[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. A. T.*, 2014 SSTAD 139

Appeal No.: 2012-2004

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Pierre LAFONTAINE
DATE OF DECISION:	June 5, 2014
TYPE AND DATE OF HEARING:	In-person hearing held in Trois-Rivières on May 30, 2014, at 10:00 a.m. (Eastern Time)

DECISION

[1] The appeal is allowed and the Board of Referees' decision dated March 29, 2012, is upheld.

INTRODUCTION

[2] On March 29, 2012, a Board of Referees determined that:

- the Respondent lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (the Act);

[3] On November 26, 2012, a Board of Referees determined that:

- the Respondent's request for a reconsideration of the March 29, 2012, decision under section 120 of the Act had merit.

[4] The Appellant filed an appeal from this last decision of the Board of Referees to the Umpire on December 13, 2012.

TYPE OF HEARING

[5] The Tribunal held an in-person hearing for the reasons set out in the notice of hearing dated March 18, 2014. The Appellant was represented by counsel Sarah Gauthier. The Respondent attended the hearing and was represented by counsel Jean-Guy Ouellet.

THE LAW

[6] The Appeal Division of the Social Security Tribunal (the Tribunal) hears appeals that were filed with the Office of the Umpire and not heard before April 1, 2013, in compliance with sections 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act* of 2012. On April 1, 2013, the Umpire had not yet heard or rendered a decision on the Appellant's appeal. The appeal was transferred from the Office of the Umpire to the Tribunal's Appeal Division. Leave to appeal from the decision is considered to have been granted by the Tribunal on April 1, 2013, in compliance with section 268 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[7] To ensure fairness, this appeal will be reviewed on the basis of the legitimate expectations of the Appellant at the time of filing its appeal to the Umpire. For this reason, the present appeal will be decided in accordance with the applicable provisions of the Act in effect immediately before April 1, 2013.

[8] In compliance with subsection 115(2) of the Act, in effect at the time of the appeal, the only grounds of appeal are the following:

> (*a*) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[9] Did the Board of Referees err in fact and in law by concluding, after reconsideration, that the Respondent had not lost his employment by reason of his misconduct pursuant to sections 29 and 30 of the Act?

SUBMISSIONS

[10] The Appellant submitted the following reasons in support of its appeal:

- The Board of Referees erred in law in its decision of November 26, 2012, by not taking into account the interaction between sections 29, 30 and 31 of the Act;
- The Board of Referees erred in law by failing to consider, or by setting aside without providing explanations, the evidence that supported its initial decision of March 29, 2012;
- In its November 26, 2012, decision, the Board of Referees did not analyze the legal rules and principles set out in sections 29, 30 and 31 of the Act;

- More specifically, it did not identify which of the three paragraphs in section 31 of the Act would be applicable. It also did not address the interaction and complementarity of this provision with sections 29 and 30 of the Act;
- The result of the interaction between sections 29, 30 and 31 of the Act is that when a claimant is suspended and subsequently loses his job because of misconduct or voluntarily leaves a job, this claimant is indefinitely disqualified from receiving benefits;
- There is no indication how the agreement between the Respondent, his union and his former employer would justify changing the Board of Referees' previous decision dated March 29, 2012;
- There is nothing in the agreement that raises any doubt about the Board of Referees' initial decision regarding misconduct;
- The terms of the agreement, which replace the dismissal with a suspension and a relinquishment of the right to reinstatement, do not in any way change the basic facts that resulted in termination of the claimant's employment, and do not cancel or retract his extrajudicial or judicial admissions;
- The Respondent's employment relationship ended because of his misconduct or because he voluntarily left his employment and relinquished his right to reinstatement. The legal effect is the same in both cases: the Respondent is disqualified from receiving benefits.

[11] The Respondent submitted the following reasons against the Appellant's appeal:

- He did not ask the Board of Referees to get involved in assessing the sanction imposed, but to note that the employer acknowledged that the sanction imposed was a suspension of three weeks;
- He also did not ask that the Board revisit its decision that there was misconduct within the meaning of the Act or find that the agreement that was reached created doubt about an act of misconduct having taken place;

- He limited himself to indicating that sections 29, 30 and 31 of the Act explicitly exclude application of the disqualification in sections 29 and 30 if section 31 applies, that is, in the case of a suspension;
- The Board of Referees did not ignore the facts in its decision, but took into account that he had been sanctioned with a suspension and not a dismissal, so the disqualification did not apply;
- The Commission's own observations indicate that the final end of the employment was not voluntary. Therefore, the Board did not have to deal with this aspect, given that the impact of the facts in this case (suspension) is clearly limited by Parliament in section 31 of the Act;
- The purpose of the enabling legislation is to pay benefits to individuals who are unemployed. The courts have repeatedly held that the Act should be interpreted liberally and that, when in doubt with respect to the scope of a text, the text should be interpreted in favour of the scheme's recipients;
- The Board of Referees' decision to find as it did does not allow for the Tribunal's intervention.

