

Citation: *Canada Employment Insurance Commission v. P. B.*, 2015 SSTAD 935

Date: July 29, 2015

File number: AD-13-1144

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

P. B.

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the Board of Referees (Board) issued on April 2, 2013. The Board allowed the Respondent's appeal where the Commission had determined that he (the claimant) had voluntarily left his employment without just cause and had imposed an indefinite disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on April 19, 2013. The Application was filed within the 30 day time limit.

[3] The grounds of appeal stated in the Application were that:

- a) The Board erred in law in making its decision, when it failed to resolve contradictions in the evidence and apply the legal test for just cause under section 29(c) of the EI Act; and
- b) The Board based its decision on an erroneous finding of fact, as the claimant failed to meet the onus of proving that leaving his employment was the only reasonable alternative, given all the circumstances.

[4] The reasons for appeal were that:

- a) The claimant chose to quit his employment to seek employment in his chosen career;
- b) He failed to prove just cause for leaving within the meaning of the EI Act;
- c) He testified that his only option was to accept a managerial position because his seasonal job was ending;
- d) There were contradictions in the claimant's evidence regarding his reasons for quitting, which the Board did not resolve;

- e) The onus was on the claimant to prove that he exhausted all reasonable alternatives prior to quitting his job and he failed to meet this onus of proof, as he had the reasonable alternative to remain employed until he found more suitable employment; and
- f) The Board also erred when it concluded that the claimant proved just cause due to “significant changes in work duties” based solely on his testimony at the hearing that the job he was offered was unsuitable, as there was no evidence to support the assertion that his job duties would be changed significantly.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) Act*, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal”.

[7] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

[8] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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, whether or not the error appears on the face of the record; or
- (c) The General Division 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.

[9] For our purposes, the decision of the Board is considered to be a decision of the General Division.

[10] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

Errors of law

[11] The Board's decision refers to having reviewed the legislation and jurisprudence relevant to the issue of voluntary leaving, including sections 29 and 30 of the EI Act and the *Tanguay* (A- 1458-84) and *Rena Astonomo* (A-141-97) cases. The Board stated that the claimant must establish that he had no reasonable alternative to leaving when he did.

[12] The Board found, at pages 5 and 6, that: "the claimant left his employment ... because he did not want to accept the only position available (Manager) and the season was ending, meaning that his retail clerk position would be eliminated" and "the claimant had just cause for voluntarily leaving his employment because of a significant change in work duties".

[13] On the basis of these findings, the Board concluded that the exception in subsection 29(c)(ix) of the EI Act, providing just cause, was applicable and allowed the appeal.

[14] The *Tanguay* and *Rena Astonomo* cases establish the principle that any claimant who leaves his or her employment must establish that circumstances left him or her no reasonable alternative to leaving. The Board decision correctly stated this principle.

[15] The Respondent's written submissions to the Board included jurisprudence in relation to subsection 29(c)(vi) of the EI Act ("reasonable assurance of another employment in the immediate future"). However, the Board based its decision on subsection 29(c)(ix) of the EI Act ("significant changes in work duties"). The decision does not refer to jurisprudence specific to subsection 29(c)(ix) but this, in and of itself, is not an error of law.

[16] As to contradictions in the claimant's evidence, the Board decision does not refer to any contradictions in the evidence of the claimant regarding his reasons for leaving. However, the Application does not specify what the contradictions in the evidence are said to be.

[17] The Tribunal notes that the claimant was present and testified at the hearing before the Board, but the Applicant chose not to attend. The Board decision notes that the hearing was audio recorded. The Respondent could have reviewed the audio recording and provided details of its assertion that there were contradictions in the evidence. Asserting contradictions in the evidence without providing specific details or examples is not sufficient. The Appeal Division of the Tribunal, on an application for leave to appeal, should not need to guess whether and how there are contradictions in the evidence.

[18] The Applicant's grounds of appeal in relation to errors of law are: that the Board erred in law when it failed to resolve contradictions in the evidence and apply the relevant evidence to the legislation. I am not satisfied that the appeal has a reasonable chance of success in relation to the alleged errors of law.

Error in Findings of Fact

[19] The Board found, in relation to proving that leaving employment was the only reasonable alternative, as follows:

The claimant said that he feels he had just cause for voluntarily leaving his employment on September 20, 2011 because of a "significant change in work duties"- that is, his only option as this casual and seasonal work was coming to a close except the managerial role. He said this would be a long term life choice (due to it being a family business) which he chose to decline. He does not have HR and Managerial training and he did not accept this offer which would be a significant change.

... the Board finds as a fact that the claimant left his employment on September 29, 2011 because he did not want to accept the only position available (Manager) and the season was ending, meaning that his retail clerk position would be eliminated, and the renovations he had been working on were completed.

The claimant said in the Hearing that he was not educated in management, nor did he wish to make a lifelong commitment to the job offer of manager, which was expected, since it was a family run business for more than a quarter of a century. It was a small business, with few employees, seasonal in nature.

The Board finds as a fact that the claimant had just cause for voluntarily leaving his employment on September 29, 2011 because of a significant change in work duties. It is understandable that he would choose not to take the job as "Manager," a commitment for life.

[20] While the Board stated the legal principle established in the jurisprudence - that any claimant who leaves his or her employment must establish that circumstances left him or her no reasonable alternative to leaving - the Board does not appear to make findings of fact on there being “no reasonable alternative to leaving”.

[21] The Applicant’s grounds of appeal in relation to errors in findings of fact, that the claimant failed to meet the onus of proving that leaving his employment was the only reasonable alternative, can be broken down into the onus and the findings of fact of the Board. The onus was correctly stated by the Board, but there appear to be no specific findings of fact in relation to “no reasonable alternative”. I am satisfied that the appeal has a reasonable chance of success on this ground.

[22] In terms of “significant changes in work duties”, the Board did make findings of fact. It found that:

... the claimant left his employment on September 29, 2011 because he did not want to accept the only position available (Manager) and the season was ending, meaning that his retail clerk position would be eliminated, and the renovations he had been working on were completed.

... the claimant had just cause for voluntarily leaving his employment on September 29, 2011 because of a significant change in work duties. It is understandable that he would choose not to take the job as "Manager," a commitment for life.

[23] The Applicant submits that the Board erred by basing its finding of “significant changes in work duties” solely on the claimant’s testimony at the hearing, as there was no evidence to support the claimant’s assertion. This argument presumes that the claimant’s testimonial evidence must be supported by other evidence in order for the Board to properly base a finding of fact on the testimony. The Applicant does not point to any case authorities to support this submission or provide any substantiation for this presumption. Also, had the Applicant attended the hearing, it could have cross-examined the claimant on his testimony. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

[24] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the

enumerated grounds of appeal. Here, the Applicant has identified one ground and reason for appeal which falls into the enumerated grounds of appeal.

[25] On the ground that there may be an error in the finding of facts, made in a perverse or capricious manner or without regard for the material before it, in relation to “no reasonable alternative”, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[26] The Application is granted as specified in paragraphs [21] and [25] above.

[27] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[28] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division