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

Citation: *S. W. v. Canada Employment Insurance Commission*, 2017 SSTADEI 437

Tribunal File Number: AD-17-256

BETWEEN:

S. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: October 24, 2017

DATE OF DECISION: December 15, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

S. W.: Appellant

Susan Prud'homme: Representative for the Respondent, the Canada Employment Insurance Commission

INTRODUCTION

[1] On February 22, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant did not have just cause for voluntarily leaving his employment under section 29 of the *Employment Insurance Act* (Act). An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on March 23, 2017, and leave to appeal was granted on March 30, 2017.

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

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

b) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] Did the General Division err in fact or in law or fail to observe a principle of natural justice in concluding that the Appellant had a reasonable alternative to voluntarily leaving his 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.

SUBMISSIONS

[5] The Appellant submits that the General Division failed to consider his testimony that he had made multiple attempts to discuss his concerns about working conditions with the Director (also referred to by the General Division as the "president").

[6] The Appellant further submits that the General Division misconstrued the extent of his efforts to obtain alternative employment while still employed.

[7] The Appellant argues that the General Division's finding at paragraph 55 of its decision, that he did not seek other employment before quitting, is inconsistent with its reliance on the Federal Court of Appeal decision in *Canada (Attorney General) v. White*, 2011 FCA 190.

[8] The Appellant also argues that he had provided precedent decisions to the Canada Employment Insurance Commission (Commission) (at GD2-8) where individuals in the same circumstances were granted benefits, and that the General Division ought to have had regard to these decisions.

[9] The Respondent submits that the General Division member put her mind to each issue and clearly addressed each one. She noted that the onus is on the Appellant to demonstrate that he had no reasonable alternatives to leaving his employment. The Respondent stated that the General Division decision fell within the range of possible outcomes and was a reasonable one that conforms to the Act, as well as to the established case law.

ANALYSIS

Standard of Review

[10] The Respondent's reference to the reasonableness of the General Division decision and its comment respecting the application of standards of review for Umpires, suggests that it

considers a standard of review analysis to be appropriate. However, the Respondent does not specifically argue that I should apply the standards of review, or that reasonableness is the appropriate standard.

[11] I recognize that the grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, there has been some recent case law from the Federal Court of Appeal that has not required that the standards of review be applied, and I do not consider it to be necessary.

[12] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference. Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[13] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[14] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not provide that a review should be conducted in accordance with the standards of review.

[15] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of

Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[16] I agree with the Court in *Jean* where it referred to one of the grounds of appeal set out in subsection 58(1) of the Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." 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 Appeal—Did the General Division err in fact or law?

I. Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it?

A. Did the General Division ignore the Appellant's efforts to raise his concerns with the Director?

[17] The Appellant argues that the General Division ignored his testimony in determining that he had the reasonable alternative of discussing his concerns with the Director. He said that he had told the General Division member "numerous times" that he had done so.

[18] While I acknowledge that the Appellant now recollects that he attempted to take his concerns to the Director, both before and after he quit, this was not in evidence before the General Division.

[19] I have reviewed the audio recording of the hearing, but I have not discovered any testimony to the effect that the Appellant discussed any of his concerns before resigning. In his testimony to the General Division, the Appellant said only that the Director was "not on site at all really" and "difficult to get a hold of" and he discussed his attempt to contact the Director after he forwarded his resignation.

[20] I located a single reference on the record that could relate to the Appellant's contention that he had raised, or tried to raise, his concerns with his Director. In paragraph 2 of the Appellant's written submission to the General Division, the Appellant states that "the employer breached the terms of [his] employment contract by not allowing [him] the hours of work which

were stated as [HIS] choice in the contract and explicitly conveyed to both [the Director] and [his office manager] at more than 1 occasion" (AD1-4).

[21] The ordinary grammatical construction of this statement is that it was "his preferred hours" that he had conveyed to the Director, and not his concerns with not being permitted to work those preferred hours. There was no other documentary or testimonial evidence before the General Division to suggest that the Appellant had raised his concerns with the Director.

