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

Citation: *C. R. v Canada Employment Insurance Commission and X*, 2019 SST 82

Tribunal File Number: AD-18-759

BETWEEN:

C. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 4, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, C. R. (Claimant), quit her part-time contract position to accept a casual on-call position. The Respondent, the Canada Employment Insurance Commission (Commission), approved her claim and paid benefits on the understanding that she had not quit. When the Commission later found that she had quit her employment, it determined that she should be disqualified from receiving benefits, and it asked her to repay the benefits she had received.

[3] The Commission maintained its decision when the Claimant requested a reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal, but her appeal was dismissed. The Claimant now appeals to the Appeal Division.

[4] I find that the General Division erred in law by failing to consider whether the Claimant has a reasonable assurance of another employment in the immediate future. The General Division also erred by finding that the Claimant could have remained employed until she found another job, without regard for the evidence that she had found another job.

[5] I have made the decision the General Division should have made. The Claimant had just cause for leaving her employment and should not have been disqualified from receiving Employment Insurance benefits.

ISSUE

[6] Did the General Division err in law by finding that the Claimant had a reasonable alternative without regard to whether she had a reasonable assurance of another employment in the immediate future?

[7] Did the General Division err when it found that the Claimant had the reasonable alternative of remaining employed until she found another job, without considering the evidence that she had found another job?

ANALYSIS

[8] 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).

[9] 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 before it.

Issue 1: Did the General Division err in law by finding that the Claimant had a reasonable alternative without regard to whether she had a reasonable assurance of another employment in the immediate future?

[10] Section 29(c) of the *Employment Insurance Act* (EI Act) states just cause for leaving an employment exists if the Claimant had no reasonable alternative to leaving, "having regard to all the circumstances, including […] (vi) reasonable assurance of another employment in the immediate future."

[11] The Claimant left her part-time position with her employer on October 2, 2015. She provided an email from the local Board of Education (Board) dated July 22, 2015, to confirm

that she was offered a job with the Board.[1] The Claimant also provided a copy of the letter of offer informing her of her pay grade and rate and given a start date of August 10, 2015.[2]

[12] Information from the Board indicates that casual employees are required to be available five days per week.[3] The Claimant understood that she would begin to receive work following her orientation: According to the Claimant, at her Board orientation on August 13, 2015, the Board "said that if the [new hires] were available Mon[day] to Fri[day], they would get work."[4] She said that if she "was not available certain days due to [her previous employer]," then she "could be missing out on a chance to get some positions with the [B]oard."[5]

[13] The General Division found that "the [Claimant] made a personal choice to leave work because she was under stress due to trying to get a permanent position with another employer to better her career." However, the General Division did not assess whether the Claimant's contract with the Board, and the representations made to her in the course of her orientation, represented a "reasonable assurance of another employment in the immediate future."

[14] I find that the General Division failed to consider all the circumstances as required under section 29(c) of the EI Act, which is an error of law under section 58(1)(b) of the DESD Act. I note that the Commission concedes that the General Division erred in its analysis by not considering whether the Claimant had a reasonable assurance of another employment in the immediate future.

Issue 2: Did the General Division find that she had the reasonable alternative of remaining employed until she found another job, without considering the evidence that she had found another job?

[15] The General Division stated that the Claimant "had the reasonable alternative of continuing in her employment until she started her new job."[6] In other words, the General Division did not understand or accept that the Claimant had started her new job.

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[1] GD3-93.
[2] GD3-96.
[3] GD3-120.
[4] GD3-80.
[5] GD3-69.
[6] General Division decision at para 24.

[16] The Board had posted a position for a X.[7] The Claimant had presumably applied because she was offered the position by email and directed to attend an orientation session on August 13, 2015, as a new employee. The Board confirmed the offer of casual employment effective August 10, 2015, in the July 22, 2015, letter. The Claimant attended the orientation session where she was informed she could be called in to work any day of the week and was expected to be available. The Claimant quit her job to ensure that she was available when called.

[17] As now conceded by the Commission, the Claimant had secured alternate employment before quitting her job. The General Division either ignored or misunderstood the evidence when finding that she should have waited until she had a job before quitting, which is an error under section 58(1)(c) of the DESD Act.

CONCLUSION

[18] The appeal is allowed.

REMEDY

[19] Having allowed the appeal, I have the authority under section 59 of the DESD Act to refer the matter back to the General Division for a reconsideration; give the decision that the General Division should have given; or confirm, rescind or vary the decision of the General Division in whole or in part.

[20] The Commission has asked that the matter be referred back to the General Division for reconsideration. However, I accept that the record is complete, meaning that the record contains all of the evidence that I need to make the decision that the General Division should have made.

