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

Citation: *W. C. v. Canada Employment Insurance Commission*, 2017 SSTADEI 384

Tribunal File Number: AD-16-1022
AD-16-1013

BETWEEN:

W. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: October 10, 2017

DATE OF DECISION: November 6. 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

W. C., Appellant
Lyle Rowe, representative for the Appellant
Judy Prudhomme, representative for the Employment Insurance Commission (Commission)

INTRODUCTION

[1] On June 15, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant was disqualified from benefits pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act) on the basis that she had not had just cause for voluntarily leaving her employment. An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on August 15, 2016, and leave to appeal was granted on April 4, 2017.

[2] This appeal concerns the appeal filed under AD-16-1013 as well as AD-16-1022. There is only one filed appeal, but the appeal was mistakenly assigned two appeal files.

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

a) the complexity of the issue(s) under appeal;

b) the fact that the credibility may be a prevailing issue.

ISSUE

Did the General Division err in finding that the Appellant was disqualified from receiving Employment Insurance benefits because she had not had just cause for voluntarily leaving her employment?

THE LAW

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

> (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.

[5] Subsection 29(c) of the Act states as follows:

> (c) 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.

SUBMISSIONS

[6] In the teleconference hearing, the Appellant raised a number of concerns with the General Division decision. These concerns were not framed in respect of particular grounds of appeal, but I have attempted to capture her concerns below:

- The General Division ignored evidence of discrimination.
- The General Division accepted the "3rd party" evidence of the employer's District Manager in preference to the Appellant's direct evidence, and without giving adequate reasons.
- The General Division failed to fully investigate her reasons for leaving her employment.
- In particular, the General Division failed to consider that the repeated allegations of starting (or nearly starting) fryer fires, contributed to an intolerable working situation.
- The General Division was wrong in requiring the Appellant to discuss her concerns with her employer before leaving her job.
- The General Division failed to appreciate that the reduction in hours amounted to "constructive dismissal."
- The General Division failed to consider that requiring the Appellant to work with the two new employees, each receiving more hours than the Appellant who was a long standing full-time employer, was a circumstance contributing to an intolerable working situation.

[7] The Respondent has submitted that the primary question for the General Division was: "Did the Appellant have no reasonable alternative to leaving the employment?" The Respondent has asserted that the General Division clearly determined that the Appellant had not had reasonable alternatives prior to leaving her job when she did in December 2014. Consequently, the General Division found the Appellant's reasons for voluntarily leaving her employment did not constitute just cause.

[8] The Respondent contends that the General Division's findings are reasonable, transparent and intelligible, and that they fall within the range of possible outcomes that conforms to the Act—as well as established case law—and that the General Division committed no error in the manner in which it rendered its decision, nor did it disregard evidence.

ANALYSIS

Standard of Review

[9] The Respondent's reference to the reasonableness of the General Division decision suggests that it considers a standard of review analysis to be appropriate, although it does not specifically argue that I should apply the standards of review or that the General Division decision should be reviewed on the standard of reasonableness.

[10] I recognize that the grounds of appeal set out in subsection 58(1) of the Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, I do not consider the application of a standard of review to be necessary. There is now significant support in a recent Federal Court case law for not applying the standards of review.

[11] In *Canada (Attorney General) v. Paradis*; *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the Tribunal's Appeal Division is reviewing appeals of Employment Insurance decisions rendered by the General Division.

[12] The Federal Court of Appeal, in *Maunder v. Canada (Attorney General*), 2015 FCA 274, referred to *Jean*, *supra*, and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the Appeal Division to General Division decisions. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan.*

[13] In the recent matter of *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the Appeal Division, which had applied the standard of review. The Appeal Division had concluded that the decision of the General Division was "consistent with the evidence before it and is a reasonable one […]", The Court t did not comment on the standard of review applied by the Appeal Division, concluding only that it was "unable to find that the Appeal Division decision was unreasonable."

[14] I will consider this appeal by referring to the grounds of appeal set out in the DESD Act only and without reference to "reasonableness" or the standard of review.

