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

Citation: *R. B. v Canada Employment Insurance Commission and X*, 2019 SST 1382

Tribunal File Number: AD-19-589

BETWEEN:

R. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] R. B. (Claimant) worked for X (Employer). He took a leave from work because he had surgery. The Claimant did not return to work after his surgery. The Claimant says that he was constructively dismissed from work because the Employer offered him only part-time work when he was to return after the medical leave. He applied for Employment Insurance benefits (EI). The Canada Employment Insurance Commission decided that the Claimant was disqualified from receiving EI because he voluntarily left his employment without just cause when he refused the Employer’s offer to resume work.

[3] The Claimant appealed this decision to the Tribunal. The Tribunal’s General Division dismissed the appeal for the same reason. I granted leave to appeal this decision to the Tribunal Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division made an error in law. After reviewing the Application to the Appeal Division, the parties’ written submissions and the documents filed with Tribunal, the appeal is dismissed. The General Division made errors such that Appeal Division should intervene. However, I give the same decision that the General Division gave because the Claimant had reasonable alternatives to leaving his work.

PRELIMINARY MATTER

[4] This decision was made based on the documents filed with the Tribunal after considering the following:

a) The parties agree that the General Division erred;

b) The legal issues to be decided are straightforward;

c) The parties have filed written submissions on the legal issues that are clear;

d) The *Social Security Tribunal Regulations* require that appeals be concluded as quickly and efficiently as the circumstances and considerations of fairness and natural justice permit.[1]

GROUNDS OF APPEAL

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim. Instead, I must decide whether the General Division:

a) failed to provide a fair process;

b) failed to decide an issue that it should have, or decided an issue that it should not have;

c) made an error in law; or

d) based its decision on an important factual error.[2]

If the General Division has made any of these errors, the Appeal Division can intervene.

ISSUES

[6] The issues in this appeal are

a) Did the General Division make an error in law because it failed to consider whether the proposed change in work hours was just cause for the Claimant to voluntarily leave employment?

b) Did the General Division base its decision on an erroneous finding of fact regarding how the Claimant communicated medical information to the Employer?

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[1] *Social Security Tribunal Regulations* s. 3(1)
[2] This paraphrases the grounds of appeal set out in s. 58(1) of the DESD Act

ANALYSIS

Failure to consider change in work hours

[7] One ground of appeal under the DESD Act is that the General Division made an error in law. The *Employment Insurance Act* (EI Act) states that a person is disqualified from receiving EI if they voluntarily leave employment without just cause.[3] Refusing to resume employment is voluntary leaving.[4] The Act also states that just cause for leaving employment exists if the person had no reasonable alternative to leaving, having regard to all of the circumstances. It also provides a list of factors that can be considered.[5] One of these factors is significant changes in work duties.[6]

[8] Before the Claimant left work because of his surgery, he worked full-time. At the end of his medical leave the Employer offered the Claimant part-time hours (20 hours per week). The General Division decision does not address whether this change in work hours was significant. It also fails to consider whether this, with the Claimant's other circumstances, would be just cause for his voluntarily leaving his employment.

[9] This is an error in law. The Appeal Division should intervene on this basis.

[10] The Commission says that the General Division made another error in law because it placed weight on its submissions. It says that the General Division is to weigh evidence, not submissions. This may be an error. However, the General Division did not explain how it weighed the evidence or submissions. Therefore, I cannot fully assess this.

[11] Also, the Commission says that the General Division gave no reasons for giving greater weight to its case than the Claimant's and that the appeal must be allowed for this reason as well. The Supreme Court of Canada teaches that a decision-maker must give reasons for its decision so that the reader can understand what decision was made and why it was made.[7] It did so. The decision states that the Claimant did not have just cause to voluntarily leave his employment

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[3] *Employment Insurance Act* ss. 29, 30
[4] EI Act s. 29(*b*.1)(*ii*)
[5] Ibid. s. 29(*c*)
[6] Ibid. s. 29(*c*)(*ix*)
[7] *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62

because he had reasonable alternatives to do so. These alternatives included accepting the offer of part-time work, and working with the Employer and his doctor to communicate sufficient information so that he could return to work.[8] Therefore, the General Division made no error in this regard.

