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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. S. A.*, 2017 SSTADEI 371

Tribunal File Number: AD-16-369

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: October 30, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Elena Kitova	Appellant’s representative
A. S.	Respondent

INTRODUCTION

[1] On February 9, 2016, the General Division of the Social Security Tribunal (Tribunal) allowed the Respondent’s appeal. It found [translation] “that there is no evidence in the file to show that the appellant voluntarily left his employment [...] on November 26, 2014. His employment ended because of a shortage of work.”

[2] An application for leave to appeal before the Appeal Division was filed on March 1, 2016. The Appeal Division granted leave to appeal on April 27, 2016.

[3] This appeal was heard by teleconference for the following reasons:

a) the complexity of the issue(s);

b) the information in the file, including the need for additional information; and

c) the need to proceed as informally and quickly as possible in accordance with the criteria in the Tribunal’s rules relating to the circumstances and considerations of fairness and natural justice.

ISSUES

[4] The Tribunal's Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division’s decision.

[5] Leave to appeal was granted with respect to an error of law. The Appeal Division must decide whether the claimant's refusal to accept an employment offered by his employer in March 2015 can be considered voluntary leaving according to section 29 of the *Employment Insurance Act* (EI Act).

[6] The Appeal Division may also be authorized to review the General Division decision under the headings other errors (see paragraph 7 below).

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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.

[8] Pursuant to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the General Division’s decision in whole or in part.

[9] The provisions related to voluntary leaving are set out in sections 29 and 30 of the EI Act.

[10] For the purposes of sections 30 to 33 of the EI Act regarding the disqualification from Employment Insurance benefits for “leaving without just cause,” paragraph 29(*b.1*) of the EI Act provides the following:

> […] voluntarily leaving an employment includes **(i)** the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs, **(ii)** the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and **(iii)** the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred […]

[11] Paragraph 29(*c*) of the EI Act reads as follows:

> […] just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following: **(i)** sexual or other harassment, **(ii)** obligation to accompany a spouse, common-law partner or dependent child to another residence, **(iii)** discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*, **(iv)** working conditions that constitute a danger to health or safety, **(v)** obligation to care for a child or a member of the immediate family, **(vi)** reasonable assurance of another employment in the immediate future, **(vii)** significant modification of terms and conditions respecting wages or salary, **(viii)** excessive overtime work or refusal to pay for overtime work, **(ix)** significant changes in work duties, **(x)** antagonism with a supervisor if the claimant is not primarily responsible for the antagonism, **(xi)** practices of an employer that are contrary to law, **(xii)** discrimination with regard to employment because of membership in an association, organization or union of workers, **(xiii)** undue pressure by an employer on the claimant to leave their employment, and **(xiv)** any other reasonable circumstances that are prescribed.

[12] Paragraph 18(1)(*a*) of the EI Act provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant failed to prove that on that day they were capable of and available for work and unable to find suitable employment.

SUBMISSIONS

[13] The Appellant made the following submissions:

a) The General Division erred in law in making its decision, namely an error in its application of the legislation.

b) The Appeal Division does not have to defer to the General Division's conclusions regarding 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.

c) The General Division erred in its interpretation of the provisions of subparagraph 29(*b.1*)(ii) of the EI Act when it allowed the appeal on the ground that March 30, 2015, was not [translation] "when the employment is supposed to be resumed."

d) The Respondent refused the offer because the employment was not permanent, but the claimant's employment was not permanent (he had been laid off in November 2014).

e) The Respondent was offered an employment on the same conditions, that is, the same position and the same tasks as before the lay-off. He refused his employer's offer to resume that employment.

f) Paragraph 29(*b.1*) applies to the situation and the Respondent left his employment when he could have returned to the same position on March 30, 2015;

g) Applying the legal test to the facts of the case leads to the conclusion that the Respondent made the personal choice to not return to his employment. Personal reasons such as the desire to improve one's situation in the job market do not constitute "just cause" for voluntarily leaving an employment within the meaning of the EI Act.

h) The appeal should be allowed and the General Division decision reversed.