STANDARDS OF REVIEW

[12] The Appellant submitted that the standard of review applicable in this case is correctness – *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[13] The Respondent submitted that the standard of review applicable to questions of mixed fact and law is reasonableness – *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[14] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on a question of law is correctness – *Martens v. Canada (AG*), 2008 FCA 240. The standard of review applicable to questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] The following provisions of the Act are relevant to this issue:

> **29.** For the purposes of sections 30 to 33,
>
> (*a*) "employment" refers to any employment of the claimant within their qualifying period or their benefit period;
>
> (*b*) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;
>
> Disqualification — misconduct or leaving without just cause
>
> 30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless
>
> (*a*) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (*b*) the claimant is disentitled under sections 31 to 33 in relation to the employment.
>
> Disentitlement — suspension for misconduct
>
> 31**.** A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until
>
> (*a*) the period of suspension expires;
>
> (*b*) the claimant loses or voluntarily leaves the employment; or
>
> (*c*) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

[16] When it initially dismissed the Respondent's appeal on March 29, 2012, the Board of Referees stated as follows:

> [Translation]
> In this case, it is clear from the Appellant's own admission in Exhibit 4 and during the hearing that he committed the alleged act, namely, illegally connecting the cable for a municipal housing tenant who was not a subscriber of the cable company, in this case, Cogéco Câble.
>
> The question the Board of Referees must ask is whether the alleged act constituted misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act*.

> Although the Appellant's representative questioned the admissibility of the statements made by the employer's representative in Exhibit 4, the employer's director of administrative services corroborated the truth of what the representative said in Exhibit 10.
>
> As for whether the fact that the employer had not given out the policy regarding wrongdoing and its related sanctions is a factor in favour of the Appellant, we believe that it is not. In fact, by committing an illegal act by connecting the television cable for a non-subscriber to the service, the Appellant committed an offence and consequently undermined the relationship of trust that he should have with his employer.
>
> Furthermore, the Appellant admitted that he committed the act twice even though Cogéco Câble disconnected it the first time. The Board of Referees considers that by making these illegal connections, he chose not to take into account the repercussions that his actions could have on the relationship of trust that should exist with his employer.
>
> In our opinion, the Appellant should have known that his actions could result in his dismissal and that this met the definition of misconduct under the *Employment Insurance Act*.

[17] On August 8, 2012 (Exhibit 16-1), counsel for the Respondent asked for a rehearing under section 120 of the Act, which reads as follows:

> Amendment of decision
>
> 120. The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[18] Counsel indicated in its correspondence that this request is because of the agreement reached by the Respondent, his union and his former employer. The agreement indicates that the act at the origin of the dispute was to result in a three-week suspension instead of a dismissal. This would then be a new fact according to the case law.

[19] The Board of Referees dealt with the Respondent's request on November 26, 2012. It defined the issue in question as follows (Exhibit 19-1):

> [Translation]
> The Board of Referees must determine whether the request for reconsideration of its March 29, 2012, decision has merit and whether the agreement between the Appellant and his employer after the Board had ruled on the Appellant's case constitutes a new fact.

[20] When it allowed the Respondent's appeal, the Board of Referees stated the following:

> [Translation]
> The fact that the agreement stipulates that a three-week suspension should have been and will be imposed on the appellant instead of a dismissal truly constitutes a new fact under section 120 of the Act.
>
> The Board of Referees refutes the Commission's argument that the request for a reconsideration of the decision should be rejected on the ground that the facts presented did not in any way change the claimant's misconduct. It is not on the basis of this finding that the assessment of a new fact in the case should be examined.

[21] The Tribunal notes that the Board of Referees seems to have limited itself to determining whether the agreement between the Respondent, his union and his former employer constituted a new fact. The Board's conclusions mentioned above support the Tribunal's finding. Furthermore, the Board of Referees did not explain in its decision the legal impact of this fact, which it considered to be new, in its initial March 29, 2012, decision and how this led to the conclusion that this decision should be set aside.

[22] The Board of Referees' failure to correctly apply the Act constitutes an error of law that enables the Tribunal to intervene. Given that the facts are not being disputed, and at the request of the parties, the Tribunal is able to render the decision that the Board of Referees should have rendered.

[23] The Tribunal is of the opinion that the agreement constitutes a new fact and that the Board could reconsider its March 29, 2012, decision. Moreover, the Appellant conceded this point on appeal (Exhibit 21-2).

[24] Consequently, it is important that the terms of the agreement between the Respondent, his union and his former employer be reproduced here (Exhibit 16-3):

> [Translation]
>
> SETTLEMENT AND RELEASE
>
> | | |
> |---|---|
> | WHEREAS | the Employee has been employed by the Employer since November 2010; |
> | WHEREAS | the Employee was dismissed on November 25, 2011; |

WHEREAS the Employee had not received any disciplinary sanction before that date;

WHEREAS the Employee was dismissed on November 25, 2011, for the alleged act of illegally connecting the cable for the Employer's tenant because she had cancer;

WHEREAS the Employee alleges that the Union failed in its duty to represent him by not disputing his dismissal;

WHEREAS the Employee filed a complaint (CQ-2012-1178) against his Union with the Commission des relations de travail;