[22] As a result, I do not find that the General Division erred in finding that the Appellant had failed to raise his concerns, or any one of his concerns, with the Director.

B. Did the General Division fail to understand the extent of the Appellant's job search while still employed?

[23] In relation to the Appellant's argument that the General Division misconstrued the extent of his job search while he was still working with the employer, the Appellant had provided the General Division with little evidence on which this could be assessed. The Appellant has now provided additional evidence to the Appeal Division to substantiate the extent of his search for alternative employment, but I cannot consider this new evidence in my decision.

[24] The General Division was limited to considering only the evidence that was before it and I can consider only whether the General Division failed to consider or properly appreciate that evidence. The grounds of appeal are those described in subsection 58(1) of the DESD Act, as set out in paragraph 4 above.

[25] I do accept that there was some evidence to support the General Division's factual finding that the Appellant did look for work prior to leaving his job. In response to Question 9 of the initial application for benefits, the Appellant responded "yes"—that he looked for work prior to quitting. When interviewed by the Commission as to whether he attempted to look for other work prior to leaving, he said that he never stopped looking (GD3-21). However, this is the entirety of the evidence on the Appellant's job search that was available to the General Division. The Appellant did not testify at his General Division hearing that he had looked for work or indicate what was involved in that search.

[26] I am therefore unable to find that the General Division ignored or misapprehended the evidence that was before it, in stating that the Appellant provided no evidence or detailed submissions on the *extent* of his job search efforts (paragraph 55).

II. Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its discretion?

A. Were the General Division's reasons sufficient to understand the decision?

[27] The Appellant argues that paragraphs 55 and 57 appear to be contradictory on their face. At paragraph 55, the General Division accepts that the Appellant did look for other employment while still working (paragraph 55) on the basis of his statement to the Commission (GD3-21). Then, at paragraph 57, the General Division cites *White* for the proposition that, "[…] there is an obligation on a claimant, in most cases, to attempt to resolve workplace conflicts with the employer or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit".

[28] Since the General Division had already found that the Appellant had sought alternative employment before quitting, the Appellant appears to have satisfied the obligation to demonstrate efforts to seek alternative employment. The General Division does not address how this statement of the principle in *White* supports its conclusion that the Appellant did not have just cause. It appears on its face to suggest the opposite.

[29] The Appellant did not explain in what sense he considered this to be an error, but I understand it to be a challenge to the sufficiency of the reasons, which could be considered a breach of natural justice, or an error of law. The General Division's reasons do not explain the manner in which it might apply *White* to the facts and reach its conclusion.

[30] Nonetheless, I must presume the General Division to have cited *White* purposively; i.e. I must presume that the General Division considered the *White* decision to be in some way applicable to the facts in the Appellant's case. On that presumption, I accept that the twin obligations specified in *White* influenced the General Division decision in some fashion.

[31] *White* states that one of the claimant's obligations is to *demonstrate efforts to seek* alternative employment, as opposed to obligating a claimant to "actually obtain" alternative employment. According to the General Division, the Appellant did demonstrate efforts. Yet, the General Division still found that he had the reasonable alternative of remaining employed until he found suitable employment (paragraph 56). I am led to the conclusion that the General Division considers that the efforts required by *White* must be *reasonable* efforts and, further, I conclude that the General Division tacitly accepted that the Appellant either did not make reasonable efforts or did not establish that he made reasonable efforts.

[32] The General Division might have been more transparent in this determination. Paragraph 55, in particular, could have benefited from an overt finding in respect of the reasonableness of the job search and from an explanation of any inference that the General Division may have drawn from the lack of evidence as to the extent of the search. It would also have been preferable if the *White* case had been clearly addressed to the facts and applied.

[33] Still, I do not find that the reasons are so opaque as to preclude appellate review, nor so inadequate as to be a failure to observe a principle of natural justice.

III. Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

A. Did the General Division consider the Appellant's reasonable alternatives to leaving in light of all the circumstances?

[34] The only other argument advanced by the Appellant concerns the General Division's failure to take into account the authorities he provided. However, before I visit the question of the proper use of legal authorities (at paragraph 67 below), I will address some other concerns I have with the manner in which the General Division applied the paragraph 29(*c*) test. The first of those concerns relates to the manner in which the General Division evaluated the reasonable alternatives.

[35] According to paragraph 29(*c*) of the Act, "just cause" may be found only where a claimant has no reasonable alternative to leaving their employment having regard to all the circumstances. Paragraph 29(*c*) identifies a number of particular circumstances in

subparagraphs (i) through (xiv) that are relevant to the determination. The list is non-exhaustive, but these particular circumstances, if present, must be taken into account. The Federal Court of Appeal states the test as whether, on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment, *having regard to all the circumstances*, including but not limited to those specified in subparagraphs 29(*c*)(i) to (xiv) of the Act (*Canada [Attorney General] v. Landry* [1993], 2 C.C.E.L. [2d] 92 [FCA]).

[36] In the decision under appeal, the General Division finds as fact that the Appellant has experienced some of the circumstances enumerated under paragraph 29(*c*). It makes the following findings respecting circumstances:

- The Appellant had a significant modification of terms and conditions respecting wage and salary (subparagraph 29[*c*][vii]);

- The Appellant was not able to work his preferred schedule and this may be considered a breach of contract (which relates directly to the "significant change in work duties" circumstance in subparagraph 29[*c*][ix]); and

- The Appellant had an antagonistic relationship with his supervisor per subparagraph 29(*c*)(x).

While the General Division makes no finding as to who was primarily responsible for the antagonism, it supports its finding with regard only to the supervisor's antagonistic behaviour towards the Appellant (paragraphs 41, 42 and 43). As a result, I accept that the General Division implicitly finds that the Appellant was not the one primarily responsible and that the circumstance in subparagraph 29(*c*)(x) applied.

[37] In the decision, the General Division considers each of the circumstances prescribed under subparagraphs 29(*c*)(vii), (ix), and (x) independently of the others, and determines, independently, that a reasonable alternative or alternatives existed to leaving as follows:

- In respect of the *change in salary* circumstance, the General Division finds that a reasonable alternative would be to continue working while seeking other employment (paragraph 35).

- In respect of the *change in employment terms* (referred to in the decision under the heading "Schedule"), the General Division identifies two reasonable alternatives: that the Appellant work through his probation period; and that he discuss the issue with the president (paragraph 40). (In his testimony to the General Division, the Appellant actually identified the "president" as the "Director.")

- In respect of the antagonism with his supervisor, the General Division proposed that the Appellant could have sought mediation through the president (paragraph 46).

[38] The General Division also took note of the additional "reasonable circumstances" raised by the Appellant including offensive language in the workplace, a lack of trust evidenced by the withholding of the keys to the workplace, the company credit card, and purchasing authority, as well as a lack of leadership from the president and being set up for failure by being denied the access he required or the ability to obtain the parts he needed. The General Division makes no specific finding on the existence of any of these other circumstances, but I find these circumstances were accepted as additional factors. There is no indication to the contrary and the General Division twice alluded to the Appellant's credibility (paragraphs 39 and 55). The General Division neutrally recorded the Appellant's view that "[…] all of the issues combined made it increasingly difficult to work there" (paragraph 48).

[39] It would be reasonable to presume that the effect of all the circumstances to which the Appellant testified, taken together, would be greater than the effect of any one of them. One can even imagine scenarios in which the existence of a number of circumstances interact in such a way that their total impact on the availability of reasonable alternatives would be even greater than simply summing the impacts of all the individual circumstances.