[14] The Respondent made the following submissions:

a) His refusal to accept the employment offered by the employer was not voluntary leaving;

b) He met with an Emploi-Quebec officer on March 17, 2015, to obtain help with his job search, and this officer offered him a training to improve his skills and to find a job. The training was offered to him before the employer's offer.

c) He did not want to lose his place in the training. Had he accepted the offer, he would have worked for a few months and went back on Employment Insurance. It was better to do the training.

d) He completed the training in industrial process control technology from August 2015 to June 2015; and he started a permanent job in July 2016.

e) The appeal should be dismissed.

STANDARD OF REVIEW

[15] Some Federal Court of Appeal decisions seem to suggest that the Appeal Division should not apply a standard of review to General Division decisions: *Canada (A.G.) v. Paradis*; *Canada (A.G.) v. Jean*, 2015 FCA 242; and *Maunder v. Canada (A.G.)*, 2015 FCA 274. Nonetheless, in *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, an Employment Insurance decision, the Federal Court of Appeal found that an application of a standard of review by the Appeal Division to a General Division decision was reasonable.

[16] There seems to be a discrepancy with regard to how the Tribunal's Appeal Division should review appeals of decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction differs from the standard of review for questions of fact and mixed fact and law.

[17] Given that I am unable to reconcile this seeming discrepancy, I will assess this appeal by referring to the provisions of the DESDA, without referring to the terms "reasonableness" and "correctness" so as to avoid the application of standards of review.

ANALYSIS

[18] The General Division concluded the following:

a) The issue under appeal is whether the Respondent had just cause for voluntarily leaving his employment, pursuant to sections 29 and 30 of the EI Act.

b) A claimant has just cause for voluntarily leaving their employment if, having regard to all the circumstances, including those set out in paragraph 29(*c*) of the EI Act, leaving is the only reasonable alternative in their case.

c) The Respondent did not voluntarily leave the employer Mega Brands Inc., but rather his employment ended on November 26, 2014, because of a work shortage.

d) The employer then told the Appellant that he might possibly call him back to work during the Christmas holidays, around the second week of January 2015.

e) The fact that the Respondent subsequently refused temporary employment offered by the employer in late March 2015 in no way alters the fact that his employment ended on November 26, 2014. The employment relationship was terminated when the Appellant was laid off by his employer on November 26, 2014.

f) The evidence shows that the Appellant did not refuse to resume his employment when he was supposed to do so in January 2015. The employer did not call the Appellant back in January 2015 as planned.

g) Furthermore, the employer did not suggest that the Appellant resume the employment that he initially had, but rather offered him temporary employment for a period of two or three months.

h) The Respondent's situation cannot be considered voluntary leaving under subparagraph 29(*b.1*)(ii) of the EI Act because he declined the offer of employment that his employer made to him on March 30, 2015.

i) The Appellant failed to meet the onus on it to prove that it was a voluntary leaving.

[19] The Appeal Division's decision granting leave to appeal states the following:

> [translation]
>
> [20]On the question of whether the claimant's refusal to accept an employment offered by his employer in March 2015 can be considered voluntary leaving, there is a reasonable chance of success that an error in law was committed. However, there is

> no reasonable chance of success with respect to the allegations of erroneous findings of fact.
>
> [21]After considering the appeal docket, the General Division decision and the Applicant’s submissions, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question pertaining to an error in law, described in paragraph [20] above the response to which may lead to the setting aside of the decision under review.
>
> **CONCLUSION**
>
> [22]Leave to appeal is granted. However, it is limited by the findings in paragraphs [20] and [21] above.

[20] I note that, before the General Division, the Respondent submitted that he had signed a contract with Emploi-Quebec on May 27, 2015, to be able to take training that had been proposed to him, but the General Division decision made no reference to the contract or to the argument that the training had been offered before the employer's offer.

