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

[TRANSLATION]

Citation: *M. B. v. Canada Employment Insurance Commission,* 2016 SSTADEI 460

Tribunal File Number: AD-15-1207

BETWEEN:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: September 6, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. B.	Appellant
Gabrielle Milliard	Appellant's representative

INTRODUCTION

[1] On April 15, 2014, the General Division of the Social Security Tribunal (Tribunal) dismissed the Appellant's appeal. It found that the Appellant did not meet the necessary criteria to receive Employment Insurance benefits because he had failed to prove that he had just cause for leaving his employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[2] An application for leave to appeal before the Appeal Division was filed on July 7, 2014. In a decision dated February 3, 2015, the Appeal Division refused leave to appeal.

[3] The Appellant filed an application for judicial review before the Federal Court, and a hearing was held on September 24, 2015. A Federal Court decision was issued on October 7, 2015. The Federal Court allowed the application for a judicial review and ordered that the application for leave to appeal be sent back to the Tribunal’s Appeal Division for decision by another Appeal Division member.

[4] The application for leave to appeal was sent back to the Appeal Division and the Appellant drafted a letter dated November 4, 2015, outlining his grounds for appeal.

[5] Leave to appeal was granted because the Appellant raised a question relating to allegedly erroneous findings of fact, the answer to which could lead to the setting aside of the contested decision.

[6] This appeal was heard via videoconference for the following reasons:

a) The complexity of the issue or issues;

b) The availability of videoconference in the Appellant's location; and

c) The need to proceed as informally and quickly as possible in accordance with the criteria in the Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

ISSUE

[7] The Tribunal's Appeal Division must decide whether it should dismiss the appeal; render the decision that the General Division should have rendered; refer the matter back to the General Division; or confirm, rescind, or revise the decision.

THE LAW

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[9] Subsection 59(1) of the DESDA states that the Appeal Division may dismiss the appeal, issue the decision that the General Division should have issued, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or modify the General Division's decision in whole or in part.

SUBMISSIONS

[10] The Appellant submitted the following:

a) The General Division did not properly address the appeal issues.

b) The General Division based its conclusion on the following erroneous findings of fact:

- The Appellant quit his job because he didn't feel like doing part-time work. This is incorrect because the employer had told him the work would be full time and the duties were not those that were agreed upon.

- There were issues with the training; the Appellant had not brought up an issue with the training itself, but rather that the job was different than what had been agreed upon at the time of hiring.

- The Appellant was aware that the training would last for a month. This is incorrect. The Appellant was not aware because the employer had failed to inform him at the and when he was hired.

c) The Appellant found out that the job was part time two days after training had begun. Accordingly, work hours and pay were modified.

d) The employer was looking for a representative and the Appellant wanted to be a driver; the work duties had therefore been modified.

e) Subparagraphs 29(*c*)(vii) and (ix) of the Act are applicable to the situation, but the General Division did not consider the grounds brought forward by the Appellant on this matter.

f) The Appellant did not have the necessary qualifications to carry out the representative position.

g) The Appellant's evidence regarding the job contradicts the employer's evidence. The General Division did not explain why it had retained the employer's version (the employer did not attend the hearing before the General Division).

h) The appeal should be allowed.

[11] The Respondent did not attend the hearing. It was only on the very morning that the hearing was to be held that the Respondent informed that it would not be attending the hearing. It stated that its position [TRANSLATION] "is explained in the written submissions sent on February 9, 2016".

[12] The Respondent submits that:

a) The Appellant quit his employment and does not qualify for Employment Insurance benefits.

b) The Appellant's factual position has changed since his initial claim.

c) His new factual position (that the two-day training was for a part-time representative position rather than a full-time delivery driver position) is inconsistent with the Appellant's various statements in the file.

d) The Appellant quit his job to undergo training that had not been previously approved by the Commission; this does not constitute just cause under sections 29 and 30 of the Act.

e) The fact that the job was part time rather than full time also does not constitute just cause for voluntary leaving.

f) The Tribunal's Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division.

g) The appeal should be dismissed.

