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

Citation: *S. K. v. Canada Employment Insurance Commission*, 2018 SST 6

Tribunal File Number: AD-16-1189

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: October 20, 2017

DATE OF DECISION: January 4, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: S. K.
Appellant's representative: A. Winicki
Respondent's representative: S. Prud'Homme
Observer: I. K.

OVERVIEW

[1] The Appellant made an initial claim for Employment Insurance regular benefits in December 2015, reporting to the Canada Employment Insurance Commission (Commission) that he had quit his job effective July 26, 2015. The Commission determined that benefits could not be paid because the Appellant had voluntarily left his employment without just cause, within the meaning of the *Employment Insurance Act* (Act).

[2] This decision was upheld by the Commission on reconsideration, and the Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated September 8, 2016, the General Division dismissed the appeal upon determining that the Appellant had not demonstrated just cause for voluntarily leaving his employment. The Tribunal's Appeal Division granted the Appellant's request for leave to appeal this decision, on March 31, 2017.

[3] The hearing of this appeal was conducted by teleconference, for the purpose of hearing oral submissions, 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*.

ANALYSIS

[4] The grounds of appeal raised in this matter are those found in s. 58(1)(*b*) and (*c*) of the *Department of Employment and Social Development Act* (DESDA):

> (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] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 (CanLII), 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, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on errors of law. However, the language of s. 58(1)(*c*) requires the Appeal Division to show some deference on factual errors: for the appeal to succeed, the impugned finding of fact must not only be material ("based its decision on") and incorrect ("erroneous"), but also made in a perverse or capricious manner or without regard for the evidence.

[6] This appeal centres on the General Division's determination that the Appellant did not have just cause for resigning his employment in July 2015. Through his representative, the Appellant claimed first that the General Division made an error of law by not focusing its attention on s. 29(*c*)(ix) of the Act, which reads 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:
>
> […]
>
> (ix) significant changes in work duties,
>
> […]

[7] The Appellant also claimed that the General Division made an error of fact by not giving "due regard to the fact that [the Appellant] conveyed his concerns with respect to the change in work duties to the Staffing Agency and tried to seek alternate employment before

leaving." His representative argued that the Appellant had consistently explained that his job duties had been unilaterally changed and that he had looked for alternative employment.

[8] The General Division analysis contains the following key paragraphs:

> [36] In this case, given the evidence that was before the Commission at the time it made the decision, the Commission determined that the Appellant had voluntarily quit his employment on July 25, 2015 without just cause within the meaning of the Act. The employer submitted on the ROE that the Appellant quit. The Appellant, on the other hand, testified and submits that that [*sic*] there were multiple reasons for him to leave his employment; to quit. He had been working as a temporary employee for several years and that [*sic*] he wished to obtain a permanent position that paid higher wages or had more incentives, such as production bonuses, and that [*sic*] most employees working through his placement agency became permanent employees after only 3 to 6 months. He had sought other work though his placement agency prior to resigning however no other positions were available. He was unable to continue working until he secured another position as most employers required that he begin working immediately and that [*sic*] he was contractually obligated to give two weeks' notice when he resigned. He required a higher paying position as his expenses were growing and he had children who will soon be attending university.
>
> **[37]** The Tribunal considered the Appellant's submissions from his appeal to the Tribunal, his direct testimony and additionally in the docket. The submissions of the Appellant change over the time between his application for benefits and his appeal. His statements are not concise and often contradictory. The Appellant's earlier submission, on his application for benefits, was that he quit. As his case progressed through to the appeal, he submitted he quit for a multitude of reasons, such as his health, stress, the need for a high-paying job, the fact others were hired by G & D and he was not after 26 months. He also submitted that it was not working nights that hurt his health it was waiting for 3 buses. **The Appellant's submissions changed over time and were contradictory. The Tribunal gives more weight to the Appellant's earlier statements. The Tribunal and [*sic*] finds the Appellant voluntarily left his employment, he quit, without just cause within the meaning of the Act.**
>
> […]
>
> [41] The Tribunal finds that the Appellant has not demonstrated sufficiently that he had no reasonable alternative to leaving his employment. His situation was not so intolerable as to justify that he quit. He worked at G & D for 26 months. **As upsetting as it may have been to see others hired, and he was not, he could have continued his employment. He could have sought work elsewhere before he voluntarily left his employment; the period of time**

> **before he quit. There was no urgency for him to quit his employment. The situation was not so intolerable that he could not discuss the situation with his employer, Winters Technical Staffing, to seek other work assignments, and wait to be assigned elsewhere, prior to voluntarily leaving his employment.**
>
> [emphasis added]

