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

Citation: *Canada Employment Insurance Commission v. N. G.*, 2017 SSTADEI 209

Tribunal File Number: AD-16-400

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

N. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 19, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative	Louise Laviolette
Respondent	N. G.

INTRODUCTION

[1] On February 26, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal where the Canada Employment Insurance Commission (Appellant) had determined that she had voluntarily left her employment without just cause and imposed an indefinite disqualification, pursuant to sections 18 and 30 of the *Employment Insurance Act* (EI Act). The Respondent attended the teleconference hearing before the General Division, but the Appellant did not.

[2] The General Division found that the Respondent had just cause for leaving her employment, pursuant to paragraph 29(*c*) of the EI Act, in that she had reasonable assurance of another employment in the immediate future.

[3] The Appellant filed an application for leave to appeal to the Tribunal's Appeal Division on March 9, 2016. Leave to appeal was granted on May 4, 2016, on the grounds that there may have been an error of law or an error of mixed fact and law, in that the General Division, in making its decision, failed to apply the correct legal test on the issue of voluntarily leaving.

[4] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal; and

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[5] Did the General Division base its decision on an error of law or an error of fact and law?

[6] Should the Appeal Division dismiss the appeal, give the decision that the General Division should have given, refer the case back to the General Division for reconsideration or confirm, rescind or vary the General Division decision?

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the following are the only grounds of appeal:

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.

[8] Leave to appeal was granted on the basis that the Appellant had set out reasons that fell within the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[9] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division.

[10] Paragraph 29(*c*) of the EI Act states that just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including: "reasonable assurance of another employment in the immediate future."

SUBMISSIONS

[11] The Appellant's submissions can be summarized as follows:

a) The General Division erred in law when it failed to apply the correct legal test to the issue of voluntary leaving pursuant to paragraph 29(*c*) of the EI Act;

b) While the Respondent may have made a good personal decision to leave her job, her reasons do not amount to good cause under the EI Act;

c) Paragraph 29(*c*) of the EI Act provides that to show just cause for voluntarily leaving one's employment, there must be no reasonable alternative to leaving, having regard to all the circumstances;

d) The Respondent did not have interviews with other employers until after she left her employment with Accountivity Inc.; therefore, it cannot be said that she knew what future employment she would have or the identity of her future employer;

e) A reasonable alternative for the Respondent would have been to schedule interviews outside of her working hours and to remain employed until she found more suitable employment;

f) Leaving one's employment to improve one's situation does not constitute just cause within the meaning of paragraph 29(*c*) of the EI Act; and

g) Therefore, the Appellant correctly disqualified the Respondent effective August 30, 2015.

[12] The Respondent's submissions from the appeal hearing can be summarized as follows:

a) The week of September 2, 2015, she left her temporary position at Accountivity Inc.;

b) She had three interviews set up for the following week and attended them;

c) She was offered a permanent job, which she is still at, and she has not needed to go back on EI;

d) It was the right decision for her to leave the temporary position, so that she did not lose her skills, and to go to a job where she has gained skills.

[13] The Tribunal's Appeal Division granted leave to appeal on the issue of voluntary leaving on the grounds of an error of law and an error of mixed fact and law.

STANDARD OF REVIEW

[14] The Appellant 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.

[15] The Federal Court of Appeal has determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in Employment Insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[16] However, in *Canada (A.G.) v. Paradis* and *Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that this approach is not appropriate when the Tribunal's Appeal Division is reviewing appeals of Employment Insurance decisions rendered by the General Division.

[17] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 2015 FCA 274, referred to *Jean*, *supra*, and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the Appeal Division to decisions of the General Division. The *Maunder* case related to a claim for a disability pension under the *Canada Pension Plan*.

[18] In the matter of *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the Appeal Division that had dismissed an appeal from a General Division decision. The Appeal Division had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The Appeal Division had concluded that the General Division decision was "consistent with the evidence before it and is a reasonable one…" The Appeal Division applied the approach that the Federal Court of Appeal in *Jean*, *supra*, suggested was not appropriate, but the Appeal Division decision was rendered before the

Jean decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[19] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Decision should take on reviewing appeals of Employment Insurance decisions rendered by the General Division and, in particular, whether the standard of review for questions of law and jurisdiction in Employment Insurance appeals from the General Division differs from the standard of review for questions of fact and mixed fact and law.

[20] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[21] In this case, errors of law and errors of fact and law are alleged.

FACTS NOT IN DISPUTE

[22] There is no dispute on the following:

a) The Respondent applied for Employment Insurance regular benefits and an initial claim was established effective August 2, 2015;

b) She was offered a temporary job at Accountivity Inc. where she worked from August 31, 2015, to September 2, 2015;

c) The job consisted of mostly data entry and she did not like it; she requested a new position, but none was available; she believed she would lose skills if she stayed in that job;

d) She requested time off to attend interviews elsewhere, but her manager would not approve the request;

e) At the time she left, she had not interviewed for another job or received any other offers of employment; she attended interviews after she left her temporary job;

f) She was successful in finding other employment shortly after she left; and

g) She made a good personal decision.

