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

Citation: *Canada Employment Insurance Commission v S. R.*, 2020 SST 104

Tribunal File Number: AD-19-760

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 14, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Respondent, S. R. (Claimant), worked part-time for a private art school to supplement her other income. She left that position in the spring when the term of her employment expired, even though her employer had told her that it would like to have her teach another art class over the summer. The Claimant applied for Employment Insurance benefits, but the Appellant, the Canada Employment Insurance Commission (Commission), found that she had left her employment voluntarily and that she had left without just cause. The Commission maintained its decision when the Claimant asked it to reconsider.

[3] The Claimant successfully appealed to the General Division of the Social Security Tribunal. The General Division found that the employer had not made a formal offer of employment for the summer camp position and that the Claimant did not have a choice to continue her employment. Therefore, it decided that the Claimant did not leave her employment voluntarily, and it allowed her appeal. The Commission is appealing the General Decision's decision to the Appeal Division.

[4] The appeal is dismissed. I am not satisfied that the General Division made an error of law or an important error of fact.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] I may only allow the appeal if I find that the General Division made an error or errors that are related to the "grounds of appeal." These are described below:[1]

1. The General Division hearing process was not fair in some way.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

2. The General Division did not decide an issue it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[6] Did the General Division make an error in law by ignoring the legal effect of the Claimant's refusal of alternative employment?

[7] Did the General Division make an important error of fact when it found that the Claimant did not refuse an offer of alternate employment?

ANALYSIS

Voluntary leaving by refusing employment

[8] Near the beginning of the Claimant's spring contract, the Claimant's employer expressed an interest in having the Claimant work in a summer camp position after her spring contract expired. The Commission argued to the General Division that this was an offer of employment, and that the Claimant had refused to accept the offer.

[9] The General Division did not agree. It found that the employer had not made an offer of employment to the Claimant and that the Claimant had not voluntarily left her employment, because her contract had come to an end. The General Division also stated that choosing to refuse an offer to renew contractual employment is not a choice to leave employment without just cause. In support of this proposition, the General Division cited the decision in *Canada (Attorney General) v Cecconi*.[2]

[10] The Commission now argues that the General Division made an error of law. According to the Commission, the definition of voluntary leaving has expanded since *Cecconi*, and the General Division should have applied section 29(b.1) of the *Employment Insurance Act* (EI Act) to find that the Claimant had voluntarily left. Section 29(b.1) states that a claimant voluntarily

[2] *Canada (Attorney General) v Cecconi*, A-49-94.

leaves his or her employment at the time the claimant loses that employment, if the claimant has refused an offer of alternative employment.

[11] I agree with the Commission that the definition of voluntary leaving has expanded. According to section 29(b.1) of the EI Act, a claimant who refuses an offer of alternative employment has voluntarily left his or her employment. Whether that claimant has just cause for doing so is a separate question. *Cecconi* was decided under the former *Unemployment Insurance Act*, which did not have a provision similar to section 29(b.1) of the current EI Act. Under the current legislative scheme, *Cecconi* cannot be relied on to support the notion that a claimant's refusal of alternative employment is not voluntarily leaving employment.

[12] The General Division's unfortunate suggestion that it was required to apply *Cecconi* betrays a misunderstanding of the legal effect of a claimant's refusal of an offer of employment. However, I find that the General Division did not rely on this misinterpretation. The decision was based on the General Division's finding that the employer did **not** offer the Claimant continuing employment. This has two implications. The present circumstances do not attract the application of *Cecconi* because there was no offer of continuing or alternative employment. Therefore, the General Division's reference to *Cecconi* was not necessary to the decision and it did not affect the result.

[13] The second implication is that section 29(b.1) of the EI Act is not engaged. The Commission's argument that the General Division made an error of law by failing to consider section 29(b.1) presupposes that the Claimant refused an offer of employment. The General Division explicitly found that the Claimant's conversation with her employer in April 2019 did not amount to an offer of continued employment. Once the General Division reached this conclusion, there was no need for it to consider or rely on section 29(b.1) of the EI Act. The Claimant could not refuse an offer that had not been made.

