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

Citation: *P. R. v. Canada Employment Insurance Commission,* 2017 SSTADEI 445

Tribunal File Number: AD-17-236

BETWEEN:

P. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Klass Investments Inc

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: November 9, 2017

DATE OF DECISION: December 27, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

P. R., Appellant

D. H., Employer and Added Party

Carman R. McNary, Employer's Representative

INTRODUCTION

[1] On February 14, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had voluntarily left her employment without just cause contrary to paragraph 29(*c*) of the *Employment Insurance Act* (Act).

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division of the Tribunal on May 12, 2017, and leave to appeal was granted on May 18, 2017.

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

a) The complexity of the issue(s) under appeal.

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

ISSUE

[4] Did the General Division err in fact or law in finding that the Appellant did not have just cause for leaving her employment?

THE LAW

[5] 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

[6] The Appellant submitted that the General Division had based 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, per paragraph 58(1)(*c*) of the DESD Act.

[7] More specifically, the Appellant argues that the General Division:

a. failed to consider her evidence as to the significant change in work duties;

b. based its decision on an assumption that the Employer had provided direction to the Appellant prior to the Employer's surgery whereas there was no evidence of this;

c. based its decision on an assumption that the Appellant was aware the Employer would not be available during her surgery and recovery, and that the Appellant was expected to make decisions based on the directions she had received whereas there was no evidence of this;

d. made no enquiries into the antagonism that existed between the Appellant and the Employer;

e. failed to consider the Appellant's difficulty in contacting the Employer;

f. failed to consider all the evidence regarding the Appellant's job searches;

g. ignored the Appellant's evidence clarifying her job title; and

h. ignores the Appellant's evidence regarding contradictory and false statements of the Employer.

[8] The Respondent (the "Commission") submits that there are no grounds to appeal the decision under subsection 58(1) of the DESD Act. The Commission argues that there was evidence before the General Division on which it could reasonably conclude that the Appellant had reasonable alternatives to leaving her employment.

[9] The Commission further argues that the General Division considered all the evidence that was before it and that it has not misunderstood or misinterpreted the evidence.

[10] The Commission submits that the General Division applied the correct legal test.

[11] The Employer submits that there was no evidence that the General Division made findings of fact in a perverse or capricious manner or that it misunderstood the arguments. According to the Employer, the Appellant is disputing the manner in which the General Division has *characterized* the evidence. The Employer argues that there is no evidence that the General Division misapprehended anything material.

[12] The Employer further submits that there is no suggestion that the General Division failed to observe a principle of natural justice or that it failed to exercise its jurisdiction.

[13] The Employer also argues that the manner in which the General Division stated the legal test is synonymous with the correct legal test, even if it is not precisely the test set out in the Act. The Employer submits that the General Division did not err in its statement of the legal test but that, even if was imprecise in its statement of the test, there is no evidence that the test was misapplied.

ANALYSIS

Standard of Review

[14] The Commission'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. The Employer, as an Added

Party, has argued that I should apply the standard of review of "reasonableness" to questions of mixed fact and law and questions of fact alone, and "correctness" to questions of law.

[15] 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, recent case law from the Federal Court of Appeal has not insisted that the standards of review be applied, and I do not consider it to be necessary or helpful.

[16] 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 decisions of the Appeal Division 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. Where the Appeal Division hears appeals pursuant to subsection 58(1) of the DESD Act, its mandate is conferred to it by sections 55 to 69 of that act.

[17] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but 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 only be applied if the enabling statute provides for it. The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act and the DESD Act does not provide for a review according to the standards of review.

[18] I recognize that there are other decisions of the Federal Court of Appeal that appear to approve of the application of the standard of review (such as *Hurtubise v. Canada [Attorney General],* 2016 FCA 147; *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the application of standard of review.

[19] 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 DESD 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.

Merit of the Appeal

[20] While I acknowledge that the Appellant has many concerns with the factual findings of the General Division, this appeal is most readily resolved with reference to the basis on which the leave to appeal was granted. I will consider the legal test applied by the General Division and the manner in which it was applied.

[21] The correct legal test for “just cause” is set out in subsection 29(*c*) of the Act. I will restate it here: “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…” The “following” are set out in a list of specific circumstances in paragraphs 29(c)(i) –(xiv), some of which were claimed to be present in the Appellant’s case.

