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

Citation: *J. D. v. Canada Employment Insurance Commission,* 2017 SSTADEI 429

Tribunal File Number: AD-17-1

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

LCL Spas

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: November 14, 2017

DATE OF DECISION: December 7, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: J. D.
Appellant's representative: S. Guevara-Holguin
Respondent's representative: S. Prud'Homme
Added Party: J. B.

OVERVIEW

[1] The Appellant made an initial claim for regular Employment Insurance (EI) benefits with a benefit period beginning on June 21, 2015. The Canada Employment Insurance Commission (Commission) determined on July 10, 2015 that EI benefits could not be paid because the Appellant had voluntarily taken leave from his job on June 19, 2015 without just cause.

[2] At the conclusion of his leave of absence, the Appellant returned to work as planned, on or around September 23, 2015. He was subsequently laid off from employment on November 27, 2015. The Commission determined on December 22, 2015 that EI benefits could not be paid on a reactivation of the existing benefit period "because of your previous disqualification," and further noted that a new (initial) claim could not be made because the Appellant had not worked the minimum number of insurable hours "since voluntarily leaving your employment […] without just cause." There was no change to this decision on reconsideration.

[3] The General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Appellant's appeal. First, the General Division found that the Appellant had voluntarily taken a leave of absence without just cause, and a disentitlement was correctly imposed pursuant to s. 32 of the *Employment Insurance Act* (Act). Secondly, the General Division found that the Appellant had not accumulated sufficient hours to qualify for benefits upon the November 2015 layoff, because "only hours worked after the disqualifying event on June 19, 2015 can be used" pursuant to s. 30(5) of the Act.

[4] The Tribunal's Appeal Division granted the Appellant leave to appeal the General Division decision. The permissible grounds of appeal to the Appeal Division, under s. 58(1) of

the *Department of Employment and Social Development Act* (DESDA), include a failure to observe a principle of natural justice, errors of law and jurisdiction, and erroneous findings of fact made in a perverse or capricious manner or without regard for the evidence.

[5] The hearing of this appeal was conducted by teleconference, consistent with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

Disentitlement to benefits, June to September 2015

[6] The Appellant has conceded, through his representative, that he was disentitled from receiving EI benefits between June 21 and September 23, 2015, pursuant to s. 32 of the Act. My review of the file and the General Division decision does not reveal any breach of natural justice or any error of jurisdiction, law, or fact on this issue, and the parties are now in agreement. As such, the General Division's decision on the issue of disentitlement to EI benefits between June and September 2015 is confirmed.

Insufficient hours to qualify for benefits in November 2015

[7] I note at this juncture that, when I sought the Commission's oral submissions on this issue early in the hearing, the representative expressed her view that the only issue under appeal was whether the Appellant had voluntarily taken a leave of absence without just cause. She initially suggested an adjournment so that this matter could be clarified. I did not entertain the suggestion of an adjournment, since the General Division decision addressed both issues, the Appellant's written submissions claimed an error of law in respect of the second issue in detail, and the Commission's own written submissions, to the General Division and to the Appeal Division, addressed the question of qualifying hours for further benefits.

[8] The Commission had submitted the following to the General Division, in May 2016:

> With regards to the issue of insufficient hours since the disqualifying event, the Commission submits that **in accordance with section 30(5) of the Act, only the hours worked after the disqualifying event on June 19, 2015 can be used to determine whether the claimant can escape disentitlement in accordance with section 32(1) of the Act.** The

> Commission submits that after voluntarily taking a leave of absence from his employment with LCL Spas on June 19, 2015 without just cause, the claimant did not accumulate sufficient insurable hours to receive regular benefits in accordance with section 7 of the Act (GD3-29). [emphasis added]

[9] Although the decision under reconsideration had addressed eligibility for benefits upon reactivation of the June 2015 benefit period and upon establishment of a new benefit period, the Commission did not distinguish between these two scenarios in its submission.

