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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v K. M.*, 2020 SST 151

Tribunal File Number: AD-19-853

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

K. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: February 18, 2020

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal.

OVERVIEW

[2] The Respondent, K. M. (Claimant), left her employment when the employer gave her a new schedule involving full-time work and evening shifts. The Claimant submits that she had an agreement with the employer to work only part-time mornings starting in September. Because she was not available for the evening shift, namely because of returning to school, the Claimant left her job.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), determined that the Claimant did not have just cause for voluntarily leaving her employment. After reconsideration, the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division determined that the employer had made significant changes to the Claimant's work duties. It determined that the Claimant had no reasonable alternative to leaving given the circumstances.

[5] The Commission was granted leave to appeal. It argues that the General Division made an error in its interpretation of section 29(c)(ix) of the *Employment Insurance Act* (EI Act). It also submits that the General Division ignored the Federal Court of Appeal case law and, in doing so, made an error of law by finding that the Claimant had not voluntarily left within the meaning of section 29 of the EI Act.

[6] The Tribunal must decide whether the General Division made an error in its interpretation of section 29(c)(ix) of the EI Act. It must also decide whether the General Division made an error by finding that the Claimant did not voluntarily leave her employment within the meaning of section 29 of the EI Act.

[7] The Tribunal allows the Commission's appeal.

ISSUES

[8] Did the General Division make an error in its interpretation of section 29(c)(ix) of the EI Act?

[9] Did the General Division make an error of law by finding that the Claimant did not voluntarily leave her employment under section 29 of the EI Act?

ANALYSIS

Appeal Division's Mandate

[10] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of law, 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, the Tribunal must dismiss the appeal.

Issue 1: Did the General Division make an error in its interpretation of section 29(c)(ix) of the EI Act?

Issue 2: Did the General Division make an error of law by finding that the Claimant did not voluntarily leave her employment under section 29 of the EI Act?

[13] The Commission argues that the General Division made an error in its interpretation of the term "work duties" from section 29(c)(ix) of the EI Act. It also submits that the General Division ignored the Federal Court of Appeal case law

[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

indicating that leaving employment to pursue studies is a personal decision and does not constitute just cause within the meaning of sections 29 and 30 of the EI Act.

[14] The Tribunal is of the view that the evidence does not support the General Division's finding that the employer made a significant change to the Claimant's work duties within the meaning of section 29(c)(ix) of the EI Act. The employer did not unilaterally change the Claimant's work duties. Instead, the Claimant asked that her work duties be changed so she could prioritize her studies. If she had not returned to school, she would clearly have kept the same work duties.

[15] The Tribunal is also of the view that the General Division ignored the Federal Court of Appeal's consistent case law and therefore made an error of law by finding that the Claimant had not voluntarily left within the meaning of the EI Act.[2]

[16] The Tribunal will therefore give the decision that the General Division should have given.[3]

[17] The Claimant was hired part-time. However, she worked full-time during the summer. When she was hired, the Claimant told her employer that she planned to attend school full-time in September. Towards the beginning of September, the Claimant asked the employer to work part-time because she was returning to school. The employer decided to terminate her employment because the Claimant's availability was inconsistent with the business's operational needs.

[18] The Claimant tried to talk with her employer to find a solution. However, she was unable to reach an agreement with her employer. Therefore, the employer decided to terminate the Claimant's employment. She began her studies in September 2019.

[19] The undisputed evidence shows that the Claimant returned to school and that she asked her employer to accept a schedule adapted to her educational needs.

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[2] EI Act, s 29(c).
[3] In accordance with the DESD Act, s 59(1).

[20] However, the employer did not accept the Claimant's proposed change of schedule and instead decided to terminate the employment. The Claimant could have kept her employment had she not chosen to prioritize her studies. The employer hired another employee.

[21] The Federal Court of Appeal has established that an employee who informs their employer that they are less available than previously is, for all intents and purposes, asking the employer to terminate the employment contract if the employer cannot accommodate the employee's reduced availability. Dismissal is therefore only the sanction of the real cause of the loss of employment, that is, the employee's decision to continue their studies under conditions that do not allow them to be available any longer. Dismissal is only the logical consequence of the employee's deliberate act and cannot erase the fact that there was first and foremost voluntary leaving on the part of the employee.[4]

[22] The General Division made an error of law by failing to follow the Federal Court of Appeal's consistent case law, which has held that a claimant voluntarily leaving their employment to return to school does not constitute just cause within the meaning of sections 29 and 30 of the EI Act.[5]

[23] The Claimant's case inspires sympathy. The employer certainly could have shown more flexibility. However, as soon as circumstances required this student to make herself less available to continue her studies, and because the employer refused to accept that reduced availability, she lost the benefit of accumulated hours of work in that employment.

[24] For the reasons mentioned above, the Commission's appeal should be allowed.

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[4] *Canada (Attorney General) v Côté*, 2006 FCA 219.
[5] *Canada (Attorney General) v King*, 2011 FCA 29; *Canada (Attorney General) v Macleod*, 2010 FCA 301; *Canada (Attorney General) v Beaulieu*, 2008 FCA 133; *Canada (Attorney General) v Caron*, 2007 FCA 204; *Canada (Attorney General) v Côté*, 2006 FCA 219; *Canada (Attorney General) v Bois*, 2001 FCA 175.

CONCLUSION

[25] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	February 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Julie Meilleur, Representative for the Appellant K. M., Respondent