[TRANSLATION]

Citation: ***Canada Employment Insurance Commission v. D. R.,*** **2015 SSTAD 690**

Date: June 3, 2015

File number: AD-13-1177

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

D. R.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on June 2, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the Board of Referees' decision dated May 14, 2013, is rescinded and the Respondent's appeal to the Board of Referees is dismissed.

INTRODUCTION

[2] On May 14, 2013, a Board of Referees found that:

- The Respondent had just cause for voluntarily leaving his employment within the meaning of sections 29 and 30 of the *Employment Insurance Act* ("the *Act*").

[3] The Appellant filed an application for leave to appeal the Board of Referees' decision to the Tribunal's Appeal Division on June 3, 2013. The application for leave to appeal was allowed on January 16, 2015.

FORM OF HEARING

[4] The Tribunal held a telephone hearing 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] The Appellant was represented by Rachel Paquette. The Respondent did not attend the hearing despite receiving the notice of hearing dated April 7, 2015.

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 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

[7] The Tribunal must determine whether the Board of Referees erred in fact or in law in finding that the Respondent had just cause for voluntarily leaving his employment within the meaning of sections 29 and 30 of the *Act*.

ARGUMENTS

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

- The Board of Referees erred in law in not properly applying to the facts the question of whether the claimant had no reasonable alternative to leaving his employment, as stated in paragraph 29(*c*) of the *Act*;

- The evidence cannot support a finding that the Respondent had just cause for leaving his employment;

- The evidence on file confirms that the Respondent left his employment to avoid jeopardizing his studies and that, if not for his end-of-year exams, he would have continued to work for his employer despite the significant changes that had been made to his duties and the organization of his work schedule since he was hired;

- The Board of Referees' decision is unreasonable and contrary to the case law;

- The Federal Court of Appeal has repeatedly held that leaving employment to pursue an education is a personal decision the economic weight of which cannot be borne by taxpayers and therefore does not constitute just cause within the meaning of the *Act*;

- The Appellant submits that, since his employer could no longer accommodate his reduced availability, one reasonable alternative would have been for the Respondent to continue working until he found other suitable employment as a student.

[9] The Respondent made no submissions against the Appellant's appeal.

STANDARDS OF REVIEW

[10] The Appellant submits that the standard of review applicable to questions of law is correctness (*Chaulk v. Canada (AG)*, 2012 FCA 190) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Martens v. Canada (AG)*, 2008 FCA 240).

[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 (*Chaulk v. Canada (AG)*, 2012 FCA 190; *Martens v. Canada (AG)*, 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159; *Martens v. Canada (AG)*, 2008 FCA 240).

ANALYSIS

[13] The facts on file are not in dispute.

[14] The Respondent worked for his employer from July 15, 2006, until December 7, 2012, when he left his employment voluntarily (Exhibit AD-2-8). He filed an initial claim for benefits that began on December 9, 2012. He stated that he had had no choice but to leave his employment because the manager had refused to give him a second day off even though he absolutely needed it to prepare for his final exams. He explained, at the time he had been hired as a student, the schedules were flexible and it was easy to get someone to replace him, which made it possible for him to balance work and school. However, that flexibility had decreased, and the only way to change his schedule now was to ask for time off. He said that the previous managers had always accommodated him but that the last general manager had refused to accommodate him and had required him to come in and work. He added that he had asked another employee to replace him but that she had refused (Exhibit AD-2-13).

[15] On January 17, 2013, the employer confirmed that it had been able to give the Respondent only one day off because there was no one to replace him on Sundays. On January 17, 2013, the Appellant notified the Respondent that it could not pay him benefits because he had voluntarily left his employment on December 9, 2012, without just cause within the meaning of the *Act* (Exhibit AD2-27).

