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

Citation: *Canada Employment Insurance Commission v. A. A.*, 2017 SSTADEI 296

Tribunal File Number: AD-17-129

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 18, 2017

DATE OF DECISION: August 2, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 20, 2017, is rescinded, and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On January 20, 2017, the Tribunal's General Division determined that the Respondent had just cause to leave his 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 10, 2017. Leave to appeal was granted on February 16, 2017.

TYPE OF HEARING

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

- the complexity of the issue under appeal;
- the fact that the parties' credibility was 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] At the hearing, Elena Kitova represented the Appellant. The Respondent also attended the hearing accompanied by Hilary Eastmure.

APPLICABLE 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 committed an error when it concluded that the Respondent had just cause to leave his employment pursuant to sections 29 and 30 of the Act.

SUBMISSIONS

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

- The correct legal test for just cause and the question to be resolved was whether the Respondent, having regard to all the circumstances, had reasonable alternatives to immediately leaving his employment.

- The facts in this case are not disputed, and the Appellant acknowledges that the Respondent may have been frustrated with the employer's way of doing business and with the organizational culture. However, the employer has the right to make policies and decisions on who will and who will not be given certain access. The Respondent should either have accepted the situation or, if he was uncomfortable with it, he should have secured alternative employment.

- The Respondent could have also taken sick leave to relieve the stress or he could have requested that he be re-appointed to another position or transferred to a different location. Instead, he "kept fighting hoping things would change" and ended up simply walking off the job.

- The General Division erred when it found the Respondent had no reasonable alternative but to quit.

- The Respondent admitted that, while that issue was not a big deal and while he could work around it, he did find it awkward to deal with the managers' displeasure. Furthermore, he stated that when he had walked off the job, he had not meant to quit, but rather he had hoped that the employer would ask him back. These statements show that the Respondent's working conditions had not been as difficult as he had claimed at the hearing.

- The General Division neglected to take those statements into consideration and ignored the fact that the case law has consistently held that, unless they can prove that the conditions were such as to leave them no alternative but to quit, an employee who leaves their employment because they are not entirely satisfied with the working conditions has failed to establish just cause.

- The General Division ignored requirements set by jurisprudence in order to prove just cause for leaving an employment for medical reasons: a claimant must provide medical evidence, as well as evidence that they attempted to reach an agreement with the employer to accommodate health concerns and that they had attempted to find alternative employment. In the case at hand, the Respondent has submitted no medical evidence demonstrating that he had to quit; he chose not to take stress leave as his doctor had recommended, and he did not attempt to seek employment prior to leaving. In light of this, the General Division could not reasonably conclude that the Respondent had left his employment with just cause within the meaning of the Act.

- The Federal Court of Appeal stated that searching for work before leaving an employment is the most obvious reasonable alternative.

- Had the General Division applied to the evidence the correct legal test for just cause under subsection 29(c) of the Act, it would have concluded that the Respondent had failed to meet the onus of proving that he had no reasonable alternative but to quit his employment.

[9] The Respondent presents the following arguments against the appeal.

- He did seek alternatives within his workplace, but to no avail.

- The Appellant is disregarding the fact that the key holder responsibilities were part of the Respondent's job description. Otherwise, if they had been against company/store policy, they would not have been part of his responsibilities. The Appellant is also ignoring the fact that the Respondent's paperwork for high ticket items was not being signed, which was part of the company policies.

- He clearly felt that his employer wanted him to leave or wanted to put him in situations whereby his credibility would be jeopardized and then the employer could seize an opportunity to dismiss him.

- His intention throughout this ordeal was to do whatever it took to seek better resolutions within his workplace.

- Just because he accepted the situation as he had been told regarding the back door, it does not take away from the fact that his issue worsened. This was an ongoing issue that he dealt with amicably and, like anyone else would have done, he did whatever it took to protect his job, but unfortunately his situation never improved.

- Things just became worse after he had informed the district manager of what he had been going through, and his general manager's relationship with him became even sourer.

- The Appellant cannot assume what the outcome would have been had there been an option presented to him, but clearly he was in no possible position to go back to that same toxic environment.

