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

Citation: *Z. M. v. Canada Employment Insurance Commission,* 2017 SSTADEI 71

Tribunal File Number: AD-16-888

BETWEEN:

Z. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 7, 2017

DATE OF DECISION: February 20, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 29, 2016, the General Division of the Tribunal determined that the Appellant had left her employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (Act).

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- 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 as quickly as circumstances, fairness, and natural justice permit.

[4] The Appellant, represented by C. M., was present at the hearing. The Respondent, however, was not present at the hearing.

THE LAW

[5] 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

[6] The Tribunal must decide whether the General Division erred when it concluded that the Appellant did not have just cause to leave her employment pursuant to sections 29 and 30 of the Act.

ARGUMENTS

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

- She was the victim of a violent sexual assault followed by criminal harassment and stalking – day and night;

- The Appellant's assailant was due to be released from prison around June 2015. The Appellant booked a one-way ticket to Europe and left on June 4, 2015, to avoid a serious threat, and she had the intention of finding work in Europe and staying there for an extended period of time;

- It was only when she was unable to secure a job in Europe, and it became likely that she might have to return to Canada, that she filed an Employment Insurance claim;

- It is not fair or realistic to require or expect that any victim, such as her, to be fully forthcoming about what happened to her with her employer, or when interviewed by the Respondent. This information is very personal, private and sensitive;

- It was unfair for the General Division, once it learned of the gravity and sensitivity of the Appellant's situation, to give more weight to initial, spontaneous statements made by the Appellant ;

- It is very unlikely that, *Bellefleur v. Canada (A.G.)*, 2008 FCA 13, had been intended to be applicable to a case involving a victim of a violent sexual assault, criminal harassment and stalking, so it was a poor guide for the General Division;

- The reason for her actions and departure was to protect her personal health and ensure her safety.

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

- The General Division is the trier of fact, and its role includes the weighing of evidence and making findings based on its consideration of that evidence;

- The General Division made findings of fact that were consistent with the evidence it accepted, and it committed no error in dismissing the appeal because the decision was a reasonable one that complies with the Act, as well as the established case law;

- It also submitted that the General Division committed no error in its application of *Bellefleur*. The General Division was faced with contradictory evidence which it could not disregard. In this case, the Appellant's initial statement was that the main reason she had quit her job was to go and visit a family member in Europe and to travel.

- In the present case, the General Division clearly explained how it reconciled the contradictory evidence and why it accepted the initial statement, rather than subsequent statements given following the unfavourable decision from the Respondent.

- The General Division applied to the evidence the correct legal test for just cause under paragraph 29(*c*) of the Act to the evidence when it concluded that the Appellant had not met the onus of proving that she had no reasonable alternative but to quit her employment when she did.

- There is nothing in the General Division's decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially. Moreover, there is no evidence that the General Division's conduct derogated from the general principles inherent to the "rules of natural justice".

STANDARD OF REVIEW

[9] The Appellant did not make any representations regarding the applicable standard of review.

[10] The Respondent submits that the Appeal Division does not owe any deference to the General Division's conclusions 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 intervene only 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.

[11] 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 "When 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."

[12] The Federal Court of Appeal further indicated that:

> Not 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.

[13] The Court concluded that "When[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 (A.G.)*, 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 dismissed the Appellant's appeal, the General Division concluded that:

> [33] The Tribunal finds that the Appellant had reasonable alternatives to leaving her employment. She could have requested a leave of absence from her employment or continue with her employment rather than making a personal choice to travel; she could have requested and pursue day shift and discuss with her employer whether accommodation could be made with respect to the duties she was performing; if she was dissatisfied with her employment, it would have been reasonable to find another job before quitting.
>
> [34] It is possible that the Appellant had good reason for leaving his employment because she felt threatened by events that could possibly occur as a result the release from prison of the person responsible for assaulting her in the past.
>
> [35] The Tribunal is sympathetic to the Appellant's situation but finds that the Appellant made a personal choice not to address this issue in the months previous to her departure. She also made a personal choice not to consult with her doctor to obtain documentation that allowed her to take leave of absence or required her to quit her employment. And did not discuss her predicament with her employer. All these decisions were very personal to her and possibly amount to good reason. But good reason does not equal to just cause as stated

> in the Act and defined by jurisprudence. It is unreasonable for claimants to expect the Employment Insurance system to bear the cost of supporting them when they make a decision to leave their employment for personal reasons.
>
> [36] The words "just cause" in section 29 of the Act are not synonymous with "reason" or "motive". It is not sufficient for a claimant to prove that they were quite reasonable in leaving their employment. Reasonableness may be "good cause", but it is not necessarily "just cause" (*Tanguay* 1458-84).

[17] The Appellant vigorously pleads that it was not for the General Division, once it learned of the gravity and sensitivity of the Appellant's situation, to give more weight to initial, spontaneous statements that she had made. She pleads that it is very unlikely that *Bellefleur* had been intended to be applicable to a case involving a victim of a violent sexual assault, criminal harassment and stalking, so it was a poor guide for the General Division. It is not realistic to require or expect that any victim, such as her, to be fully forthcoming about what had happened to her with her employer, or when she was interviewed by the Respondent. The real reason for her actions and departure was to protect her personal health and ensure her safety.

[18] The Tribunal understands and is sensitive to the Appellant's arguments. However, even if the Tribunal were to set aside her initial statements, the evidence still demonstrate that the Appellant did not have just cause to leave her employment under the Act.

[19] Whether one had just cause to voluntarily leave an employment depends on whether he or she had no reasonable alternative to leaving, having regard to all the circumstances, including several specific circumstances enumerated in section 29 of the Act. The burden of establishing just cause rests on the Appellant.

[20] It is not contested that the harassment and stalking started in 2012. The unpleasant situation for the Appellant existed when she had decided to start working for the employer, and she then agreed to a schedule of work that included night shifts. The evidence shows that the Appellant accepted the employment and maintained it notwithstanding her personal situation.

[21] The Appellant left her employment in June 2015 because her assailant, who was not a work colleague, was due to be released from prison around that time. She booked a one-way ticket to Europe, leaving June 4, 2015, two days after leaving her employment, to avoid a serious threat and she had the intention of finding work in Europe and staying there for an extended period of time.

[22] However commendable the Appellant's intentions may have been, the General Division did not err in dismissing the Appellant's appeal. Consistent jurisprudence has long established that leaving one's employment for personal reasons unrelated to employment does not constitute just cause pursuant to the Act: *Canada (A.G.) v. Graham*, 2011 FCA 311; *Canada (A.G.) v. Richard*, 2009 FCA 122; *Canada (A.G.) v. Campeau*, 2006 FCA 376; *Canada (A.G.) v. Murugaiah*, 2008 FCA 10; *Canada (A.G.) v. McCarthy*, A-600-93.

[23] As per the conclusions of the General Division, a reasonable alternative for the Appellant would have been for her to discuss with her doctor to determine whether the doctor felt it was necessary for her to either take sick leave or quit her job. The Appellant could have also discussed with her employer to determine whether accommodations could be made with respect to her work schedule, considering her seniority and the fact that she was unionized. Furthermore, the Appellant could have searched for other suitable work prior to quitting.

[24] The undisputed evidence demonstrates rather that the Appellant decided to go to Europe to get away from her assailant, who was getting out of prison. The Tribunal finds that, although the decision to leave her employment might have been a good personal choice for the Appellant in that context, it is unfortunately insufficient to establish just cause within the meaning of section 29 of the Act.

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division