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

Citation: *J. H. v. Canada Employment Insurance Commission*, 2018 SST 988

Tribunal File Number: AD-18-487

BETWEEN:

J. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: October 12, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. H. (Claimant), is a trucker. She left her employment following an incident in which her truck broke down on the road. She applied for Employment Insurance benefits, but the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim on the basis that she had voluntarily left without just cause. The Claimant sought a reconsideration, arguing that she was terminated and that she did not voluntarily leave, but the Commission maintained its original decision. Her appeal to the General Division of the Social Security Tribunal was dismissed, and she now brings her appeal to the Appeal Division

[3] The appeal is allowed. The General Division's reasons do not disclose how it weighed the evidence and are therefore inadequate, which is an error of law under s. 58(1)(*c*) of the *Department of Employment and Social Development Act* (DESD Act). In addition, the General Division did not consider or appreciate the Claimant's evidence that she had been dismissed.

ISSUES

[4] Did the General Division err in law by failing to provide adequate reasons for its conclusion that the Claimant voluntarily left her employment?

[5] Did the General Division base its decision on an erroneous finding of fact without regard for the Claimant's testimony and evidence that she had been dismissed?

ANALYSIS

Standard of Review

[6] The grounds of appeal set out in s. 58(1) of the 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. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*,[1] 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 guide 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.

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.

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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

[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.

Issue 1: Did the General Division err in law by failing to provide adequate reasons for its conclusion that the Claimant voluntarily left her employment?

[13] The central requirement of the General Division's reasons is that they explain how it reached its decision.[4] In *Bellefleur v. Canada (Attorney General)*, the Federal Court of Appeal said:

> [The former Board of Referees] must justify its determinations. When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.[5]

[14] When the General Division found that the Claimant severed the employment relationship, it justified this finding by "reading the text messages as a whole." This interpretive exercise was said to be based on a number of "grammatical and spelling errors",[6] but the General Division did not otherwise elaborate on the manner in which it analyzed the text messages. The only basis for the decision that the Claimant voluntarily left her employment is the January 4 text message in which the employer asked that the Claimant call to "figure things out" and the fact that she did not call the employer in response to that invitation.

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[4] *McKinnon v. Canada (Employment Insurance Commission*), 2010 FCA 250
[5] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur(Employer) v. Canada (Attorney General*), 2008 FCA 13
[6] General Division decision, at para. 18

[15] On its face, the same January 4 text message also acknowledges that the Claimant actually was dismissed (i.e. according to the text message, the Claimant was not dismissed "**until that day**," based on the employer's stated view that the Claimant had abandoned the truck). However, the General Division found that it was not the employer's intention to end the employment relationship at that time. It is not clear whether the General Division determined that the employer had never terminated the Claimant or whether it considered that the Claimant spurned an offer of re-employment.

[16] The fact that the employer requested the Claimant to call to figure things out does not lead to the inescapable conclusion that it wanted to maintain or restore the employment relationship. From the Claimant's own text messages between January 5 and January 12, it is apparent that the Claimant was in almost continuous contact with the employer following the January 4 text and that the text messages related to outstanding pay. Other than the employer's request that the Claimant complete a single run on January 11, which the General Division rejected as evidence of a continuing employment relationship,[7] there is no offer or discussion of continued employment (GD3-194 to GD3-231).

[17] The General Division did not explain how it arrived at its interpretation of "figure things out" and the decision does not address the possibility that "figure things out" may have been a reference to this matter of outstanding pay.

[18] I cannot discern in what manner it weighed the evidence to find that it was not the employer's intention to dismiss the Claimant or to reach its conclusion that the Claimant voluntarily left her employment. In its written submission to the Appeal Division, the Commission agrees that the General Division did not explain how it read the text messages to find it more likely than not that the Claimant voluntarily left her employment.

[19] I find the reasons to be so inadequate as to constitute an error of law under s. 58(1)(*b*) of the DESD Act.

[7] General Division decision, at para. 26

Issue 2: Did the General Division base its decision on an erroneous finding of fact without regard for the Claimant's testimony and evidence that she had been dismissed?

[20] The Claimant testified that she had been dismissed. She stated that the supervisor responsible for the employer's drivers had called her on January 2 to tell her that the employer considered her responsible for the truck breakdown, that she was not to call the repair shop to check on the truck's status, and that she was fired (at 00:13:12 of the audio recording). The General Division did not refer to or analyze the Claimant's evidence.

[21] When the General Division determined that the Claimant did not call the employer back as requested in the January 4 text message, it failed to note that the Claimant was nonetheless in communication with the employer. A significant number of text messages from the period between January 5 and January 12 were in evidence, from which it is apparent that the Claimant was in almost continuous contact with the employer regarding the matter of outstanding pay (GD3-194 to GD3-231). There is no mention in any of those texts, by either party, that the Claimant is or may continue to be employed by the employer, excepting the reference to the January 11 run at GD-231.

[22] Otherwise, the General Division did not refer to those text messages from January 5 to January 12. It did not analyze whether any inference may be drawn from what is, or is not, discussed in those texts about whether the Claimant had actually been terminated and about what the employer had meant by "figure things out".

[23] The Commission again agrees that the General Division may have erred by failing to consider the Claimant's testimony and evidence. I find that the General Division erred under s. 58(1)(*c*) of the DESD Act by basing its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the Claimant's testimony or to the record of text messages from January 5 to January 12.

CONCLUSION

[24] The appeal is allowed.

REMEDY

[25] I return the matter to the General Division for reconsideration, in accordance with my authority under s. 59 of the DESD Act. I do not consider the record to be complete. In the event the General Division accepts that the Claimant was terminated, it may be necessary to determine whether the Claimant was terminated for misconduct.

Stephen Bergen
Member, Appeal Division

HEARD ON:	
METHOD OF PROCEEDING:	On the Record
APPEARANCES:	J. H., Appellant I. Thiffault, Representative for the Respondent