[21] In response to questions asked during the hearing before the Appeal Division on this issue, the Respondent specified that he had met with an Emploi-Quebec officer on March 18, 2015, that the officer had offered him training during this meeting, that he mentioned in the Emploi-Quebec file that he had received a follow-up date in May 2015, and that he returned to Emploi-Quebec on May 22, 2015, to get the paperwork for the training. The Appellant, however, noted that the Respondent did not bring up the training as the reason for leaving his employment or for refusing the employment offered at the end of May 2015 until the file was at the Appeal Division; this argument was not presented to the General Division. Furthermore, the Respondent mentioned the training for the first time on June 12, 2015, in a conversation with a Commission agent and the notes indicate that nothing was concrete.

[22] An appeal before the Tribunal's Appeal Division is not a second chance to once again plead your case given that an appeal before the Appeal Division is not *de novo* and is limited by subsection 58(1) of the DESDA.

[23] There is no evidence in the file regarding the Respondent's training, such as

a) details of the approval by Emploi-Quebec (date, conditions, authorization or not of the Canada Employment Insurance Commission, etc.);

b) the "contract" with Emploi-Quebec.

[24] The recapitulation of submissions presented before the General Division (see paragraph 17d) of the General Division decision) is not evidence.

The General Division Decision

[25] The General Division allowed the Respondent's appeal for three main reasons:

a) the Appellant did not meet the onus of demonstrating that there had been a voluntary leaving;

b) the Respondent cannot have left his employment voluntarily on March 30, 2015, as he no longer had an employment relationship with his employer;

c) subparagraph 29(*b.1*)(ii) does not apply to the Respondent's situation because he did not refuse to resume his employment.

[26] The General Division cites *Green*, 2012 FCA 313 to find that the Appellant did not meet the onus of demonstrating that there had been a voluntary leaving. However, *Green* did not find that an issue relating to the burden of proof. At paragraph 49 of *Green*, the Court noted the following:

> First, the Board identified the relevant test with regard to “just cause” when it stated that the onus was on the Commission to show that the applicant had left his employment with Seismic voluntarily and that the applicant had to show that he had “just cause”, in all of the circumstances, in leaving his employment.

That is the only thing the Federal Court of Appeal said about the Commission's burden of proof.

[27] In this case, the following facts are not in dispute:

a) The Respondent's employer had a work shortage as of the end of November 2014. When that employment ended on November 26, 2014, the Respondent did not voluntarily leave his employment.

b) The Respondent submitted an initial benefit claim that took effect on November 23, 2014.

c) On March 27, 2015, the employer contacted the Respondent to offer him work.

d) The Respondent refused because it was alternative work for two or three months when he wanted full-time employment and to have time to look for work and do training.

e) The Appellant found that the refusal to accept the employment at the end of March 2015 was considered a voluntary leaving based on the EI Act and, therefore, that the Respondent was not entitled to regular benefits effective March 29, 2015.

[28] The General Division wrote the following at paragraphs 31 to 33 of its decision:

> [translation]
> [31]The fact that the Appellant subsequently refused temporary employment that the employer had offered in late March 2015 does not alter the fact that his employment had ended on November 26, 2014. The employment relationship was terminated when the employer laid off the Appellant on November 26, 2014.
>
> [32]The Tribunal is of the view that the Appellant's situation cannot be considered a voluntary leaving under subparagraph 29(*b.1*)(ii) of the Act because he declined the offer of employment that his employer made to him on March 30, 2015.
>
> [33]The Tribunal finds that the Appellant did not refuse "to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed…," as provided in subparagraph 29(*b.1*)(ii) of the Act.

Did the General Division err in law in making its decision?

[29] Subparagraph 29(*b.1*)(ii) of the EI Act talks about the refusal "to resume an employment." I note that, in French, the same paragraph talks about the refusal "*de reprendre son emploi*." The expression "an employment" would be "*un emploi*" in French (and not "*son emploi*").

[30] Based on the undisputed facts, the Respondent refused to resume an employment with his employer. His main reason is that it was not the same employment with the same conditions that he had in November 2014.

[31] The parties did not cite jurisprudence specific to subparagraph 29(*b.1*)(ii) of the EI Act and the interpretation of the words "resume an employment" or "*reprendre son emploi*." The Appellant explained that it had not found a specific case regarding this point. The Appellant relies on the English version and submits that if Parliament's intention had been that it had to be exactly the same employment, it would have clearly specified it.