Merits of the Appeal

[15] The General Division considered that the Commission had the onus of establishing that the Appellant had left her employment voluntarily (at paragraph 31). It determined that this was undisputed, and this was not challenged on appeal by either party.

[16] The principal justification that the Appellant has given for voluntarily leaving her employment was that her work hours were reduced from full-time to 18.5 hours per week, and, at the same time, two newly hired co-workers were each given more hours than she was given. The Appellant claimed that this disparity in work hours amounted to discrimination, because the two new hires were of Indian descent, as was her Manager at work.

Ground of Appeal

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. (Paragraph 58(1)(*c*) of the DESD Act)

[17] The Appellant has challenged the General Division decision on the basis that the General Division failed to consider the Appellant's evidence or that it preferred the Appellant's

evidence over that of the District Manager of the Appellant's former employer. The Appellant asserts that the General Division accepted the District Manager's explanation that her hours had been reduced because the business had been going through a slow time and also that other employees had their hours reduced. The Appellant states that the District Manager has no direct knowledge of the matters that are at issue and contends that the General Division failed to explain why it has accepted this "3rd party" evidence of the District Manager in preference to the Appellant's direct evidence. She also claims that the General Division failed to consider her Record of Employment, which indicated that she had been working full-time hours right up to when she quit.

[18] The Appellant also takes issue with the General Division's acceptance of the District Manager's evidence as it relates to the fault for a fryer fire and/or a second fryer incident that might have resulted in a fire.

[19] I note that the General Division does refer to the employer's explanation for reduced hours at paragraph 16, but that it also refers to the Appellant's Record of Employment at paragraph 12 and to her provided work schedule at paragraph 18. In neither instance does the General Division indicate that the evidence was accepted, or that either the employer's or the Appellant's evidence is preferred over that of the other. While the General Division refers to the Appellant's perspective on the fryer fire incident at paragraphs 19, 20, 21, 24, 26, 31 and 34, there is no reference to the employer's evidence in association with this incident or incidents.

[20] No findings of credibility were made for or against either the Appellant or the District Manager either generally, or specifically, in respect of the reason for reduced hours or as to any incident involving the fryers.

[21] The General Division is not required to make specific findings of credibility in each case, and no error is disclosed by the fact that the General Division made no findings regarding the District Manager's or the Appellant's credibility. The General Division did not reach any conclusion as to the motivation for the reduced hours or misconduct in relation to any fryer fire.

[22] I will address this in more detail below, but the General Division did not require an answer to either of these questions before it could determine whether the Appellant had had just cause for leaving her employment.

Other contributing circumstances:

[23] In respect of the fryer fire and other circumstances that may have contributed to the Appellant's leaving, the General Division's finding at paragraph 37 that there was a lack of evidence to suggest that she had to leave her employment immediately due to intolerable conditions, is a reasonable one. I have reviewed the recording of the General Division hearing and find no fault in the manner in which the General Division comprehended the testimony.

[24] The Appellant's representative argued that the Appellant had left because of an accumulation of stress. He said that she had been blamed for two fryer incidents and that she had been working in a poisoned environment caused by management. When the General Division pointed out that this was not what the Appellant had said but rather that she maintained she left because her employer had taken her hours away, the Appellant did not refute this.

[25] According to the recording of the hearing, the Appellant volunteered that the fire was "not really relevant," except that the employer had tried to blame it on her. She testified that her boss had blamed the fire on her because he had no reason for cutting her hours. In her written submissions to the General Division, the Appellant had also claimed that being blamed for the fire was also discrimination and was a way of coercing her to quit.

[26] As noted above, the General Division referenced her views on the fryer incident repeatedly. At paragraphs 24 and 31, the General Division correctly notes that the Appellant has testified that she quit because she had lost hours, not because of the fire incident, and that she has consistently and adamantly indicated that she quit because of the significant modification to her job (loss of hours) due to discrimination.

[27] I find that the General Division considered the fryer incident as one of the circumstances that may have influenced the Appellant to quit. How much weight the General Division gave that particular circumstance in comparison to the weight it gave to the reduction in hours is entirely her prerogative, so long as she has acted reasonably.