[10] It appears that the General Division accepted the Commission's submission, without any discussion of the law, or any citation of s. 30 of the Act:

> [81] The Tribunal finds that the Appellant did voluntary [sic] take a leave of absence without just cause therefore in accordance to subsection 30(5) of the Act only hours worked after the disqualifying event on June 19, 2015 can be used.

[11] Since the Appellant had accumulated only 380 hours between his leave of absence and the November 2015 layoff, the General Division confirmed that he did not have sufficient hours to qualify for benefits.

[12] The Appellant claims an error of law. The applicable ground of appeal is found in s. 58(1)(*b*) of the DESDA, that "[t]he General Division erred in law in making its decision, whether or not the error appears on the face of the record." *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, I agree with the Commission's submission that, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on questions of law.

[13] Specifically, the Appellant submits that the General Division erred in law by applying the requirements of s. 30(5) rather than s. 32 of the Act. I agree.

[14] The relevant provisions are as follows:

30(1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or **voluntarily left any employment** without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[…]

(5) If a claimant **who has lost or left an employment as described in subsection (1)** makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

[…]

32 (1) A claimant who **voluntarily takes a period of leave from their employment** without just cause is not entitled to receive benefits if, before or after the beginning of the period of leave,

(a) the period of leave was authorized by the employer; and

(b) the claimant and the employer agreed as to the day on which the claimant would resume employment.

(2) The disentitlement lasts until the claimant

(a) **resumes the employment;**

(b) **loses or voluntarily leaves the employment;** or

(c) after the beginning of the period of leave, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

[emphasis added]

[15] In written submissions to the Appeal Division, the Commission supported the General Division finding of insufficient hours to qualify for benefits, and cited *Canada (Attorney General) v. Trochimchuk*, 2011 FCA 268,[1] for the principle that "[w]here a claimant leaves an employment without just cause, the hours of insurable employment accumulated in that and any previous employment cannot be used to qualify him for benefits under section 7 of the Act." This summary is no more than a restatement of s. 30(5) of the Act, tied to s. 30(1) of the Act. *Trochimchuk* itself is factually distinguishable from the case at hand, as it involved a claimant who had voluntarily left employment rather than voluntarily taking a leave of absence. The Commission has not provided any explanation as to how s. 30(5) could apply to the present appeal, and the Added Party did not provide submissions on this matter.

[16] I find no basis for the application of s. 30(5) of the Act to the Appellant's situation. This provision applies only if a claimant lost any employment due to misconduct or voluntarily left any employment without just cause. I do not interpret "voluntarily left any employment" as encompassing a voluntary leave of absence with a fixed return date. A temporary "period of leave from" employment does not constitute leaving that employment. The distinction is perhaps even clearer in the French version of the Act, where the language in s. 30(1) is "*quitte volontairement un emploi*," and in s. 32(1) it is "*prend volontairement une période de congé*." I note that s. 29(b.1) of the Act extended the scope of voluntarily leaving employment to include a refusal of alternative employment, a refusal to resume employment, and a refusal to continue employment transferred to another employer; a voluntary period of leave was not included in the expanded definition. Moreover, the fact that a s. 32 disentitlement ends if the claimant "voluntarily leaves the employment" (s. 32(2)(*b*)) further reinforces that this concept is meant

[1] I note that, for other reasons, the Federal Court of Appeal has since departed from the approach taken in *Trochimchuk*, in *Canada (Attorney General) v. Marier*, 2013 FCA 39.

to be distinct from a voluntary period of leave. In my view, s. 32 of the Act provides comprehensive direction with respect to the consequences of a voluntary leave of absence without just cause, when there is authorization and a fixed return date. When s. 32 of the Act applies, there is no basis for the application of s. 30 of the Act, including s. 30(5).

