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

Citation: *H. L. v Canada Employment Insurance Commission and X*, 2019 SST 47

Tribunal File Number: AD-18-708

BETWEEN:

H. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 23, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, H. L. (Claimant), was laid-off from his job as an apprentice electrician and was approved for Employment Insurance benefits. After his lay-off, Alberta Apprenticeship and Industry Training referred him to a college for the next technical training component of his apprenticeship. In the meantime, the Claimant accepted a referral from a union hall to a temporary job which was stated to be six to eight weeks long. This was supposed to conclude before he started his training, but the employer, extended the job. His employer initially refused the Claimant's request to be laid-off to go to his training, but the Claimant still left his job to attend the training. The Respondent, the Canada Employment Insurance Commission (Commission), refused to pay him benefits during his training period because he voluntarily left his employment without just cause, and without authorization to quit to attend the training.

[3] The Commission maintained this decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal. His appeal was dismissed, and he now appeals to the Appeal Division.

[4] The appeal is allowed. When the General Division found that the Claimant had voluntarily left his employment, it failed to consider any of the employer's documentary or testimonial evidence. I have made the decision the General Division should have made and found that the Claimant should not be disqualified from receiving benefits because he did not voluntarily leave his employment without just cause.

ISSUE

[5] Did the General Division find that the Claimant left his employment to go to school without regard for the employer's evidence that supported his lay-off to attend apprenticeship training?

ANALYSIS

[6] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The grounds of appeal are as follows:

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.

Did the General Division find that the Claimant left his employment to go to school without regard for the fact that the Claimant's employer intended to amend the Claimant's reason for leaving on his Record of Employment (ROE)?

[8] As I stated in the leave to appeal decision, returning to school, or training, is not just cause for leaving an employment within the meaning of sections 29 and 30 of the *Employment Insurance Act* (EI Act), unless the training program is authorized by the Commission.

[9] The Claimant in this case had been referred by a designated authority to a course approved under section 25 of the EI Act. The Commission nonetheless determined that the Claimant had failed to actually obtain the required authorization to quit his employment. However, in the course of its reconsideration investigation, the Commission implied that its decision could be changed if the Claimant could obtain an amended ROE from his employer, coding the reason that he left his employment as "J–Apprenticeship Training."[1] The Commission issued the reconsideration decision when it was unable to obtain confirmation that the employer had amended the ROE or intended to do so. The Commission clearly considered the ROE coding to be key to the decision that it needed to make.

[1] GD3-44

[10] When an employer indicates through its use of Code J on the ROE, that a Claimant is leaving work attend apprenticeship training, the employer is usually taken at its word. A worker who leaves his employment temporarily to attend apprenticeship training to which he or she was referred, is classified as having been laid-off, and not as having "quit". If the Claimant could prove that the employer's intention was to lay him off to attend apprenticeship training, there would be no need for him to prove that he had obtained a separate authorization to quit.

[11] However, the General Division did not refer to the amended ROE supplied by the Commission together with its additional submissions,[2] or to the employer's letter that the Claimant submitted in which the employer explained the error,[3] or to the testimony of the employer's representative in which she said that the employer had not originally understood the Claimant to have apprenticeship training scheduled when he was first referred by the union. The General Division also did not refer to the representative's testimony that the employer would have accepted the Claimant's return after his training.

[12] The General Division's decision that the Claimant voluntarily left his employment without just cause was based on its finding that the Claimant voluntarily quit to return to school. It ignored the employer's evidence that supported the Claimant's contention that he was instead laid-off to attend apprenticeship training. The Commission agreed that the General Division made an error under section 58(1)(c) of the DESD Act for having ignored some of this evidence as well as the Commission's additional submissions.

[13] The General Division also misunderstood or misstated the Claimant's evidence about what he told his employer when he took the temporary job. It is not accurate to say that the Claimant did not tell the employer that he intended to work only until his program started.[4] The General Division member asked the Claimant whether he told the employer, at the time he accepted the work, that he would work only until January 1, 2018,[5] and the Claimant initially responded that this was correct. The General Division spoke over the rest of the Claimant's response (which is therefore inaudible), asking whether the Claimant told his employer he would

[2] GD8-3.
[3] GD7-2.
[4] General Division decision at para 8.
[5] Audio recording of General Division hearing at 44:45.

be quitting. The Claimant then paused before continuing "because if they put … no, no, no.", and he then said that the job was supposed to have been only six to eight weeks long but that the job was not done and his employer refused to lay him off. I am not certain whether the Claimant intended his response as a clarification, qualification, or elaboration of his affirmation that he told the employer he accepted the work: There was no follow-up questioning, and it is not obvious from the audio recording. However, the audio recording does not confirm that the Claimant denied telling his employer that he intended to leave because of his training.

[14] Evidence bearing on the parties' understanding of the terms of the Claimant's employment is relevant to the question of whether the Claimant voluntarily left his employment or whether he instead refused an offer of additional employment. The General Division's finding that the Claimant voluntarily left his employment is based at least in part on its misunderstanding that the Claimant denied informing the employer of his intention to leave at the end of the project. Therefore, I find that this was also an error under section 58(1)(c) of the DESD Act.