[40] Paragraph 29(*c*) of the Act appears to recognize the need to consider the overall effect where it directs the Commission to determine the reasonableness of alternatives with regard to "all the circumstances" rather than to "any of the circumstances".

[41] I do not understand the General Division to have properly analyzed the effect of all the circumstances. At paragraph 56, the General Division compiles its various findings on the reasonable alternatives it related to particular circumstances into two finalists, which are said to

have regard to all the circumstances. However, before it reaches that point, the General Division considers the circumstances individually.

[42] The General Division finds that "speaking to the president" is a reasonable alternative to quitting in relation to his *significant change in work duties* circumstance (paragraph 40), and in relation to his *antagonism with a supervisor* circumstance (also described here as seeking mediation through the president), but the General Division does not find it to be a reasonable alternative in relation to the s*ignificant modification of terms and conditions respecting wages or salary* (paragraph 35). This is perfectly reasonable. The new salary terms were imposed by the Director in the course of negotiations with the Appellant. The Appellant had already negotiated with the Director to the best of his ability from the difficult position of having accepted and commenced employment.

[43] The General Division also finds that remaining employed while seeking alternate employment is a reasonable alternative to leaving for the *significant modification of terms and conditions respecting wages or salary* and the *significant change in work duties,* but not for *antagonism with a supervisor* with whom he works on a daily basis. This also makes sense. It is hard to imagine that continuing to work in an antagonistic relationship with an immediate supervisor could be said to be any kind of reasonable *alternative* to getting away from that antagonistic supervisor.

[44] Each of the three circumstances described above are circumstances specifically enumerated under paragraph 29(*c*) for their recognized potential to impact reasonable alternatives, and all of them were found by the General Division to exist in fact. However, not one of these reasonable alternatives is identified as applying to all three of these circumstances. Where the General Division endeavours to consider "all the circumstances" at paragraph 56, as required by paragraph 29(*c*) of the Act, it ultimately determines that the Appellant could have addressed his issues with the president or remained employed until he found other suitable employment. As seen above, neither of these alternatives is applicable to each and every claimed circumstance, but rather only to individual circumstances.

[45] Furthermore, the General Division fails to consider the reasonableness of the alternatives in a manner that would take into account the effect of any interaction between those circumstances.

[46] Thus, the manner in which the General Division assessed reasonable alternatives is not one that comprehends all the circumstances and this represents an error of law per paragraph 58(1)(*b*).

B. Was the General Division correct to require that the Appellant's circumstances should be so intolerable as to require him to leave immediately?

[47] There is one final error of law that was not identified by the Appellant but that bears comment. This error relates to the General Division's apparent application of a legal test directed to the requirements of the legislative predecessor to paragraph 29(*c*) of the current Act.

[48] The General Division states at paragraph 35, that the change in terms of conditions respecting salary was, "[…] not so significant that it required him to quit his job immediately". At paragraph 52, the General Division states that it has considered the totality of all of the circumstances before finding that the Appellant's, "working conditions were intolerable, but not so intolerable as to cause him to quit immediately". At paragraph 53, the General Division considers the Appellant's attempt to rescind his resignation, finding that this again, "[…] supports the notion that the conditions were not so intolerable that leaving immediately, in the absence of new employment, was his only option available".

[49] The General Division comprehends the ultimate issue correctly, finding that the Appellant did not have just cause for leaving his employment. However, its analysis at paragraphs 52 and 53 suggests that the General Division is adopting and applying an interpretation of a test for "just cause" that requires that the circumstances be so intolerable that that the Appellant had to quit *immediately*.

[50] The application of an immediacy requirement has its origin in subsection 28(4) of the former *Unemployment Insurance Act* which required a claimant to have no reasonable alternative to leaving immediately. "Immediately," in the former act was addressed to "leaving" immediately not to those alternatives that existed immediately and this is just how the

General Division is employing it now. However, the word “immediately” was omitted from the current statute. Presuming Parliament to have been acting purposefully, it would now be an error of law to interpret the current statute in such a way as to reintroduce the immediacy requirement. In fact, a requirement for immediacy would obstruct the proper consideration of “all the circumstances” as required by paragraph 29(*c*) of the current Act, circumstances that may variously occur at different times or develop progressively, as was the case here.

