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

Citation: *M. K. v. Canada Employment Insurance Commission and 9963512 Albert Ltd*, 2018 SST 892

Tribunal File Number: AD-18-206

BETWEEN:

M. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

9963512 Albert Ltd

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 10, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] Just before the Appellant, M. K. (Claimant), left on vacation, his employer gave him two letters. The first letter terminated him from his position as general manager and the second letter offered him a position as a lower-level supervisor. The Claimant was given the choice of immediately accepting both the general manager termination and the offer of the supervisor position, or having his employment terminated altogether. After the Claimant refused to accept either choice, the employer sought to retract both letters, telling the Claimant that his position would be reviewed after he returned from his vacation. When the Claimant returned, he emailed the employer to discuss the effect of the employer's prior termination together with some outstanding grievances. The employer accepted this as his resignation.

[3] The Claimant applied for Employment Insurance benefits but was denied. The Respondent, the Canada Employment Insurance Commission (Commission), considered that he had voluntarily left his employment without just cause. The Claimant requested a reconsideration, but the Commission maintained this decision. The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal, and he is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division finding that the Claimant could return to work in his previous position as a general manager was made in a perverse or capricious manner or without regard to the material before it. The finding also resulted in a determination that the Claimant had reasonable alternatives to leaving that did not take into consideration the additional circumstances that may have been associated with his demotion/re-employment at a lower level.

ISSUE

[5] Did the General Division find that the Claimant was able to retain his previous general manager position, in a perverse or capricious manner or without regard to the evidence before it?

ANALYSIS

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 in the Courts, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division.

[7] However, I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. In *Canada (Citizenship and Immigration) v. Huruglica*,[1] the Federal Court of Appeal was of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[8] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of a decision of the Appeal Division. The Federal Court of Appeal was not required to rule on the applicability of standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[9] While certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] I am nonetheless persuaded by the reasoning of the Court in *Huruglica* and *Jean*. I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] See for example *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General*), 2015 FCA 167

General Principles

[10] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[11] However, the Appeal Division may only intervene in a decision of the General Division if 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.

[12] The only grounds of appeal are described 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.

Did the General Division find that the Claimant was able to retain his previous general manager position, in a perverse or capricious manner or without regard to the evidence before it?

[13] Section 29(c) of the *Employment Insurance Act* (EI Act) states that just cause for leaving an employment or taking leave from employment exists if the claimant had no reasonable alternative to leaving or taking leave having regard to all the circumstances, and it provides a non-exhaustive list of relevant circumstances for consideration. Included in those circumstances are s.29(c)(vii) significant modification of terms and conditions respecting wages or salary, and; s. 29(c)(ix)significant changes in work duties.

[14] In finding that the Claimant did not have just cause, the General Division relied on a finding that the Claimant could return to his previous position with the employer but chose otherwise. As noted in the leave to appeal decision, the General Division stated that the Claimant

had "an offer to return and take up his old position of general manager and through mutual discussion with his employer, formulate a performance plan to address their issues of suitability". It also stated that the demotion was "off the table" and that the Claimant's "only decision was to return to work to his previous position as a general manager, which he decided not to do".

[15] The Claimant had testified to the General Division that his termination as general manager and the offer of the lower pay, lower status supervisor position was the employer's response to his same-day request for a salary review. He testified that he believed the employer was acting in bad faith and, in his notice of appeal, he stated that he resisted pressure to sign the demotion over a period of two hours before the managing partner relented. At that point, he was told to forget about the conversation and that they would proceed as before but he stated that he had "zero trust for [the managing partner]". He said that he was left "confused as to the stability of his employment".

[16] The General Division justified its finding that the Claimant could return (after his vacation) to his previous position partly with reference to the fact that the employer had informed the Claimant that he could return to his old job[4]—the Claimant did not dispute that he had been told this. However, the General Division decision does not analyze the context of that remark or take into account the circumstances that caused the Claimant to question whether the employer was acting in bad faith.

[17] To support its finding, the General Division also relied on the existence of some kind of performance plan through which the employer and the Claimant might address "their issues of suitability"[5]. In fact, there is no evidence that the employer discussed a performance plan with the Claimant or otherwise described the conditions under which the Claimant could continue as general manager or that such a plan was even contemplated prior the Claimant's separation from the employer.