[17] In this appeal, the Appellant filed an initial claim and, as required by ss. 9 and 10 of the Act, a benefit period was established effective June 21, 2015. The Appellant was not disqualified from receiving benefits under s. 30(1) of the Act, and he did not lose any employment because of misconduct or voluntarily leave his employment without just cause. Rather, as confirmed by the General Division (and consistent with the Commission's position), the Appellant was disentitled to benefits between June and September 2015 due to a voluntary period of leave without just cause, pursuant to s. 32(1) of the Act. He resumed his employment in late September 2015 and consequently his disentitlement ended at that point in time, pursuant to s. 32(2)(*a*) of the Act. The Appellant did not need to "escape disentitlement" through the application of s. 30(5) of the Act, nor had there been a "disqualifying event," as the Commission had originally submitted. When the Appellant sought benefits following the November 2015 layoff, his existing benefit period had not ended or been cancelled pursuant to s. 10 of the Act, and the disentitlement was no longer in effect. I conclude that the General Division incorrectly applied s. 30(5) of the Act to the facts of this case, after inexplicably re-characterizing the Appellant's disentitlement as a "disqualifying event." The incorrect application of s. 30(5) of the Act by the General Division constitutes an error of law.

[18] Pursuant to s. 59 of the DESDA, I have the authority to give the decision that the General Division should have given. I am able to correct the General Division's error of law in this manner, and I find it appropriate to do so. The Appellant's appeal to the General Division ought not to have been dismissed. The Commission's December 22, 2015 decision that the Appellant was ineligible for benefits due to a previous disqualification, and due to insufficient hours since voluntarily leaving employment, must be rescinded. At the end of November 2015, the Appellant was eligible to claim benefits within his existing benefit period, which began on June 21, 2015, without restriction due to any disqualifying event or disentitlement associated with the leave of absence.

[19] Since the Appellant's existing benefit period had not ended or been cancelled by November 2015, the conditions for a new benefit period at that time need not be addressed in the disposition of this appeal. I note that if the June 2015 benefit period had ended (and not been cancelled), in order to establish a new benefit period the Appellant would have required sufficient insurable hours during a shortened qualifying period beginning on June 21, 2015; this is by virtue of s. 8(1)(*b*) of the Act, not s. 30(5), and it is unrelated to any disqualification or disentitlement. In any case, the benefit period established in June 2015 had not ended by November 27, 2015, and the Appellant was eligible to claim EI benefits within the existing benefit period, as determined above.

[20] It seems that the Commission, at its operating level, might have already reached this conclusion. The Appellant's representative informed both the General Division and the Appeal Division that the Appellant had received benefits, retrospectively, for the period following the November 2015 layoff. This is consistent with file evidence that a Service Canada agent had advised the Appellant on April 20, 2016 that he would be paid for the post-layoff period (GD3-36). However, the reconsideration decision of April 21, 2016 indicates that there was no change to the December 2015 decision, and the Commission's representative did not have a record of payments for the post-layoff period. Varying the General Division decision may be largely academic if the Appellant has already been paid EI benefits for the relevant period, yet the Appellant understandably wishes to have any contradiction between the General Division decision and the Commission's actions resolved, in order to avoid the possibility of the Commission claiming an overpayment in future.

DISPOSITION

[21] The appeal is allowed in part.

[22] The General Division's decision that the Appellant was disentitled to EI benefits during the leave of absence between June 19 and September 23, 2015, pursuant to s. 32 of the Act, is confirmed. The Commission's July 10, 2015 decision in this respect is thus also confirmed.

[23] The General Division's dismissal of the Appellant's appeal on the issue of the hours required to qualify for benefits upon layoff in November 2015 is rescinded, and the following is substituted therefor:

> The Appellant was disentitled, not disqualified, from receiving benefits for the duration of a leave of absence that began on June 19, 2015 and ended on or around September 23, 2015. The Commission's December 22, 2015 decision is rescinded. At the time of the November 27, 2015 layoff, there was no disentitlement or disqualification in effect; the Appellant was eligible to claim benefits at that time, under the existing benefit period that had begun on June 21, 2015.

Shirley Netten
Member, Appeal Division