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

Citation: *H. M. v. Canada Employment Insurance Commission*, 2018 SST 115

Tribunal File Number: AD-17-564

BETWEEN:

H. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 1, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 21, 2017, the General Division of the Social Security Tribunal of Canada determined that the Appellant (referred to below as the Claimant) had left his employment without just cause and that he was thereby disqualified from receiving benefits under the *Employment Insurance Act*. The Claimant filed an application for leave to appeal with the Tribunal's Appeal Division on August 9, 2017, and leave to appeal was granted on October 30, 2017.

[2] This appeal proceeded on the basis of the record for the following reasons:

a) I have determined that no further hearing is required.

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

c) The Respondent concedes that the General Division erred.

ISSUE

[3] Did the General Division err in fact or law, fail to observe a principle of natural justice or make an error of jurisdiction?

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 Claimant did not provide additional submissions beyond those provided earlier in support of his application for leave to appeal.

[6] The Respondent acknowledges the General Division's role in assessing credibility but submits that, in the present case, the General Division does not provide a reasonable explanation as to how it reconciles contradictory evidence, and that it therefore has based its decision on an erroneous finding of fact made without regard to "all the circumstances." In addition, the Respondent submits that the decision was not transparent or intelligible. Although the Respondent maintains that transportation problems do not constitute just cause and that this is borne out in the jurisprudence, including *Canada (Attorney General) v. Lanteigne*, 2009 FCA 195, and *Chemouny v. Canada (Attorney General)*, 2015 FCA 48, it submits that the General Division misapplied CUB 72804 and erred in requiring the Claimant to provide legislation or case law to support this proposition.

ANALYSIS

Standard of Review

[7] 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.

[8] 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.

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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, fail to observe a principle of natural justice or make an error of jurisdiction?

[14] The Respondent attributes some significance to a discrepancy between the Claimant's stated daily earnings at the hearing and his record of employment, and it suggests that this is one example of how the General Division fails to reconcile contradictory evidence. However, it is not apparent to me how this example is relevant. The General Division did not reference or rely on the Claimant's daily earnings in the decision nor was it necessary to do so, given that the issue before the General Division was whether the Claimant had voluntarily left his employment without just cause.

[15] I nonetheless agree with the Respondent that the General Division 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 as per paragraph 58(1)(*c*) of the DESD Act. Quite aside from the Respondent's reasons for supporting the appeal, I consider the General Division's finding against the Claimant's credibility at paragraph 24 to be based in part on the General Division's misapprehension of the Claimant's testimony at paragraph 25. The General Division understood the Claimant to have testified that it was difficult to work at the job because he is Muslim and one part of the job was to haul pork in his truck. The Claimant actually testified that his wife had concerns but that he did not care about the pork because he just needed the paycheck. He said, "I'm not eating it. I'm not processing it. I'm just delivering it – that's okay."

[16] Furthermore, the General Division fails to justify its skepticism (at paragraph 25) of the Claimant's assertion that he spoke with his employer about alternative arrangements. The General Division claims that it is skeptical *because* "J." (from the employer) made a statement that the Claimant had quit because the job did not suit him. If the employer's statement is the reason for the General Division's skepticism, this can only mean that it accepted the statement for its truth, i.e. that the Claimant actually told the employer that he quit because the job did not suit him. The Commission's evidence on this is a brief notation of a telephone call from J.'s statement. The Commission did not explore or challenge this assertion in any way. In fact, it is impossible to determine whether there was any conversation or whether this was just a voicemail message. Hearsay evidence such as this is inherently less reliable than direct

testimony, yet the General Division does not explain why it chose to accept what amounts to an unsworn record of the Commission's interpretation of J.'s recollection (or characterization) of what the Claimant told J. In his testimony, the Claimant clearly denied saying that he quit his job because the job did not suit him. After he denied making this statement, his evidence was challenged by the General Division member who asked if J.'s statement could have related to his concern about handling pork as a Muslim. He denied this also. The Claimant maintained throughout his testimony that his only reason for quitting was his lack of transportation.

[17] The General Division provides no justification for accepting the truth of the employer's statement over the Claimant's evidence but, even if it had, J.'s statement does not purport to be a comprehensive statement of all that passed between the Claimant and the employer. There is no necessary conflict between the statement and the Claimant's testimony that he discussed travel arrangements with his supervisor, "K."

