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

Citation: *J. R. v. Canada Employment Insurance Commission*, 2018 SST 373

Tribunal File Number: AD-17-627

BETWEEN:

J. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: April 3, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant (Claimant) left her employment and applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), refused her benefits on the basis that she had voluntarily left her employment when she had reasonable alternatives to leaving. The Commission found that she did not have "just cause" for leaving and that she was therefore disqualified from receiving benefits. The Claimant applied for reconsideration, but the Commission maintained its original decision.

[3] The Claimant appealed to the General Division, which considered her circumstances and found that she had reasonable alternatives to leaving. While the Claimant attended the General Division hearing, she sought leave to appeal on the basis that she was not notified to attend the hearing. Leave to appeal was granted because the Claimant indicated *at her hearing* that she had not reviewed the documents and because it was not clear from the record whether she understood that she could request an adjournment and whether she understood the potential prejudice in proceeding without having reviewed the evidence and submissions on file.

[4] The appeal cannot succeed. At her Appeal Division hearing, the Claimant did not pursue the arguments that she had not been granted a hearing or been provided with an opportunity to present medical evidence, which she had advanced in her leave to appeal application. Nor did she otherwise claim that the process was unfair. Instead, she argued that the General Division's decision that she had left her employment without just cause was unfair because she had worked very hard for 17 years. The Claimant did not argue that the General Division had made any error in finding that she had reasonable alternatives to leaving, and I do not find such an error on the record.

[5] Furthermore, I am not satisfied that the General Division failed to observe a principle of natural justice in not suggesting to the Claimant that she could seek an adjournment to review the

appeal documentation or to have it translated or interpreted to her. The Claimant is responsible for coming to the hearing ready to proceed, and she informed the General Division that she wished to proceed.

PRELIMINARY ISSUES

[6] At the Appeal Division teleconference hearing, the Claimant stated that she had not read any of the documents in preparation for the hearing because she cannot read English and she has no one to translate.

[7] The Claimant also said that she knew to call in for the Appeal Division hearing because she can read some English and because her husband helps her. She stated that her husband could not attend on the hearing date to assist her because he works, and she indicated that he would not be able to attend with her even if the hearing were adjourned. She also noted that she has adult children but that they are "on the go" and have to work.

[8] I asked the Claimant whether she still wished to proceed as scheduled or whether she wished to adjourn to a time when she could bring someone with her to help her read the documents. She indicated she wished to proceed. I asked her again to confirm that she wished to proceed that day, even though I had specifically asked her about adjourning to another time to review the documentation, and she answered, "Yes."

[9] The hearing proceeded with the assistance of a Farsi interpreter.

ISSUES

[10] Did the General Division fail to observe a principle of natural justice by proceeding with the hearing when the Claimant stated she had not reviewed the hearing documents, including the Commission's submissions and evidence?

[11] Did the General Division err in law or base 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?

ANALYSIS

Standard of Review

[12] 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.

[13] I recognize that the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESDA) are very similar to the usual grounds for judicial review, and that 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 necessary to apply them.

[14] 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 that it is therefore not required to show deference.

[15] 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.

[16] 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 guide 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.

[17] The enabling statute for administrative appeals of Employment Insurance decisions is the DESDA, and the DESDA does not provide that a review should be conducted in accordance with the standards of review.

[18] 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.

[19] I agree with the Court in *Jean*, where it referred to one of the grounds of appeal set out in s. 58(1) of the DESDA 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 only to the grounds of appeal set out in the DESDA, and not to "reasonableness" or the standard of review.

General Principles

[20] 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 includes the statutory provisions of the *Employment Insurance Act* (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 has to decide, by applying the law to the facts.

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

[22] Subsection 58(1) of the DESDA 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.

Did the General Division fail to observe a principle of natural justice in proceeding when the Claimant had not reviewed the hearing documents?

