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

Citation: *B. C. v. Canada Employment Insurance Commission*, 2018 SST 540

Tribunal File Number: AD-17-663

BETWEEN:

B. C.

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 allowed.

OVERVIEW

[2] The Appellant, B. C. (Claimant), applied for Employment Insurance benefits after leaving his job in December 2016. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim on the basis that he had voluntarily left his employment without just cause. In a letter dated March 13, 2017, the Commission maintained this decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal on August 30, 2017, and the Claimant now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division's conclusion that the Claimant had reasonable alternatives to leaving was based in part on its finding that the Claimant intended to move to British Columbia (BC) but had not sought work there before leaving. This was not supported in the evidence.

PRELIMINARY MATTERS

[4] The Claimant attached additional medical and other evidence to his submissions to the Appeal Division. The Claimant agreed that this evidence was not before the General Division and that it was submitted in support of his position that the General Division's conclusion was wrong. However, the Claimant's evidence is not relevant for the purpose of establishing whether the General Division made an error on the basis of the evidence that was before it. The Federal Court has confirmed that the Appeal Division does not allow new evidence,[1] and I will not be considering it.

[1] *Canada (Attorney General) v. O'keefe*, 2016 FC 503

ISSUE

[5] Was the General Division's finding that the Claimant could have looked for work in BC before leaving his job made in a perverse or capricious manner or without regard for the evidence before it?

Standard of review

[6] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review, suggesting that the same kind of standard of review analysis might also be applicable at the Appeal Division. However, there has been some relatively recent case law from the Federal Court of Appeal that has not insisted on the application of standards of review analysis, and I do not consider it to be necessary.

[7] In *Canada (Attorney General) v. Jean*,[2] 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.

[8] 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.

[9] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*,[3] 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.

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[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93

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

[11] I recognize that the Federal Court of Appeal may not be of one mind on the applicability of such an analysis within an administrative appeal process: Certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review.[4]

[12] Nonetheless, I am persuaded by the reasoning of the Court in *Jean*, where it referred to one of the grounds of appeal set out in s. 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, and without reference to "reasonableness" or the standards of review.

General principles

[13] 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.

[14] 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 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.

[4] *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167

Evidence of BC job search

[15] Section 29 of the *Employment Insurance Act* states that 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. The General Division found at paragraph 51 that, "looking for and securing employment in BC prior to voluntarily leaving [the employer] […] was a reasonable alternative". This followed its finding that "the Claimant did not attempt to find other work in BC, knowing that he was making a family decision to move to BC […]".

[16] The Claimant argued that the General Division disregarded his evidence that he had looked for work in BC before leaving his employment. The Claimant also argued that the General Division mistook his evidence in other particulars: He states that he did not say that he did not take any pain medication or other medication except for glucosamine (paragraph 19). He recalls testifying to taking a topical medication as well. The Claimant also states that he did not say that he had sold his condo before moving to BC (paragraph 25).

[17] A representative for the Commission did not appear at the Appeal Division hearing, but the Commission filed written submissions. After reviewing the audio recording, the Commission agreed that the Claimant had testified that he had looked for work in BC and X before he determined to move and that he started looking for jobs in the summer (before he left his job). The Commission submitted that it was unclear what the General Division member found as reasonable alternatives. The Commission stated that the General Division had failed to resolve contradictory evidence concerning the Claimant's motivation for leaving his job. The Commission also argued that the General Division erred by basing its decision on an erroneous finding of fact, and that it erred in law in failing to clearly justify its decision.

[18] I agree with the submissions of both parties that there was evidence before the General Division that the Claimant had sought work in BC and that the General Division erred in failing to have regard to that evidence. The General Division's determination that seeking work in BC would have been one reasonable alternative to quitting was predicated on its understanding that the Claimant had not sought work in BC.

[19] I also accept that the General Division based its decision that the Claimant did not have just cause on its finding that the Claimant could have looked for work in BC. The General Division considered and discounted some of the Claimant's asserted circumstances in its decision, but this is the only "reasonable alternative" on which the General Division based its decision. While the General Division noted that the Claimant could have "taken a leave of absence to look for work in BC" or "taken vacation to look for work in BC," its reasons are not sufficiently clear that I can discern whether the General Division considered these as distinct alternatives to quitting. In my view, they are not *additional* reasonable alternatives, only variations of the single reasonable alternative identified by the General Division, i.e. that the Claimant could have looked for work in BC before leaving his job. The General Division's finding that Claimant could have looked for work in BC is incurably compromised by its failure to appreciate the Claimant's evidence (that he had made attempts to find work in BC).[5]

[20] I note that the Claimant has also argued that the General Division ignored or misunderstood certain other evidence. However, I do not consider that the General Division decision could be said to be based on that evidence, and it has not influenced my decision.

[21] I find that the General Division based its decision on an erroneous finding of fact, i.e. that the Claimant had not looked for work in BC before quitting, and that this was made without regard for the Claimant's evidence and therefore constitutes an error under s. 58(1)(*c*) of the DESD Act.

[5] Audio recording of General Division hearing at 33 minutes, 8 seconds)

CONCLUSION

[22] The appeal is allowed. The matter is referred back to the General Division for reconsideration as per s. 59 of the DESD Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	April 19, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. C., Appellant S. Prud'Homme, Representative for the Respondent