[22] The General Division stated the test in paragraphs 35 and 36 as follows:

> [35]. The legal test for just cause, as set out in paragraph 29(c) of the Act, is whether a claimant has “no reasonable alternative to leaving the employment”. In making the determination as to whether just cause exists, the focus is on whether the claimant had a reasonable alternative to placing himself/herself in the position of being unemployed and forcing others to bear that burden. *Just cause exists if, at the time a claimant leaves his/her employment without having secured another job, circumstances existed which excused him/her from taking the risk of causing others to bear the burden of his/her unemployment*. [emphasis added]
>
> [36] Claimants who voluntarily leave their employment will not be entitled to receive benefits unless they can establish they had “just cause” for doing so. The term “just cause” is not defined in the legislation. Paragraph 29(c) of the Act lists certain examples or circumstances which may constitute just cause. These examples are not

> exhaustive to all of the circumstances of each individual case in determining whether just cause exists.

[23] In paragraph 35, the General Division juxtaposes “no reasonable alternative to leaving” against the definition of just cause, which appears to suggest, incorrectly, that “just cause” may be considered independently of the requirement that a claimant have no reasonable alternative to leaving.

[24] Furthermore, in paragraph 36, the General Division identifies the circumstances enumerated in the subparagraphs of subsection 29(*c*) as circumstances that “may *constitute* just cause” (emphasis added). The test in subsection 29(*c*) requires that regard be had to *all of the circumstances* for the purpose of determining whether there are reasonable alternatives to leaving. These circumstances are not “just cause” in and of themselves. They only provide the context by which the reasonableness of the alternatives may be evaluated.

[25] From its misstatement of the statutory test in paragraphs 35 and 36, the General Division continues on to independently consider several of the circumstances on which, according to the General Division, the Appellant relies on “as just cause.” The General Division then dispenses with each of the claimed circumstances individually, as follows:

a. Finding that the Appellant’s working conditions did not constitute a danger to health or safety;

b. Finding that the Appellant’s duties had not changed significantly [and within the consideration of this circumstance, also appeared to find that the Appellant had been provided sufficient direction to do her job];

c. Making no particular finding in respect of the antagonism with a supervisor other than to say it did not exist initially;

d. Finding no evidence that the employer was pressuring the appellant to leave.

At this point, the General Division turns to the question of no reasonable alternative in paragraph 40, noting that that “a claimant who seeks to demonstrate just cause <u>must also show</u> that he/she had ‘no reasonable alternative to leaving or taking leave’” (emphasis added).

[26] On the one hand, it is possible that the General Division is simply acknowledging that the claimant must show no reasonable alternative *in order* to show that she had just cause, which would seem to contradict its earlier statement of the legal test, but which would be more technically correct. However, this statement is found immediately after its review of certain of the circumstances, which it had already cast as examples of just cause. In this light, it appears to me that the General Division is once again treating “just cause” and “no reasonable alternative to leaving” as independent conclusions.

[27] In its apparent treatment of the reasonable alternative issue as a stand-alone issue, the General Division failed to consider whether there were reasonable alternatives to leaving, having regard to *all the circumstances*. I see no indication that such an analysis was conducted.

[28] This is critical. Reasonable alternatives must be assessed having regard to all the circumstances. It may be that no individual circumstance, taken in isolation, will meet the threshold by which it could be said that there was no reasonable alternative but for the claimant to leave. However, the confluence of a number of such circumstances may well meet that threshold. The Federal Court of Appeal in *Canada (Attorney General) v. King*, 2011 FCA 29, stated that [translated from French]

> … the board erred in law in focusing on the question of whether the reduction in remuneration constituted a ‘substantial change in its remuneration conditions’ within the meaning of subparagraph [vii] without also asking whether, given all the circumstances, [the Appellant] had no reasonable alternative but to leave her employment.

[29] Even supposing the General Division’s consideration and dismissal of each of the individual circumstances to have been conducted for the purpose of determining whether there was no reasonable alternative to leaving, the result might still be different if the General Division applied the test in such manner as to have regard for all the circumstances.

[30] For example, the General Division's earlier finding in relation to the circumstance of change in work duties [subparagraph 29(*c*)(ix)] was a finding that there had been no *significant* change, reflecting the wording of the legislation. The question of what is a "significant" change necessarily involves a subjective assessment. While the nature and degree of the change in work duties may not have been considered significant in and of itself, this does not mean that such a change should be completely ignored. The nature or degree of that change may have taken on more significance had it been considered in the light of all the other circumstances, such as the Appellant's claimed antagonism with the Employer (on which the General Division failed to make a finding).

[31] I find that the General Division misstated and misapplied the legal test set out in subsection 29(*c*) of the Act. This represents an error of law per paragraph 58(1)(*b*) of the DESD Act.

[32] Having found as I have, there is no reason to consider the other arguments of the Appellant.

CONCLUSION

[33] The appeal is allowed. The decision is remitted to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division