[23] The General Division did not fail to observe a principle of natural justice. When the Claimant indicated that she had not reviewed the documents because she could not read English, the General Division member asked her whether she "[felt] comfortable" proceeding, and the Claimant agreed to proceed.

[24] The General Division member did not suggest an alternative to proceeding when the Claimant stated she had "no other choice," and it was open to the member to have offered an adjournment. Nonetheless, a decision to grant or deny an adjournment is a discretionary decision even where it is specifically requested, and it was not requested in this case.

[25] Furthermore, the Claimant must bear some responsibility for her lack of preparation. Information in the General Division file suggests that the Claimant had access to resources to assist her in understanding written English even if she did not read English herself. I note that the Claimant completed her initial application for benefits correctly, and that she followed written instructions to attend her General Division and Appeal Division hearings. She also submitted a coherent, full-page letter in English (signed by her) to the Commission in support of her request for a reconsideration. Furthermore, she told me that her husband helps her and that she can read and understand some English.

[26] The Claimant is responsible for coming to the hearing prepared to proceed. She could have reviewed the documentation in advance with someone proficient in reading English or she could have brought her husband or some other representative with her to assist. Furthermore, it is quite possible that the Claimant would not have sought assistance and reviewed the documents even if the General Division member had adjourned the hearing on her own initiative. I note that leave to appeal was granted on the basis that she had not reviewed the documents, but that the Claimant appeared before the Appeal Division, again, without having reviewed any of the documents because, as she told me, "[she] cannot read English." Yet the Claimant insisted on proceeding, even after I informed her that she could request an adjournment to review the documentation and properly prepare.

[27] While the possibility of an adjournment was not offered to the Claimant at her General Division hearing, the General Division member did ask her whether she wished to proceed. The Claimant appears to have assumed she had "no choice," but she did not ask whether she had any options or express any concern about proceeding. I am not satisfied that the Claimant was prejudiced by the General Division member's failure to suggest options other than proceeding. The Claimant was given a hearing and participated in the hearing. Furthermore, she did not pursue this argument at the Appeal Division hearing. I find that the General Division did not fail to observe a principle of natural justice and that therefore, no error was made under s. 58(1)(*a*) of the DESDA.

Did the General Division err in law or base its decision on an erroneous finding of fact?

[28] The General Division did not err in law or in fact. It accurately set out the test in s. 29(*c*) of the Act for determining whether a claimant has just cause for voluntarily leaving, and applied the test. It determined on the basis of undisputed facts that the Claimant had voluntarily left her employment, and it considered all the circumstances. It specifically considered the Claimant's principal complaint that she had anticipated that her modified work duties would cause her back pain. The undisputed evidence was that her new work duties were within the duties expected of her as a general labourer and that there was no change in hours or wages. The Claimant did not argue that the General Division should have considered any other circumstances.

[29] With regard to the change in her duties and its potential impact on her health, the General Division accepted that the Claimant had reasonable alternatives to leaving, including seeking medical attention for her pain complaints, discussing her health concerns with her employer to explore options, or seeking other work before quitting. I can find no error related to any of the grounds of appeal in s. 58(1) of the DESDA in the General Division's determination that reasonable alternatives were available.

[30] I appreciate the Claimant's position that she worked hard at her job and should be entitled to benefits. However, this is not a ground of appeal. An appeal before the Appeal Division is not a rehearing: the Claimant cannot resubmit her evidence and hope for a different result.[1] I also acknowledge that the Claimant disagrees with the conclusions and the result in this decision, and

[1] Bergeron v. Canada (Attorney General), 2016 FC 220

that she would like me to reweigh the evidence and come to a different conclusion. However, it is not my function to reassess the evidence or reweigh the factors that were considered by the General Division to reach a different conclusion.[2]

[31] I am satisfied that the General Division did not err in law and that its decision was not based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it.

CONCLUSION

[32] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. R., Appellant Susan Prud'homme, Representative for the Respondent

[2] *Tracey v. Canada (Attorney General)*, 2015 FC 1300