



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. A. Professional Corporation v. Canada Employment Insurance Commission*,
2016 SSTADEI 569

Tribunal File Number: AD-16-392

BETWEEN:

K. A. Professional Corporation

Appellant

and

Canada Employment Insurance Commission

Respondent

and

N. B.

Added party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: December 13, 2016

DATE OF DECISION: December 14, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file is returned to the General Division for a new hearing by a different Member.

INTRODUCTION

[2] On January 5, 2016, the General Division of the Tribunal determined that:

- The Claimant did not voluntarily leave her employment pursuant to sections 29 and 30 of the *Employment Insurance Act (Act)*.

[3] The Appellant requested leave to appeal to the Appeal Division on March 8, 2016 after receiving the decision of the General Division on February 16, 2016. Leave to appeal was granted by the Tribunal on June 8, 2016.

TYPE OF HEARING

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

- The complexity of the issue(s) 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 K. A. The Claimant was not present although she did receive notice of hearing on August 26, 2016. The Respondent was represented by Elena Kitova.

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 Claimant had just cause for voluntarily leaving 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 found that the Appellant and the witness were credible and that the Claimant became very emotional during the hearing. Despite these findings, the General Division ignored relevant and key evidence from the Appellant and the witness in finding that the Claimant did not quit her job, while the evidence established that the totality of her actions were designed to cause the Appellant to dismiss the Claimant so that she would be entitled to collect EI benefits;

- The General Division either ignored or failed to consider seven letters prepared by various employees of the Appellant, all of which contradict and undermine the allegations of the Claimant;
- The totality of the evidence, when viewed objectively, fails to support the finding of the General Division that the Claimant had proven that there was no reasonable alternative to leaving on January 2, 2015, and that the Claimant did not quit her job, or at least attempt to orchestrate a dismissal;
- The reasonable alternative for the Claimant to leaving her employment when she did would have been to continue working as she had all along, to advise her employer if she intended to leave early on January 2, 2015 as she had all along, to not clear her desk of all papers and files, and to not remove all personal belongings from the office altogether. This alternative was not followed because the Claimant did not wish to continue with her job. She realized that if she quit, she could not receive EI benefits;
- The Appellant did not have the opportunity to cross-examine the Claimant during the hearing. The General Division failed to cross-examine the Claimant effectively or to properly assess credibility in making the findings of fact.

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

- The present matter was analyzed from the perspective of voluntary leaving, pursuant to section 29c) of the *Act*, and it was determined that the Claimant proved just cause for leaving her employment because she had exhausted all reasonable alternatives prior to leaving. The disentitlement imposed pursuant to section 30(1) of the *Act* was therefore removed;
- Despite its finding that there was no evidence to prove the Claimant quit her employment, the General Division relied on section 29c) of the *Act* and applied the legal test for just cause to make its decision;

- The General Division erred in law. The Federal Court of Appeal has confirmed that it does not matter whether the employer or the employee took the initiative in severing the employment relationship. When the issue under appeal is a disqualification under subsection 30(1) of the *Act*, the finding to that effect can be based on any of the two grounds for disqualification. In other words, since the General Division found the Claimant did not voluntarily leave her employment, it should have then determined whether the Claimant lost her employment by reason of her own misconduct;
- In light of the above and given the employer's allegations regarding a possible breach of the principles of natural justice, the Respondent recommends that the Appeal Division return the matter to the General Division for a new determination, in accordance with section 59(1) of the *DESD Act*.

STANDARD OF REVIEW

[10] The Appellant made no representations regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division. It can only intervene if 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 – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (A.G.) 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.”

[15] 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 (A.G.)*, 2015 FCA 274.

[16] 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

[17] The Tribunal proceeded with the appeal hearing in the absence of the Claimant since it was satisfied that she had received proper notice of the hearing on August 28, 2016, in accordance with section 12(1) of the *Social Security Tribunal Regulations*.

[18] The parties submitted, and the Tribunal agrees, that the General Division made contradictory conclusions in its decision when it first concluded that the Claimant did not leave her employment (paragraph 48) to afterwards conclude that she had just cause to leave her employment (paragraph 49).

[19] Furthermore, after finding the witnesses of the Appellant to be credible during the hearing in that they were open and consistent in their comments and answers to questions, while under oath, the General Division did not explain why it ignored the evidence of the

Employer, in particular, all the evidence filed in support of the appeal before the General Division.

[20] It is well established that the General Division must analyze all of the evidence, and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain clearly why – *Bellefleur v. Canada (A.G.)*, 2008 FCA 13.

[21] The General Division also erred in law when it awarded the benefit of the doubt to the Claimant on certain allegations of the Employer. Subsection 49(2) of the *Act* clearly states that the benefit of the doubt rule only applies in cases of misconduct and voluntary leave if the evidence on each side of the issue is equally balanced.

[22] Finally, the Appellant was not offered the opportunity to cross-examine the Claimant during the hearing. It is well established that parties have the right to cross-examine the other parties or their witnesses who testify before the General Division.

[23] For the above mentioned reasons, the appeal will be allowed.

CONCLUSION

[24] The appeal is allowed and the file is returned to the General Division for a new hearing by a different Member.

Pierre Lafontaine

Member, Appeal Division