[9] While the General Division member did not restate, in paragraph 37, the earlier statements upon which he relied, it is readily apparent that he did not accept the Appellant's newest argument that he had resigned due to a significant change in work duties and/or the impact on his health. As outlined in the body of the decision, this argument was first made by the Appellant in March 2016, only after benefits had been refused initially and upon reconsideration, and after the Appellant had provided other explanations for his resignation on three occasions. The Appellant's earlier statements focused on the fact that he had not been hired in a regular position, he was concerned about being let go, and he quit in order to get a better job elsewhere. The Appellant noted the change in operator duties in his initial application (described as a labour "efficiency") to support the fact that he had not been hired in a regular position ("the system was changed and operators were assigned to run two machines, no need of extra workers"), and in January 2016 he provided the Commission with a copy of an e-mail exchange with the staffing agency counsellor because it "proves my attempts to have pay increased, and find another work place…"; he did not suggest that the change in duties was itself one of the reasons for his resignation. As for the effect on his health claimed at the General Division, the Appellant did not tick the box "for health or medical reasons," or mention any health concerns, in his initial reporting.

[10] I do not agree with the Appellant's representative's oral submission that giving weight to the earlier statements gives rise to an erroneous finding of fact, nor do I agree that this weighing of the evidence requires further justification. The General Division's reasons for preferring the initial explanations are, in my view, sufficiently clear from their description as "earlier," i.e. these explanations were given closest in time to the events in question, and prior to any subsequent negative decisions. Where new reasons for leaving employment were given in a notice of appeal, the Federal Court of Appeal found no error in the Umpire's approval of

the Board of Referees' findings of fact, which "obviously discounted the documentary evidence submitted by the applicant in favour of his earlier statements to the Commission": *Cundle v. Canada (Human Resources Development)*, 2007 FCA 364. In my estimation, the General Division's finding that the Appellant resigned for the reasons initially provided and, implicitly, not in response to a significant change in work duties or to health problems, is a finding of fact made with, not without, regard for the evidence. In this respect, the General Division did not base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[11] Since the General Division member did not accept that the Appellant had left his employment because of a significant change in work duties, he did not err in law by not focusing his analysis on s. 29(*c*)(ix) of the Act. Rather, in determining whether the claimant had a reasonable alternative to leaving his employment in July 2015 (as required to determine whether there was just cause), the General Division member considered the facts relevant to the resignation as he had found them. These did not include any circumstances specifically enumerated in s. 29(*c*) of the Act, but included such things as the Appellant's concern that others had been hired and he had not, the Appellant's desire for better employment, the lack of urgency, and the option of waiting until another position had been secured. I note that the General Division's determination was consistent with the jurisprudence; the Federal Court of Appeal has repeatedly held that leaving employment in an effort to improve one's lot does not constitute just cause (*Canada (Attorney General) v. Murugaiah*, 2008 FCA 10; *Canada (Attorney General) v. Richard*, 2009 FCA 122), nor does "sincerity and inadequate income" (*Canada (Attorney General) v. Campeau*, 2006 FCA 376).

[12] The Appellant's representative also submitted that the Appellant had, effectively, been constructively dismissed by the employer as a result of the unilateral change in work duties without increased compensation. This argument was not raised before the General Division, but in any case the General Division did not err by not considering the possibility of constructive dismissal. The Federal Court of Appeal has confirmed in *Canada (Attorney General) v. Peace*, 2004 FCA 56, that the notion of constructive dismissal does not apply to the issue of voluntarily leaving employment under s. 30(1) of the Act:

> [15] […] 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 benefits. Under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?

[13] As for the submission that there was an error of fact with respect to the Appellant's search for employment, the General Division decision cites the Appellant's initial statement that he had not looked for employment outside the job bank prior to resigning (paragraph 12), accepts that the Appellant had sought other positions through his placement agency (paragraph 36), and asserts that the Appellant could have looked for work elsewhere (as well as with the agency) prior to resigning (paragraph 41). The Appellant's representative submitted that the Appellant had actually searched for employment elsewhere, but relied only upon the evidence of an enquiry made to the placement agency. I find no error of fact by the General Division regarding the Appellant's job search; the findings are consistent with the Appellant's own evidence in this regard. In any case, the findings of fact regarding the job search, such as they were, were ultimately not material to the decision, and the General Division did not "base its decision on" these findings of fact. Regardless of whether the Appellant had conducted a broader job search before leaving his job, the General Division determined that the situation was such that he could have continued working, while job searching, until he had been successful.

[14] I have found no reviewable error of law or fact committed by the General Division in its decision, which found that the Appellant had reasonable alternatives to resigning in July 2015 and thus concluded that he had voluntarily left his employment without just cause.

CONCLUSION

[15] The appeal is dismissed.

Shirley Netten
Member, Appeal Division