[28] The General Division was not charged with determining whether the Appellant had had a good reason to quit. Rather, the General Division was required to assess "just cause" within the meaning of the Act, which means that it needed to find that the Appellant had had no reasonable alternative to leaving. Regardless of how great an injustice it might have been for the employer to blame the Appellant for a fryer fire that was not her fault, or how much the Appellant resents being blamed, the General Division was apparently unconvinced that this had prevented her from attempting reasonable alternatives before quitting. Such a conclusion was reasonably open to the General Division on the evidence.

[29] The Appellant has also raised the issue on appeal that the General Division failed to consider that she had left because she would be working reduced hours, have less pay and *with people benefiting from her loss.* I cannot be certain whether the Appellant was seeking to raise another circumstance supporting her claim of "intolerable conditions," but I do note that any additional impact of having to work with co-workers that she viewed as having taken her hours was not raised at the General Division hearing. There is therefore no error in the General Division having failed to take it into account as a factor distinct from the Appellant's broader claim that she had her hours reduced in a discriminatory manner.

[30] Finally, the Appellant has asserted that the General Division failed to consider that the employer had paid her holiday pay to which she was not entitled. This is presumably in relation to her claim to having been paid for Christmas. In the Appellant's view, the employer was trying to "appease" her, and this was some form of admission of wrongdoing—although it is not clear whether the Appellant believes this admission to be in relation to the discriminatory assignment of work hours or in relation to unjustly blaming the Appellant for the fryer fire, both, or some other work circumstance.

[31] The Appellant has not explained why she believes her unearned Christmas pay is related to the reasonable alternatives to leaving that were open to her, and it is not otherwise evident. The General Division did not refer to Christmas pay in its decision, but it is not required to refer to every piece of evidence, irrespective of its relevance.

[32] In any event, this claim was not raised at the hearing and is found only in the post-hearing submissions (RGD7-21). The General Division allowed the Appellant to file late

submissions, but it was clear that she was expecting submissions only in connection with the evidence that she had heard at the hearing.

[33] I find no error in the fact that the claim of unearned Christmas pay, as well as the motive of appeasement that the Appellant had ascribed to the employer, was not referenced in the General Division decision.

Ground of Appeal: *The General Division erred in law in making its decision, whether or not the error appears on the face of the record.* (Paragraph 58(1)(*b*) of the DESD Act)

[34] The Appellant has argued that she established discrimination before the General Division and that the General Division's failure to find just cause in such circumstances is an error of law.

[35] The fundamental issue before the General Division was **not** whether the Appellant could establish discrimination, or whether or not she could establish any of the other circumstances enumerated from subparagraphs (i) to (xiv) in paragraph 29(c). The issue was whether the Appellant had had just cause for leaving her employment. "Just cause" is established only when a claimant has no reasonable alternative to leaving. The General Division is correct at paragraph 35 where it says "[…] it is not enough to simply show that one (or more) of the circumstance listed in subsection 29(c) existed at the time that the [Appellant] left her employment." Individual circumstances (such as subparagraph 29(*c*)(iii), discrimination, or subparagraph 29(*c*)(vii) significant modifications of terms and conditions respecting wages or salary) are relevant only to the extent that they may impact the Appellant's reasonable alternatives to leaving.

[36] The employer differed from the Appellant in his explanation for the reduced hours, but he did not dispute the manner in which hours had been allocated between employees. The Appellant's challenge to the employer's motivation for reducing her hours (and whether that motivation was discriminatory) can be relevant only to the extent that his motivation affects whether she had "no reasonable alternative to leaving."

[37] The General Division considered the circumstances that had led to the Appellant's decision to quit, and it accepted that she had felt discriminated against. However, the Appellant's perception of discrimination derived from a single event: The Appellant's hours

had been reduced to 18.5 hours per week on a single week's schedule at a time when two new employees of Indian descent had been given more hours. There was no other evidence of any employer conduct brought before the General Division that could be considered discriminatory and, more to the point, there was no evidence that discrimination affected the availability of alternatives to leaving or that it caused any of those alternatives to be less reasonable in the Appellant's particular circumstances.

