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

Citation: *Canada Employment Insurance Commission v. J. B.,* 2016 SSTADEI 459

Tribunal File Number: AD-16-353

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: August 23, 2016

DATE OF DECISION: September 1, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated February 15, 2016 is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On February 15, 2016, the General Division of the Tribunal determined that the Respondent left her employment with 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 February 25, 2016. Leave to appeal was granted by the appeal division on March 11, 2016.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- The complexity of the issue under appeal.
- The fact that 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 was represented at the hearing by Elena Kitova. The Respondent was also present at the hearing.

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 Respondent had just cause to leave her employment pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

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

- The General Division erred in law under paragraph 58(1)(b) of the *DESD Act* as it misapplied the principle established in the *Canada (AG) v. Langlois*, 2008 FCA 18 to the matter at hand. The Federal Court of Appeal confirmed that while it is legitimate for a worker to want to improve their life by changing employers, they cannot expect those who contribute to the EI fund to bear the cost of that legitimate desire;

- 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, pursuant to paragraph 58(1)(c) of the *DESD Act*;

- The evidence clearly contradicts the conclusion of the General Division that the Respondent had just cause for leaving pursuant to paragraph 29(c)(vi) of the *Act*;

- Jurisprudence is clear that a claimant must have a *bona fide* offer of employment from a new employer and that the possibility of employment or

- finding employment after leaving does not meet the test of just cause pursuant to paragraph 29(c)(vi) of the *Act*;

- The question to be resolved was whether the Respondent had any reasonable alternative to leaving when she did;

- The evidence is consistent that while the Respondent may not have been guaranteed any hours of employment with the P. P. Manor, at the time she voluntarily left her employment, she was working a greater number of hours than she did at the K. E. Senior Home Care;

- While the Appellant acknowledges that the Respondent may have made a good personal decision to leave one employment in favour of another, she has not met the test for just cause under paragraph 29(c)(vi) of the *Act*;

- Taking into account all the circumstances surrounding the voluntary leaving, the Respondent has not demonstrated that she had no reasonable alternative to leaving when she did. Furthermore, her voluntary leaving created an unnecessary risk of unemployment for which she is asking the EI fund to bear;

- That a proper application of the facts of this case to the legal test for just cause leads to the reasonable conclusion that the Respondent has not shown that she had no reasonable alternative to leaving employment pursuant to section 29(c) of the *Act*.

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

- In June 2015, she met with officials of Provincial Social Development in order to obtain career re-orientation. She registered and followed intensive two months career counseling;

- After having work for the Manoir P. P. for five years, she stopped working on July 19, 2015, because of work related situations (Stress, non- respect at workplace, working in dangerous situations);

- At the end of July beginning of August, she gathered the required information (criminal and vulnerability check) in order to secure her next job with K. E. Senior Home Care;

- On August 3, 2015, she started working for K. E. Senior Care on a full time basis;

- She was always active in seeking work and/or working. At no time was she idle;

- Unemployment insurance served as a safety net while she was in transition from one job to the next.

STANDARD OF REVIEW

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

[11] The Respondent did not make any representations regarding the applicable standard of review.

[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.
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> 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*."

[14] 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] When it allowed the appeal of the Respondent, the General Division made the following findings:

> "[24] In the present case the Claimant who had been on sick leave due to her workplace returned to work when requested and stayed for a month however once she was able to find another job in her field of homecare and still not liking her workplace she left this employment with the P. P. Manor to take a job with K. E. Senior.
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> [25] The Tribunal Member finds that in this case the Claimant had made direct contact with her new employer before she quit her job and had actually been hired on the phone at that time pending background checks which were required in her field of work.

> [26] In the present case, the Tribunal Member reviewed the evidence and finds that based on the Claimant's evidence the Claimant had a reasonable assurance of other employment when she left her previous employment.
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> (…)
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> [28] The Tribunal Member finds that in taking into account the circumstances in which the Claimant found herself at her workplace and the fact that she had secured other employment before leaving that the Claimant did not have any other reasonable alternative except to leave her job when she did."

[17] With great respect, the decision of the General Division cannot be maintained for the below mentioned reasons.

[18] The facts of the present case are not in dispute. The Respondent worked at 057033 NB Inc. (the P. P. Manor) until March 20, 2015 at which time she finished due to illness. She then established a claim for sickness benefits effective March 22, 2015. On July 3, 2015, she requested to be paid regular benefit. A record of employment from the P. P. Manor was provided confirming that the Appellant returned to work on June 22, 2015, and quit on July 17, 2015.

[19] The Respondent advised the Appellant that she voluntarily left her employment at the P. P. Manor on July 17, 2015 where she was paid an hourly rate of $12.52, and started a new job at the K. E. Senior Home Care on August 3, 2015 where her salary is equivalent to approximately $14.50 per hour.

[20] The Respondent was hired to work 20 hours per week based on the employer's needs at that time and had been working approximately 35 hours per week at her former place of employment.

[21] When asked by the Tribunal why she left her former employer who offered her more hours of work, the Respondent stated that the new employer offered a higher salary, paid her by direct deposit instead of by cheque, and she felt that leaving a small employer to work for a bigger company would be better for her in the long term.

[22] Applying the principles of the Federal Court of Appeal established in *Canada (AG) c. Muhammad Imran*, 2008 FCA 17 to the present case, it is not really in dispute that

the Respondent had a “reasonable assurance of another employment in the immediate future” when she left her employment at the P. P. Manor.

[23] Beyond the reasonable assurance of another employment in the immediate future, paragraph 29(c) invites one to have regard to all the circumstances surrounding the Respondent’s leaving in order to determine whether it was the only reasonable alternative.

[24] As stated by the Federal Court of Appeal in *Langlois v. Canada (AG)*, 2008 FCA 18, while it is legitimate for a worker to want to improve his life by changing employers or the nature of his work, he cannot expect those who contribute to the employment insurance fund to bear the cost of that legitimate desire. Leaving a job where the Appellant was working approximately 35 hours per week for a job that offered 20 hours per week with no guarantee of hours, therefore deliberately causing the risk of unemployment, is not just cause under the *Act*.

[25] Furthermore, based on the evidence presented to the General Division, the Tribunal is not convinced that the working conditions of the Appellant were so intolerable as to leave her no option but to resign immediately. The fact that the Respondent returned to her previous employer after establishing a claim for sickness benefits supports that conclusion.

[26] A proper application of the facts of this case to the legal test for just cause leads to the conclusion that the Respondent has not shown that she had no reasonable alternative to leaving employment pursuant to section 29(c) of the *Act*.

CONCLUSION

[27] The appeal is granted, the decision of the General Division dated February 15, 2016, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division