[32] As noted by the Federal Court in *Canada (A.G.) v. Trochimchuk*, 2011 FCA 268:

> [12] However, the legislation is written in both official languages. Both the English and French versions of a statute are equally authoritative statements: *Schreiber v. Canada* (*Attorney General*), 2002 SCC 62 (CanLII), [2002] 3 S.C.R. 269, at para. 54; Michel Bastarache, *The Law of Bilingual Interpretation*, 1st ed. (Markham: LexisNexis, 2008) at p. 15. As stated in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), both versions of bilingual legislation must express the same law and must receive the same interpretation. If there is a discrepancy between the versions, the discrepancy must be eliminated. The best way to reconcile conflicting versions is to identify and adopt a meaning that may plausibly be attributed to both (Sullivan, at p. 100). When the versions differ in scope, the narrower meaning found in both expresses the shared meaning and should prevail: *R v. Daoust*, 2004 SCC 6 (CanLII), [2004] 1 S.C.R. 217, at para. 29.

[33] Subparagraph 29(*b.1*)(ii) must be interpreted together with the general context of subsection 29(*b.1*) of the EI Act, that is, voluntary leaving and circumstances considered to be voluntary leaving.

[34] Subparagraph 29(*b.1*)(ii) of the EI Act provides the following:

a) English version: "voluntarily leaving an employment includes the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed."

b) French version: "*sont assimilés à un départ volontaire le refus de reprendre son emploi, auquel cas le départ volontaire a lieu au moment où il est censé le reprendre.*"

[35] It is relevant to note that subparagraph 29(*b.1*)(i) provides the following:

a) English version: "voluntarily leaving an employment includes the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs."

b) French version: "*sont assimilés à un départ volontaire le refus d'accepter un emploi offert comme solution de rechange à la perte prévisible de son emploi, auquel cas le départ volontaire a lieu au moment où son emploi prend fin.*"

[36] Therefore, subparagraph 29(*b.1*)(i) of the EI Act applies when a claimant refuses employment offered as an alternative to an anticipated loss of employment and subparagraph 29(*b.1*)(ii) applies when a claimant refuses employment because of the loss of their employment. Subparagraph 29(*b.1*)(ii) is applicable in this case, because the Respondent's refusal took place after the loss of his employment.

[37] Can the difference between the two versions of subparagraph 29(b.1)(ii) be abolished? Is there a way to reconcile the two versions by identifying and retaining [translation] "the meaning that can be plausibly attributed to both versions" in the general context?

[38] I do not believe that it is possible in this case.

[39] According to the English version of subparagraph 29(*b.1*)(ii) of the EI Act, refusing to resume **an employment** is considered voluntary leaving but, according to the French version, it is the refusal to resume **one's employment** (the claimant's employment) that determines the issue. The same meaning cannot be plausibly attributed to both versions.

[40] The Federal Court of Appeal stated the following: when the two versions do not have the same scope, we rely on the narrowest interpretation that is common to both versions. In *Abrahams v. Attorney General of Canada*, [1983] RCS 2, the Supreme Court of Canada decided

that any doubt arising from the language of such legislation must be resolved in favour of the claimant.

[41] For these reasons, the most narrow interpretation of subparagraph 29(*b.1*)(ii) common to both versions, and in favour of the claimant if there is ambiguity, is to resume his employment, meaning the employment that the Respondent had in November 2014.

[42] That is the interpretation adopted by the General Division. The General Division did not err in law in making its decision by relying on the narrow interpretation of subparagraph 29(*b.1*)(ii).

Did the General Division base its decision on an error of mixed law and fact?

[43] In this case, the Respondent refused an employment, but did he refuse his employment—the employment that he had in November 2014?

[44] The expression "one's employment" is not defined in the EI Act.

