[TRANSLATION]

Citation: ***C. B. v. Canada Employment Insurance Commission*****, 2015 SSTAD 714**

Date: June 8, 2015

File number: AD-13-127

APPEAL DIVISION

Between:

C. B.

Appellant

and

Canada Employment Insurance Commission

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 and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing.

INTRODUCTION

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

> - The Appellant had voluntarily left her employment without good cause 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 to the Appeal Division on May 16, 2013. The application for leave to appeal was allowed on January 6, 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 present at the hearing and was represented by Denis Poudrier. The Respondent was represented by Elena Kitova.

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.

ISSUES

[7] The Tribunal must determine whether the Board of Referees erred in fact and in law in finding that the Appellant had voluntarily left her employment without good cause within the meaning of sections 29 and 30 of the *Act* and whether it erred in not addressing the issue of the number of insurable hours under section 7 or 7.1 of the *Act*.

ARGUMENTS

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

- The Board of Referees erred in analyzing the issue from the standpoint of good cause rather than just cause and the "no reasonable alternative" test;

- The Board of Referees limited its analysis to the reasons set out in paragraph 29(*c*) of the *Act*, which is an error of law according to the case law;

- The Board of Referees decided to prefer indirect evidence, even though it was questionable and incomplete, to her direct testimony; it had to explain why it did so;

- She argues that requiring her to have a guarantee of employment, as the Board of Referees did in its decision, is an error of law.

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

- The Board of Referees' decision is consistent with the legislation and the case law in this area and is reasonably consistent with the facts on file;

- The Respondent maintains that the Appellant voluntarily left her employment without just cause;

- The Board of Referees adopted the Commission's conclusion and added that the Appellant did not fall within any of the reasons set out in paragraph 29(*c*) of the *Act*, which would constitute "good" or just cause for leaving her employment;

- The representative refers to the Appellant's health issue, but she has not shown that the state of her health required her to leave her employment at the time she did. She has not shown that she took all necessary steps (talking to her employer, requesting sick leave, etc.) to keep her employment;

- The employer stated that the Appellant had been hired as a casual on-call employee. The employer added that the Appellant had no contract and that no promise had been made to her about the number of hours she would work per week (Exhibit 5-2). This is confirmed by the figures provided by the employer (Exhibit 5-1);

- The case law is consistent that a person with permanent employment cannot leave for temporary, on-call employment even if the working conditions and the wage package are more favourable;

- The Tribunal must not substitute its opinion for that of the Board of Referees unless the Board's decision appears to have been made in a perverse or capricious manner or without regard for the material before it;

- The Tribunal's function is limited to deciding whether the view of facts taken by the Board of Referees was reasonably open to it on the record.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits 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) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

[12] The Tribunal acknowledges 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) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

ANALYSIS

[13] In this case, the Board of Referees was faced with contradictory versions of the representations made to the Appellant by her new employer at the time she was hired. The Board of Referees therefore had to justify the conclusion it reached.

[14] When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight, it must explain the reasons for the decision (*Bellefleur v. Canada (AG)*, 2008 FCA 13; *Parks v. Canada (AG)*, A-321-97). Here, the Board of Referees failed to do so, which is an error of law.

[15] In addition, subparagraph 29(*c*)(vi) of the *Act* requires only that a claimant have a reasonable assurance of another employment in the immediate future; it is an error of law to set the test too high, as the Board of Referees did in this case, by requiring a guarantee of employment.

[16] The Board of Referees also erred in limiting the circumstances associated with voluntary leaving to the ones specified in section 29 of the *Act*, which is another error of law.

[17] Finally, the Board of Referees did not address the Appellant's argument that she had left her employment because the working conditions constituted a danger to her health (subparagraph 29(*c*)(iv) of the *Act*), nor did it address the issue of whether she had a sufficient number of insurable hours.

[18] For these reasons, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing.

CONCLUSION

[19] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member.

[20] The Tribunal orders that the Board of Referees' decision dated April 2, 2013, be removed from the file.

Pierre Lafontaine
Member, Appeal Division