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

Citation: *L. N. v Canada Employment Insurance Commission*, 2019 SST 780

Tribunal File Number: AD-19-352

BETWEEN:

L. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 19, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

[2] The Claimant has established that the General Division erred under section 58 (1) of the *Department of Employment and Social Development Act*. I have made the decision that the General Division should have made but I must still confirm the decision of the Commission.

OVERVIEW

[3] The Appellant, L. N. (Claimant), left her job at the end of August 2018 to accept a job offer in her chosen field. The Claimant was not paid by her new employer until she had completed an initial practicum period that ran from September to December 3, 2018. She applied for Employment Insurance benefits and the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim on the basis that she voluntarily left her employment without just cause in August. It maintained its decision after the Claimant requested that it reconsider.

[4] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division did not accept that she had a reasonable assurance of employment in the immediate future when she left her job and it dismissed her appeal. She now seeks leave to appeal.

[5] The General Division erred in law under section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act) by providing inadequate reasons for how it relied on legal authority. It also erred under section 58(1)(c) of the DESD Act by basing its decision on an unsupported inference.

[6] However, the appeal is dismissed. I have made the decision that the General Division should have made and I find that the Claimant did not have just cause for leaving her employment.

ISSUES

[7] Did the General Division err in law by defining "immediate future" with reference to case law that was addressed to circumstances that were different from those of the Claimant?

[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?

ANALYSIS

[9] 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) the DESD Act.

[10] The only 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.

Issue 1: Did the General Division err in law by defining "immediate future" with reference to case law that was addressed to circumstances that were different from those of the Claimant?

[11] There were significant factual differences between the Claimant's circumstances and the circumstances in *Canada (Attorney General) v Lessard*.[1] Because of those differences, it would be an error of law if the General Division considered itself bound to reach the same result as *Lessard*.

[1] *Canada (Attorney General) v Lessard* 2002 FCA 469

[12] In *Lessard*, the appellant quit his job but then had to take a 13-week course at an independent training institute as a precondition to an offer of employment at another employer. In this case, the Claimant accepted an offer of unpaid practicum work to start September 4, 2018, within days of leaving her employment. At the same time that she accepted the practicum, she also accepted an offer of paid employment with the same employer to commence December 4, 2018. The Claimant's relationship with the new employer commenced immediately after she left her previous job and there was no change in duties or expectations between her practicum and her eventual paid employment. Furthermore, the practicum component was a requirement of her Master of Social Work program but it was not a precondition to her contract of paid employment.

[13] The distinctions between the Claimant's circumstances and those in *Lessard* are clearly relevant to the question of whether the Claimant's offer of employment was in the immediate future. *Canada (Attorney General) v. Bordage*[2] is another case in which the Federal Court of Appeal considered whether a claimant had a reasonable assurance of another employment in the immediate future. In finding that the claimant did not have a reasonable assurance of employment in the immediate future, the Court said this:

> At the moment when he himself chose to become unemployed, the respondent did not know if he would have employment, he did not know what employment he would have with what employer, he did not know at what moment in the future he would have employment.

[14] In this case, when the Claimant left her employment she knew that she would have employment, she knew what employment she would have with what employer, and she knew when in the future she would have employment.

[15] According to *Bordage* these distinctions are at least relevant. Therefore, it was not sufficient for the General Division to have reasoned that the Claimant's new employment was not in the "immediate future" simply because *Lessard*, on its own facts, had found that a similar interval meant that employment was not in the immediate future. The General Division should

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[2] *Canada (Attorney General) v. Bordage*, 2005 FCA 155

have addressed those factual differences and/or explained how, or to what extent, it understood *Lessard* to apply.

[16] The General Division may only have referenced *Lessard* because it provided perspective, or as some sort of rough benchmark, to assist it in assessing whether the Claimant's anticipated employment was in the "immediate future". It cited *Lessard* as authority for the notion that "a period of 13 weeks or more is not in the immediate future".[3] *Lessard* had found that, "employment which only comes into being on the expiry of a course which has not yet been started and lasts thirteen weeks is not employment "in the immediate future". Perhaps coincidentally, the date that the Claimant commenced paid employment with her new employer was just over 13 weeks from the date that she left her first employment.