[45] The General Division concluded that it was not "his employment" because it was not the same employment he had had before, because of the following:

a) The employment relationship was terminated when the Respondent was laid off by his employer.

b) The employment offered in March 2015 was temporary and the employment in November 2014 was permanent.

[46] Break in employment relationship: Subparagraph 29(*b.1*)(ii) of the EI Act applies when a claimant refuses employment offered after the loss of their employment. A loss of employment is a break in the employment relationship. The situation that subparagraph 29(*b.1*)(ii) provides for is that of the loss of employment and a break in the employment relationship. There is evidence in the file that the employment offered to the Respondent was with the same employer. The General Division's interpretation means that this subparagraph would not apply to a situation of employment loss and subsequent offer of employment by the same employer. Its conclusion in this regard is erroneous.

[47] The General Division also referred to the delay between the March 2015 employment offer and the time when the Respondent was expecting a callback to work in January 2015 (paragraph 35 of the decision). The evidence in the file was that the employer had said to the Respondent [translation] "that he would be called back to work after the Christmas holidays" (GD3-17). March 2015 was just as much "after the Christmas holidays" as January 2015 was. The General Division relied in part on the fact that the employment offer was made in March 2015 instead of January 2015 to find that the employment offered in March 2015 was not the Respondent's employment.

[48] Temporary and not permanent employment: The evidence on file is that with the employment offered in March 2015, the Respondent would have the same position and same tasks as he had before, and he would be with a team that was short a worker (GD3-18). The difference between the November 2014 employment and that offered in March 2015 was the length, that is, a few months versus employment with no fixed term. The Respondent and the General Division used the words "temporary" and "permanent" to describe this difference.

[49] The General Division found that the difference between "temporary" and "permanent" was determinative. I do not agree.

[50] The Respondent's November 2014 employment had been "permanent" according to him, but he lost it due to a work shortage. He was the only person who was laid off and he understood that that was because he did not have a degree (GD3-18). The evidence on file goes both ways: the Respondent said he had a permanent position but, in reality, he was dismissed without recourse. Therefore, there was no real difference between the employment the Respondent had in November 2014 and the one he was offered in March 2015.

[51] For the above-mentioned reasons, the General Division's conclusion that the employment offered to the Respondent in March 2015 was not "his employment" was an erroneous, and made in a perverse or capricious manner or without regard for the material before the Tribunal.

[52] I find that subparagraph 29(*b.1*)(ii) of the EI Act applies to this situation. The Respondent’s refusal to resume his employment in March 2015 is considered voluntary leaving.

Did the Respondent have "just cause" for refusing employment?

[53] Because the Respondent's situation is considered voluntary leaving, I must ask whether he had "just cause" pursuant to the EI Act.

[54] Paragraph 29(*c*) of the EI Act provides the following: just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances. Several situations are referred to in the subparagraphs, but none of them apply to this case.

[55] The Respondent gave reasons for refusing the employment. He did not want to lose his place in the training program. Had he accepted the offer, he would have worked for several months and went back on Employment Insurance. According to the Respondent, it was better to do the training.

[56] It is possible that for the Respondent, the decision to refuse the employment and attend a training program was better for his future. However, the desire to improve one's situation in the job market does not constitute "just cause" under paragraph 29(*c*) of the EI Act. Jurisprudence in this regard is clear.

Appeal allowed

[57] Now, the Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division’s decision.

[58] It is not necessary to refer this case back to the General Division. The evidence on file is sufficient for the Appeal Division to render the decision that the General Division should have rendered.

[59] The Respondent refused employment in March 2015. That employment was "his employment." According to subparagraph 29(*b.1*)(c) of the EI Act, the refusal to resume one's employment is considered voluntary leaving. The Respondent did not have "just cause" under paragraph 29(*c*) of the EI Act. For these reasons, the Respondent was not entitled to regular Employment Insurance benefits starting on March 29, 2015.

[60] I also note that the refusal of employment in March 2015 could have led to the conclusion that the Respondent was not available to work under paragraph 18(1)(*a*) of the EI Act, because it is not an issue on file; the legislative provision and the jurisprudence are not discussed in detail.

CONCLUSION

[61] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division