[18] The only evidence related to a performance plan is a statement to the Commission from a representative from the employer's human resources department (GD3-49). In that statement, the

[4] General Division decision, para. 13
[5] Ibid.

representative indicated that the Claimant "could have been put on a Performance Improvement Plan as a General Manager". That statement is hypothetical, and a reader could only speculate that it related to the employer's prior intentions. The Commission obtained this statement about 10 months after the Claimant left the employer.

[19] Furthermore, it was not the Claimant's performance of his duties that was to be reviewed on his return but the termination itself. The representative told the Commission in the same statement that the Claimant had reacted poorly to the news, so the *termination process* had been put "on hold" until he returned from vacation and they could talk. This is consistent with the employer's email of September 2, 2016, confirming that the Claimant's termination as general manager was under review (GD3-53). The subject line of that email was "Employment Termination—Under Review."

[20] The Claimant testified that the six-month probation period in his general manager position had lapsed some time before the employer attempted to terminate him from the position. Therefore, before his termination, he had been confirmed in a full-time, permanent position as general manager. The letter terminating the Claimant's employment as general manager was in evidence, as was the offer of a lower level supervisory position, which the Claimant testified that he had been pressured to accept. However, there was no evidence that the employer's stated intention to reinstate/continue the Claimant was offered on the same terms as his previous position.

[21] To the contrary, the September 2 email purporting to reinstate the Claimant states that his Claimant's termination was "under review", with the final outcome to be determined upon the Claimant's return from vacation (GD3-53). The Claimant was invited to return to a position while his *termination* was "on hold" and "under review", which would appear to offer only an interim status as general manager. It is not apparent from the decision that the General Division took the nature of the termination/retraction/offer into account.

[22] It is not clear if the General Division also relied on the fact that the employer permitted the Claimant to take a company vehicle on a two-week holiday to find that he could have returned to his previous position. Perhaps the General Division inferred only that the employer did not intend to fire him.

[23] In either case, the General Division did not account for evidence that the employer may have been contractually bound to allow the Claimant to have the use of the vehicle, regardless of its future intentions. The Claimant had provided a copy of his employment offer by which the employer agreed "to provide [a vehicle] for the Claimant's personal and business use" (GD3-26) and there was no evidence that the Claimant was engaged by the employer on terms other than those of the offer. To the extent that any part of the General Division's finding that the employer intended to continue the Claimant in his previous position is grounded in the Claimant's continuing access to a vehicle, it would appear the contractual explanation was overlooked.

[24] In my view, the General Division accepted that the employer would have reinstated the Claimant to his previous position without sufficient regard to the evidence that the offer was made on an interim or a probationary basis only, and without proper regard to the circumstances that caused the Claimant to believe the offer was not a good faith offer of permanent reinstatement. I find therefore that the General Division erred under s. 58(1)(*c*) of the DESD Act because its finding that the Claimant could have returned to his previous position but chose not to do so was made in a manner that was perverse or capricious, or without regard for the material before it. By making such a finding, the General Division may not have had regard to all the circumstances under par. 29(*c*) of the EI Act—particularly such circumstances as a significant change in duties and significant modifications to terms and conditions with regard to wages or salary—that might require consideration if it were found that the Claimant voluntarily left his employment after, or to pre-empt, demotion.

CONCLUSION

[25] The appeal is allowed.

REMEDY

[26] I have the authority under s. 59 of the DESD Act to give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration, in accordance with any directions I consider appropriate; or confirm, rescind, or vary the decision in whole or in part. The Commission recommended that the matter be referred back to the General Division for a reconsideration, in the event that I should find—as I have—that the General Division erred.

[27] Whether the Claimant could return to his precious position as general manager is not dispositive of the issue of whether he voluntarily left his employment. If the General Division ultimately finds that the employer did not intend to keep the Claimant in his previous position or finds the Claimant's belief that he would not be kept in that position to be objectively reasonable, the General Division may wish to hear additional evidence on the implications of the Claimant's termination and the offer to be rehired at a lower position—or "demotion", as the case may be—including whether there were any additional circumstances that affect his reasonable alternatives.

[28] The circumstances of the Claimant's departure and the relevant circumstances applicable to reasonable alternatives are intertwined; they may depend, to some extent, on the reliability and credibility of the Claimant's evidence. I therefore agree with the Commission that the matter is best referred back to the General Division.

[29] It is not my intention to restrict the scope of that appeal. However, I will impose two procedural requirements: I direct that the appeal before the General Division proceed by way of oral hearing, and I direct that it be heard by a different General Division member than the member involved in the original General Division decision.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 28, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. K., Appellant Carole Robillard, Representative for the Respondent