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

Citation: *Canada Employment Insurance Commission v. S. G.*, 2017 SSTADEI 284

Tribunal File Number: AD-17-25

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 20, 2017

DATE OF DECISION: July 27, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 23, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent had just cause for leaving her employment under sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on January 11, 2017. Leave to appeal was granted on January 16, 2017.

TYPE OF HEARING

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

- The complexity of the issue under appeal;
- The credibility of the parties is not anticipated being 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] The Appellant attended the hearing and was represented by Elena Kitova. The Respondent attended and was assisted by Jean-Claude Basque.

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 Respondent had just cause for leaving her employment pursuant to sections 29 and 30 of the Act.

SUBMISSIONS

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

- The General Division erred in law when it misapplied the legal test for just cause. The Federal Court of Appeal established that it is not sufficient that a claimant find relief under one of the situations listed in paragraph 29(*c*) of the Act but that, having regard to all the circumstances, a person has to show there was no reasonable alternative to leaving when they did.

- The General Division ignored the evidence before it and the jurisprudence on the issue of voluntary leaving employment for health reasons. 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 their health concerns and attempted to find alternative employment.

- In the case at hand, despite several requests from the employer and the Appellant, the Respondent submitted no medical evidence supporting her decision to quit or demonstrating that her medical condition was the result of the work environment.

- The Functional Ability Form signed by her doctor does not specify any work restrictions and makes no recommendations. Furthermore, the Respondent did not demonstrate that she was willing to collaborate with her employer. She failed to comply with the employer's requests to provide relevant documentation in order to have her accommodation request addressed. The employer kept asking her to return to work or to submit a leave request to cover her absence, even after the Respondent sent her letter of resignation.

- She was continuously asked to submit a consent form so the employer would be able to contact her physician and obtain necessary information to find her suitable accommodation. The Respondent failed to reply to those requests and chose instead to resign. Finally, the Respondent did not attempt to find employment prior to leaving.

- The Appellant submits that the General Division disregarded this evidence, which makes its decision unreasonable.

- The General Division relied on CUB 74903 and CUB 11075 to support its decision. It is the Appellant's position that in CUB 74903, dangerous working conditions were acknowledged by the employer but, despite this fact and the safety committee's recommendations, the employer preferred not to invest money to improve the ventilation system. In CUB 11075, there was ample medical evidence indicating that the claimant could no longer work in their office because of serious allergic reactions that he had been experiencing for some time.

- There is no evidence to support the General Division's finding that workplace conditions had an adverse effect on the Respondent's health. The medical evidence that the Respondent submitted does not state that her condition was the result of the air quality in her workplace, that she was required to quit or that she had to work from home. The results of the last survey on record show that the airborne microbial results in the Respondent's area of work were acceptable according to government standards.

- The Respondent had reasonable alternatives open to her: she could have provided the required documentation to have her accommodation request addressed, filed a grievance with her Union, taken a leave without pay or sought different employment.

- Based on the case law and the evidence before it, the General Division erred when it concluded that the Respondent left her employment with just cause within the meaning of the Act. Had the General Division applied the correct legal test for just cause under paragraph 29(*c*) of the Act to the evidence, it would have concluded that the Respondent has not met the onus of proving that she had no reasonable alternative to leaving her employment.

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

- She was forced to resign for serious health reasons, as her employer had refused any other solution that would have allowed her to work in safe conditions.

- A forced resignation due to a serious health reason cannot be seen as a voluntary leave.

- The General Division did not err in fact and in law in making its decision. The General Division took into account her health problems and the risks induced by the airborne infections at her workplace.

STANDARD OF REVIEW

[10] The Appellant 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 and 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 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 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 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*, 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 Appellant is appealing the General Division decision dated December 23, 2016. The issue under appeal was whether the Respondent had voluntarily left her 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 she had voluntarily left her employment without just cause. On December 23, 2016, the General Division allowed the Respondent's appeal on the basis that she was left with no other reasonable alternative except to resign from the workplace in order to preserve her health.

[19] On appeal, the Appellant argues that the General Division erred in law when it misapplied the legal test for just cause. It also pleads that 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 he attempted to reach an agreement with the employer to accommodate health concerns and had attempted to find alternative employment.

[20] The Respondent submits that the General Division did not err in fact and in law in making its decision. She submits that the General Division took into account her health problems and the risks induced by the airborne infections at her workplace. It also accepted that she was forced to resign for serious health reasons, as her employer had refused any other solution that would have been adequate to allow her to work in safe conditions.

[21] Whether she had just cause for voluntarily leaving her employment depends on whether she had no reasonable alternative to leaving having regard to all the

circumstances, including several specific circumstances enumerated in section 29 of the *Act*. The burden of establishing just cause rests on the claimant.

[22] The Federal Court of Appeal has determined that when a claimant alleges health reasons for leaving their employment, they must provide objective medical evidence to substantiate not only the health issue but also that they were obliged to leave work for this reason, demonstrate that they attempted to reach an agreement with the employer to accommodate their health concerns and prove that they attempted to find alternative employment before leaving—*Her Majesty the Queen v. Dietrich*, FCA, A-640-93.

[23] The subsequent case law of the Umpires was predominantly of the view that the absence of a medical certificate should not of itself exclude medical reasons, as just cause to leave employment. These Umpires ruled that the type of medical evidence required to find just cause for leaving depended on the facts and circumstances of each case. Therefore, a claimant could have just cause to leave his employment if the circumstances of employment created a medical situation of sufficient gravity to justify a claimant voluntarily terminating his employment.

