduction and he continued regular part time 25 hours a week and to work 5 hours per day, five days a week), these findings of fact are not ones upon which the GD based its decision;

(d) There were no other findings of fact which were erroneous;

(e) The Appellant did not dispute the Commission's initial decision on availability (that he was not available) and, therefore, availability is not an issue on appeal. Nonetheless, if the AD found that the Appellant had just cause for voluntary leaving, the Commission's position continues to be that he was not available pursuant to the EI Act; and

(f) The Appellant simply repeats the arguments that he raised before the GD.

STANDARD OF REVIEW

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

[18] 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.

[19] 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.

[20] 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.

[21] 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*.

[22] 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."

[23] 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.

[24] 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.

[25] Consequently, I will consider whether the GD 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

[26] I will take each of the findings of fact upon which leave to appeal was granted in turn.

[27] Paragraphs [81] and [82] of the GD decision state:

> [81] The Tribunal finds as fact that the Appellant did not sustain an hourly wage reduction. The Tribunal finds as fact that the Appellant continued to work his regular permanent part time 25 hours per week throughout 2013, and until his departure date. The Tribunal finds that he was hired and continued to work 5 hours per day, five days a week.
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> [82] The Tribunal finds that it cannot be said that his hours were reduced to five hours per day, when this is was what he was originally hired to work.

[28] The Appellant submits that he did not continue to work permanent part-time 25 hours a week throughout 2013 until his departure date and that while he was hired in 2008 to work 5

days a week for 5 hours a day, that schedule lasted for about one year and his work schedule evolved from 2009 to 2013.

[29] At the appeal hearing, the Respondent acknowledged that the finding that the Appellant continued to work 5 hours a day, five days a week is not supported by the documentary evidence. As the Respondent did not attend the GD hearing, it is not in a position to challenge the Appellant's evidence before the GD that his work schedule evolved from 2009 to 2013. However, the Respondent noted that the Appellant's Record of Employment (ROE) in those years do not show any decrease in wages. Therefore, the erroneous finding of fact is not relevant and the GD did not base its decision on this finding.

[30] The Appellant argued before the GD that his decision to leave his employment was due to the reduction of hours/wages that he sustained in March 2013. The GD found that the Appellant did not sustain an hourly wage reduction, had the flexibility to accept or refuse the shifts offered to him, and his ROE did not show that his earnings were substantially reduced from March 2013 to his departure date (in November 2014). Based on these findings, the GD concluded that the evidence did not support the Appellant's arguments that there was an "excessive modification of terms and conditions respecting wages or salary" or that he left his employment for this reason.

[31] While the finding relating to "5 hours per day, five days a week" was erroneous, it was not an erroneous finding of fact upon which the GD based its decision. The GD referred to other evidence as the basis for finding that there was not an excessive modification of the terms and conditions respecting wages or salary. Moreover, the GD found as a fact that the Appellant voluntarily left a permanent part time position in order to return to school.

[32] Paragraphs [118] , [119] and [120] of the GD decision state:

> [118] The Tribunal finds that given, the Appellant's out of province training opportunity, that remaining employed in the same part time employment may have proved difficult. However the Tribunal finds, given the circumstances, that a reasonable alternative to leaving his employment would have been to request an unpaid educational leave of absence, and apply for part time work in X prior to his departure. Remaining job attached may have resulted in the resumption of his duties during university closures (Christmas, and summer closure) during the entire length of his studies.

> [119] The Tribunal finds that given his immaculate employment and volunteer references, the Employer would have, on the balance of probabilities, been receptive to the Appellant's request. However there is no evidence that the Appellant broached the subject of a leave of absence with his Employer. He simply arrived at his own conclusions that a leave of absence would not have been granted.
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> [120] The Tribunal finds, no evidence to show that during the period of September to November 2014, that the Appellant applied for work in X. A reasonable alternative, given his history of working while attending full time university, would have been to apply for work prior to his employment departure. In so doing, the Appellant would have prevented the risk of unemployment from becoming a reality.

[33] The Appellant submits that maintaining his employment in X while attending a full-time program of study in X would have been impossible and asking the employer for an unpaid educational leave for 4 years would have been against the employer's policy on leaves of absence (a maximum of 6 months).

[34] The GD decision discussed reasonable alternatives to leaving employment at paragraphs [115] to [120]. The GD found, among other things:

(a) The Federal Court of Appeal has held that remaining employed until a new job is secured is generally a reasonable alternative to taking a unilateral decision to quit a job;

(b) Given the Appellant's out of province training opportunity, remaining employed in the same part time employment while attending that training may have proved difficult;

(c) A reasonable alternative to leaving would have been to request an unpaid educational leave of absence. In relation to this:

1. the GD opined that given his immaculate employment and job references, the employer would have been receptive and may have accepted to have the Appellant resume duties during school breaks; and

2. the Appellant did not request a leave of absence related to his decision to leave employment in order to pursue a doctorate program in X; and

(d) Another reasonable alternative to leaving was for the Appellant to apply for work prior to moving to X, in order to prevent the risk of unemployment from becoming a reality; and there was no evidence that during the period of September to November 2014, the Appellant applied for work in X.

[35] In essence, the GD found three reasonable alternatives to the Appellant leaving his employment when he did (remaining in his permanent part time position, requesting a leave of absence and seeking work prior to moving to X). Therefore, the Appellant did have a reasonable alternative to leaving his employment. While the GD "explored all the Appellant's specific and unique circumstances", it concluded that "the Appellant failed to demonstrate just cause for his departure because he failed to explore all reasonable alternatives, given his circumstances, prior to his … employment departure."

[36] I have taken into consideration the Appellant's argument that the GD concluded that a leave of absence was a reasonable alternative based on erroneous findings of fact. However, this was not the only reasonable alternative to leaving found by the GD. The GD's conclusion that the Appellant did have a reasonable alternative to leaving his employment can be maintained on one reasonable alternative. This conclusion was not an erroneous finding of fact.

[37] The Appellant sought to make arguments during the appeal hearing on issues for which leave to appeal was not granted. While I took note of these submissions, the Appellant sought to broadly re-argue the facts and arguments that he asserted before the GD.

[38] 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.

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

[40] Having determined that the findings of fact asserted by the Appellant to be reviewable errors were not “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”, the Appellant’s appeal to the AD cannot succeed.

CONCLUSION

[41] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division