CONCLUSION

[15] The appeal is allowed.

REMEDY

[16] I consider the record to be complete. Therefore, I will make the decision that the General Division should have made. In accordance with my authority under section 59 of the DESD Act.

[17] The General Division decided the appeal on the basis that the Claimant quit his job to attend school, which the Commission interpreted as a personal choice. Once it is determined that a claimant has quit, the statutory test for just cause requires that the claimant have no reasonable alternative to leaving, having regard to all the circumstances.

[18] In finding that the Claimant did not have just cause, the General Division stated that leaving to attend school is not just cause "unless one has obtained the required approvals to do so."[6] The General Division did not refer to any authority for this proposition, but the Federal

[6] General Division decision at para 8.

Court of Appeal has held in *Canada (Attorney General) v Bédard*[7] that voluntarily leaving to attend an unauthorized course is not just cause. *Bédard* also referred of a number of other court decisions in which it was also found that leaving to attend school without authorization is not just cause.

[19] In its submissions in support of this present appeal, the Commission stated that a claimant cannot be authorized to quit employment unless the Commission has received a request for authorization to quit employment from Alberta Works.[8] The Commission further stated that the Claimant acknowledged that Commission representatives had advised him to obtain a letter of approval from Alberta Works on two occasions.

[20] In the course of the hearing, the General Division member also suggested to the Claimant that he needed a letter of approval from Alberta Works[9] and that his letter from Alberta Apprenticeship and Industry Training was insufficient.[10] However, the Claimant testified that he had made a number of enquiries during his claim reactivation about the process for obtaining benefits while on apprenticeship training. He disputed that Alberta Works had anything to do with the "authorization" for apprentices.[11]

The General Division member also said that "whether the ROE was changed or not, [the Claimant] still had to have […] the approval from the Alberta government to be able to quit."[12] However, it appears that there are actually two separate processes that need to be distinguished from one another and that the Claimant and the member did not understand one another. In the first process, an authorization or approval is required from the Alberta government (in this case, perhaps Albert Works) to quit—that is, to leave an employment to attend training of any kind when the claimant has not been laid-off. This is the process to which the General Division member was referring.

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[7] *Canada (Attorney General) v Bédard*, 2004 FCA 21.
[8] AD3-3.
[9] Audio recording of General Division hearing at 37:00.
[10] Audio recording of General Division hearing at 39:35.
[11] Audio recording of General Division hearing at 37:12.
[12] Audio recording of General Division hearing at 52:00.

[21] In the other, separate process, a *laid-off apprentice* may obtain benefits for the period that he or she attends technical training. The apprentice is laid-off, not quitting, and therefore does not require approval to quit. An apprentice only requires a referral from a designated authority (and confirmation of lay-off for the purpose of training). The Commission outlined this other process in its earlier submissions to the General Division: A claimant completes an online application for benefits, enters the reference code from the referral, and the system then presents him with a specialized application for benefits.[13] Under this process, the application for benefits and the authorization approval process proceed together. The Claimant appears to have understood he fell under the second process.

[22] The Claimant provided the General Division with a copy of the letter he received from Alberta Apprenticeship and Industry Training. The letter provided him with the start and end date of his classes and his reference code. It also detailed a process for the Claimant to follow to obtain Employment Insurance benefits that is consistent with the Commission's description. (I also take notice of Employment Insurance's published webpage entitled "Employment Insurance for Apprentices,"[14] which provides advice to apprentices who have been referred to attend full-time technical training. This webpage tells apprentices to obtain a reference code as proof of referral and to use that code to apply for benefits. It notes that the apprentice's employer should complete the ROE using Code J in block 16. All of this supports the process *that the Commission's agent appears to have been following* when it was investigating the reconsideration and asked the Claimant to obtain an amended ROE.[15]

[23] In this case, the Claimant had been laid-off from an employer in his own trade, he had applied for Employment Insurance benefits, and he had established a benefit period, all in May 2017. The Claimant said that he received a letter from a college in June 2018 following his lay-off.[16] (The Claimant said that he was laid-off in May 2018 and received the letter in June 2018, but it seems clear from other facts in evidence that these events both occurred in 2017, and that the letter he received was actually from Alberta Apprenticeship and Industry Training.) The letter informed the Claimant that his technical training would start on January 8, 2018, and it

[13] GD4-4.
[14] Accessed at https://www.canada.ca/en/employment-social-development/services/apprentices/ei-apprentices.html.
[15] GD3-47.
[16] GD3-38.

gave him a reference code. The Claimant had not received the letter at the time that his benefit period was established, so the initial approval of his claim was not related to his status as an apprentice or his need to attend training.

[24] However, when the Claimant left the temporary work assignment, it was to attend apprenticeship training. Therefore, when he attempted to reactivate his claim, he entered the reference code and completed the application on the basis that he had been laid-off for apprenticeship training.

