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

Citation: *A. D. v. Canada Employment Insurance Commission*, 2018 SST 271

Tribunal File Number: AD-17-668

BETWEEN:

A. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] On September 30, 2016, the Appellant (Claimant) left a full-time contract position in the U.S. to accept an offer from her previous employer in the city in which her family resides. When her hours were significantly cut back, she applied for regular Employment Insurance benefits, for reactivation of her claim and for consideration under the Working While on Claim pilot project. The Respondent (Commission) refused to reactivate her claim (she had established a benefit period on or about January 11, 2016, in connection with a prior claim). It determined that she voluntarily left her employment in the U.S. without just cause. The Claimant applied for a reconsideration on the basis that she left her job with a reasonable expectation of employment. However, the Commission maintained its earlier decision, because she left a full-time job to take a part-time temporary position.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, but the General Division agreed with the Commission. It found that she had other options besides leaving her employment and that she did not show she had just cause for leaving full-time employment for part-time employment. The Claimant sought leave to appeal to the Appeal Division, which was granted.

[4] I find the General Division erred in law and made an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it. The General Division failed to assess the reasonable alternatives to leaving and therefore failed to properly apply the test set out in s. 29 of the *Employment Insurance Act* (Act). The General Division also failed to indicate that it had "regard to all the circumstances", as required by the s. 29 test, in that it did not make a clear finding on whether the Claimant had a reasonable assurance of another employment in the immediate future. The General Division decision is also based on a finding that there was "no evidence" that there was an opportunity for full-time, permanent work. This finding was made without regard to the Claimant's statement in support of her appeal that the

employer that recruited her had told her that there was an opportunity that could lead to a more permanent position.

ISSUES

[5] Did the General Division err in law in failing to assess the "reasonable alternatives to leaving" as required by s. 29(c) of the Act?

[6] Did the General Division err in law in failing to have regard to all the circumstances when assessing the reasonable alternatives to leaving as required by s. 29(c) of the Act?

[7] Did the General Division base its decision on an erroneous finding of fact that there was no evidence that the Claimant had an opportunity for full-time, permanent work, and was this finding made in a perverse or capricious manner or without regard to the evidence before it?

ANALYSIS

Standard of review

[8] The Commission's written submissions suggest that it considers a standard of review analysis to be appropriate. However, the Commission does not specifically argue that I should apply the standards of review or that reasonableness is the appropriate standard.

[9] I recognize that the grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[10] 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.

[11] 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.

[12] In the relatively 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 multilevel administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[13] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not require that a review be conducted in accordance with the standards of review.

[14] Other Federal Court of Appeal decisions 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.

[15] 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 therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only, without reference to “reasonableness” or the standard of review.

General principles

[16] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to apply the law. The law would include the statutory provisions of the Act and the Employment Insurance Regulations (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the

statutory provisions. Finally, the General Division must reach conclusions on the issues that it must decide, by applying the law to the facts.

[17] The appeal to the General Division was unsuccessful. An appeal of the General Division decision now comes before the Appeal Division. The Appeal Division is only permitted to interfere with a decision of the General Division if the General Division has made certain types of errors, which are called “grounds of appeal”.

[18] Subsection 58(1) of the DESD Act sets out 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.

Issue 1: Did the General Division err in law in failing to assess the “reasonable alternatives to leaving” as required by s. 29(c) of the Act?

[19] A claimant will be disqualified from employment insurance benefits if he or she leaves employment without just cause. For a claimant to have just cause, s. 29(c) of the Act requires that the claimant have no reasonable alternative to leaving.

[20] The General Division erred in law. While the General Division stated the legal test correctly at paragraph 25 of the decision, it did not apply the test. There is no indication that the General Division turned its mind to available alternatives or whether those alternatives were reasonable, having regard to all the circumstances. This is an error under s. 58(1)(*b*) of the DESD Act.

Issue 2: Did the General Division err in law in failing to have regard to all the circumstances when assessing the reasonable alternatives to leaving as required by s. 29(c) of the Act?

[21] This error is akin to the error identified in Issue 1. It is impossible to determine that a particular alternative is reasonable, having regard to the circumstances, without identifying the alternative under consideration.

[22] The predominant circumstance raised by the Claimant is the circumstance identified in s. 29(c)(*vi*), i.e. that she had a reasonable assurance of another employment in the immediate future. As noted in the Commission's submissions, the General Division made no clear finding in this regard.

[23] Furthermore, while the General Division found that the Claimant left a full-time position to accept a part-time position and also found that there was no evidence to support the Claimant's contention that there had been an opportunity for full-time employment, it did not determine whether the Claimant nonetheless had a reasonable assurance of another employment.

[24] The General Division cited *Canada (Attorney General) v. Langlois*[1] but failed to apply it. The General Division noted that *Langlois* considered the time of voluntary separation and the remaining duration of seasonal employment to be the most important circumstances to consider when determining whether leaving was a reasonable alternative. Having set out these important circumstances, the General Division fails to consider how they apply to the facts. Instead the General Division decision hangs on its finding that the Claimant left full-time employment for part-time employment. *Langlois* does not require that the reasonable assurance relate to full-time employment.

[25] Therefore, the General Division erred in law in failing to fully apply the s.29(c) test. It failed to have regard to all the circumstances, failed to apply *Langlois*, and failed to determine whether the Claimant had a reasonable assurance of employment. This is an error under s. 58(1)(*b*) of the DESD Act.

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[1] *Canada (Attorney General) v. Langlois*, 2008 FCA 18

Issue 3: Did the General Division base its decision on an erroneous finding that there was no evidence that the Claimant had an opportunity for full-time, permanent work, and was this finding made in a perverse or capricious manner or without regard to the evidence before it?

[26] It is apparent to me that the General Division decision is based on its finding that there was no evidence that the Claimant had an opportunity of full-time, permanent work. It is also apparent to me that there is at least some evidence that she had such an opportunity. The General Division recorded the Claimant's evidence (at paragraph 11 of the decision) that the new employer reached out to her and that "she was advised that there were [*sic*] a job opportunity in Calgary that could lead to a more permanent position."

[27] The General Division may choose to disregard the Claimant's evidence or to give it little weight if it considers that evidence to lack credibility or be unreliable, or it may choose to prefer evidence that it considers to be more credible or more reliable. However, absent a finding against the reliability or credibility of the Claimant's evidence, the General Division is not permitted to ignore her evidence entirely, as it did in this case. The General Division's finding that there was "no evidence" that the Claimant had an opportunity for full-time, permanent work was made perversely or capriciously or without regard to her evidence. Therefore, I find that the General Division erred under s. 58(1)(*c*).

CONCLUSION

[28] The appeal is allowed. The matter is referred back to the General Division for reconsideration in accordance with my authority under section 59 of the DESD Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. D., Appellant G. D., Representative for the Claimant Susan Prud'homme, Representative for the Canada Employment Insurance Commission