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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. C. B.*, 2017 SSTADEI 151

Tribunal File Number: AD-16-1217

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

C. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 6, 2017

DATE OF DECISION: April 10, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division decision dated September 30, 2016, is rescinded, and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On September 30, 2016, the General Division of the Social Security Tribunal (Tribunal) determined that the Respondent had not voluntarily left her employment without just cause under sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on October 20, 2016. Leave to appeal was granted on October 28, 2016.

FORM OF HEARING

[4] The Tribunal decided that the hearing of this appeal would proceed by teleconference for the following reasons:

- The complexity of the issue or issues.
- The parties' credibility was not a key issue.
- The cost-effectiveness and expediency of the hearing of choice.
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] At the hearing, Manon Richardson represented the Appellant. Counsel Pierre Paradis represented the Respondent.

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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 whether the General Division erred when it concluded that the Respondent had not voluntarily left her employment without just cause in accordance with sections 29 and 30 of Act.

SUBMISSIONS

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

- The Respondent had voluntarily left her employment, because she had the choice to continue working or not. The undisputed evidence on file shows that the Respondent would have worked for her employer until February 12, 2016, had she not prioritized her studies. It was therefore the Respondent's decision, rather than the employer's, that brought on the end of the employment.

- The Respondent did not have just cause to leave her employment considering that none of the conditions provided in paragraph 29(*c*) of the Act apply, and considering that she did not show that leaving her employment was the only reasonable solution in her case, having regard for all of the circumstances.

- The Respondent, who was refused a change to her work schedule, chose to prioritize her studies rather than her job. There is ample case law to the effect that leaving a job to focus on school is a personal decision and does not constitute just cause within the meaning of the Act.

- The General Division erred in its application of subsection 49(2) of the Act, which constitutes an error of law. The benefit of the doubt granted under subsection 49(2) of the Act is used only for weighing two conflicting versions of events. In this case, there is no contradiction between the Respondent's and the employer's versions of events.

- By deciding to return to school, without the employer's agreement, the Respondent could not continue working at L'Âtre de X.

[9] The Respondent submitted the following reasons against the Appellant's appeal:

- The General Division did not err in law or in fact and properly exercised its jurisdiction.

- On her record of employment, the employer did not indicate that it was voluntary leaving.

- She did not take the initiative of terminating her employment.

- She was in a temporary replacement position, and it was her employer who decided to terminate her employment.

STANDARDS OF REVIEW

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

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

[12] The Tribunal notes that the Federal Court of Appeal, in *Canada (Attorney General) 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:

> 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.

[14] The Court concluded that "[w]hen 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 Tribunal's Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 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 General Division's role is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. It must clearly justify its conclusions.

[18] In this case, the General Division clearly ignored the material brought before it to erroneously conclude that the Respondent had not voluntarily left her employment. Moreover, the General Division erred in law in ignoring Federal Court of Appeal jurisprudence and in granting the benefit of the doubt to the Respondent under subsection 49(2) of the Act. Indeed, this subsection only applies in cases of conflicting versions of events, which is not the case here.

[19] For these reasons, the Tribunal is justified to intervene and to render the decision that the General Davison should have rendered.

[20] The facts on file are relatively simple.

[21] The Respondent accepted to work for her employer as a temporary, part-time replacement (29 hours/ week). She was replacing a person who was on compassionate leave to take care of her dying mother. It was temporary employment, from Monday to Friday, with no possibility of a permanent placement. She therefore tried in the meantime to find other employment. After several weeks of unsuccessful job searching, rather than waiting to find herself once again without work, she decided to return to school.

[22] The Respondent tried discussing this with her employer and to find a solution, because she could no longer work on Mondays and Tuesdays. However, she was unable to reach an agreement with the employer. The employer then decided to terminate the Respondent's employment on January 8, 2016. She started school on January 11, 2016.

[23] The undisputed evidence shows that the Respondent decided to return to school and that she proposed a change of schedule to her employer. However, the employer did not accept the proposed change of schedule and instead decided to terminate her employment on January 8, 2016, before she returned to school.

[24] The evidence clearly shows that it was the Respondent—not the employer—who triggered the job loss by no longer being able to respect her work schedule. The Respondent could have remained in her job until February 12, 2016, had it not been for her decision to return to school.

[25] An employee who advises their employer that they are less available than previously is, for all intents and purposes, asking the employer to terminate the employment contract if the employer cannot accommodate the employee's reduced availability. The dismissal is therefore merely the penalty for the actual reason for the job loss, namely the employee's decision to return to school in conditions that would render her no longer available. The dismissal is in fact the logical consequence of the employee's deliberate act and does not change the fact that **there was, first and foremost, a voluntary leaving on the employee's part**—*Canada (Attorney General) v. Côté*, 2006 FCA 219.

[26] Furthermore, voluntarily leaving an employment to go back to school or to enrol in training does not constitute "just cause" within the meaning of sections 29 and 30 of the Act—*Canada (Attorney General) v. King*, 2011 FCA 29, *Canada (Attorney General) v. MacLeod*, 2010 FCA 201, *Canada (Attorney General) v. Beaulieu*, 2008 FCA 133, *Canada (Attorney General) v. Caron*, 2007 FCA 204, *Canada (Attorney General) v. Côté*, 2006 FCA 219, *Canada (Attorney General) v. Bois*, 2001 FCA 175.

[27] For the above reasons, the appeal should be allowed.

CONCLUSION

[28] The appeal is allowed, the General Division decision dated September 30, 2016, is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division