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

Citation: *A. R. v. Canada Employment Insurance Commission*, 2018 SST 54

Tribunal File Number: AD-17-291

BETWEEN:

A. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: November 16, 2017

DATE OF DECISION: January 21, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: A. R.

OVERVIEW

[1] The Appellant made an initial claim for Employment Insurance (EI) regular benefits in March 2016, reporting to the Canada Employment Insurance Commission (Commission) that he had quit his job effective March 17, 2016, because of harassment at work. The Commission determined in May 2016 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. In a decision dated March 2, 2017, the General Division dismissed the appeal. The Tribunal's Appeal Division granted the Appellant's request for leave to appeal this decision, on the basis that the General Division may not have correctly applied the law in its decision.

[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* (Regulations). The Commission's representative did not attend the hearing. Having satisfied myself that the Commission had received notice of the hearing, I proceeded in the Commission's absence in accordance with s. 12(1) of the Regulations. The Commission had previously provided written submissions, and I have considered these submissions along with the Appellant's comments at the hearing, the General Division decision, and the evidence before the General Division.

ANALYSIS

[4] The ground of appeal raised in the leave decision is found in s. 58(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA): "the 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, 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.

[5] Pursuant to s. 30(1) of the Act, a claimant who voluntarily left employment without just cause is disqualified from receiving benefits (subject to two exceptions not relevant to this appeal). The concept of "just cause" is explained at s. 29(*c*) of the Act:

> (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:
>
> (i) sexual or other harassment;
>
> […]

[6] The General Division decision reflects some uncertainty about the concept of just cause. At paragraph 21, the decision states that the term "just cause" is not defined in the legislation, yet a definition is found in s. 29(*c*) of the Act. The General Division refers to the s. 29(*c*) test in paragraph 20, while simultaneously stating that just cause exists if "circumstances existed which excused [the claimant] from taking the risk of causing others to bear the burden of his/her unemployment." Thirdly, at paragraph 22, the decision states that s. 29(*c*) "stipulates that just cause is proven when the existence of any of the 14 situations listed can be established."

[7] Just cause is defined in s. 29(*c*) of the Act. As confirmed in the jurisprudence, the legal test is whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving the employment (*Canada (Attorney General) v. Macleod*, 2010 FCA 301; *Canada (Attorney General) v. White*, 2011 FCA 190). The circumstances listed in s. 29(*c*)(i) to (xiv) must be considered, but the existence of any such circumstance is not in and of itself sufficient to establish just cause; there must still be "no reasonable alternative to leaving."

[8] It has occasionally been found appropriate to interpret and apply s. 29(*c*) by considering the fundamental principles of an insurance system (as was initially done in the 1985 decision of *Tanguay v. Unemployment Insurance Commission*, A-1458-84, prior to the current definition of just cause). For example, the duty of an insured person not to cause the risk of unemployment was considered in *Canada (Attorney General) v. Langlois*, 2008 FCA 18, to resolve the apparent conflict between "no reasonable alternative" and the s. 29(*c*)(vi) scenario of "reasonable assurance of another employment in the immediate future," and in *Canada (Attorney General) v. Marier*, 2013 FCA 39, to excuse voluntarily leaving one of two concurrent positions.

[9] In the instant appeal, the Appellant claimed to have resigned due to harassment, which is listed as a relevant circumstance in s. 29(*c*)(i). There was no need for the General Division to have expanded, and confused, its analysis by going beyond the question of whether, in all the circumstances, the Appellant had no reasonable alternative to leaving his employment. That said, the General Division determined both that the Appellant failed to demonstrate having no reasonable alternative to leaving (paragraph 27) and that the Appellant's circumstances did not justify placing the financial risk of leaving his employment on others (paragraph 28). Moreover, the two tests, though articulated differently, overlap: in *Tanguay*, the Federal Court of Appeal indicated that the duty not to deliberately cause the risk of unemployment may be rebutted in "circumstances which leave him no reasonable alternative to leaving his employment." Given that the General Division did determine that the Appellant in this case had a reasonable alternative to leaving his employment (which is conclusive of just cause), I am not persuaded that the General Division "erred in law in making its decision" when it unnecessarily considered the deliberate imposition of risk of unemployment. Similarly, the error in suggesting that the

mere existence of one of the listed circumstances is sufficient to establish just cause is insignificant in this particular appeal, since this was not applied in reaching the decision.

[10] There is, however, another aspect of the General Division's decision that requires this matter to be returned to the General Division for reconsideration. As became clear from the Appellant's submissions at the hearing of this appeal, he could not find any "logic in the decision-making" and he could not ascertain why the General Division rejected his explanations. In my view, the Appellant could not understand the decision not because of any failure on his part, nor simply because he disagreed with the outcome, but rather because the General Division's reasoning cannot be discerned from its decision.

[11] The General Division is required by law to give written reasons for its decision (s. 54(2), DESDA), and a failure to provide adequate reasons is an error of law.[1] Reasons for decision need not reference all of the evidence, arguments, statutory provisions or jurisprudence, but they must allow the reader to understand why a tribunal made its decision, and permit appellate review (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62). The Ontario Court of Appeal put it this way: "the 'path' taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way" (*Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, leave to appeal refused [2009] S.C.C.A. No. 416).

[12] While every detail need not be addressed in a decision, a decision-maker must explain why it rejected substantial evidence contradictory to its conclusion (*Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92). Moreover, with respect to claims of harassment in the EI context, reasons for decision must contain an explicit finding of fact as to whether the claimant was harassed, prior to determining whether there was any reasonable alternative to leaving: *Bell v. Canada (Attorney General)*, A-450-95 (March 25, 1996); *McFarlane v. Canada (Attorney General)*, A-448-96 (May 28, 1997).