STANDARDS OF REVIEW

[13] The Appellant maintains that the standard of review that derives from the superintending and reform power of the higher courts should certainly not be applied to the Tribunal's Appeal Division. No provisions in its legislation grant it this power, which is reserved for higher provincial courts and other federal boards. The Appeal Division must analyse the files submitted before it only within the scope of the sections outlining its jurisdiction, that is,

sections 55 to 69 of the DESDA. The Tribunal must determine if the alleged errors of fact and law were indeed committed, in accordance with section 58 of the DESDA.

[14] Regarding the standard of review, 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 that of reasonableness.

[15] Certain recent Federal Court of Appeal decisions seem to suggest that the Appeal Division should not apply a standard of review to General Division decisions: *Canada (A.G.) v. Paradis*; *Canada (A.G.) v. Jean*, 2015 FCA 242; and *Maunder v. Canada (A.G.)*, 2015 FCA 274. On the other hand, in the recent matter of *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, a decision regarding Employment Insurance, the Federal Court of Appeal determined that the application of a standard of review by the Appeal Division to a General Division Decision was reasonable

[16] There seems to be a discrepancy with regard to how the Tribunal's Appeal Division should review appeals of decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction differs from the standard of review for questions of fact and mixed fact and law.

[17] Given that I am unable to reconcile this seeming discrepancy, I will assess this appeal by referring to the provisions of the DESDA, without referring to “reasonableness” and “correctness” so as to avoid the application of standards of review.

ANALYSIS

[18] The General Division determined that:

a) The issue is whether there is merit to the appeal from the Commission’s decision to indefinitely disqualify the Appellant from receiving Employment Insurance benefits because he failed to prove that he had just cause for leaving his employment under sections 29 and 30 of the Act.

b) [TRANSLATION] "The decision taken by the Appellant to quit his job that he had with the employer...cannot be considered the only reasonable alternative in this situation, given all the circumstances."

c) [TRANSLATION] "The evidence on file and the Appellant's testimony show that his main objective was to complete a training course in order to obtain a licence to drive heavy vehicles."

d) [TRANSLATION] "Moreover, although the Appellant felt that his employment with his employer...did not allow him to perform the type of tasks he wanted to perform, and although the employment was only part time whereas he was seeking full-time employment, this type of situation does not represent just cause for voluntary leaving."

e) [TRANSLATION] "Despite the reasons given by the Appellant to justify his voluntary leaving, the Tribunal is of the view that he could have continued to work for the employer ... while waiting to obtain new employment that was more suited to his expectations and interests, or first ensuring that he had the Commission's authorization to take a training course."

f) [TRANSLATION] "There is no evidence on file to suggest that the voluntary leaving was the Appellant's only reasonable alternative in this situation."

[19] The Appeal Division decision granting leave to appeal states the following:

[TRANSLATION]

> [17] The General Division considered the Applicant's testimony that his voluntary leaving was justified; however, given all the circumstances, it found that leaving his employment could not be considered the only reasonable alternative in this situation. This decision is based on the Applicant's main intention to complete a training course, the fact that the employment was part time (whereas the Applicant was seeking full-time employment), the Applicant's dissatisfaction with the tasks he had to perform, the way the training was going after two days, and on the fact that there was no urgent need to leave, amongst others. The decision does not address the skills required to perform the job and it is unclear if the Applicant had brought up this argument before the General Division (it is not stated under "Submissions").

[18] The General Division found that the Applicant knew when he was hired that the position was part time and that there would be a one-month training to complete. Based on the Applicant's submissions to the General Division, the employer did not guarantee that there would be a full-time position as delivery person or delivery driver. The Applicant knew when he met with the employing officer that the employer could not offer him a full-time position. Furthermore, the employer always advertised part-time, not full-time positions. The General Division's factual finding that the Applicant was aware that the position was part-time was therefore not "based […] on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[19] As regards the one-month training, the General Division refers to two documents on file. They state that the [TRANSLATION] "employer told him that he would be on his delivery driver training". The Applicant claims that the employer never told him that the training would be one month long at the job interview. The General Division's finding that the Applicant was aware of these facts at the time he was hired do not seem to be based on the Applicant's testimony at the hearing. The transcript of the hearing before the General Division does not provide proof from which to conclude that the Applicant knew from the moment he was hired that there would be one month of training to complete.