[14] The General Division correctly applied section 29(c) of the EI Act when it found that the Claimant had not voluntarily left her employment.

Factual basis for finding that the claimant had no choice to remain

[15] The General Division found that the Claimant had a casual conversation with her employer about whether she would like to work at the summer camp after her contract expired on June 20, 2019. This conversation took place shortly after the Claimant started her spring contract in April. Based on her previous experience working at the summer camp, the Claimant told the employer that she thought she would need more hours than would be available, but she said she would think about it. The employer did not mention the anticipated start or end dates, the actual hours that would be involved, or the hourly pay rate.

[16] The Claimant testified that the employer never brought up the summer camp position again, after the initial discussion. She knew that the summer camp required a one- or two-day preparatory session a week, or more, before the camp started. Her employer did not ask her to be involved in the preparatory session. She left the employer when her spring contract ended.

[17] The Commission had the burden of proving that the Claimant had voluntarily left her employment. The Commission did not contest that the Claimant's spring contract had ended. Therefore, the Claimant did not have a choice to stay or to leave the employment defined by her spring contract. To prove that the Claimant had voluntarily left, the Commission had to establish that the Claimant had refused an offer of employment.

[18] The Commission argued that the evidence supports a finding that the Claimant was aware that she could have stayed on as an employee and that she knew the type of job offered to her, including the hours and wages. It noted that the Claimant confirmed that she knew the type of job offered to her[3] and that classes occurred three hours a day, Monday to Friday, for $14.00 an hour.[4] However, the Claimant also mentioned that her knowledge of the camp position came from her experience with the camp in past summers.[5] She testified to the General Division that her understanding of wages and hours, in particular, was based on her previous work at the summer camp.

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[3] GD3-29.
[4] AD2-3; reference to evidence statement at GD3-27.
[5] GD3-27; GD3-29.

[19] While the Claimant likely had a good idea of what to expect at the summer camp from her experience, she could only assume that the coming summer camp arrangements would be similar. She testified that she and the employer had not discussed hours, salary, or other details in the single conversation she had had with the employer in April 2019. There was no other evidence that the employer discussed or confirmed with the Claimant the terms of employment for the 2019 summer camp.

[20] Based on the Claimant's evidence, her employer informally suggested to her that she was welcome to take a summer camp position when her contract ended on June 20, 2019. She testified that she responded by saying she would think about it but that she would likely require more hours. In a statement to the Commission about three months after the April conversation,[6] the employer said that it recalled the Claimant saying that she would not be available for the summer camp. The General Division set out all of this evidence in its decision.[7]

[21] The General Division also understood that the employer had only expressed its interest in having the Claimant work at the summer camp in general terms[8]. It understood that the employer did not mention the summer camp employment again,[9] even though the Claimant worked for the employer for another two to three months before the end of her contract.

[22] In finding that the employer did not make a formal offer of employment, the General Division relied on several factors: the lack of detail in the original discussion between the employer and the Claimant; the employer's failure to raise the issue again over the remainder of the Claimant's contract, and; the fact that the employer did not ask the Claimant to attend the preparatory training, which would have been necessary if the Claimant were to take on the summer camp position. The evidence related to these factors was not disputed.

[23] The General Division did not accept that the Commission had established that the Claimant refused an offer of employment from her employer. It found instead that the April conversation was not an offer of employment. The Commission appears to disagree with how the General Division assessed the evidence and with its conclusion but it is not my role to reassess or

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[6] GD3-20.
[7] General Division decision, paras 9 and 10.
[8] General Division decision, para 10.
[9] *Ibid*.

reweigh the evidence.[10] I do not accept that the General Division's finding ignored or misunderstood the evidence when it, or that its finding was "willfully […] contrary to the evidence" or "not guided by steady judgment, intent of purpose."[11] The General Division did not make an important error of fact.

CONCLUSION

[24] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 14, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	S. R., Respondent
SUBMISSIONS:	Rachel Paquette, Representative for the Appellant

[10] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[11] This is how "perverse" and "capricious" are defined in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.