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

Citation: *Canada Employment Insurance Commission v. M. C.*, 2017 SSTADEI 70

Tribunal File Number: AD-16-584

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. C.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: December 15, 2016

DATE OF DECISION: February 21, 2017

DECISION

[1] The appeal is allowed. The decision of the General Division is rescinded and the determination of the Commission is restored.

INTRODUCTION

[2] Previously, a member of the General Division allowed the Respondent's appeal in part. In due course, the Commission filed an application for leave to appeal and leave to appeal was granted.

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), 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.

ANALYSIS

[5] This case is about whether or not the General Division member correctly determined the Respondent had just cause to voluntarily leave her employment because she needed to look after her children and could not do so while working. The Commission does not appeal against the remainder of the decision, which supported the Commission position on availability.

[6] The Commission submits that the General Division member erred in law by not applying the established jurisprudence of the Courts. The Commission also submits that the Respondent did not exhaust all of the reasonable alternatives available to her (as required by the *Employment Insurance Act*) because she did not attempt to hire a babysitter for her children before quitting. They ask that their appeal be allowed.

[7] The Respondent argues that because she has an autistic child, finding childcare is not simple. She also submits that she was not making enough money to afford paid childcare, in any case. She supports the General Division decision, essentially for the reasons given by the General Division member.

[8] In his decision, the General Division member summarized the evidence and submissions, and stated the law. He then found (at paragraph 42 of his decision) that the Respondent "could not find anyone who would be able to care for her autistic child", and went on to find that she had shown just cause for leaving her employment.

[9] In doing so, the member distinguished *Canada (Attorney General) v. Patel*, 2010 FCA 95 (which for unknown reasons he mistakenly cited in paragraph 43 as 2009 FCA 274), on the basis that *Patel* dealt only with normal babysitting instead of the specialized care required for an autistic child.

[10] With respect, I do not agree that this case can be distinguished.

[11] In *Patel*, the Court noted that the claimant in that case did not make attempts to find childcare before leaving his position. As such, since the burden of proof rests on the claimant, the board of referees (now the General Division) was justified in finding that all reasonable alternatives to leaving employment had not been exhausted.

[12] I do not see the distinction between types of required childcare as making any difference within the context of *Patel.* The claimant still must show that all reasonable alternatives to leaving employment have been exhausted, given all of the circumstances, in order to prove just cause.

[13] At the hearing before me, the Respondent stated that she did not attempt to find paid childcare because she didn't think she could afford it. This stands in opposition to the General Division member's finding (noted above) that the Respondent was unable to find childcare and is virtually identical to the situation addressed by the Court in *Patel*.

[14] If the member had properly applied *Patel* to the findings of fact he made in his decision, he could have come to only one possible conclusion: that because the Respondent had not looked for paid childcare before leaving her employment she had not exhausted the reasonable alternatives open to her and for that reason had not shown just cause as required.

[15] The General Division decision cannot stand.

CONCLUSION

[16] For the above reasons, the appeal is allowed. The decision of the General Division member is rescinded and the determination of the Commission is restored.

Mark Borer
Member, Appeal Division