[17] I accept that it was appropriate for the General Division to reference the *Lessard* decision. The decision in *Lessard* had considered the same essential question as the question on appeal; whether a claimant had a "reasonable assurance of another employment in the immediate future".

[18] The General Division's reasons do not suggest that it considered itself bound by *Lessard*, or that its conclusion was preordained. Even so, the General Division gave no reason, other than *Lessard*, for finding that the Claimant's new employment was not in the "immediate future". *Lessard* is distinguishable and the General Division's reasons do not otherwise explain why the deferral of paid employment in the Claimant's circumstances should mean that she did not have a reasonable assurance of employment in the immediate future. I find that the General Division's reasons do not explain its decision and I therefore find that the General Division erred in law by not providing adequate reasons for its decision.

[19] This is an error of law under section 58(1) of the DESD Act.

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

[20] In its decision, the General Division acknowledged the Claimant's testimony that her employer had refused to offer her a practicum or grant a leave of absence for her to complete a

[3] General Division, para 14

practicum. It noted that the Claimant had not offered evidence that she had to complete her practicum in the period from September to December 2018 and it found that she had the reasonable alternative to remain in her employment and wait for another opportunity.[4]

[21] The Claimant argued that the General Division member did not ask her whether she needed to complete her practicum. She said that she could have proven that she was required to complete the practicum at that particular time, so that she could meet the requirements of her Master's degree program.

[22] The General Division said that there was no evidence before the General Division as to whether the Claimant needed to complete her practicum within this specific frame or not. The General Division member appears to have inferred from this absence of evidence, that the Claimant could have competed her practicum at some other time.

[23] The onus is always on the appellant to put forward any and all evidence that he or she believes will support his or her position. The General Division is an adjudicative body and does not have a mandate to proactively investigate the circumstances. Having said that, the Claimant's silence on what she may have regarded as an incidental fact does not support an adverse inference. The General Division's assumption that she could have completed the practicum at some later date is improper.

[24] Whether the Claimant has just cause depends on whether she had no reasonable alternatives to leaving. The General Division explicitly linked its assumption that the Claimant could have waited to complete her practicum to its finding that she had a reasonable alternative. This finding is not based on evidence but assumption, and is therefore perverse or capricious or not made having regard to the evidence.

[25] The General Division based its decision on the finding of this reasonable alternative. In doing so, it erred under section 58(1)(c) of the DESD Act.

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[4] General Division decision, para 17

REMEDY

[26] I consider that the General Division record is complete. I will therefore exercise my authority under section 59 of the DESD Act, to give the decision that the General Division should have given.

[27] Section 29(c) of the *Employment Insurance Act* (EI Act) states that a Claimant will have just cause for leaving his or her employment if she has no reasonable alternative to leaving having regard for all the circumstances. A non-exhaustive list of included circumstances follows. The Claimant argued that voluntarily leaving her employment was justified on the basis of one of those circumstances; that she had a "reasonable assurance of another employment in the immediate future" (section 29(c)(vi) of the EI Act).

[28] *Canada (Attorney General) v. Langlois*[5] noted that the section 29(*c*)(vi) circumstance is unique among the listed circumstances and that the legislator's *no-reasonable-alternative* requirement from section 29(c) must be viewed differently when applied to a situation in which section 29(*c*)(vi) may apply. According to *Langlois*, this is because a person who voluntarily leaves one's employment for another is not necessarily doing so because there is no reasonable alternative to leaving. *Langlois* also noted that the circumstance of having a reasonable assurance of employment in the immediate future is brought about solely through the will of the claimant. The Court stated that "this peculiarity of subparagraph 29(*c*)(vi) brings us back to the very foundations and principles of insurance … a **compensation system based on risk**." (Emphasis added.)

[29] According to *Langlois*, "While it is legitimate for a worker to want to improve his life by changing employers or the nature of his work, he cannot expect those who contribute to the employment insurance fund to bear the cost of that legitimate desire. This applies equally to those who decide to go back to school to further their education or start a business and to those who simply wish to earn more money." A claimant who leaves a job because he or she has a "reasonable assurance of employment" should not knowingly increase his or her risk of unemployment.