[24] The General Division found that the Respondent had provided sufficient evidence to support the fact that her workplace conditions had an adverse effect on her health and that she had requested accommodations that were basically refused, except to remove her from her original workplace and reassign her to another department where the problems persisted until she was left with no reasonable alternative to leaving her position.

[25] The General Division also found that it was evident from the file that the Respondent had a medical condition—a diagnosis of mucormycosis—which made her more susceptible to airborne infections and, while the tests found generally acceptable conditions, several areas of concern were raised at different times. In addition, since the workplace was in a building that was also susceptible to airborne problems due to leakage and age, the Respondent was justified in requesting an accommodation to work elsewhere until the department moved to another building, which it did, and when this accommodation was

not forthcoming, the Respondent was left with no reasonable alternative to resigning from the workplace in order to preserve her health.

[26] The Tribunal finds that the medical evidence supports the General Division's conclusion that the Respondent's working conditions were dangerous enough to her health to constitute just cause for voluntarily leaving her employment. The preponderant evidence also demonstrates that the circumstances of the Respondent's employment created a medical situation of sufficient gravity to justify her voluntarily terminating her employment.

[27] The Respondent, who was in good health, became sick three months after starting to work at Finance Canada (hired on August 2010). She first became seriously ill, with a number of unusual symptoms, at the beginning of 2011. At that time, she was on sick leave for three days for the first time in her life. During 2011 and 2012, she recurrently got sick with similar infections. At the end of 2012, she asked to see a specialist because her health had declined and doctors in walk-in clinics just put her on antibiotics for 10 days each month, which she had started to question. In February 2013, she had a surgery during which a sinus polyp was removed. The biopsy of the polyp revealed that she had mucormycosis, a sickness that is difficult to detect prior to its final stage. She then asked (ATIP Request) to have copies of the air analysis reports done at her workplace for the years she had worked there as there were a number of employees who seemed affected by the air quality (sneezing, allergies, sinus infections, etc.).

[28] Historically, the Respondent's workplace had been exposed to numerous water leaks from problems associated with routine plumbing, water condensation on windows and the original design and construction of the building envelope (GD2-24). The reports showed that the fungus at the source of her disease was found in different places in the building. Her employer, however, never gave her access to the test results around her office space. In March 2013, she asked her employer if she could work from home. Her employer refused this request. So she went back to her workplace, wearing a mask to protect herself against the airborne infections. But in March 2014, despite the masks, she got another infection and became seriously ill again. She asked again if she could work from home. This time,

her request was not refused, but she was asked to have the official request form to work from home completed by a doctor.

[29] Her manager sent her the form. She saw Dr. Tuli, an infectious disease specialist (not a family doctor), and upon review of her medical history and the air quality reports at her workplace, Dr. Tuli completed the form supplied by the employer. Dr. Tuli indicated that the Respondent's medical condition made her more susceptible to airborne infections (GD2-140). She gave the form to her manager.

[30] Once again, the employer refused to allow the Respondent to work from home or to temporarily change buildings. The employer maintained its position that the Respondent's health issues were not caused by her workplace. The Respondent stated repeatedly that she would not come back to her current workplace due to the risk for her health. She then resigned because the employer was ignoring her health condition.

[31] In view of the above facts, the Tribunal wonders what more would the Respondent have achieved by going back to the employer before she left? Her health had been showing troubling signs for years after her arrival at her workplace. A biopsy of the polyp revealed that she had mucormycosis, a life-threatening infection (GD-2- 143). Contrary to her employer's position, test reports obtained by the Respondent through an ATIP request showed the presence of the pathogen that induces this pathology (mucor, rhizopus) in the building (GD2-80, GD2-97, GD2-107, GD2-123, GD2-130, GD2-131, GD2-132). Furthermore, she was refused access to the test results for the immediate area of her office space.

[32] Dr. Tuli, in the work limitations section of the functional ability form, indicated that her medical condition made her more susceptible to airborne infections. The employer, aware of her history of health problems at work since 2011 her susceptibility to airborne infections and the building test results showing the presence of a pathogen able to induce her pathology, demonstrated no willingness to let her work from home or to suggest another temporary working location pending the upcoming move to another building. On the contrary, the employer insisted that she come back to work and go through an unprecedented "fitness to work evaluation." The employer never replied to her request to

learn what tests could be done to assess her "fitness to work" in relation with airborne infections (GD2-153). Instead, the employer proceeded to consider the Respondent to be on an unauthorized leave of absence. The Respondent's request for unpaid leave until the upcoming move to the new building that was to occur in the following three months was not seriously considered by the employer. By its actions, the employer demonstrated clearly that it did not want to accommodate the Respondent and that it did not want to acknowledge the relation between the Respondent's medical situation and the results of the building reports.

[33] The Respondent also testified before the General Division that she had repeatedly tried to get a transfer to another department, and that she had tried to find alternative employment outside her workplace before leaving, without success, because of her issues with the employer.

[34] The Tribunal finds that the Respondent provided evidence before the General Division that substantiates not only her health issue but also that she was obliged to leave work because of it, demonstrated that she had attempted to reach an agreement with the employer to accommodate her health concerns and proved that she had attempted to find alternative employment before leaving. Furthermore, the circumstances of her employment clearly created a medical situation of sufficient gravity to justify her voluntarily terminating her employment.

[35] In view of the above, the Tribunal finds no reason to intervene.

CONCLUSION

[36] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division