- Quitting was not something he had been planning to do; rather, he had been seeking options to improve his working environment and eliminate the difficulties he was having.

- He stayed loyal to his work and, until the very end, left his employer with options to present to him, but it was clear that the employer did not want to present them to him, as it chose not to do anything about his concerns.

STANDARD OF REVIEW

[10] The Appellant argues 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 for 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.

[11] The Respondent has made no submissions regarding the applicable standard of review.

[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 the following:

> 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]here 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

[17] The issue under appeal before the General Division was whether the Respondent had voluntarily left his employment without just cause pursuant to sections 29 and 30 of the Act.

[18] Based on the information on file, the Appellant concluded that the Respondent could not be paid benefits because he had voluntarily left his employment without just cause. On January 20, 2017, the General Division allowed the Respondent's appeal on the basis that his working conditions had been such that they eventually affected his health.

[19] The facts of the present case are not in dispute. The Respondent had a range of responsibilities as the store receiver, and it was difficult for him to fulfil his duties because his manager had refused to give him the alarm code for the receiving door, and because his

managers and colleagues were lax about completing paperwork and following procedures. He felt discriminated against and, at times, he felt threatened. He felt that the company did not trust him even if the employer would attempt to reassure him. He did raise his concerns with the human resources (HR) department, but his general manager and his superior indicated that he had not been targeted. He stated that he was branded aggressive for expressing himself, and that he was scared to go to work because it affected his health and the quality of his output. The Respondent felt the company had been looking for an excuse to get rid of him. He left his job two weeks after being granted stress leave from a doctor. He did not request sick leave from his employer prior to leaving. He also did not seek other employment prior to quitting because he wanted to work things out and keep his job.

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

[21] Although the General Division correctly stated the applicable legal test, the Tribunal finds that it failed to apply said test to the facts of the case and to ask itself whether the Respondent, having regard to all the circumstances, had no reasonable alternative to leaving his employment. Therefore, the test was not correctly applied or interpreted.

[22] The Tribunal is therefore justified to intervene and render the decision that the General Division should have rendered.

[23] Despite the numerous circumstances described in subsection section 29(c) of the Act of what would constitute just cause for voluntarily leaving an employment, the primary question remains: did the Respondent have no reasonable alternative to leaving his employment?

[24] The Appellant had worked for his employer from December 1, 2014, to February 25, 2016, when he walked out. The evidence shows that the working conditions that led the Respondent to leave his employment had existed from the beginning of his employment and that “he then did not make a big deal out of it.” The evidence clearly shows that he had

been unhappy with his working conditions for quite some time, if not the entire time of his employment. He decided to leave his employment on February 25, 2016, after he had unsuccessfully tried to find paperwork for the purchase that a customer had made, and after being told not to worry about it and to mind his own business.

[25] The Tribunal undoubtedly agrees with the General Division's conclusions that the Appellant may have been justifiably frustrated with the employer's way of doing business and with its apparent disregard of its own company policies but finds that the Respondent could have kept his job instead of just walking out.

[26] In other words, the Tribunal is unconvinced, from the evidence before the General Division, that the Respondent's working conditions were so intolerable as to leave him no option but to resign immediately. This is confirmed particularly by the fact that the Appellant was hoping his employer would ask him back to work after he left the job.

[27] The Tribunal finds that the Respondent could have made efforts to secure other employment before leaving his employment, since he had been unhappy with his working conditions for a long period of time. In fact, he consulted Work BC and started his process to look for another job the day after he had left his employment.

[28] The Respondent also could have submitted his doctor's note and requested short-term disability through the employer's human resources department as an alternative to walking out. The General Division could not ignore this alternative on the hypothesis that nothing would change upon his return to work.

[29] The evidence clearly shows that, rather than the employer, it is the Respondent who, unhappy with his working conditions, took the initial steps to terminate his own employment. The job would still have been available if he had chosen to stay.

[30] The Tribunal finds that, having regard to all the circumstances, the Respondent had reasonable alternatives to leaving his employment when he did.

CONCLUSION

[31] The appeal is allowed, the General Division's decision dated January 20, 2017, is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division