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

Citation: *D. W. v Canada Employment Insurance Commission*, 2020 SST 162

Tribunal File Number: AD-18-676

BETWEEN:

D. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 26, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

OVERVIEW

[2] The Appellant, D. W. (Claimant), admitted to certain conduct that the employer considered to be grounds for dismissal. The Claimant was given an opportunity to resign, which he accepted. If he had not resigned, he would have been fired.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) denied his application for Employment Insurance benefits, stating that he had voluntarily left his employment without just cause. It maintained this decision on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal but his appeal was dismissed. He is now appealing the General Division decision to the Appeal Division.

[4] The appeal is allowed. The General Division made an error of law by failing to apply the correct test for voluntary leaving.

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 grounds would be where the General Division**,**[1]

1. did not act fairly in some way;
2. did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide;
3. based its decision on an important error of fact, or;
4. made an error of law when making its decision.

[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.*

ISSUES

[6] Did the General Division make an error of law by failing to apply the correct legal test for voluntarily leaving employment?

ANALYSIS

Legal test for voluntarily leaving employment

[7] A claimant who voluntarily leaves employment without just cause is disqualified from receiving benefits.[2] The legal test for voluntary leaving is quite simple: Did the employee have a choice to stay or to leave?[3] The General Division erred in law by misapplying the legal test for voluntarily leaving.

[8] The General Division found that the Claimant voluntarily left his employment after accepting that the employer was ready to fire the Claimant if the Claimant did not resign[4] and that the Claimant quit under threat of dismissal.[5] In fact, the General Division said that the Claimant "had no alternative to leaving in the face of inevitable termination."

[9] The Commission concedes that the General Division made an error by analyzing the issue as voluntary leaving instead of as a dismissal for misconduct. It characterizes the General Division's finding that the Claimant voluntarily left his employment as an error of fact, rather than an error of law.

[10] I agree with the Commission that the General Division made an error, however I find that General Division's error is an error of law. The General Division's findings of fact are consistent with the evidence, but they would not support a finding of voluntarily leaving if the General Division had asked itself if the Claimant had a choice to stay or to leave. The only choice before the Claimant was a choice as to *how* he was to leave his employment; not a choice *whether* he should leave. The General Division neither cited the correct test for voluntary leaving,[6] nor applied it to its findings.

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[2] Section 30 of the *Employment Insurance Act*.
[3] *Canada (Attorney General) v Peace*, 2004 FCA 56
[4] General Division, para. 13
[5] Ibid., para 11
[6] *Supra*, note 3

[11] I note that the Commission argued to the General Division that it does not matter who takes the initiative to terminate the employment relationship where the real cause for the claimant's leaving is a reprehensible act. The Commission stated that its argument relied on the Federal Court decision in "Easson", but I suspect it meant to refer to the Federal Court of Appeal decision in *Canada (Attorney General v Desson).*[7] The language used by the Commission to describe the case, and its reference to its source as A-78-04 both suggest that the Commission was relying on *Desson*.

[12] Unfortunately, the Commission's reference to the decision as "Easson*"* resulted in some confusion. The General Division accepted the Commission's submission[8], and found that the Claimant did not have just cause for leaving even though his employer would have fired him if he had not left.[9] However, the General Division cited the decision of *Canada (Attorney General) v Easson.*[10] By a strange coincidence, *Easson* is also a decision dealing with the relationship between voluntary leaving and misconduct. This means that I cannot simply presume that the General Division meant to refer to the same decision that the Commission was referencing.

[13] However, it actually makes little difference whether the General Division based its decision on an application of *Easson*, or by applying *Desson*. In the *Easson* decision, the Commission originally disqualified the claimant because the employer had dismissed him for misconduct. The question in *Easson* was the breadth of the appeal body's jurisdiction. The Court accepted that the appeal body had the jurisdiction to find the claimant to be disqualified for having voluntarily left his job without just cause, despite the fact that the Commission decision had disqualified the claimant for misconduct.

[14] The facts in the *Desson* case are more similar to the facts of this case. *Desson* concerned a claimant who was found to have voluntarily left his job because he expected his employer would dismiss him otherwise. In *Desson*, the Court found that the nature of the conduct is what determines whether a claimant's actions are misconduct; not the identity of the party who initiated the separation from employment (the employer or the claimant).

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[7] *Canada (Attorney General) v Desson*, A-78-04.
[8] General Division decision, para. 17
[9] General Division decision, para. 18
[10] *Canada (Attorney General) v Easson, A-1598-93*

[15] However, neither *Easson* nor *Desson* suggest that the concept of voluntary leaving is broad enough to include a compelled resignation. Neither case would authorize the General Division to find a claimant to have voluntarily left employment where the evidence actually supports a finding that he or she was dismissed, or effectively dismissed. And neither case would authorize the General Division to find that a "reprehensible act is the real cause" (to use the words of *Desson*) without first applying the legal test for misconduct.

[16] It might have been appropriate for the General Division to discount the fact that the employer would still have fired the Claimant if the Claimant had not quit first—if the General Division had been analyzing whether the claimant should be disqualified because of his misconduct. However, the General Division did not analyze whether the Claimant was dismissed for misconduct. Instead, the General Division found that the Claimant voluntarily left his employment without just cause, and it made an error of law in how it applied the test for voluntary leaving.

[17] Having found that the General Division made an error of law, I must now consider the appropriate remedy.

REMEDY

[18] I have the authority to change the General Division decision or make the decision that the General Division should have made.[11] I could also send the matter back to the General Division to reconsider its decision.

[19] The ultimate issue before the General Division was the Claimant's disqualification from benefits. Therefore, I accept that the General Division would have had the jurisdiction to determine whether the Claimant had been dismissed for misconduct. However, the General Division did **not** determine whether the Claimant had been dismissed for misconduct, because it analyzed his circumstances as a "voluntary leaving".

[20] The Commission has asked that I make the decision that the General Division should have made. However, the record is not complete. It is not possible for me to determine whether

[11] My authority is set out in section 59 of the *Department of Employment and Social Development Act*.

the Claimant was dismissed for misconduct. The Commission's decision was concerned only with the Claimant's "voluntary leaving". The Commission has not made submissions on how the Claimant meets the common law test for misconduct, and the Claimant has not had the opportunity to give evidence or make submissions in answer to each element of the test for misconduct.[12]

[21] I am sending the matter back to the General Division to determine whether the Claimant was dismissed for misconduct.

CONCLUSION

[22] The appeal is allowed. The matter is referred to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 6, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. W., Appellant J. Lachance, Representative for the Respondent

[12] Elements of the test for misconduct are set out in decisions such as *Canada (Attorney General) v. Lemire*, 2010 FCA 314, *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Attorney General of Canada v. Langlois*, A-94-95).