[51] Related to the idea of immediacy is the idea that the working conditions must be intolerable to justify leaving. *Canada (Attorney General) v. Hernandez*, 2007 FCA 320 is a decision often referenced in support of the view that working conditions must be so intolerable as to leave the employee no option but to quit. There are two caveats that must be considered in applying *Hernandez*: First, *Hernandez* is restricted in its application to one of the paragraph 27(*c*) circumstances, that of significant changes of work duties. No other circumstance, or any combination of other circumstances, is directed to attain the “so intolerable” standard. Second, *Hernandez* does not define intolerable as *acutely* intolerable or, to use the words of the General Division, “so intolerable as to require the Appellant to leave *immediately”*. In other words, *Hernandez* does not foreclose the prospect that individual circumstances may approach the “so intolerable” threshold by increments or that a number of circumstances may be intolerable cumulatively.

[52] Neither is “so intolerable” universally accepted as an appropriate measure. The Federal Court of Appeal decision of *Chaoui v. Canada* (*Attorney General*), 2005 FCA 66 (CanLII), appears to have rejected “intolerable” as an appropriate standard. In that case, the Umpire held that the claimant should have “continued to work until he found a job that was more consistent with his aspirations” and that there was “no evidence that the working conditions were intolerable”. The Federal Court of Appeal rejected this saying that the Umpire “[…] went beyond the requirements of paragraph 29(*c*) and imposed a burden that ultimately renders that paragraph meaningless”.

[53] The Appellant submitted two decisions of the former Umpire (CUB 15298 and 15252), arguing that the General Division erred in failing to take these decisions into account. These cases were adduced as supportive of his point that changes in his contractual terms may be

considered just cause. I do not accept that it was an error for the General Division to refuse to apply or to reference these CUB decisions. Decisions of the Umpire may be considered persuasive, but the General Division is not bound to follow them and it does not err in failing to refer to them in its reasons.

[54] Having said that, I appreciate the words of Muldoon, J. in CUB 12252 where he said,

> What claimants are not required to endure, however, is to be exploited, misled or constructively dismissed by their employers. On the evidence, that is what the referees apparently found when they found "… the reduction of wages, from that originally offered…" Now, that a claimant should be disqualified from benefits because he would not be so used by an employer who engages him, but breaks his word, if not also the contract of employment, would be offensively against public interest and would bring the administration of the Unemployment Insurance Act into sorry disrepute.

[55] Like the General Division, I am not bound by any decision of the Umpire. However, I find Justice Muldoon's views to be persuasive. The application of "so intolerable" in this case, effectively substitutes a "no other alternative" test for the "no reasonable alternative" test. The question is not whether the Appellant had no options but to leave. The question is whether those other options available to him were unreasonable.

[56] I accept that the *reasonable alternatives* must be alternatives that are available immediately, i.e. at the time that a claimant voluntarily leaves. Here, however, the General Division applies "immediacy" to mean that the leaving must immediately follow the circumstance that provokes the departure. Such a circumstance would need to arise and develop to the maturity of "so intolerable status" almost instantly, in order that it could be said at any particular moment that there is no choice but to depart immediately.

[57] According to the General Division, the Appellant's salary modifications did not require an immediate departure (paragraph 35); neither did the totality of the circumstances (paragraph 52). I find that this "immediacy" requirement, as it is applied by the General Division, produces a test of reasonableness that is more restrictive than is supported by either the letter or the intent of the Act.

[58] I therefore find that the General Division erred in law in its application of paragraph 29(*c*) of the Act. This is an error per paragraph 58(1)(*b*) of the Act.

CONCLUSION

[59] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division