ANALYSIS

[23] The General Division decision referred to the Federal Court of Appeal decision in *Canada (A.G.) v. Imran*, 2008 FCA 17.

[24] In *Imran*, the Federal Court of Appeal found that the Umpire had accepted the claimant's argument that he could not have stayed in his job and had been successful in finding better employment and, on that basis, concluded that he had no reasonable alternative but to leave his employment. This conclusion conflicted with the Federal Court of Appeal decision in *Canada (A.G.) v. Traynor*, [1995] F.C.J. No. 836, which held that the Employment Insurance scheme does not allow a claimant to leave a job with the sole view of improving their situation in the market place.

[25] The Federal Court of Appeal also commented on Mr. Imran's argument that because jobs in his field (engineering) were plentiful, he had reasonable assurance of another job in the immediate future, which constituted just cause for voluntarily leaving his employment. Also, he was successful in finding an engineering job shortly after leaving his employment. The Court noted that these factors were not sufficient to establish just cause for voluntarily leaving pursuant to subparagraph 29(*c*)(vi) of the EI Act for the following reason:

> Subparagraph 29(*c*)(vi) requires that there be reasonable assurance of another employment in the immediate future. In this case, none of the three requirements have been met… At the moment when he himself chose to become unemployed, the respondent did not know if he would have employment, he did not know what employment he would have with what employer, he did not know at what moment in the future he would have employment […]

[26] The Federal Court of Appeal concluded that at the moment when Mr. Imran left his job, it cannot be said that he knew what future employment he would have or the identity of his future employer. Therefore, just cause for leaving his employment on the basis provided in subparagraph 29(*c*)(vi) of the EI Act had not been established.

[27] After referring to *Imran*, the General Division in the current matter found that the Respondent had reasonable assurance of another employment in the immediate future

(subparagraph 29(*c*)(vi) of the EI Act). This finding was based on the Respondent having two employment interviews in the two days following her separation from the employer and having been interviewed, hired and starting new employment all within 17 days after her separation.

[28] With respect to the General Division member, the facts here cannot be distinguished from those in the *Imran* decision. At the moment when the Respondent chose to become unemployed, she did not know if she would have employment, what employment she would have with what employer, or when in the future she would have employment. The Federal Court of Appeal held that this fact situation does not establish just cause for leaving one's employment based on subparagraph 29(*c*)(vi) of the EI Act.

[29] Questions of mixed fact and law involve the application of a legal standard to a set of facts: *Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33. Here, the General Division erred in its application of the legal test for just cause based on subparagraph 29(*c*)(vi) of the EI Act, to the facts of this case. Therefore, the General Division erred on a question of mixed fact and law.

[30] This is a reviewable error pursuant to paragraphs 58(1)(*b*) and (c) of the DESD Act.

[31] I also note that the General Division found that the Respondent had a reasonable alternative to leaving her employment when she did (paragraph 24 of the General Division decision). This is a curious finding, as the General Division also concluded that she had just cause for leaving her employment. In order to have just cause for voluntarily leaving an employment, the Respondent must show that there was no reasonable alternative to leaving when she did.

General Division Error and Appeal Division Decision

[32] Given the General Division's error, the Appeal Division is required to make its own analysis and decide whether it should dismiss the appeal, give the decision that the General Division should have given, refer the case back to the General Division, or confirm, reverse or modify the decision: *Housen v. Nikolaisen*, *supra*, at paragraph 8, and subsection 59(1) of the DESD Act.

[33] Is the Appeal Division able to give the decision that the General Division should have given on this issue? I find that it is, as the facts necessary to make this decision are not in dispute and no further evidence is required from the parties.

[34] In addition to *Imran*, the Federal Court of Appeal has held that leaving one's employment to improve one's situation does not constitute just cause within the meaning of paragraph 29(*c*) of the EI Act: *Canada (A.G.) v. Langevin*, 2011 FCA 163. It has also confirmed that while it is legitimate for a worker to want to improve their life by changing employers or the nature of their work, they cannot expect those who contribute to the Employment Insurance fund to bear the cost of that legitimate desire: *Canada (A.G.) v. Langlois*, 2008 FCA 18.

[35] The Appellant does not dispute that the Respondent's employer did not accommodate her request to take time off to attend interviews. However, the Appellant submits that she was not prevented from staying at the job she had until she found something better and that she could have tried to schedule interviews at times that did not conflict with her work hours.

[36] I find that the *Imran*, *Langevin* and *Langlois* decisions of the Federal Court of Appeal are binding jurisprudence. The Respondent's situation does not constitute just cause for voluntarily leaving her employment within the meaning of paragraph 29(*c*) of the EI Act.

[37] In addition, the Respondent had a reasonable alternative to leaving when she did. She could have stayed in the temporary job she was in while seeking other employment, until she found something better.

[38] In the circumstances, I am able to give the decision that the General Division should have given (the dismissal of the Respondent's appeal before the General Division).

CONCLUSION

[39] The appeal is allowed, and the General Division decision is rescinded.

Shu-Tai Cheng
Member, Appeal Division