[18] The Respondent concedes that the General Division does not provide a reasonable explanation as to how it reconciles the contradictory evidence although, as noted, the Respondent identified a different example of this than the one on which I rely. As the Court stated in *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General*), 2008 FCA 13:

> A Board of Referees must justify its determinations. When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[19] Further to the question of whether the Claimant explored alternative travel arrangements with the employer, the General Division also states that it is "not clear to the Tribunal that K. held a position of authority with the employer so as to offer alternative transportation options." The General Division does not explain why it considers this to be unclear, but whether K. actually had the authority to offer alternative transportation options is not the issue. The issue is whether the Claimant could reasonably conclude that K. represented the employer. The only evidence on this point was that of the Claimant and he testified that K. was his supervisor and the only one in authority with whom he dealt. The Claimant testified that he had told K. about

his transportation problems and asked about alternative transportation arrangements and that K. had responded in such a way as to suggest he was responding on behalf of the employer.

[20] The General Division also appears to reject the Claimant's general credibility, with reference only to its view that the Claimant was "evasive" in response to a single question as to whether he had requested leave. At the hearing, the General Division member asked about leave three times before he was satisfied that the Claimant's response engaged the question. If the General Division member considered the Claimant to have been evasive on this point, he was entitled to disbelieve him *on this point* but, in actual fact, the member *did not disbelieve* the Claimant's response. The Claimant conceded the narrow point that he had not requested leave and his concession was the only evidence on this point. The General Division relies on its finding that he had not requested leave in reaching its decision.

[21] I do not accept that the General Division's characterization of the Claimant's demeanour in regard to one question can be a sufficient basis for rejecting the Claimant's credibility generally, *particularly when the General Division ultimately accepts and relies on his answer to the question*. I therefore do not accept the sufficiency of the General Division's reasons in relation to its assessment of credibility.

[22] Furthermore, I do not accept that the General Division's decision can be divorced from its consideration of the Claimant's credibility. I acknowledge that the General Division ultimately found that the Claimant could have asked for a leave of absence, which was based on the portion of the Claimant's evidence that it chose to accept. However, as I stated in the leave to appeal decision, the "reasonableness" of this alternative cannot be assessed apart from its context, and the General Division's understanding of the context is dependent on what evidence it believes and accepts:

> Had the Applicant's evidence been found credible, it would have been open to the General Division to find that it would be unnecessary for the Applicant to frame his request for assistance as a request for leave, in order that the General Division might consider his investigation of alternatives to be reasonable. The Applicant provided a substantial context in which he explained that he had worked for only a few days, that he was still in training, that he had tried to explore with his supervisor the available options for getting to work, and his supervisor's

> [sic] offered no assistance or advice. According to the Applicant, the gist of the supervisor's response was: "You have to be here and if you can't be here, the job is not for you.

[23] For the reasons above, I find that the General Division's reasons are insufficient for the Claimant to determine why the General Division gives so little weight to his testimony. This could be considered as a failure to observe a principle of natural justice as described in paragraph 58(1)(*a*) of the DESD Act; however, I appreciate that the inadequacy of reasons is seldom sufficient as a stand-alone reason for interfering with a decision. In this case, I consider the inadequacy of the reasons to support my finding at paragraph 15 that the General Division erred under paragraph 58(1)(*c*). It is capricious to find against the Claimant's credibility without providing proper justification.

[24] I agree with the Respondent that CUB 72804 does not support the General Division's decision, as it dealt with "good cause" for the purpose of antedating, and not "just cause" for voluntarily leaving employment. Having otherwise found that grounds for appeal have been made out, I do not find it necessary to further consider whether CUB 72804 was misapplied or whether its application may be considered an error of law. At the same time, while the Respondent is correct that "transportation problems do not constitute just cause" (in themselves), I am unaware of any jurisprudence, including the cited cases of *Lanteigne* and of *Chemouny*, that establishes, as a general principle, that "transportation problems" may not be considered as a relevant circumstance in determining whether there are reasonable alternatives to leaving. The findings in each of *Lanteigne* and *Chemouny* were highly dependent on the particular facts of those cases.

CONCLUSION

[25] The appeal is allowed. The decision is returned to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division