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

Citation: *Canada Employment Insurance Commission v S. D.*, 2020 SST 256

Tribunal File Number: AD-19-854

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 24, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division made an error of law. I have corrected that error and I find that the Claimant did not have just cause for leaving her employment.

OVERVIEW

[2] The Respondent, S. D. (Claimant), left her permanent, part-time job with her employer (X) to accept a temporary, full-time contract that would help further her career. When that temporary contract expired, the Claimant applied for Employment Insurance benefits. The Appellant, the Canada Employment Insurance Commission (Commission), denied her claim, finding that she left her permanent part-time job without just cause. It maintained this decision when the Claimant requested a reconsideration.

[3] The Respondent successfully appealed to the General Division of the Social Security Tribunal, but the Commission 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 not applying the law as expressed in the Federal Court of Appeal decision of *Canada (Attorney General) v Langlois*.[1]

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[2]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that 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.

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[1] *Canada (Attorney General) v. Langlois*, 2008 FCA 18.
[2] 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.*

4. The General Division made an error of law when making its decision.

ISSUES

[6] Did the General Division make an error of law when it failed to apply relevant case law?

[7] Did the General Division make an important error of fact when it found that the Claimant's permanent employment was probationary?

ANALYSIS

Error of law

[8] The *Employment Insurance Act* (EI Act) states that a claimant for Employment Insurance benefits is disqualified from receiving benefits[3] if that claimant leaves an employment without just cause.[4] "Just cause" may only be found where a Claimant has no reasonable alternative to leaving employment when all of the circumstances are taken into account.[5] A claimant who is disqualified cannot use any of the hours of insurable employment that he or she accumulated from *any* employment before the disqualifying event.

[9] The Claimant's circumstances are similar to those of the claimant in Federal Court of Appeal decision of *Canada (Attorney General) v Langlois*.[6] In *Langlois*, a claimant left a permanent job to take a temporary job that was better paying and that would have helped to advance the claimant's career. In this case, the Claimant also held a permanent part-time job and also quit to accept a temporary full-time contract that paid better than her part-time job. She also expected it to advance her career. She testified that the contract job would allow her to meet the School District's requirement that she work 120 consecutive days to obtain "status". The Claimant clarified that having status would increase her chance of being awarded a permanent position with the School District. However, the Claimant knew that the contract position was temporary and that would be unemployed at the end of the spring term if she did not find some other job.

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[3] EI Act, section 30(1)
[4] EI Act, section 29(c)
[5] EI Act, section 29(c).
[6] *Canada (Attorney General) v Langlois*, 2008 FCA 18.

[10] The Claimant has not shown that her circumstances were different from those of the claimant in the *Langlois* case in any meaningful sense and I cannot find any basis on which to distinguish *Langlois.* In *Langlois*, the Court held that there can be no "just cause" for creating a certainty of unemployment. A claimant that switches to temporary employment that will not allow the claimant to accumulate enough hours to qualify for benefits creates a certainty of unemployment.[7]

[11] I accept that the General Division made an error of law when it failed to apply the decision in *Langlois* to the facts of this case. The General Division is legally bound to accept the authority of the Federal Court of Appeal. Instead, the General Division relied on earlier decisions of the former Umpire,[8] to find that the Claimant had no reasonable alternative to leaving her job.

[12] The General Division is entitled to consider Umpire decisions and it may even be persuaded by the reasoning in those decisions. However, the General Division is not permitted to follow Umpire decisions to a conclusion that is inconsistent with any position taken or principle established by the Federal Court of Appeal.[9]

[13] I also note that the Umpire cases would have provided little support for the General Division decision in any event. Of the three Umpire decisions to which the General Division referred, I can locate only CUB 62603 and CUB 68764. The facts in these two Umpire cases are substantially different than the present facts. The Umpire decided the claimant had just cause for leaving for another job in CB 62603 because it found that the claimant quit a job that was itself only a temporary and precarious job. In CUB 68764, the Umpire refused to interfere with a decision that a claimant had just cause when the decision relied on evidence that the Claimant accepted a temporary term with the expectation that it would be extended.

Important error of fact

[14] The Commission also argued that the General Division made an error when it found that the Claimant was on probation and could be dismissed without notice.

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[7] *Ibid*. para. 34. This is a reference to meeting the requirements of section 30 of the EI Act.
[8] The General Division decision, para 2, referred to Canadian Umpire Benefit (CUB) decisions 62603 and 68764.
[9] Unless that Federal Court of Appeal decision has been overturned by a higher court or is superseded by more recent Federal Court of Appeal authority.

[15] However, according to the evidence before the General Division, the Claimant had been employed with X for less than six months[10] and that she was still on probation with X.[11] Employees who have worked for an employer for less than six months may be dismissed without notice in the Claimant's province of residence.[12] If the Commission meant to argue that the Claimant's job was no less certain than any other employee with the same length of service, the General Division did not find that it was.

[16] In any event, the General Division decision does not depend on a finding that the Claimant's part-time job was in any kind of jeopardy.

[17] I do not find that the General Division made an important error of fact.

Summary of errors

[18] I have found that the General Division made an error of law. This means I must consider what manner of remedy is appropriate.

REMEDY

Nature of remedy

[19] I have the authority to change the General Division decision or make the decision that the General Division should have made.[13] I could also send the matter back to the General Division to reconsider its decision.

