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

Citation: *S. K. v. Canada Employment Insurance Commission*, 2018 SST 539

Tribunal File Number: AD-17-894

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 15, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, S. K. (Claimant), left his employment in October 2016 after having some difficulty performing his duties due to a hand injury. He applied for Employment Insurance benefits, but his claim was denied. The Respondent, the Canada Employment Insurance Commission (Commission), determined that he had voluntarily left his employment without just cause. The Commission maintained its original decision following a reconsideration request from the Claimant. The General Division of the Social Security Tribunal dismissed his appeal, and the matter now comes before the Appeal Division for a decision on the merits.

[3] The appeal is denied. Although, the General Division erred in its interpretation of s. 29(*c*) of the *Employment Insurance Act* (Act) the correct understanding and application of the law does not change the decision. The Claimant did not have just cause for leaving his employment because there were reasonable alternatives to leaving, having regard to all the circumstances.

ISSUE

[4] Did the General Division err in law when applying s. 29(*c*) to determine whether the Claimant had just cause for voluntarily leaving?

ANALYSIS

General principles

[5] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[6] By way of contrast, the Appeal Division cannot intervene in a decision of the General Division unless it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act), which are set out below:

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.

Legal definition of "just cause"

[7] A claimant is disqualified from receiving benefits under s. 30(1) of the Act if the claimant left their employment without just cause. Paragraph 29(*c*) of the Act states that "just cause" exists where a claimant has no reasonable alternative to leaving, having regard to all the circumstances.

[8] Just cause requires that there be "no *reasonable* alternative" to voluntarily leaving (emphasis added). The General Division acknowledged the language of s. 29(*c*) at paragraph 32 of the decision, but it did not apply the s. 29(*c*) definition. Instead it found that the Claimant did not "exhaust *all* options" and that he did not determine "*all available* options" (emphasis added).

[9] In its written submissions, the Commission agreed that the General Division misapplied the legal test for voluntary leaving. The Commission further submitted that it was unclear what the General Division found to be "reasonable alternatives," after having regard to all the circumstances, and it suggested that the decision was not transparent and intelligible.

[10] I accept the Commission's submissions that the legal test was misapplied. In *Tanguay*,[1] the Federal Court of Appeal considered an error regarding the definition of "just cause" in

[1] *Tanguay v. Canada Employment Insurance Commission*, A-1458-84

s. 41(1), a provision similar to the disqualification provision in s. 30 of the Act. The Court stated, "[…] it is clear that where the question is as to the definition that must be given to the words 'just cause' in (the former) s. 41(1), this is purely a question of law. It follows that if a decision is made which cannot be reconciled with this definition, the decision is vitiated by an error of law."

[11] In requiring the Claimant to have exhausted all options or all available options, the General Division effectively stripped out the statutory caveat that the Claimant need only exhaust those options that could be considered reasonable. I do not accept that the more stringent requirement of "all available options" may be reconciled with the statutory definition of "just cause" and the requirement that there be no "reasonable alternative," which is now described in s. 29(*c*) of the Act.

[12] I also agree with the Commission that it was not clear which of the options identified by the General Division as alternatives to leaving were considered by the General Division to be reasonable alternatives.

[13] I find that the General Division erred in law under s. 58(1)(*b*) of the DESD Act by misapplying the statutory definition of "just cause."

Inconsistent findings

[14] The Commission also submitted that the General Division made findings of fact that were inconsistent with the evidence and that, in doing so, it 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. The Commission gave two examples: The Commission noted that the Claimant testified that he had requested modified duties but was denied, but the Commission found that there was no indication that the Claimant had attempted to get modified duties. The Commission also noted that the member found that the evidence indicates that the Claimant was advised to take a week off and did not do so, whereas according to GD3-20, the Claimant was actually off work for five days after providing a doctor's note recommending one week off.

[15] The first of the Commission's examples represents a clear inconsistency and a misapprehension of the evidence relevant to the General Division's finding on reasonable alternatives. This is an error under s. 58(1)(*c*) of the DESD Act.

[16] I accept that the second example also represents an inconsistency apparent on the face of the decision. However, the Claimant visited his doctor, purportedly obtained his doctor's recommendation to take a week off, and took the time off about a week after he had already tendered his resignation. Given the General Division's statement that the "determining factor for the Tribunal is the [Claimant's] lack of medical guidance in regards to the [Claimant]'s hand pain and his ability to work" (paragraph 40), I do not find that this particular inconsistency about whether or not the Claimant took a week off was reflected in the General Division's identification of reasonable alternatives, or that it influenced any other finding on which the decision was based.

Remedy

[17] The record is complete, and I have all the information that I require to make the decision that the General Division should have given.

[18] While the General Division required the Claimant to have exhausted **all** alternatives, one of the alternatives identified by the General Division was that the Claimant should have first seen his family doctor and determined his hand issues before quitting (paragraph 43). I find that this alternative is also reasonable: It would have been reasonable for the Claimant to have confirmed his medical limitations and treatment recommendations with his doctor before leaving his employment and to have presented the doctor's note or certificate to his employer to see if they could have found a solution to his difficulty working with his hand pain.

[19] The Claimant had difficulty getting away to see his doctor, but he took a sick day to see his doctor after he gave notice, demonstrating that it was possible. I acknowledge that the Claimant might have felt more inhibited about taking time off to see a doctor when he was still hoping to keep his job, but quitting without making the attempt is converting a possibility of job loss into a certainty. If the doctor's recommendations required accommodated duties, he would have been justified in seeking duties that were consistent with the recommendations. If the recommendations had involved a period of rest, he might have sought leave for that period.

[20] I have had regard to all the other relevant circumstances that are apparent. I recognize that the Claimant complained that his workload had increased as a result of chronic understaffing

and that he felt the employer wanted him to quit. However, there is insufficient evidence to conclude that the increased workload was of such a nature or degree as to constitute a significant change in work duties, and there is insufficient evidence to find that there was pressure on the Claimant to leave.

[21] Having regard to all the circumstances and on a balance of probabilities, I find that the Claimant had not exhausted the reasonable alternatives to leaving his employment and that he therefore did not have just cause for leaving under s. 29(*c*) of the Act.

CONCLUSION

[22] Under the authority of s. 59 of the DESD Act, I will give the decision that the General Division should have given. The Claimant did not have just cause for leaving his employment.

[23] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	S. K, Appellant Susan Prud'Homme, Representative for the Respondent Both by written representation only