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

Citation: *R. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 285

Tribunal File Number: AD-17-122

BETWEEN:

R. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 20, 2017

DATE OF DECISION: July 28, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 4, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant did not have just cause for voluntarily leaving her employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on February 8, 2017, after having received communication of the General Division's decision on January 9, 2017. Leave to appeal was granted on February 14, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue(s) under appeal;
- the fact that the parties' credibility is not anticipated to be a prevailing issue;
- the information in the file, including the need for additional information; and
- the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[5] Mark Crawford represented the Appellant, who was also present at the hearing. The Respondent did not attend, even though it had received the notice of hearing.

THE LAW

[6] 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

[7] 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.

SUBMISSIONS

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

- Although the letter in the docket at GD 3-28 does not express urgency, it clearly indicates that “it is better for mom and other sibling to be closer to the child in care” and that it is a perverse conclusion to determine, on the premise that the child has been in care for some period of time, that there is no urgency in his mother’s availability.

- The General Division recognized that there were concerns at the time regarding her son’s aggressive behaviour. Surely that indicates the seriousness of the emotional issues her son deals with.

- In CUB 67172, the situation is similar to the present case, since the Appellant needs to take care of a family member who is 12 years old and who has emotional, mental health issues for which his mother can best appreciate the benefits of her immediate availability to her son.

- The General Division failed to consider that she had been in contact with her previous employer and that she had thought she would have a good chance of re-employment. After she had moved, an opportunity to take training arose that she took advantage of and, after her training, she actually returned to her employment at the K&S construction project, where she remains employed.

- The General Division did not consider that her employment had been minimal in nature and on an on-call basis.

[9] The Respondent submits the following arguments against the appeal:

- The Federal Court of Appeal has confirmed that, in order to prove just cause due to an "obligation to care for a child or a member of the immediate family" pursuant to subsection 29(c)(v) of the Act, the evidence must show that it was necessary for the claimant to personally care for his or her child and that, having regard to all the circumstances, leaving was the only reasonable alternative.

- The member of the Tribunal's General Division committed no reviewable error either in fact or in law when it found that it had been the Appellant's personal choice, without exhausting all reasonable alternatives that had been available to her, to quit her employment and move closer to her son.

- A reasonable alternative would have been for the Appellant to stay employed and to continue with the arrangements she had had for the past year until becoming able to secure employment in X, Saskatchewan.

- The General Division applied the correct legal test to the facts of this case, and it had both written and oral evidence upon which to base the findings, which were not unreasonable.

- The General Division committed no error in finding that the Appellant had failed to establish that a reasonable assurance of another employment in the immediate future, so as to establish just cause pursuant to subsection 29(c)(vi) of the Act, was applicable in this case.

- 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, nor is there any evidence to show that there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant has not made any representations regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the General Division's conclusions with respect to questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, as well as 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 had made in a perverse or capricious manner or without regard for the material before it—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *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 that:

> [n]ot 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]he[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."

[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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

The Facts

[17] The facts of this case are not in dispute.

[18] The Appellant quit her employment with Southland Transportation because she had moved to be closer to her son. He lives in a social services group home in Regina, which is around four hours away from where she had been living in X, Saskatchewan. She tried to find a place to live in Regina but was unsuccessful, so she moved to X, which is about a 90-minute drive to Regina. She submitted a letter from a family social worker at the X Child and Family Services who acknowledged that the Appellant had moved to be closer to her son, which, in her view, is better for the child in their care when the family is closer. Prior to the move, the Appellant had worked around her son's school schedule to visit him.

Now she gets to see him more frequently than before, but he is still under the care of X Child and Family Services.

On-Call Employment

[19] The Appellant worked for the employer, Southland Transportation, during the period from September 18 to December 18, 2015. Over this period of time, she accumulated a total of 147 hours of work while on call.

[20] The Appellant contends that she therefore did not have an employment within the meaning of the Act because she was on an on-call basis.

[21] On the matter of employment, the record clearly shows that Southland Transportation employed the Appellant and that an employer-employee relationship existed. She therefore had employee status within the meaning of subsection 2(1) of the Act. Moreover, section 29 of the Act provides that, for the purposes of interpreting sections 30 to 33, "employment" means **any employment** held by a claimant within the claimant's qualifying period or benefit period.

[22] This ground of appeal must therefore be dismissed.

Voluntary Leave

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

[24] Paragraph 29(c)(v) of the Act specifically addresses the situation where a claimant leaves his or her employment to take care of a child or an immediate family member. The almost unanimous jurisprudence has determined that in order to establish "just cause," the claimant's presence must be required to care for the family member. To take care of someone is to provide what is necessary for the health, welfare, maintenance and protection of that person (Canadian Oxford Dictionary).

[25] The General Division found that Social Services had been in charge of the child's care and had been responsible for her son at the time of her leaving her employment in December 2015, and that a reasonable alternative would have been to stay employed and to continue with the arrangements she had for the past year until becoming able to secure employment in X.

[26] The Tribunal finds that, although the letter from the Family Services dated April 25, 2016, indicates that "it is better for the mom and other sibling to be closer to the child in care," the undisputed evidence shows that, prior to leaving her employment, the Appellant had been living and working in X and that, during that time, social services had been taking care of the child and that the mother had scheduled visits. The Appellant continued to have scheduled visits of the child after her move to X.

[27] In order for the Appellant to satisfy the provisions of the Act, it would have been necessary to present preponderant evidence to establish that, at the time she had left her employment, the child was in such a situation that the mother's presence was immediately required to take care of him. It is insufficient for establishing just cause for voluntarily leaving her employment under paragraph 29(c)(v) of the Act to simply state that it is better for the mother to be closer to the child who is under the care of Social Services.

[28] Furthermore, as the General Division has stated, a reasonable alternative would have been to continue working until the Appellant had secured employment in X. The Appellant testified before the General Division that she had not looked for work prior to leaving, since she had been hoping that she would get back with her previous employer.

[29] Finally, the General Division correctly concluded from the evidence before it that the Appellant had not had the reasonable assurance of another employment in the immediate future when she left her employment in X—*Canada (Attorney General) v. Imran*, 2008 FCA 17; and *Canada (Attorney General) v. Lessard*, 2002 FCA 469.

[30] While the decision to leave her employment to be closer to her son might have been a very good decision, unfortunately for the Appellant, it is not sufficient for establishing just cause within the meaning of section 29 of the Act.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division