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

Citation: *E. R. v Canada Employment Insurance Commission*, 2019 SST 525

Tribunal File Number: AD-18-838

BETWEEN:

E. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 31, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the matter is returned to the General Division for reconsideration in accordance with the reasons and the directions in this decision.

OVERVIEW

[2] The Appellant, E. R., worked part-time in 2015 at a retail store in Alberta. She started an EMT training course in August 2015, but maintains that she was available for work and had advised her employer of her availability. She worked one shift from October to December 2015, and resigned on December 22, 2015. She moved from Alberta to Ontario in January 2016 and applied for benefits under the *Employment Insurance Act*.

[3] The Respondent, the Canada Employment Insurance Commission, determined that the Appellant voluntarily left her employment without just cause and denied her request for benefits.

[4] The Appellant appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada. The General Division found that the Appellant left her job voluntarily so she could move home to Ontario and return to school. It also found that the Appellant had reasonable alternatives to leaving her employment when she did and, therefore, did not have just cause for voluntarily leaving her employment.

[5] Leave to appeal the General Division decision to the Appeal Division was granted on the grounds that General Division may have made reviewable errors in its decision.

[6] The appeal is allowed because the General Division based its decision on a serious error in its findings of fact and made an error of mixed fact and law.

ISSUES

[7] Did General Division fail to observe a principle of natural justice by making a decision despite the Appellant's absence from the hearing?

[8] Did the General Division base 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, specifically as follows?

a) By finding that the Appellant had been unable to accept work because of her course.

b) By finding that the Appellant left her employment to return to school in Ontario.

[9] If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[10] The Appellant submits that the General Division violated a principle of natural justice, made errors of law and made serious errors in its fact-finding. She submits that the facts do not support a finding that she voluntarily left her employment without just cause. She argues that the General Division disregarded evidence that she left her employment because of a combination of factors (change of work duties and an obligation to care for immediate family). Moreover, because she could not attend the hearing, she did not have an opportunity present her case fully and the General Division drew a negative inference from the documentary evidence without giving her a chance to respond.

[11] The Appellant attended the Appeal Division hearing and was represented by counsel. The Respondent, although notified of the hearing, chose not to participate and elected to rely on its written submissions alone.[1]

[12] The Respondent's position is that the General Division committed no error in proceeding with its hearing in the Appellant's absence and that the General Division applied the correct legal test to the facts of this case. It further submits that "even though it might have been preferable for

[1] AD6: letter from the Respondent, dated May 17, 2019.

the General Division to express its decision-making process in a more fulsome manner, the brief analysis does not mean that the General Division [made any reviewable errors]”.[2]

[13] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or 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.[3]

[14] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, and law.[4] In addition, the Appeal Division may find an error in law, whether or not it appears on the face of the record.[5]

[15] The appeal before the General Division turned on the question of whether the Appellant voluntarily left her employment without just cause, a question of mixed fact and law.

[16] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under s. 58(1) of the DESD Act.[6]

[17] The appeal before the Appeal Division rests on distinct questions of errors of law and serious errors in the findings of fact, each of which discloses an extricable legal issue.

[18] A claimant for Employment Insurance benefits can be disqualified from receiving benefits for voluntarily leaving employment without just cause.[7] The burden is on the Canada Employment Insurance Commission to show that the leaving was voluntary. Once it has established that the claimant left their employment voluntarily, the onus shifts to the claimant to demonstrate just cause for leaving.

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[2] AD2 (Respondent’s submissions), at part 6.
[3] *Department of Employment and Social Development Act* at s. 58(1).
[4] *Canada (Attorney General) v. Paradis* and *Canada (Attorney General) v. Jean*, 2015 FCA 242, at para. 19.
[5] *Department of Employment and Social Development Act*, s. 58(1)(*b*).
[6] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[7] *Employment Insurance Act*, ss. 29 and 30.

Issue 1: Did General Division fail to observe a principle of natural justice by making a decision despite the Appellant's absence from the hearing?

[19] I find that the General Division did not fail to observe a principle of natural justice by making a decision despite the Appellant's absence from the hearing.

[20] Counsel for the Appellant argues that the Appellant did not have a full opportunity to present her case and, therefore, the General Division failed to observe a principle of natural justice.

[21] The Appellant had received a notice of hearing. However, she was in the late stages of her pregnancy and did not have any support to advocate for herself in the appeal process. She was unable to attend the General Division hearing on September 5, 2018, and did not contact the Tribunal until November 2018. . Her explanation was that she had a baby in September 2018, and there were post-natal complications. Afterwards, she retained a lawyer to help her.

