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

Citation: *S. C. v. Canada Employment Insurance Commission,* 2017 SSTADEI 297

Tribunal File Number: AD-17-152

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 18, 2017

DATE OF DECISION: August 4, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, and the file is returned to the General Division for a new hearing before a different member.

INTRODUCTION

[2] On January 13, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had left her employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on February 15, 2017, after having received communication of the General Division decision on January 18, 2017. Leave to appeal was granted on March 1, 2017.

TYPE OF HEARING

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

- the complexity of the issue under appeal;
- 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] The Appellant attended the hearing with her representative, Sukhpreet Sangha. Susan Prud'Homme represented the Respondent, who also attended the hearing. An interpreter, Tanvir Ahmed, was provided to the Appellant.

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 committed an error when it concluded that the Respondent had not had just cause to leave her employment pursuant to sections 29 and 30 of the Act.

SUBMISSIONS

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

- Pursuant to paragraph 58(1)(*c*) of the DESD Act, 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.

- The General Division's finding that "the Appellant failed to secure alternate employment because she wanted to return to school to improve her English language skills" (para. 31) is erroneous and disregards the clear evidence before the General Division that the Appellant wanted to work more than she wanted to attend school, which is why she quit schooling as soon as she had been offered employment in September 2016.

- The General Division based its decision on a second erroneous finding of fact, "that the Appellant failed to seek alternate employment prior to leaving her job," (para. 30) without regard for the material before it.

- Finally, the General Division erred in finding that she had "failed to investigate the new location" and that she had "considered the impact the additional time and commute may add to her situation, without understanding if she could potentially find a way to balance her work and life situation" (para. 35).

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

- The General Division applied the correct legal test to the facts of this case.

- The question for the General Division to resolve was whether the Appellant had had no reasonable alternative to leaving.

- The Federal Court of Appeal re-affirmed the principle that, where a claimant voluntarily leaves their employment, the burden with on the claimant to prove that there was no reasonable alternative to leaving when they did.

- With regards to a claimant who voluntarily leaves their employment pursuant to subsection 29(c)(v) of the Act "obligation to care for a child or a member of the immediate family," the exception applies only when the claimant's presence is necessary to personally care for an immediate family member who is incapacitated; and where there is no reasonable alternative but to quit one's employment in order to do so.

- The General Division found that the Appellant had had the reasonable alternative of contacting friends, family members and social agencies in an attempt to help her family with travel arrangements to doctors' offices for visits and appointments.

- Consequently, the General Division concluded that, because the Appellant had failed to prove that she had exhausted all reasonable alternatives prior to quitting her job, her reasons for voluntarily leaving her employment did not constitute just cause pursuant to subsection 29(c)(v) of the Act.

- The General Division also found that the Appellant had not quit due to subsection 29(*c*)(ix) of the Act "significant changes in work duties" because there had been no changes in her work duties, seniority or salary at the new location in X, Ontario.

- It has long been established by jurisprudence that it is the trier of fact, which in this case is the General Division, that assesses the credibility of the evidence. The General Division did not dismiss the appeal based on erroneous findings of fact.

- The General Division's conclusion that the Appellant failed to prove that she had left her employment with Monarch Plastics Ltd. with "just cause" within the meaning of the Act and that she was disqualified from benefits in accordance with sections 29 and 30 of the Act falls within the range of possible outcomes, and it was a reasonable one that conforms to the Act, as well as established case law.

- 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 that there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant made no submissions regarding the applicable standard of review.

[11] The Respondent 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.

[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 her employment without just cause pursuant to sections 29 and 30 of the Act.

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

[19] The Appellant submits that, pursuant to paragraph 58(1)(*c*) of the DESD Act, 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, when it concluded that:

- rather than finding alternate employment, the Appellant had chosen to pursue schooling;
- the Appellant had not made any efforts to find employment prior to leaving her position; and
- the Appellant had failed to investigate and had left her employment without knowing whether she could potentially balance her work and life situation.

[20] Because of the alleged grounds of appeal, the Tribunal listened carefully to the recording of the hearing before the General Division. Although it was not raised during the appeal hearing, the Tribunal finds that the General Division member failed to respect certain principles of natural justice.

[21] The concept of "natural justice" includes the right of a claimant to a fair hearing. So fundamentally important is this right, that there must not exist even the appearance of prejudice to the right of any claimant to make a full presentation before an unbiased General Division. The law requires that not only must justice be done, it also must manifestly and undoubtedly be seen to be done. The mere suspicion that a claimant has

been denied their right is justification in itself for an order returning the matter to the General Division.

[22] The Tribunal finds that, when questioning the Appellant's representative, the General Division member appeared to act more as an advocate for the Respondent than as an impartial decision maker. Furthermore, by conducting the hearing in the way that he did, he gave the impression that he had already decided the case. The Appellant was therefore not given a full opportunity to present her case.

[23] Finally, the Tribunal finds that the Appellant should have benefited from an interpreter since she did not completely understand the language of the hearing. It is pointless to simply let the representative, not personally aware of the facts of the case, make his presentation when the Appellant, the most important witness, does not know what is being said at the hearing.

[24] For the above-mentioned reasons, the Tribunal finds that the Appellant was not given a fair and impartial hearing. The file will be returned to the General Division for a new hearing before a different member.

CONCLUSION

[25] The appeal is allowed, and the file is returned to the General Division for a new hearing before a different member.

Pierre Lafontaine
Member, Appeal Division