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

Citation: *Q. Y. v. Canada Employment Insurance Commission,* 2017 SSTADEI 446

Tribunal File Number: AD-16-1178

BETWEEN:

Q. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: December 7, 2017

DATE OF DECISION: December 28, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Q. Y., Appellant
Susan Prud'homme, Representative for the Respondent, the Canada Employment Insurance Commission
Chen Zhang, Mandarin interpreter

INTRODUCTION

[1] On September 7, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant voluntarily left his employment without just cause.

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division of the Tribunal on October 5, 2016, and leave to appeal was granted on November 15, 2016.

[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 law or in fact in finding that the Appellant voluntarily left his employment without just cause?

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 did not initiallyidentify any of the grounds of appeal set out in subsection 58(1) of the DESD Act in his leave to appeal application, but he argued in a letter of clarification dated November 4, 2016, that the General Division had made its decision in reliance on the Record of Employment alone and without reference to his own evidence. This most closely aligns with the ground of appeal set out in paragraph 58(1)(*c*) of the DESD Act.

[7] The Respondent submits that the General Division did not rely on the Record of Employment exclusively, but considered the Appellant's oral testimony with the aid of a translator, and reviewed the documentary evidence (paragraphs [10] to [21]).

[8] The Respondent further submits that the General Division applied the relevant provisions of the legislation and the case law to the facts of this case, and maintains that the Appellant failed to demonstrate that the General Division had committed an error in law in dismissing the appeal.

[9] The Respondent submits that the Appellant is attempting to re-argue his case before the Appeal Division on facts that were before the General Division at the time of the hearing.

ANALYSIS

Standard of Review

[10] The Respondent's reference to the reasonableness of the General Division decision 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 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.

Merits of Appeal—Did the General Division err in fact or law?

Did the General Division fail to consider the Appellant's evidence that he was fired?

[17] The principal concern the Appellant raised at the General Division was that he did not leave his job voluntarily but that he was fired. Had the General Division found that he had been fired, it would have then had to further consider whether he had been fired for his own misconduct. Having found instead that the Appellant voluntarily left his employment, the General Division considered whether the Appellant had any reasonable alternative to leaving, having regard to all the circumstances.

[18] The Appellant initially argued that the General Division decision was based solely on the Record of Employment, but he acknowledged at the hearing that he had also indicated that he had quit on his application for benefits, and he also acknowledged the employer's evidence that he had quit, although he maintained that this evidence was false.

[19] The Appellant questioned on what basis the General Division found that he had quit; I referred him to the decision and to the evidence referred to in the decision. I also specifically referred the Appellant to records of statements that he had made to the Commission at GD3-17, GD3-18, and GD3-20, in which he said that he had quit.

[20] The Appellant advised that his own statements to the Commission were “not his statements,” that they were all from the employer, that he was repeating what the employer had told him. When I asked the Appellant if he had tried to explain this to the General Division, he did not directly respond. However, when I reviewed the audio recording of the General Division hearing, I observed that the Appellant did not offer an explanation for any of his prior statements that he had quit, other than to explain his response to Question 1 on his application for benefits. When questioned by the General Division on Question 1, he said that he was told that he was required to complete his application to be consistent with his Record of Employment.

[21] The General Division is charged with hearing and assessing the evidence. It is up to the General Division to weigh the evidence and make findings of fact. This includes assessing the credibility and reliability of the evidence. In this case, the General Division preferred evidence that suggested the Appellant had quit rather than that he was fired. The General Division explained that it preferred this evidence because the employer’s statements had been consistent that the Appellant had quit and that this was supported by much of the Appellant’s evidence, including statements to the Commission and his own application for benefits.

[22] In terms of the Appellant’s own evidence, I note that the first time he claims to have been fired is in his Application for Reconsideration. Up to that point, he consistently stated that he was concerned that he would be fired but that he quit. The General Division states that it gave more weight to that evidence in which the Appellant states that he quit because it is the earliest evidence from the Appellant.

[23] The General Division could only make its decision on the basis of the evidence that was before it. The Appellant did not identify any evidence that was missed or misunderstood by the General Division. His main concern appears to be that the employer’s evidence was believed and his was not. In my view, the General Division provided clear and intelligible reasons why it gave some evidence more weight than other evidence. I am only permitted to disturb a finding of fact if the General Division made that finding in a perverse or capricious manner or without regard for the evidence before it, per paragraph 58(1)(*c*) of the DESD Act. There is no indication of this.

[24] Leave to appeal was granted on the basis that the General Division acknowledged the Appellant's position that he did not quit but was fired, but still found that "the evidence from the employer and the Appellant is that the Appellant quit" (paragraph 29 of the decision). The Respondent suggests that this is a "slip of the pen" and asked me to read this as "the evidence from the employer and the *Respondent* is that the Appellant quit." The Respondent suggests that, viewed in its entirety, the analysis and direction of the decision is clear.

[25] The Appellant did not argue that paragraph 29 represented a specific error.

[26] I agree with the Respondent. The General Division was clearly aware of the Appellant's position that he was fired and was also clearly aware that there was evidence sourced from the Appellant that he was fired as well as evidence that he quit, as set out in the contrast between paragraphs 33 and 34, as well as in paragraph 37, and in its weighing of the evidence in paragraph 38.

[27] I find it more likely than not that the paragraph 29 reference, on which the grant of leave to appeal was based, is no more than a slip. I accept the explanation provided by the Respondent as the explanation that is most consistent with the decision as a whole. I do not find that paragraph 29 represents an error under subsection 58(1) of the DESD Act.

[28] In light of all the above, I find that the General Division did not make an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it. Further, there was neither evidence nor argument that a principle of natural justice was offended or that the General Division made an error of jurisdiction or law, and I find no such error.

CONCLUSION

[29] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division