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[5] *Canada (Attorney General) v. Langlois*, 2008 FCA 18

[30] The principal facts are not in dispute. The Claimant left her job on August 29, 2018. When she left, she already had an offer to work for her future employer from September 4 to December 4, 2018, in an unpaid practicum, and an offer of paid employment with the same employer to start on December 4, 2018. I am satisfied that the Claimant had a reasonable assurance of employment when she left her job. However, I must also determine whether the Claimant's assurance of employment was in the "immediate future".

[31] This case requires an interpretation of "employment". If employment includes unpaid work, then there was only a few days between when she left her job and when started working for her new employer in the practicum. On the other hand, if the Claimant could not be considered employed until a few months later when her paid contract commenced, then it would be more difficult to find that her assurance of employment was in the "immediate future".

[32] The EI Act unhelpfully defines employment as "the act of employing or the state of being employed". Merriam Webster[6] is likewise unhelpful, confirming that employment is the act of employing and that employing can mean **either** 1) to use or engage the services of; or, (2) to provide with a job that pays wages or a salary.

[33] There is also little in the way of case law that can assist to define "employment" or "immediate future". The General Division had cited four factors from *Bordage.* While those factors are relevant to the question of reasonable assurance, they do not interpret either "employment" or employment in the "immediate future" in any way applicable to the Claimant's particular circumstances.

[34] The General Division had also relied on *Lessard.* The Court in *Lessard* did not consider the question of what kind of work should be considered employment. It could not even determine when the actual employment was to begin because the claimant in that case could not have started his new job without first graduating from a training program.

[6] https://www.merriam-webster.com/dictionary/employed

[35] I must turn to statutory interpretation. The Supreme Court of Canada has offered some guidance as to how to approach statutory interpretation. In *Rizzo & Rizzo Shoes*[7] as the Court said the following:

> [T] he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> … according to several decisions of this Court, [benefits-conferring legislation], ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

[36] Section 12 of the *Interpretation Act* confirms that "[e] very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[37] Like the legislation considered in *Rizzo*, the EI Act is benefit-conferring legislation. However, a generous or a liberal interpretation does not require that I should interpret "employment" to include "unpaid employment" where such an interpretation would not serve the objectives of the Employment Insurance Act.

[38] As stated in the *Digest of Benefit Entitlement Principles*[8], "the [Employment Insurance] program is designed to pay benefits to those who are unemployed through no fault of their own." Citing the judgment in *Tanguay v. Canada (Unemployment Insurance Commission),*[9] the Federal Court of Appeal in *Langlois* stated as follows:

> it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke that risk or, a fortiori, transform what was only a risk of unemployment into a certainty.

[39] I do not accept that the Claimant's unpaid practicum is employment for the purpose of section 29(c)(vi) because it is not the interpretation that best attains the objects of the Act as

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[7] *Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 SCR 27 (SCC)
[8] *Digest of Benefit Entitlement Principles*, accessed at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/introduction.html?
[9] *Tanguay v. Canada (Unemployment Insurance Commission)* A-1458-84

required by the *Interpretation Act*. The Claimant voluntarily left her job, knowing that she would certainly have a three-month period in which she would require the support of Employment lnsurance benefits. Despite the fact that the practicum was a necessary step towards her Masters degree and that this would likely improve her salary and career prospects, this is not the objective of the EI Act. Employment Insurance benefits are meant to indemnify claimants against loss of employment through no fault of their own. In my view, the Claimant has provoked the risk of her unemployment.

[40] The next question is whether the Claimant's eventual paid employment was in the "immediate" future. I do not accept that the December 4, 2018, start date was in the "immediate" future when the Claimant left her job on August 29, 2018. Miriam Webster offers some guidance on the plain language meaning of immediate. The two possible definitions that appear appropriate to the context are "occurring, acting, or accomplished without loss or interval of time" or "near to or related to the present". Even if "immediate future" is understood to mean the "near" future, I do not accept that an employment that is three months in the future is "near" in the Employment Insurance context. The EI Act is generally concerned with time frames of a year or less. For example, qualifying periods and benefit periods are generally one year. Weeks of benefits are usually less than a year. Three months is a significant length of time in the EI context.

