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

Citation: *A. C. v Canada Employment Insurance Commission*, 2019 SST 524

Tribunal File Number: AD-19-39

BETWEEN:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 31, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. C. (Claimant), had the opportunity to stay on with her employer after her contract ended but she chose to leave. Sometime after her departure, she enrolled in full-time studies to improve her employment prospects. The Claimant also applied for Employment Insurance benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant was disqualified because she had voluntarily left her employment without just cause and that she was also disentitled because she was not available for work. The Commission maintained this decision when the Claimant requested a reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal, but it dismissed her appeal. She now appeals to the Appeal Division.

[4] The appeal is allowed. In finding that the Claimant voluntarily left her employment, the General Division failed to consider the evidence that the Claimant's contract of employment had ended and therefore, it failed to distinguish between the situation where a claimant refuses to renew a contract or accept an offer of reemployment and where a claimant quits employment while still under contract. This is an error under section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act). The General Division also failed to analyze the impact of the Claimant's particular hours of schooling on her ability to apply for work when it found that she had unduly limited her prospects of employment. This is also an error under section 58(1)(c) of the DESD Act

[5] I have made the decision that the General Division should have made. The Claimant is not disqualified from receiving benefits for having voluntarily left an employment under section 29(c) *Employment Insurance Act* (EI Act)and she is capable and available for work under section 18(1)(a) of the EI Act.

ISSUES

[6] Did the General Division find that the Claimant voluntarily left her employment based on a misunderstanding as to the nature of her employment contract?

[7] Did the General Division find that the Claimant set conditions that unduly limited her chance of returning to the labour market without regard to the effect that the particular hours of her schooling would have on her general availability for work?

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 s.58(1) of the DESD Act.

[9] The 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 find that the Claimant voluntarily left her employment based on a misunderstanding as to the nature of her employment contract?

[10] The test for voluntary leaving was simply stated in *Canada (Attorney General) v Peace*[1]: Did the employee have a choice to stay or to leave?

[11] The General Division determined that full-time work continued to be available with the Claimant's employer if she had stayed, but that she had made a personal decision to return to school. On this basis, it determined that she voluntarily left her employment.

---

[1] *Canada (Attorney General) v Peace* A-97-3

[12] However, the General Division failed to consider whether that full-time work was available to her under her *existing* contract of employment. The Claimant's evidence was that she had entered into a contract of employment as a nanny that was associated in some fashion with her entry to Canada as a live-in caregiver. This contract expired at or about the time she obtained permanent residence status in Canada in February 2018. Once freed from her obligations as a nanny she had plans to go to school. The employer was aware of these plans but asked the Claimant if she would be willing to extend her contract until June 2018. The Claimant agreed to this limited extension. Except for having selected "quit" as the reason for separation on the Claimant's application for benefits,[2] the Claimant's evidence has been consistent on these facts.[3]

[13] The General Division failed to consider that the contract of employment was a specified term with a predetermined end-date, and that the Claimant only left at the end of her contract. This factor is relevant to the determination of whether or not she voluntarily left her employment. The General Division erred under section 58(1)(c) of the DESD Act by failing to take this into account.

Issue 2: Did the General Division find that the Claimant set conditions that unduly limited her chance of returning to the labour market without regard to the effect that the particular hours of her schooling would have on her general availability for work?

[14] In the *Faucher v Canada (Attorney General)*[4] decision, the Federal Court of Appeal has outlined three relevant factors to be considered in making the decision whether a claimant is capable of and available for work. One of those factors is whether a claimant has set personal conditions that might unduly limit the chances of returning to the labour market.

[15] The General Division determined that Claimant had unduly limited her chances because she was a full-time student and because it found that, as she had not rebutted the presumption that as a full-time student, she would not be available for work.

---

[2] GD3-7
[3] GD3-23, GD3-25, GD3-38
[4] *Faucher v Canada (Attorney General),* A-57-96

[16] The Claimant's evidence was that her full-time school hours were from 5:00 p.m. to 9:30 p.m. each weekday and that she was looking for work at retail places or as a caregiver or cleaner. The General Division noted that the Claimant had refused one job that conflicted with her hours, but there is no indication in the General Division's reasons that it took into account the particular hours of her schooling—which are outside of the standard working hours. Nor did it analyze whether the type of jobs to which she was applying were such that her unavailability in the evenings excessively limited her job prospects.

[17] In its submissions to the Appeal Division, the Commission agreed that the General Division's decision on this issue might have been different if it had considered that she was going to school during the evening. The Commission added that the Claimant was available to work from 6:00 a.m. to 4:30 p.m. and from 10:00 p.m. to 6:00 a.m., and suggested that the jobs she was applying or could potentially and reasonable lead to work without interfering with the Claimant's school attendance.

[18] I agree with the Commission. The General Division erred under section 58(1)(c) of the DESD Act by failing to consider the particular hours of her full-time studies and her stated availability for work.

REMEDY

[19] The Claimant has established grounds for appeal under section 58(1)(c) of the DESD Act. This means that I must now consider the appropriate remedy. I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, to refer the matter back to the General Division with or without directions, or to confirm, rescind or vary the General Division decision in whole or in part.

