[TRANSLATION]

Citation: ***Canada Employment Insurance Commission v. G. P.,*** **2015 SSTAD 653**

Date: May 27, 2015

File number: AD-13-1175

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

G. P.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on May 21, 2015

DECISION

[1] The appeal is dismissed on both issues.

INTRODUCTION

[2] On April 25, 2013, a Board of Referees found that:

> - The Respondent had not voluntarily left her employment without just cause within the meaning of sections 29 and 30 of the *Employment Insurance Act* ("the *Act*");
>
> - The Respondent had accumulated enough hours of insurable employment pursuant to section 7 of the *Act*.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on May 15, 2013. The application for leave to appeal was allowed on January 16, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] At the hearing, the Appellant was present and represented by Rachel Paquette. The Respondent was also present.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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.

ISSUES

[7] The Tribunal must determine whether the Board of Referees erred in fact or in law in finding that the Respondent had not voluntarily left her employment without just cause within the meaning of sections 29 and 30 of the *Act* and had accumulated enough hours of insurable employment pursuant to section 7 of the *Act*.

ARGUMENTS

[8] The Appellant's arguments in support of its appeal are as follows:

- The Board of Referees erred in law by failing to apply the legal test for just cause and by not considering the question of whether the Respondent had no reasonable alternative to leaving;
- The Respondent's situation does not fit within any of the circumstances described in paragraph 29(*c*) of the *Act*. She made a personal choice by deciding to leave her permanent employment to accept temporary employment. The claimant put herself in a situation in which she would inevitably be unemployed;

- In its decision, the Board of Referees cited decisions A-328-03 and A-346-03. The Appellant submits that there is more recent case law that confirms its decision. The Federal Court of Appeal is clear that leaving employment to improve one's situation in the labour market does not in itself constitute just cause within the meaning of the *Act*;

- The Appellant argues that the Respondent had to be disqualified from receiving benefits because she had voluntarily left her employment without just cause and because, since leaving, she had not been employed in insurable employment for the number of hours required under section 7 of the *Act*.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The Respondent is of the view that the Board of Referees did not err in law or in fact and properly exercised its jurisdiction.

- The Respondent submits that she saw more opportunities for advancement or for obtaining a permanent and better position in the future with the new employment;

- It is true that she was not given any guarantee by her new employer, but she was told that it would be a long-term replacement with the possibility of obtaining another position when it was over;

- She is still working for that new employer now.

STANDARDS OF REVIEW

[10] The Appellant submits that the interpretation of the legal test for just cause for voluntarily leaving employment is a question of law and that the applicable standard of review is correctness. The application of the legal test to the facts of the case is a question of mixed fact and law, and the standard of review is reasonableness (*Canada (AG) v. White*, 2011 FCA 190).

[11] The Respondent made no submissions concerning the applicable standard of review.

[12] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions 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. White*, 2011 FCA 190, *Canada (AG) v. Hallée*, 2008 FCA 159, *Hickey v. Canada (AG)*, 2008 FCA 330).

ANALYSIS

Facts

[13] The facts of this case are not in dispute.

[14] The Respondent left her former employment as a laboratory technician, which she held from June 28, 2010, to December 6, 2012, for new employment with a school board, still as a laboratory technician. The new employment began on December 11, 2012, a few days after she left. She had anticipated that the other employment would be permanent or would be for longer than the one she had left. She accepted the new employment for the wages, hours of work, benefits, working conditions and opportunity for career development.

[15] The new job was a replacement job. She worked 28 hours a week, 4 days a week, from 8:15 a.m. to 4:15 p.m., and was paid $19.66 an hour. She knew when she decided to leave her former employment that she was not being offered a permanent position immediately. She had to take the chance of accepting that contract to have an opportunity to be offered a permanent position once one was available.

[16] However, her new employer assured her that she would be a long-term replacement and that there was a good chance that positions would be available when her replacement job ended.

[17] She was still working for the said school board at the time of her hearing before the Board of Referees on April 25, 2013, and at the time of the hearing before the Appeal Division on May 21, 2015.

Voluntary leaving

[18] It is worth reproducing subparagraph 29(*c*)(vi) of the *Act*, which is relevant to this case:

> 29(*c*) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
>
> (vi) reasonable assurance of another employment in the immediate future,

[19] The Appellant submits that the Respondent's situation does not fit within any of the circumstances described in paragraph 29(*c*) of the *Act*. The Appellant is of the opinion that the Respondent made a personal choice by deciding to leave her permanent employment to accept temporary employment. The Appellant, it argues, put herself in a situation in which she would inevitably be unemployed.

[20] It also submits that the Board of Referees did not consider the question of whether the Respondent had no reasonable alternative to leaving.

[21] In allowing the Respondent's appeal, the Board of Referees found as follows:

> [TRANSLATION]
>
> The Board of Referees is of the opinion that the Act does not require claimants to do the impossible to show just cause for leaving voluntarily. The Act simply requires that they act reasonably in the circumstances.
>
> The Board of Referees is of the opinion that the claimant could accept that new temporary employment for the following reasons:
>
> (a) the claimant saw the new employment as a way of quitting a job in which the working conditions were not as good and there were no opportunities for advancement or for obtaining a better position;

> (b) the new employment with the school board was better paid and had more advantageous working conditions than her permanent employment;
>
> (c) the new employment was with an employer that was well established and recognized (CSBE) and was in a field in which there were career opportunities and a reasonable chance of applying for another position and of having her position extended or being rehired on a permanent basis.
>
> For these reasons, the Board of Referees is of the opinion that she had no reasonable alternative to leaving.
>
> The Board of Referees relies on the following cases: A-328-03 and A-346-03.
>
> DECISION: On the first and second issues, the Board of Referees unanimously allows the claimant's appeal.

[22] In *Canada (AG) v. Lessard*, 2002 FCA 469, the Federal Court of Appeal stated that the concept of "reasonable assurance of another employment in the immediate future" assumes three things: "reasonable assurance", "another employment" and "the immediate future".

[23] The uncontradicted evidence before the Board of Referees shows that the Respondent had the reasonable assurance of another employment in the immediate future when she left her former employment. She in fact began her new employment just a few days after leaving. She had anticipated that the other employment would be permanent or would be for longer than the one she had left. In addition, her new employer assured her that she would be a long-term replacement and that there was a good chance that positions would be available when her replacement job ended.

[24] The Respondent did not put herself in a situation in which she would inevitably be unemployed by leaving her former employment. As well, contrary to what the Appellant argues, the Board of Referees did in fact consider the question of whether the Respondent had no reasonable alternative to leaving.

[25] In *Le Centre de valorisation des produits marins de Tourelle Inc.*, A-547-01, Létourneau J.A. stated that the Tribunal's function is limited "to deciding whether the view of facts taken by the Board of Referees was reasonably open to them on the record".

[26] The Tribunal is therefore not empowered to retry a case or to substitute its discretion for that of the Board of Referees. The Tribunal's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*. Unless the Board of Referees failed to observe a principle of natural justice, erred in 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 (*Canada (AG) v. Ash*, A-115-94).

[27] The Tribunal cannot conclude that the Board of Referees made such an error. The Board found from the evidence before it that the Respondent had every reason to believe her new employment would continue and that she therefore had just cause for terminating her former employment.

CONCLUSION

[28] The appeal is allowed on both issues.

Pierre Lafontaine
Member, Appeal Division