[25] Had the Claimant remained on Employment Insurance benefits and attended the program to which he was referred, he would have been entitled to continue on benefits under section 25 of the EI Act with no question of any "authorization to quit". However, the Claimant did not remain on benefits: He preferred to work while he waited for his training program.

[26] Had the initial ROE submitted by the employer confirmed that the Claimant was laid-off for apprenticeship training, then the Claimant would have been approved for benefits, and there would have been no need for any authorization to quit once again. Unfortunately, there was some miscommunication between the Claimant and his temporary employer, and the employer did not correct its error until after the Claimant's reconsideration was denied.

[27] The employer later acknowledged its error in the letter supplied by the Claimant, amended the ROE to show that the Claimant was laid-off under Code J, and testified in support of the Claimant, that it had meant to lay him off. The Commissions response was that the use of Code J was inappropriate because the Claimant was not leaving the workplace temporarily.[17] The General Division focused on whether the Claimant had quit without authorization, and it did not address the Commission's argument.

[28] I understand that the Claimant himself characterized his leaving as a quit,[18] as a result of the employer's refusal to lay him off. However, I do not accept that the Claimant's contract of employment with the employer was such that the employer could unilaterally extend the term. There was no offer and acceptance related to the extension of the term of employment and

[17] GD8-1.
[18] GD2-4.

without a "meeting of minds", that is, without the employer and the Claimant sharing a common intention that the Claimant would work for the extended term.

[29] The Claimant testified that he did not intend to work more than the original six to eight weeks; that his intention was to attend his scheduled apprenticeship training commencing January 8, 2018, for which he had paid tuition before he accepted the temporary job. The Claimant accepted the union referral because it was for a six to eight week period only, and it would ,therefore,, allow him to attend training. In my view, the Claimant was actually refusing the offer of an extension and not quitting. The offer to extend was a renegotiation of the terms of his temporary employment contract and, if accepted by the Claimant, it would have constituted a new contract of employment.

[30] This interpretation is consistent with the testimony of the employer's representative who confirmed that the Claimant was working as a "temporary worker" with Local 110[19], and who also testified that the initial "call" was for 6–8 weeks[20], and that it extended the offer when it could not complete the job for which the Claimant was hired in the anticipated timeframe. At this point, the Claimant was already working. In essence, the employer confirmed that its offer, accepted by the Claimant, was for 6–8 weeks of work.

[31] The issue that was before the General Division was whether the Claimant should be disqualified from benefits for having voluntarily left his employment without just cause under section 30 and section 29 of the EI Act. The question of whether the Claimant should be disqualified for *failing to accept employment that is offered,* was not before the General Division and it would properly be adjudicated under section 27(1) of the EI Act. The Claimant's valid referral might be viewed in a different light in a section 27(1) analysis.

[32] Therefore, I find that the Claimant did not voluntarily leave his employment, but that he *refused* an offer of employment. If I am wrong, and the Claimant's initial term of employment and its extension should properly be considered as one continuous employment, then I still find that the Claimant did not leave his employment voluntarily: He was laid-off.

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[19] GD7-2.
[20] Audio recording of General Division hearing at 48:30.

[33] Once the employer obtained a better appreciation for the Claimant's circumstances, it reconsidered its position and determined that the Claimant had been entitled to a lay-off to attend apprenticeship training. This redetermination occurred even before the employer filed the first ROE,[21] and the employer's representative testified that the error on the first ROE was administrative. The employer issued the amended Code J ROE that the Commission had been seeking during the Claimant's reconsideration process. The Commission's notes suggest that it would have reached a different decision if it had had the amended ROE.[22]

[34] The Commission argued to the General Division that Code J could not properly be used in the Claimant's circumstances, with reference to its own Guide to completing a Record of Employment (Guide).[23] However, the only criteria for the use of Code J that is set out in the Guide is that: i) the employee must be leaving the workplace temporarily and ii) the employee must be leaving to participate in an apprenticeship training.

[35] The employer's representative testified that the employer often has workers moving in and out of the workforce as they take apprenticeship training and that the employer is willing to accommodate that movement. The employer also stated that they would have work available for the Claimant on the completion of his training and would take him back, if he did not find other work in the electrical field.[24] To the extent the Claimant's intentions may be relevant to the employer's reasons for laying him off, the Claimant testified that employers often do not take employees back after their training component and that he had not realized that his temporary employer was taking workers back.[25] The Claimant did not suggest that he would be unwilling to return. I find that, at the time the employer submitted the ROE, it considered the lay-off from employment to be temporary and that the use of Code J was in accordance with the Guide.

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[21] GD7-2.
[22] GD3-44.
[23] GD8-6.
[24] Audio recording of General Division hearing at 48:30.
[25] Audio recording of General Division hearing at 49:35.

[36] Whether the Claimant completed one employment term and refused another, or whether he was laid-off by his employer to attend apprenticeship training, the Claimant did not voluntarily leave his employment, and he is not disqualified from receiving benefits for that reason.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	H. L., Appellant S. Prud'Homme, Representative for the Respondent