**[TRANSLATION]**

**Citation:** ***Canada Employment Insurance Commission v. D. B.*****, 2015 SSTAD 958**

**Date: August 5, 2015**

**File number: AD-13-1137**

**APPEAL DIVISION**

**Between:**

**Canada Employment Insurance Commission**

**Applicant**

**and**

**D. B.**

**Respondent**

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

## REASONS AND DECISION

## INTRODUCTION

[1] On April 17, 2013, the Board of Referees allowed the claimant's appeal concerning whether or not she had just cause for voluntarily leaving her employment under sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[2] On May 3, 2013, the Applicant (the Commission) filed an application for leave to appeal (Application) before the Appeal Division within the prescribed time frame.

[3] In a letter dated June 29, 2013, the Tribunal requested that the parties provide their written submissions regarding the Application. The Applicant filed submissions to supplement the Application. On July 30, 2015, the Respondent filed submissions.

## ISSUE

[4] The Tribunal must determine whether the appeal has a reasonable chance of success.

## THE LAW AND ANALYSIS

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development 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."

[6] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] In accordance with 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.

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[9] The Tribunal will grant leave to appeal if it is satisfied that the Applicant demonstrates that one of the aforementioned grounds of appeal has a reasonable chance of success.

[10] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction whose response might justify setting aside the decision under review.

[11] In its Application and written submissions, the Applicant noted that:

(a) The Board of Referees erred in fact and in law by allowing the appeal;

(b) The errors of law identified are:

1. The Board of Referees' reasons are not provided as required by subsection 54(*a*) of the *Department of Employment and Social Development Act*;

2. The Board did not explain why it rejected the evidence, as well as the statement, submitted by the claimant; and

3. The interpretation of subsection 30(1) of the EI Act and the application of the legal test for "just cause" for voluntarily leaving an employment;

(c) The errors of fact or of mixed fact and law are:

1. The evidence establishes that the claimant voluntarily left her employment but failed to show that the working conditions were so intolerable that she was left with no other choice but to quit her employment;

2. The claimant left her employment in a precipitous manner and without exploring the possibility of having her working conditions changed in response to her concerns; and

3. The Board of Referees based its decision on an erroneous finding of fact when it concluded that the claimant had no choice but to resign.

[12] However, the Respondent submitted that:

(a) The Commission did not attend the hearing and, therefore, the testimony and documentary evidence presented by the claimant at the hearing;

(b) The parking management system where the claimant worked was inadequate;

(c) The supervisor ([translation] "regulator") was aware of the problems, and the claimant had tried to reason with him, but to no avail;

(d) The supervisor was not an employee of the claimant's employer, and the claimant's union could not help on the evening of her resignation;

(e) Judging that there was a threat to her safety and to the safety of clients, the claimant decided to leave her job;

(f) The Board of Referees concluded that the decision to leave that evening was solely motivated by her concern for safety and that, in the circumstances, the claimant felt that there was no alternative other than to resign;

(g) The only decision that she considered possible that evening was to resign, and that decision was in no way unreasonable;

(h) The Board of Referees applied the correct test, namely, the only reasonable alternative in the circumstances;

(i) In the arguments submitted to the Board of Referees, the Commission cited the wrong test—[translation] "successfully proven beyond a doubt"—and failed to apply subsection 49.2(2) of the EI Act (benefit of the doubt to the claimant);

(j) The Commission made no reference to the presence of a conflict between the claimant and her supervisor;

(k) The Commission erred in its assessment of this case;

(l) The Board of Referees is not required to name the reasons why it does not accept the Commission's arguments, its sole obligation being to render a reasonable decision;

(m) The reasonableness standard should be applied where deference to a specialized administrative or disciplinary tribunal should prevail, as in the circumstances of this case; and

(n) The Board of Referees' decision is well founded, fair and reasonable, and an appeal body would come to the same conclusion and would refuse to substitute another decision for that of the Board of Referees in this case.

[13] The Tribunal considered the submissions of both parties and notes that they helped to explain the situation and the parties' positions. Since the application for leave to appeal is a preliminary step to a hearing on the merits (if a hearing is necessary), the parties are not required to prove their arguments. If the Tribunal is satisfied that one of the grounds of appeal has a reasonable chance of success, leave to appeal will be granted.

[14] The Board of Referees' decision, under the heading [translation] "Conclusions and application of the law" states:

> [Translation]
>
> With regard to voluntary leaving, the Board must evaluate if, taking all the circumstances into consideration, leaving her employment at that time constituted the claimant's only reasonable alternative.

> In this case, the Board finds that the claimant left her employment after Casino officials restructured the management of traffic by removing a number of parking lot attendants and supervisors.
>
> This restructuring resulted in dissatisfaction among clients whose emotions were already running high as a result of the activity surrounding the casino's games.
>
> The day she resigned, the claimant's supervisor made certain decisions that further undermined the safety of users and workers, hence the claimant's decision to leave the premises.
>
> The Board finds that the claimant had no choice but to resign as she did in order to protect her safety in the circumstances.

[15] The Board of Referees does not appear to have stated the legal test for "just cause" for voluntarily leaving an employment. Moreover, the Board of Referees appears to have concluded that the claimant had no choice but to resign, without explaining what evidence it rejected or accepted or whether the claimant had explored the possibility of having the working conditions changed. These potential deficiencies may be the result of sparse reasons. The Applicant submitted that the reasons were not provided as required by subsection 54(*a*) of the *Department of Employment and Social Development Act*.

[16] After reviewing the appeal file, the Board of Referees' decision and the arguments of the parties, the Tribunal concludes that the appeal has a reasonable chance of success. The Applicant raised several questions of fact and of law concerning the Board of Referees' interpretation and application of sections 29 and 30 of the EI Act whose response might justify setting aside the decision under review.

**CONCLUSION**

[17] The Tribunal grants leave to appeal.

[18] This decision regarding leave to appeal does not pre-suppose the result of the appeal on the merits.

[19] I invite the parties to present submissions with respect to the following issues: whether a hearing is appropriate and, if so, the type of hearing; as well as submissions with respect to the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division