[13] The critical paragraphs of the General Division decision are the following:

[1] Insufficient reasons may also be considered a failure to observe a principle of natural justice.

[23] The Appellant stated that he was the victim of harassment but was unable to provide any evidence or witnesses to the alleged harassment. He stated he was not a victim of verbal harassment nor was he touched or assaulted. He did not seek to address the alleged harassment with his employer because he stated that all of his co-workers including his employer were staring at him and he believed that nothing would change. The Appellant did not provide any evidence of racial discrimination other than his statement that he was the only black person in the office. The employer's evidence is that the Appellant resigned indicating that he had decided to move on, that he was maybe going to do some work as a sub- contractor, self-employed. The Appellant asked if it was necessary that he stay the whole two weeks he was told that they would require him to work out his two week notice period in order for them to replace him and possibly have him train a replacement. The employer stated that the Appellant was supposed to work until March 28, 2016 but a few days into his notice period, he came to her and said he felt that some of his co- workers were staring at him so he was leaving and he left. They stated that prior to indicating this, everything seemed fine, he had never spoke with her about any issues with co-workers he may have been having prior to the day he left early during his notice period. (GD3-18)

[24] The Tribunal finds based on the evidence submitted by the Appellant that he does not meet any of the exceptions set out in section 29 (c) of the Act.

[25] In this case all the evidence, including the Appellant's own submissions and testimony demonstrates that he voluntarily left his job. The Tribunal finds that the Appellant made a personal choice to leave his employment. The Tribunal finds that the Appellant took the initiative in severing his relationship with his employer without discussing his situation with his employer or allowing them to investigate or remedy the alleged harassment. The Appellant stated he did not communicate with those he felt were responsible nor did he speak with his supervisor as he was one of those involved. The Appellant stated that the employees were not harassing him verbally or physically, they knew enough not to do that but they all would stare at him or give him dirty looks. (GD3-19) The Tribunal finds that the Appellant failed or made no attempts to mitigate the situation.

[26] An appellant who seeks to demonstrate just cause must also show that he/she had "no reasonable alternative to leaving or taking leave." The Federal Court of appeal has affirmed that the burden is on the plaintiff to demonstrate that there was no reasonable alternative to leaving (*Rena Astronomy* A-141-97)

> [27] The Tribunal finds that the Appellant left his employment of his own volition without successfully finding alternate employment prior to leaving. The Appellant confirmed this to the Tribunal during the Hearing. He made the personal decision to leave his employment. The Tribunal finds that the Appellant failed to prove that he left his employment with just cause within the meaning of the Act. The Tribunal finds that the Appellant failed to demonstrate that he had "no reasonable alternative to leaving or taking leave from his employment. [*sic*] Jurisprudence states that remaining in employment until a new job is secured is, without more, generally a reasonable alternative to taking a unilateral decision to quit a job: (*Murugaiah* 2008 FCA 10; *Campeau* 2006 FCA 376).
>
> [28] The Tribunal cannot conclude that the Appellant's circumstances were such as to justify placing the financial risk, which would arise from leaving her employment, on others. The Appellant's appeal must therefore be dismissed.

[14] This analysis raises more questions than answers: What were the member's findings of fact with respect to the conduct alleged by the Appellant? What definition of "harassment" did the member apply? Was it limited to verbal or physical harassment, and if so, why? What standard of proof did the member apply? Did the member think that the Appellant's statements to the Commission and his testimony before the General Division did not constitute "evidence"? On what basis was the Appellant's evidence rejected, or the employer's statements preferred? If the member found that there had been no harassment (in stating that none of the "exceptions" applied), what situation did he think the Appellant failed to address with the employer? Did the member find that the Appellant had other reasonable alternatives to leaving because the member believed that the conduct did not occur or was not sufficiently serious, or because the Appellant made insufficient efforts to mitigate the situation? If the latter, what facts were found with respect to the nature of the workplace, the remedies available and the status of those involved?

[15] In order to ensure that its reasons are adequate in cases of resignation allegedly due to workplace harassment, and to comply with *Bell* and *MacFarlane*, in my view the General Division should (a) outline its working definition of harassment; (b) make findings of fact (on a balance of probabilities) as to whether there was harassment, including such details as the nature, severity, frequency, pervasiveness and/or impact of the conduct in question; (c) make

findings of fact (on a balance of probabilities) on other relevant circumstances, such as the size and nature of the workplace, the roles and status of those involved, the availability of internal complaint mechanisms, and the steps taken by the claimant and employer; and (d) identify reasonable alternatives to leaving employment, if any exist, having regard to all the circumstances.

[16] In this case, the Commission supported the General Division's decision as consistent with the jurisprudence and the evidence before it, but did not address sufficiency of reasons in its submissions. The grounds to be considered in this appeal were not limited in the leave to appeal decision, and the Commission opted not to attend the hearing of the appeal. I make no comment as to whether the General Division could or could not have reasonably reached its conclusion on the evidence before it. Rather, I find only that the General Division failed in its duty to provide intelligible reasons. The General Division did not identify the path taken to reach its decision, nor did it explain if and why the Appellant's evidence was rejected. Consequently, the reader can only speculate as to why the General Division concluded as it did. The failure to provide adequate reasons constitutes an error of law.

CONCLUSION

[17] The appeal is allowed. The matter is returned to the General Division for reconsideration by a different member.

Shirley Netten
Member, Appeal Division