[22] Can a situation where an Appellant did not ask for an adjournment, did not attend the hearing, and did not contact the Tribunal until two months after the hearing be considered a failure by the General Division to be provide a full opportunity to the Appellant to present their case?

[23] At the hearing, counsel for the Appellant agreed that it was reasonable for the General Division member to proceed with the hearing in the circumstances that were known to the member. However, the consequence of proceeding (rather than adjourning the hearing) was that the Appellant could not answer the General Division's concerns about any inconsistencies in the evidence or the Appellant's credibility. Both of these formed the basis of the General Division's decision to dismiss the appeal.

[24] While it is unfortunate that the Appellant did not attend the hearing because she had more immediate concerns and was unrepresented, the General Division did not fail to observe a principle of natural justice when it proceeded with the case and rendered its decision.

[25] The Appellant conceded this point at the Appeal Division hearing. She is essentially arguing that the General Division erred in law and made serious errors in its findings of facts,

because it drew negative inferences without giving her a chance to address any concerns about her credibility or any inconsistencies in the documentary evidence.

Issue 2: Did the General Division base 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?

[26] I find that the General Decision 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.

[27] The Appellant does not dispute that she left her employment voluntarily. However, she submits that she had just cause because the employer had given her only one shift in three months (change in her work duties) and she had an obligation to care for her siblings at her mother's home in Ontario.

a) By finding that the Appellant had been unable to accept work because of her course

[28] The record of employment provided by the employer shows that the Appellant had worked in July, August and September 2015.[8] After that, she had only one shift, on October 18, 2015, for a period of 4-5 hours.[9] She had no shifts in November or December. She had a conversation with her employer on December 20, 2015 and resigned on December 22, 2015.

[29] There was contradictory evidence about why the Appellant was not scheduled for more shifts. The employer stated that the Appellant was unable to accept shifts that she was offered. The Appellant points to the employer having over-hired and being disorganized (having lost the Appellant's availability forms) as the reason for her lack of work shifts.

[30] Although the employer had confirmed that it had over hired and was limited in the hours of work for its employees, the General Division preferred the employer's assertion (that the Appellant was not available for shifts) over the Appellant's (that the employer over hired and was disorganized), because of the Appellant's earlier statement that her course would not allow her to be consistently available for five days a week. The General Division found that the Appellant had been unable to accept shifts that she was offered because of her course.

[8] GD3-15: Investigation Information Sheet, dated June 20, 2017.
[9] *Ibid.*

[31] This finding of fact was made in a perverse or capricious manner or without regard for the material before. The General Division disregarded the evidence that the employer had over hired and had limited shifts for part-time staff. It also disregarded evidence that the Appellant had worked in the first three months of her EMT course (August, September and October) and had asked the employer for more shifts. It further drew an inference that because the Appellant had said her course would not allow her to be consistently available for five days a week, she was responsible for her lack of work.

b) By finding that the Appellant left her employment to return to school in Ontario

[32] On the issue of whether the Appellant had an obligation to care for a member of her immediate family, the General Division did not give any weight to this reason for relocating to Ontario because the Appellant did not give this as a reason until she appealed the reconsideration decision.

[33] The General Division adopted the Respondent's submission that the Appellant moved back home to Ontario to return to school. This was an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before.

[34] The Appellant relocated to Ontario in January 2016. She stated, in November 2017, that she was a full-time student in university and not working. There is no evidence in the appeal record that the Appellant returned to school when she relocated to Ontario in January 2016 or that a return to school in Ontario was a factor in her resigning from the retail job in Alberta. The only evidence about a return to school in Ontario relates to a time more than a year and a half after the relocation had taken place.

[35] The General Division based its decision on the above-noted serious errors in its findings of fact.

[36] Although the definition of "just cause" is a question of law, the determination of just cause is dependent on the findings of fact based on all the circumstances of the case. By basing its application of the definition of just cause on serious errors in its findings of facts, the General Division also made an error of mixed fact and law.

Issue 3: If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

[37] The Appellant did not participate in a hearing with a full opportunity to present her case. The General Division's approach to fact-finding was not sufficiently complete.

[38] In addition, the Appellant submits that she did not have a chance to explain any inconsistencies in the documentary evidence. And there are gaps in the evidence.

[39] In the circumstances, it would not be appropriate for me to render the decision that the General Division should have rendered.

[40] It is more appropriate to refer the matter back to the General Division.

CONCLUSION

[41] The appeal is allowed, based on ss. 58(1)(*b*) and (*c*) of the *Department of Employment and Social Development Act*.

[42] The matter is referred back to the General Division for reconsideration, in accordance with these reasons and this decision.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	Lawrence Burns, for the Appellant