WHEREAS the parties want to settle this matter out of court without any admission of responsibility on either side;

BY WAY OF A FINAL AND DEFINITIVE SETTLEMENT, THE PARTIES AGREE AS FOLLOWS:

1. The preamble is an integral part of this agreement;

2. The Employer agrees to substitute a suspension of three (3) weeks without pay for the dismissal on November 25, 2011;

3. The suspension of three (3) weeks without pay mentioned in paragraph 2 of this agreement ends on December 9, 2011;

4. The Employee relinquishes his right to reinstatement in the position, which was to take place on December 12, 2011, and acknowledges that his employment relationship ended that day;

5. The Employer agrees to pay the Employee the sum of $2,000 (gross) for relinquishing his right to reinstatement;

6. The Employee agrees to submit this agreement to HRSDC (Employment Insurance) for the latter to determine the overpayment, if any, received by the Employee because of the compensation paid under paragraph 5 of this agreement;

7. Within 10 days of HRSDC's response being sent to the Employer, the Employer will pay HRSDC any amount that is owed by the Employee as overpayment because of this agreement and pay any residual amount to the Employee after the necessary deductions under current legislation have been made;

8. The Union agrees to pay the Employee the sum of $2,000 for moral damages, stress and inconvenience;

9. In consideration of the foregoing, and subject to the total performance of the commitments contained herein, the parties hereby grant complete, final and definitive discharge of any right, action, claim, complaint or cause of action, past, present or future, that they have or may have against each other.

10. Without limiting the generality of the foregoing, the Employee relinquishes all right of reinstatement with the Employer and withdraws his complaint (CQ-2012-1178) with the Commission des relations de travail against the Union;

11. In consideration of this agreement, the Employee relinquishes the right to claim any period of vacation from the Employer, acknowledging that the amounts payable hereunder by the Employer constitute compensation for any reasonable vacation period to which he may be entitled under section 2091 of the *Civil Code of Québec*;

12. This agreement cannot be cited as a precedent;

13. The parties agree to keep this document strictly confidential except where the Act requires that it be disclosed;

14. The parties declare that the purpose of this agreement is to prevent any current or future dispute, and that consequently, it is a transaction under section 2631 and following of the *Civil Code of Québec*;

(emphasis added by the undersigned)

[25] The Tribunal pointed out that the agreement mentions the alleged act by the Respondent, which was initially considered by the Board of Referees to be misconduct within the meaning of the Act. However, the agreement does not contain any retraction by the employer.

[26] In addition, the agreement clearly states that "the parties want to settle this matter out of court without any admission of responsibility on either side."

[27] The Tribunal also notes that the Respondent expressly relinquishes his right to reinstatement and, to settle and prevent any dispute, the employer agrees to pay him the gross sum of $2,000.

[28] Nothing in this transaction indicates that the employer withdrew the allegation of misconduct made against the Respondent. It neither expressly nor implicitly includes admission that the facts on file with the Appellant were erroneous or did not accurately

reflect the events that led to the dismissal – *Canada (AG) v. Boulton*, 1996 FCA 1682; *Canada (AG) v. Morrow*, 1999 FCA 193.

[29] It is true that the agreement states that the employer agrees to substitute three weeks of suspension without pay for the dismissal, but the Tribunal is not bound by the agreement between the parties and this does not in any way invalidate the other evidence in the file.

[30] This applies, for example, to exhibits 2-5 (Respondent's admission), 4 (employer's statement), 5 (Respondent's admission), 11 (confirmation of facts by the employer) and 15-3 (Respondent's testimony before the Board).

[31] All these exhibits, except obviously the judicial admission before the Board of Referees, were in the file submitted by the Appellant to the Board, which took them into account in its March 29, 2012, decision.

[32] In conclusion, following this analysis, the Tribunal finds that nothing in the July 31, 2012, agreement, presented as a fact that occurred after the Board of Referees' decision, invalidates the employer's position at the hearing before the Board of Referees. All the evidence submitted to the Board of Referees remains consistent with the decision rendered by the Board on March 29, 2012.

[33] Counsel for the Respondent argues that sections 29, 30 and 31 of the Act explicitly exclude application of the disqualification in sections 29 and 30 if section 31 applies, that is, if there is a suspension.

[34] The Respondent was dismissed because of his misconduct and the resulting breach of trust. The fact that, as a result of an agreement with his employer, the Respondent was suspended instead of dismissed does not change the nature of the misconduct that resulted in the initial dismissal.

[35] While the parties to the agreement did indeed settle a dispute, the agreement does not deny evidence of the Respondent's alleged act, which led to the loss of his employment and constituted misconduct within the meaning of sections 29 and 30 of the Act, and which

justified the disqualification imposed by the Appellant and initially upheld by the Board of Referees.

[36] For these reasons, the Tribunal allows the appeal and upholds the March 29, 2012, decision of the Board of Referees.

CONCLUSION

[37] The appeal is allowed and the March 29, 2012, decision of the Board of Referees is upheld.

Pierre Lafontaine
Member, Appeal Division