Communication of medical information

[12] Another ground of appeal is that the General Division based its decision on an erroneous finding of fact. In order to succeed on this basis, the Claimant must prove three things:

a) That a finding of fact was erroneous (in error);

b) That it was made in a perverse or capricious manner, or without regard for the material that was before it; and

c) That the decision was based on this finding of fact.[9]

[13] The Claimant argues that the General Division based its decision on an erroneous finding of fact because it failed to consider what was the Employer's normal method of communicating documents. He argues that the normal way to provide documents to the Employer was to leave them with security at any one of the Employer's sites. The Patrol Supervisor would then deliver any such items to the head office. The Claimant says that he left medical documents with security so he properly communicated this information to the Employer.

[14] The General Division decision fails to consider this. It states that it would have been reasonable for the Claimant to ensure that any medical information was provided directly to human resources or a supervisor.[10] This finding of fact was made without regard for the evidence about the workplace practices for delivering documents. The decision that the Claimant voluntarily left his employment without just cause was based, at least in part, on the finding of fact that it would have been reasonable for the Claimant to deliver medical information directly to the Employer.

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[8] General Division decision at para. 16
[9] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[10] General Division decision at para. 8

[15] Therefore, the General Division decision was based on an erroneous finding of fact under the DESD Act. The Appeal Division should step in on basis also.

REMEDY

[16] The DESD Act sets out what remedies the Appeal Division can give when it intervenes. This includes giving the decision that the General Division should have given.[11] In addition, the DESD Act says that the Tribunal can decide questions of law and fact to dispose of an appeal,[12] and the *Social Security Tribunal Regulations* require that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit.

[17] This appeal has been ongoing for a long time. Further delay would be incurred if it were referred back to the General Division for reconsideration. In addition, the record before me is complete and neither party requested an oral hearing. Therefore, below I give the decision that the General Division should have given.

[18] The undisputed facts are summarized as follows:

- The Claimant began to work for the Employer in 2016
- He took a medical leave in May 2017 to recover from surgery
- On October 24, 2017 the Claimant's doctor wrote that the Claimant could return to work on modified duties for two months
- The Employer did not receive this medical information when the Claimant sent it in by leaving it with security at a work site
- The Employer offered the Claimant a position working 20 hours per week. The Claimant did not respond to this offer.[13]

[19] The Claimant says that he dropped off the medical information to security at one of the Employer's work sites in accordance with the company's practise. He also says that he later received a voice message that the Employer had only part-time work available for him and that

[11] DESD Act s. 59(1)
[12] DESD Act s. 64
[13] GD3-43

the Employer would not schedule him for work until he was fully cleared medically. He believes this was a constructive dismissal so did not return to work.

[20] The Employer says that it had modified duties for the Claimant when he was to return to work, but did not receive medical information, so could not schedule him for work. It offered him fewer work hours to try to accommodate his need for modified duties.

[21] The evidence shows that the Employer tried to accommodate the Claimant's medical needs. On November 6, 2017 it sent the Claimant an email that states that it would try to find the medical documents that he had left at the worksite, and asks for clarification whether his doctor had currently given him full clearing or modified duties.[14] On November 30, 2017 the Employer offered the Claimant a weekend position (20 hours per week) that would "match [his] current requests."[15] When the Claimant did not respond, the Employer offered him other light duty schedules.[16] The Claimant never responded to these offers.

[22] The Claimant left his employment voluntarily by refusing to return to work after his medical leave.[17]

[23] The EI Act states that a person has just cause for leaving employment if they had no reasonable alternative to leaving, having regard to all of the circumstances. The Claimant had reasonable alternatives to leaving. He could have responded to the Employer's offers of different schedules and explained why they were not acceptable to him. He also could have asked for his medical leave to be extended until he could return to full duties.

[24] Therefore, the Claimant voluntarily left his employment without just cause when he refused to resume his employment. He is disqualified from receiving EI.

CONCLUSION

[25] The appeal dismissed for these reasons.

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[14] GD9-9
[15] GD9-10
[16] GD9-11
[17] EI Act s. 29(*b.1*)(*ii*)

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
SUBMISSIONS:	R. B., Appellant Lisa Partap, Representative for the Appellant M. Allen, Representative for the Respondent