[20] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

Voluntary leaving

[21] The Claimant testified that she was in Canada as a live-in caretaker and worked for the employer as a nanny. She expected to go to school once she obtained permanent residence status in Canada, which she obtained in February 2018. In conversation with the Commission, the Claimant confirmed that her original contract with the employer ended in February 2018, and that her contract was then extended until June 30, 2018.[5] She told the Commission that "it was an end of contract but because [she] quit for school, employer is going to put quit", and this is consistent with her Record of Employment (ROE) which the employer coded as "quit".[6] I note that ROE form does not offer a code for "end-of-term employment" or "end of contract", and "shortage of work" would have been inappropriate since the employer still needed to replace the Claimant. Like the ROE, the Claimant's application for benefits gives the Claimant's reason for leaving as "quit". However the Claimant explains in the same application that, "it was finished contract that is why I decided to go back to school."[7] In discussing her reconsideration with the Commission, the Claimant clearly maintained that "her employer had ended her contract", although the Commission agent stated that he "explained voluntarily leaving employment" and she agreed she voluntarily left. I place no weight on this concession as there is no evidence as whether the Commission agent accurately defined "voluntarily leaving employment", and his question seems to be seeking the Claimant's legal opinion rather than facts.[8]

[22] The Claimant informed her employer that she did not wish to renew her contract in February or perhaps even earlier, because she planned to go to school, but that does not mean that she voluntarily left her employment.

[23] The choice identified in the *Peace* decision is not whether the employee has a choice to stay or to leave a particular employment location, or to stay or to leave from particular duties. The choice is for an *employee* to stay or to leave, which necessarily requires that he or she must have employment to leave. The Claimant cannot be said to have a choice to stay in employment that has already terminated per the terms of the employment contract. This remains true

[5] GD3-25
[6] GD3-23
[7] GD3-10
[8] GD3-38

regardless of the fact that the Claimant had given the employer notice that she would not be renewing the contract and that the employer might have been willing to offer her a new contract or extension otherwise. The Commission has the burden of proof of establishing that the Claimant voluntarily left her employment. Among other things, the Commission must establish that the Claimant had employment to leave.

[24] I am satisfied on a balance of probabilities that the Claimant did not voluntarily leave her employment because her contract of employment had terminated before she left. I accept that the employment contract was for a fixed term, and that she worked to the end of that term. The Claimant agreed to an extension of that term, but the extension was not indeterminate but was intended to lapse June 30, 2018. At that time, the Claimant completed the extended term and left her employment. The fact that the Claimant communicated to her employer her continuing intention to return to school, and that both parties acted in accordance with that plan, suggests that neither party treated the extension as some kind of automatic rollover of term. There was neither an express contract nor an implied contract of continuing employment beyond June 30, 2018.

[25] This is not to suggest that the EI Act offers benefits to all claimants who unilaterally refuse an offer of employment, or who foreclose an extension of employment that would otherwise have been available. A claimant who fails to apply for suitable employment that is vacant or becoming vacant, or who has not taken advantage of an opportunity for suitable employment, and who does not have "good cause" for failing to, would still be disqualified, but under section 27(1) of the EI Act – not under section 29(c) and section 30 of the EI Act.

[26] The decision under section 27(1) is different from the disqualification under section 30 in at least two key respects. First, under section 27(1), it would be necessary to consider whether the employment would still be suitable if the claimant's circumstances had changed. Second, "good cause" is not synonymous with "just cause". While "just cause" required a claimant to show that he or she had no reasonable opportunity but to quit, "good cause" does not require a claimant to have no reasonable alternative but to refuse an employment opportunity.

[27] So far as I can determine, the Commission has not adjudicated whether the Claimant should be disqualified under section 27(1) of the EI Act. The Claimant was disqualified from

receiving benefits under section 30 of the EI Act because she was found to have voluntarily left her employment without just cause.

[28] I find that the Commission has not established that the Claimant voluntarily left her employment and that the Claimant is therefore not disqualified for benefits under section 30 of the EI Act.

Availability for work

[29] I have considered that the Claimant's hours of instruction were between 5:00 p.m. to 9:30 p.m. each weekday and that she was looking for work at retail places or as a caregiver or cleaner, and that she had applied for work at many places.[9] I have also considered that she testified that she was looking for full-time work and that she had given her availability from 6:00 a.m. to 4:30 p.m. and from 10:00 p.m. to 6:00 a.m. The Claimant has expressed a willingness to work any time throughout the day or night except for the period from 4:30 p.m. to 10:00 p.m. I recognize that the Claimant turned down the one job offer she received because it conflicted with her school hours.[10] Nonetheless, her availability to work is comprehensive of the usual working hours for almost any job, and broadly flexible. I find that she has rebutted the presumption of non-availability applicable to full-time students, and I find that she did not unduly limit her chances of returning to the labour market.

[30] The General Division supported its findings that the Claimant had a desire to return to the labour market as soon as suitable employment was offered and that she expressed her desire to return to the labour market through efforts to find suitable employment. I agree with those findings. As a result of my finding that the Claimant did not unduly limit her chances of returning to the labour market, I now accept that all three of the *Faucher* factors weigh in favour of accepting that the Claimant was capable of and available for work.

[31] I therefore find that the Claimant is not disentitled to Employment Insurance benefits under section 18(1) of the EI Act.

---

[9] GD3-37
[10] GD3-26

CONCLUSION

[32] The appeal is allowed.

[33] I have made the decision that the General Division should have given. The Claimant is not disqualified by operation of section 30 of the EI Act and is not disentitled by section 18(1) of the EI Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 23, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. C., Appellant Isabelle Thiffault, Representative for the Respondent