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

> [Translation]
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> In considering voluntary leaving, the Board must assess whether the claimant had no reasonable alternative to leaving his employment at that time, having regard to all the circumstances.
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> Here, the Board believes that this was the case.
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> The claimant's duties had been changed significantly since he was initially hired, as had his working conditions.
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> Although he had always been able to balance his school/work schedule while working for that employer over the previous six years, the arrival of a new supervisor changed the initial flexibility in a way that prevented him from maintaining that balance.

> In the circumstances, the Board can only find that, because of significant changes in his work description and the organization of his work schedule, the claimant was forced to leave his employment, since otherwise he would have jeopardized his studies. That situation was unusual, since it had never happened since the claimant started working for that employer.

[17] With respect, and despite the Tribunal's sympathy for the Respondent, the Board of Referees' decision cannot stand, since it is unreasonable and contrary to the case law of the Federal Court of Appeal. The Tribunal is therefore justified in intervening.

[18] In *Canada (AG) v. Côté*, 2006 FCA 219, a case very similar to this one, the Federal Court of Appeal stated the following:

> [10] It is trite law that leaving one' employment to pursue studies not authorized by the Commission does not constitute "just cause" within the meaning of the Act (see *Canada (Attorney General) v. Lessard*, (2002) 300 N.R. 354 (F.C.A.); *Canada (Attorney General) v. Bédard*, 2004 FCA 21 (CanLII); *Canada (Attorney General) v. Bois*, 2001 FCA 175 (CanLII)).
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> [11] The respondent's case inspires sympathy, as does any case of a student who works on a part-time basis to pay for his or her studies. As soon as circumstances oblige this student to leave her part-time employment to continue her studies, she loses the benefit of accumulated hours of work in that employment. However, this Court has established the principle that it is of the essence of the Employment Insurance program "that the assured shall not deliberately create or increase the risk" (*Tanguay v. Unemployment Insurance Commission*, (1985), 10 C.C.E.L. 239 (F.C.A.) at page 244; *Smith v. Canada (Attorney General)* (C.A.), 1997 CanLII 5451 (FCA), [1998] 1 F.C. 529, at page 537). I do not think there is a difference in principle between returning to or undertaking studies and continuing them. The insured student who leaves part-time employment to better complete his or her studies deliberately creates the risk. The objective is certainly laudable, but as Pratte J. underlined in *Tanguay* at page 243, the words "just cause" are not synonymous with "reasons" or "motive", and I would add, with "objective". Moreover, I note that all types of "just cause" set out by Parliament in paragraph 29(*c*) of the *Act*, except for those specified in subparagraphs (vi) ("reasonable assurance of another employment in the immediate future") and (xiv) ("any other reasonable circumstances that are prescribed") assume third-party intervention. I am aware of the fact that the list is not exhaustive, but I would hesitate to add by jurisprudential means a "just cause" that would be as within the control of an insured person as returning to studies or continuing them. I would prefer to leave this decision to Parliament or the Governor in Council.
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> (Emphasis added.)

[19] Applying this principle enunciated by the Federal Court of Appeal to the facts of this case, the Respondent, who left part-time employment to prepare for his final exams, deliberately created the risk. The evidence on file confirms that, if not for his end-of-year exams, he would have continued to work for his employer despite the changes that had been made to his duties and the organization of his work schedule since he was hired. He also confirmed that he was now looking for employment of the same type offered by his employer (Exhibit AD-2-26).

[20] Moreover, the case law of the Federal Court of Appeal requires claimants to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job: *Canada (AG) v. White*, 2011 FCA 190; *Canada (Attorney General) v. Murugaiah*, 2008 FCA 10 (CanLII).

[21] In this case, the Respondent did not seek alternative employment with another employer before quitting his job (Exhibit AD2-14).

[22] For the reasons set out above, the Tribunal has no choice but to conclude that the Respondent voluntarily left his employment without just cause within the meaning of sections 29 and 30 of the *Act*.

CONCLUSION

[23] The appeal is allowed, the Board of Referees' decision dated May 14, 2013, is rescinded and the Respondent's appeal to the Board of Referees is dismissed.

Pierre Lafontaine
Member, Appeal Division