[20] The Applicant submits that the assessment of these facts is unreasonable and that the General Division had capriciously dismissed certain aspects of his testimony regarding the description of the job interview. This is the only example that the Applicant provides of a "completely inaccurate and inconsistent factual interpretation with what the Applicant declared in his statements, particularly with regard to the employment conditions discussed with the employer at the job interview".

[21] The General Division's finding that the Applicant had known from the moment he was hired that there would be a month-long training to complete does not seem to be based on the Applicant's testimony at the hearing or on the documents on file. The General Division's decision therefore seems to be based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[…]

[25] According to the transcript of the hearing before the General Division, the Applicant testified that he had met with the employer two days into the training and that the employer told him that he could not guarantee a full-time position throughout the year and that the Applicant knew that the position advertised was part time. Furthermore, the Applicant had realized after two days of training that the training was not actually for a delivery driver position. As for the representative position, the Applicant stated that the employer had told him that there was a possibility that he could do this job once he had proven himself [TRANSLATION] "on the trucks". The Applicant believed that the training was for a position as representative, not as delivery driver; however, the General Division did not decide on this issue.

> [26] At this stage, I am not drawing any conclusions regarding the Applicant's claim that the employer's training was for a position as part-time representative rather than a position as full-time delivery driver, and that this conflicts with the testimony and statements on file. The General Division found that the Applicant knew when he was hired that the position was part time and that there would be a one-month training to complete; however, the second conclusion seems erroneous.
>
> [27] After reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question relating to an erroneous finding of fact, the answer to which could lead to the setting aside of the contested decision.

[20] I find that the General Division decision was based on certain erroneous findings of fact, particularly that the Appellant knew that he would have to undergo training (with the employer) for one month.

[21] The General Division concluded that the Appellant [TRANSLATION] "knew when he was hired...that there would be a one-month training as part of this employment" in paragraph [29] of its decision and [TRANSLATION] "as regards the training...which was expected to run for one month" in paragraph [31].

[22] These conclusions are not based on the Appellant's testimony at the hearing and there is no evidence to this effect in the file. 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.

[23] Furthermore, although paragraph 29(*c*) of the Act is mentioned in paragraph [22] of the General Division decision, the General Division found that [TRANSLATION] "the Appellant's decision to quit his job ... cannot be considered the only reasonable alternative in this situation, given the circumstances" without analysing the circumstances stated under subparagraphs (vii) and (ix):

> (vii) significant modification of terms and conditions respecting wages or salary
>
> (ix) significant changes in work duties

[24] At the hearing before the General Division, the Appellant testified that:

a) He wanted to work and that he had accepted a delivery driver position with this employer.

b) He met with the employer two days into the training to discuss the issue.

c) The employer only then informed him of the duties of the part-time representative position (rather than full-time delivery driver).

d) He wasn't capable of undertaking the duties of a representative.

[25] The General Division did not decide on the issues relating to the change in the employment's duties or pay conditions. These issues could have affected the issue of whether the decision to quit was the only reasonable alternative in this situation. The General Division therefore based its decision on an error of mixed fact and law.

[26] Upon review of the file and the parties' submissions, I allow the appeal.

[27] Given the erroneous or unanalysed findings of fact, the Appeal Division was unable to render the decision that the General Division should have rendered, or to modify the General Division decision. The case must be returned to the General Division for a *de novo* determination.

CONCLUSION

[28] The appeal is allowed and the matter is referred back to the General Division of the Social Security Tribunal of Canada.

Shu-Tai Cheng
Member, Appeal Division