[20] I accept that the General Division has already considered all the issues raised by this case and that I can make the decision based on the evidence that was before the General Division. I will make the decision that the General Division should have made.

New decision

[21] The EI Act states that a claimant has just cause when he or she has no reasonable alternative to leaving. It also includes a list of circumstances that must be considered where they

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[10] GD3-21
[11] GD3-32
[12] Section 30(1) (a) of the New Brunswick *Employment Standards Act* requires employers to give two weeks' notice when an employer has continuously employed a person for six months.
[13] My authority is set out in section 59 of the DESD Act.

are supported by the evidence. Only one of those listed circumstances appears to be present. This is the circumstance described as a "reasonable assurance of another employment in the immediate future".[14]

[22] The Claimant left her job at X on March 7, 2019, with an offer from the School District to give her full-time hours starting on March 11, 2019.[15] I accept that she had a reasonable assurance of another employment in the immediate future at the time that she left her job, which means that I must consider this circumstance when I decide if she had just cause for leaving.

[23] The Claimant left her job at X to accept a contract position with full-time hours at a better rate of pay. However, the job that she left was permanent. The contract position that she accepted was only temporary.

[24] According to the Federal Court of Appeal, insured persons under an employment insurance scheme must not provoke their risk of unemployment or transform their risk of unemployment into a certainty.[16] If the Claimant had kept her job with X, she could have continued working through the summer. By quitting X to take the temporary contract with the School District, the Claimant ensured that she would find herself unemployed when the spring school term came to a close. In other words, she transformed the risk that she might lose her job at X into a certainty that she would be unemployed at the end of the contract with the School District.

[25] According to *Langlois*, claimants who leave permanent work for "seasonal" work are not necessarily disqualified from receiving benefits. *Langlois* stated that it is important to consider the remaining duration of the seasonal employment at the time of separation from the other employment. In some cases, a claimant may be able to accumulate enough hours of insurable employment within whatever remains of the season of the seasonal employment, to qualify again for benefits. But where this is not possible, the Court said that switching employment creates a certainty of employment for which there can be no just cause.[17]

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[14] EI Act, section 29(c)(vi).
[15] GD3-30
[16] *Tanguay v Canada (Unemployment Insurance Commission),* A-1458-84, cited in *Langlois*, para. 32.
[17] *Supra* note 7, para. 33-34

[26] In this case, the Claimant accepted a short-term contract, which she expected to end when the spring term concluded. Her contract did end on June 21, 2019, in fact. Based on the earnings recorded in her Record of Employment and her stated pay rate of $20.40 per hour, it appears that the Claimant generally worked between 28 and 35 hours a week in the contract for the School District, but not more than 35 hours a week. The Record of Employment identifies that she worked for a term of 15 weeks. That means that she could have expected to accumulate as much as 525 hours of insurable employment with the School District after she quit X and before her term with the School District ended.

[27] The Claimant could not possibly have qualified for employment insurance benefits with 525 hours of insurable employment. The number of hours that are required to qualify depends on the economic region in which a claimant resides and the unemployment rate in that region at the time that the claimant quits. The Commission stated that the Claimant needed 665 hours.[18] It did not specify the unemployment rate in the Claimant's economic region at the time that she quit X, but 665 hours translates to an unemployment rate of between 6% and 7%.[19] With 525 hours, the Claimant could only have qualified if the unemployment rate in her economic region exceeded 10%. In March 10, 2019, no economic region in Canada had a regional rate of unemployment in excess of 10%.

[28] I find that the Claimant did not have just cause for leaving her employment with X. The Claimant had the reasonable alternative of remaining employed with X until she found other permanent employment. She could also have remained employed with X until the School District offered her full-time hours for a period that would be long enough so that she could accumulate enough hours of insurable employment to qualify for benefits.

[29] I have considered that the Claimant had a "reasonable assurance of employment" when she left X. However, I accept that she was assured of employment for a temporary term only and that, within that term, she could not have accumulated the hours she needed to qualify for benefits. The evidence before the General Division did not suggest any other relevant

[18] GD3-26
[19] EI Act, section 7(2).

circumstance,[20] that could have justified the Claimant's exchange of permanent employment for a certainty of unemployment at the end of her term with the School District.

[30] The Claimant's only reason for leaving her job at X was that she expected that the temporary job with the School District would eventually lead to a better job; one with more hours and at a higher rate of pay, and in the field in which she was trained. As the Court in *Langlois* observed, workers, "cannot expect those who contribute to the employment insurance fund to bear the cost of that legitimate desire [of wanting to improve their lives]."[21]

[31] The Claimant had a very good reason for leaving X and accepting the short-term contract. The short term full-time contract represented a good chance, and possibly the best chance, for the Claimant to obtain "status" and eventually access a good-paying, permanent job with the School District. I am sympathetic to the Claimant but having a good reason is not the same as having "just cause" as it is defined under the EI Act and as it has been interpreted by the courts.

CONCLUSION

[32] The appeal is allowed. The General Division made an error of law. I have corrected that error and I find that the Claimant did not have just cause for leaving her employment with X.

Stephen Bergen
Member, Appeal Division

HEARD ON:	March 10, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Louise LaViolette, Representative for the Appellant

[20] Whether included in the list of circumstances in section 29(c) of the EI Act or otherwise.
[21] *Supra* note 7, para.31.