[21] I accept that the Claimant had secured a new, casual position with the Board before quitting her job. The real question in this appeal is whether the Claimant acted reasonably in exchanging the job that she had for the position with the Board. The part-time contract position that the Claimant left behind guaranteed her two days a week, or approximately 16 hours a week according to the employment contract (12–16 hours per week according to the offer letter[8]), but

[7] GD3-90.
[8] GD3-37.

its term would expire on October 30, 2015.[9] The casual job that she accepted did not guarantee her any set number of hours.

[22] The Board confirmed that it expected its casual employees to be available five days a week. The Claimant quit her part-time job because she believed that if she "was not available certain days due to [her employer at the time] then [she] could be missing out on a chance to get some positions with the [B]oard." The Claimant had learned at the Board orientation that the position "was part-time work and that [new hires] have to work their way up to get a contract."[10] She had also been told that if she were available Monday to Friday, she would get work.[11]

[23] As it turns out, the new position did not translate into any actual shifts or work hours for quite some time. The Board informed the Commission that the Claimant did not have any work in the entire 2015-2016 school term,[12] although the Board provided a Record of Employment from which it appears that the Claimant had some earnings in early 2016 and towards the end of the school term.[13] The Board placed the Claimant on a temporary contract in December 2016 and a permanent contract in September 2017.[14]

[24] When she quit, the Claimant still had eight weeks left in her contract with her old employer, during which she could expect to have worked two days a week. Therefore, she exchanged a maximum of eight days of full-time work for a job as a casual unionized employee for what was then an indefinite term. According to the Claimant, she "knew that [she] could get more hours" and she anticipated that she would have more stability at the new job.[15]

[25] According to the Federal Court of Appeal in *Tanguay v Unemployment Insurance Commission*,[16] a claimant is only justified in voluntarily leaving employment without finding another employment if, at the time the claimant]left, "circumstances existed which excused [that claimant] for thus taking the risk of causing others to bear the burden of [the claimant's]

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[9] GD3-24.
[10] GD3-80.
[11] *Ibid.*
[12] GD3-120.
[13] GD3-123.
[14] GD3-120.
[15] GD3-21.
[16] *Tanguay v Unemployment Insurance Commission*, A-1458-84.

unemployment." *Canada (Attorney General) v Langlois*[17] explained it this way: "it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke that risk or, *a fortiori*,[even more so] transform what was only a risk of unemployment into a certainty."

[26] However, the facts in *Langlois* involved a full-time permanent employee who left his job for seasonal employment when that seasonal employment may have been about to end. Significantly, *Langlois* did not find that the claimant *necessarily* transformed a risk of unemployment into a certainty by leaving a permanent job for a seasonal one.[18] The court considered that the answer to this question depended on information that was not in evidence, including how much time remained in the season and whether *the claimant could reasonably foresee* that his new employment might conclude earlier.

[27] In the present case, the Claimant exchanged a certainty of unemployment in the near future for a position with the Board that involved "a risk of unemployment," meaning a risk that she would need to replace or supplement the income from that job with Employment Insurance benefits. However, that risk was associated with a potential upside of increased hours and a more stable future.

[28] The court in *Tanguay* said the following: "Sometimes an employee may legitimately have believed at the time that he [or she] left his employment that he [or she] would not be unemployed: this will suffice to excuse his [or her] conduct."[19] I find that the Claimant legitimately believed that she would not be unemployed as a result of the offer of casual work from the Board and their representations to her.

[29] As the court noted in *Langlois*,[20] the "no reasonable alternative" condition requires a different perspective when circumstances involve a claimant who has a reasonable assurance of another employment in the immediate future. In theory, a claimant will always have, as an alternative to leaving, the option to refuse any offer or contract of employment that does not immediately succeed the claimant's previous contract of employment with terms that include the

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[17] *Canada (Attorney General) v Langlois*, 2008 FCA 18 at para 32.
[18] *Ibid*. at para 39.
[19] *Supra* note 16.
[20] *Canada (Attorney General) v Langlois*, 2008 FCA 18 at para 22.

same or better hours or pay. I do not accept that this would be the only situation in which an offer of alternate employment could be justification for quitting.

[30] In this case, the claimant understood that she could and would be called for work at any time and that her future at the Board depended on her availability when she was called. She left her employment so that she could be available to work at the Board's pleasure and to maximize her prospects with the Board. As it turned out, the Claimant was mistaken as to the work that she could expect from her Board position in the short- to medium-term, but the question of whether she could reasonably foresee how much work would or would not be available is certainly relevant to her decision—as it was relevant in the *Langlois* case.

[31] Based on the information that was available to the Claimant and her understanding of that information, I do not accept that the Claimant could have reasonably foreseen that her new position with the Board would not provide as many, or more, hours of work than the employment she left.

[32] I find that the Claimant had no reasonable alternative to leaving her employment when she did and that the Claimant had just cause for leaving her employment. She is therefore not disqualified from receiving Employment Insurance benefits.

Stephen Bergen
Member, Appeal Division

HEARD ON:	
METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	C. R., Appellant S. Prud'Homme, Representative for the Respondent