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

Citation: *Canada Employment Insurance Commission v. A. I.,* 2017 SSTADEI 43

Tribunal File Number: AD-16-529

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

A. I.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: November 24, 2016

DATE OF DECISION: February 7, 2017

Canada

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

INTRODUCTION

[2] Previously, a General Division member allowed the Respondent's appeal.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. The Commission and the Respondent each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the General Division [or the Board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division [or the Board] erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division [or the Board] 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

[6] This is a case where the Respondent voluntarily left his employment.

[7] The Commission submits that the General Division member erred by finding that the Respondent had left his employment with just cause. Among other arguments, they submit

that the member ignored evidence that the Employer would have given the Respondent an additional medical leave of absence if he had asked for it. As the Commission alleges that this was a reasonable alternative to the Respondent leaving his employment, they submit that just cause for leaving has not been established. They ask that their appeal be allowed.

[8] The Respondent submits that he left his employment because he had re-injured his leg and because his car had broken down. In his view, these two factors combined to establish that he had no reasonable alternative to quitting his job. He would have liked to have stayed, but because of his medical issue and his lack of transportation it would not have been practical to do so. He supports the General Division decision, and asks that the Commission appeal be dismissed.

[9] In his decision, the General Division member summarized the facts and established the correct law. He then concluded that substantively for the reasons stated by the Respondent, the Respondent had no reasonable alternative to leaving his employment given all of the circumstances. On this basis, he allowed the appeal.

[10] At the hearing, it became clear that the Respondent's re-injured leg was a very strong factor in causing him to leave his employment, seemingly more important than the alleged lack of transportation. To determine if this appeal might be resolved in a different fashion, at the conclusion of the hearing I asked if the Commission and the Respondent would be open to exploring if a sickness claim might be more appropriate than the regular benefit claim filed by the Respondent.

[11] The parties agreed that this was an avenue worth exploring, and further agreed that a two-week adjournment was appropriate for them to do so.

[12] Since that time, the parties have each informed the Tribunal that no resolution has been reached and that I should proceed to issue a decision. This is that decision.

[13] In support of their submissions, during the hearing the Commission directed me to a conversation between a Commission agent and the Employer (found at GD3-29). The record stated (in part) as follows:

> "Employer stated [the Respondent] had already taken 2 weeks off due to medical reasons and **it was likely that further leave would have been granted**. [The Respondent] did provide the employer with a medical note when he went off work initially but this 2nd time he did not provide any medical note and resignedinstead [*sic*]."
>
> [emphasis added]

[14] This evidence stands in contrast with the General Division member's decision, where (at paragraph 27) he found that:

> "He employer **would not give him sick leave** as he had already used 2 weeks [sic]."
>
> [emphasis added]

[15] The Respondent, for his part, admitted before me (and also at GD3-27) that he had not requested further leave.

[16] I note that the Commission explicitly raised the above alternative to leaving in their written submissions to the General Division member (at GD4-4).

[17] To be clear, it was (and is) entirely open to the General Division member to conclude that the Respondent had no reasonable alternative to leaving his employment given all of the circumstances. But as the decision did not explain the above evidentiary discrepancy, I must reluctantly conclude that the General Division member failed to consider all of the evidence and arguments before rendering his decision.

[18] This is an error which I am obligated to intervene to correct.

[19] The correct remedy for this error is a new hearing before the General Division so that the parties can make their respective arguments in full.

CONCLUSION

[20] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

Mark Borer

Member, Appeal Division