[41] Furthermore, just as I have considered "employment" with reference to the purposes and objects of the EI Act, I must also understand "immediate" in the same manner. The Claimant knew, before she left her job, that she had a firm job offer and a contract for paid employment to commence December 4, 2018, but she still quit with the knowledge that she would be without income for three months. It would not be consistent with the purposes and objects of the EI Act to interpret "immediate" in such a way as to allow the Claimant to voluntarily choose benefits over employment.

[42] I find that the Claimant did not have a "reasonable assurance of another employment in the immediate future'.

[43] Section 29(c) requires that a Claimant have no reasonable alternative to quitting, having regard to all the circumstances. Had I found that "the Claimant has a reasonable assurance of

employment in the immediate future" within the meaning of the EI Act, this would have meant that the General Division would have been required by section 29 (c) to consider it.

[44] The Claimant did not suggest that any of the other circumstances described in section 29(c) were applicable and none are apparent on the face of the record. However, section 29(c) is not meant to provide an exhaustive list of all relevant circumstances.

[45] I have found that the claimant's circumstances do not fall within the circumstance described by section 29(c)(vi) but this does not mean that I cannot consider her actual circumstances, together with any other circumstance that I consider relevant, in my own assessment of whether the Claimant had no reasonable alternative to leaving.

[46] The Claimant argued to the Appeal Division that her Masters degree program required that she complete the practicum in the period between the end of August 2018 and December 2018, when she started paid employment. This evidence was not before the General Division and I may not consider it.[10]

[47] Therefore, I must decide whether the Claimant had any reasonable alternative to quitting on the following facts: At the time the Claimant left her job, she had an offer of a practicum that would meet her Master's requirements. The practicum was to start within a few days of her quitting. The Claimant also had an offer to begin paid employment that was to start about three months later. This paid job was with the same employer and performing the same duties.

[48] The Claimant testified that her offer of employment did not depend on her completion of the practicum. However, this is true only in the strictest sense. The Claimant could begin her job as a X based on her BSW (Bachelor of Social Work), but the position itself was a MSW (Master of Social Work) position according to the contract. The contract contemplated that she would be advanced on the pay grid once she received her MSW. [11] Furthermore, the Claimant wrote in her reconsideration submissions that she was "offered a better job that requires an MSW, which requires unpaid placement".[12] She explained further that she was, "offered a better job … **on the**

[10] *Mette v. Canada (Attorney General)*, 2016 FCA 276)
[11] GD7-7
[12] GD-24

condition that [she] fulfilled [her] practicum requirements." She later confirmed to a Commission agent that completion of the unpaid placement was required for the new job.[13]

[49] The offer letter and the terms of contract suggest that the Claimant could have begun her new employment without completing her practicum or formally obtaining her MSW degree. However, the same employer was offering her the practicum in the period before she would start her paid job. It could be reasonably confident that the Claimant would complete the practicum. Therefore, I accept that the employer had an expectation that the Claimant would have completed the practicum before commencing her employment.

[50] The only purpose for the unpaid delay before her employment commenced was to provide an opportunity for the Claimant to complete her practicum as one of the final elements of her MSW program. Even if employment with her employer did not require that the Claimant first obtain a MSW, she still needed to obtain the MSW. Employment in the particular position to which the Claimant was hired, and access to the increased salary associated with her new position, depended on her attained the MSW degree. The Claimant claimed that the MSW would increase her salary by close to $20,000.00.[14]

[51] The Claimant willingly accepted a period of about three months without paid work so that she could finish her schooling and advance her career. However, as stated by the Federal Court of Appeal in *Canada (Attorney General) v Martel:* [15]

> The primary purpose of unemployment insurance is therefore to provide compensation for any insured who involuntarily finds himself unemployed, as this risk is unfortunately all too frequent, and not to assist those who from personal choice decide to continue their training I accept that she had a good reason for quitting, but I do not accept that she had just cause under the EI Act.

[52] The Claimant also had a good reason to quit, but it was a personal choice that she made to advance her career. I am not satisfied that she had just cause under the EI Act.

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[13] GD3-28
[14] GD3-27
[15] *Canada (Attorney General) v Martel,* A-1691-92

CONCLUSION

[53] Although the Claimant has established that the General Division erred under section 58(1) of the Act, I have upheld the Commission decision by finding that the Claimant did not have just cause for leaving her employment.

[54] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. N., Appellant