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

Citation: *T. M. v. Canada Employment Insurance Commission*, 2017 SSTADEI 336

Tribunal File Number: AD-16-444

BETWEEN:

T. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: July 27, 2017

DATE OF DECISION: September 19, 2017

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. The Appellant and the Commission each attended and made submissions. The Appellant's submissions were made by way of counsel.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are that:

> (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.

ANALYSIS

[6] This appeal concerns whether or not the Appellant had just cause within the meaning of the *Employment Insurance Act* (Act) to voluntarily leave his employment.

[7] The Appellant alleges that following his taking of parental leave, he was subject to harassment and other ill treatment by his employer. In his view, he had been constructively

dismissed and thus had no recourse but to leave his employment. Among other arguments, the Appellant noted that, although the General Division member had accepted (at paragraph 34 of his decision) that he was credible, the member offered no explanation for preferring the Employer's hearsay evidence. He asks that his appeal be allowed.

[8] The Commission supports the General Division member's decision. They say that the member properly canvassed the case law and the evidence before coming to his conclusion, and that there is no basis upon which I could intervene. They ask that the appeal be dismissed.

[9] In his decision, the General Division member correctly stated the relevant law. He then examined the evidence, found the Appellant to be credible, but concluded (at paragraph 46) that the Appellant made "a personal impulsive decision to resign." Ultimately, after addressing each of the Appellant's arguments, the member concluded that the Appellant had reasonable alternatives to leaving his employment and dismissed the Appellant's appeal.

[10] I note that neither I nor the General Division member should be interpreted as making any findings with regard to whether or not the Appellant was treated fairly by his employer, either within the common meaning of that term or within the legal parameters of Canadian employment law, as this is irrelevant to the Tribunal. As held by the Federal Court of Appeal in *Canada (Attorney General) v. Peace,* 2004 FCA 56, at paragraph 17:

> The common law action for damages against an employer for constructive dismissal has not been abolished by the Act. As a result, it was open to the respondent in the present case to bring an action against his employer. However, the common law concept of constructive dismissal does not appear in the Act, which creates an insurance scheme for employees who have been fired or laid off or left their positions because they had no other reasonable alternative. As a result, whether an employee has left voluntarily and is not entitled to benefits under the Act and whether an employee has been constructively dismissed and is entitled to sue his employer are different issues.

[11] I note as well that, as correctly pointed out by the Commission, it is the General Division that is the primary trier of fact. The Appeal Division, by contrast, does not generally take evidence under oath and is usually reliant on the facts in the record. It is for this reason that factual findings made by the General Division are entitled to deference, especially where those findings rely upon testimony given at a hearing or on findings of credibility. This means that I may not intervene just because I might disagree.

[12] I also gave lengthy consideration to the Appellant's arguments including that, having accepted the Appellant's evidence, it was not logical or consistent for the member to have found that the Employer's actions did not establish just cause.

[13] It cannot be denied that the member's decision could have included a fuller explanation as to why, having found the Appellant to be credible, the member concluded regardless that the Appellant had not shown just cause to leave his employment.

[14] Ultimately, however, when the decision is viewed as a whole, I am satisfied that the General Division member simply did not believe that the situation faced by the Appellant was so intolerable that the Appellant had no reasonable alternative to leaving his employment and ruled accordingly. I note that although the member did not accept the Appellant's arguments, he did consider those arguments in coming to his conclusion.

[15] I found counsel for the Appellant to be articulate and persuasive, and I am grateful for his able submissions. Had I been the primary trier of fact, it is entirely possible that I might have come to a different conclusion than the General Division member did in his decision.

[16] That being said, although the decision may not have been perfectly written, I am not convinced that the General Division member made any error within the meaning of subsection 58(1) of the DESDA.

[17] I find instead that, as evidenced by the decision and record, the member conducted a proper hearing, weighed the evidence, made findings of fact based upon that evidence, established the correct law, properly applied that law to the facts, and came to a conclusion that was intelligible and understandable when read in its entirety.

[18] There is no reason for the Appeal Division to intervene.

CONCLUSION

[19] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division