[38] It was therefore unnecessary for the General Division to determine whether the employer's actions constituted discrimination within the meaning of the *Canada Human Rights Act*, and it was therefore unnecessary for the General Division to determine the employer's motivation for reducing the Appellant's hours.

[39] The Appellant also questioned why the General Division had not sought or provided an explanation for why her hours had been reduced, beyond that explanation that the employer had provided. As noted above, the General Division did not need to determine the reason for the reduction in her hours in order to determine whether the Appellant had exhausted her reasonable alternatives to leaving.

Reasonable alternative and seeking resolution with employer

[40] The Appellant has argued that the General Division was in error in requiring her to seek a resolution with her employer before leaving. She relies on what appears to be a general information booklet provided by Ontario's Employment Standards Branch (to assist employees in filing employment standards claims) (GD2-10-11). That information suggests that an employee should resolve employment standards issues with employers unless the employee has good reason not to. One of the examples of a "good reason" that is provided in the booklet is a "reason related to an Ontario Human Rights Code ground."

[41] The General Division must apply the Act and the *Employment Insurance Regulations*. General advice intended for employees with employment standards issues has no bearing on how Employment Insurance benefits are determined or on which alternatives to leaving employment may be considered reasonable. The General Division finds at paragraph 36 that the Appellant did not have to quit her employment in order to discuss the reduction in her hours

with her Manager, with the Labour Board, with the Human Rights Commission and/or with the company head office/CEO. Instead it finds, at paragraph 37, that it would be reasonable for the Appellant to first discuss with her employer the sudden decrease. The General Division also concluded that there was no evidence to suggest that her work circumstances were so intolerable as to require her to leave when she did. I do not find any error of fact or law in the manner in which the General Division considered this evidence, or in the conclusions it reached.

Applicability of constructive dismissal

[42] The Appellant has also argued that she had been "constructively dismissed" and that this was not understood or taken into account by the General Division.

[43] "Constructive dismissal" is not a fact that may be found: It is a legal conclusion from facts. The General Division is correct that "constructive dismissal" is not a term or concept found in the Act. The General Division cited *Canada (Attorney General) v. Peace*, 2004 FCA 56, which states as follows: "Whether or not an employee is entitled to treat the employment relationship as having been terminated at common law on the grounds of constructive dismissal is a different issue from the issue of whether an employee has voluntarily left employment under the Act such that he may not be entitled to EI [Employment Insurance] benefits."

[44] The General Division did not err by not characterizing the reduction in hours as constructive dismissal or in failing to apply a constructive dismissal test in the Employment Insurance context.

Ground of Appeal: *The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.* (Paragraph 58(1)(*a*) of the DESD Act)

[45] The Appellant has argued that the General Division failed to investigate the cause of her reduction in hours. This could be characterized as a claim that the General Division refused to exercise its jurisdiction.

[46] As set out in the General Division decision at paragraph 30, once it is established that the Appellant voluntarily left her employment within the meaning of subsection 29(b.1) of the

Act, the onus of proof shifts to the Appellant to show that she had just cause for leaving her employment.

[47] In other words, it is up to the Appellant to show that she had no reasonable alternative to leaving, having regard to all the circumstances. Even had the General Division explicitly rejected the District Manager's explanation that it was a "slow time," the General Division would not have been obliged to accept the Appellant's alternate explanation that her departure had been a result of discrimination, or to seek out some other alternate explanation.

[48] The Appellant also claims that the General Division failed to fully investigate her reasons for leaving her employment, in a more general sense. However, the General Division has no specific power of inquiry and is not an investigator. It is not the role of the General Division to assist either the Commission or the Appellant to obtain or present evidence in support of their respective positions, and the General Division is not thereby failing to consider evidence or failing to observe a principle of natural justice.

CONCLUSION

[49] The Appellant has not established any of the grounds of appeal set out in subsection 58(1) of the DESD Act. The General Division: did not fail to observe a principle of natural justice or make a jurisdictional error per paragraph 58(1)(*a*); it made no error of law per paragraph 58(1)(*b*), and; it did not base its decision an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, per paragraph 58(1)(*c*).

[50] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division