[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. F. A.*, 2015 SSTAD 1128

Date: September 23, 2015

File: AD-13-1184

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

F. A.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing on September 8, 2015, at Sainte-Foy, Quebec

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 26, 2013, a Board of Referees found that:

- The Respondent did not voluntarily leave her employment under sections 29 and 30 of the *Employment Insurance Act* (the Act).

[3] On April 12, 2013, the Appellant filed an application for leave to appeal the decision of the Board of Referees. The application for leave to appeal was allowed on February 3, 2015.

TYPE OF HEARING

[4] The Tribunal determined that an in-person hearing of this appeal would be conducted for the following reasons:

- the complexity of the issue(s);
- the information on record, including the kind of information that was missing, and the need for clarification;
- the fact that the parties were represented.

[5] The Appellant, represented by Me Stéphane Arcelin, and the Respondent, represented by Me Marlène Jacob, attended the hearing.

THE LAW

[6] 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.

ISSUE

[7] The Tribunal must decide whether the Board of Referees erred in fact and in law by finding that the Respondent had not voluntarily left her employment under sections 29 and 30 of the Act.

SUBMISSIONS

[8] The Appellant submits the following reasons in support of its appeal:

- The Board of Referees erred in fact and in law in its March 26, 2013, decision by determining that the Respondent had not voluntarily left her employment on January 11, 2013, under sections 29 and 30 of the Act;

- The Board of Referees based its decision entirely on the Respondent's representations to the effect that the Appellant should have, in its determination, taken into account that she could not [translation] "assert her seniority rights before agreeing to be laid off" and receive Employment Insurance;

- The Board of Referees' decision is based essentially on one paragraph in the letter of intent between the union and the employer, while failing to consider another paragraph in the same document, as well as other evidence in the record that was before the Board of Referees;

- More specifically, this Board of Referees' decision is based essentially on paragraph 4 of this letter of intent between the union and the employer, which stipulates that [translation] "When work teams are changing, employees who are laid off cannot exercise their bumping rights as set out in the collective agreement;"

- This determination by the Board of Referees was made without reference to paragraph 7 of the letter of intent between the union and the employer, the rules of seniority regarding bumping rights set out in article 9 of the collective agreement and the letter from Human Resources Development Canada dated November 19, 2012;

- The Board of Referees erred when it decided that the Respondent had not left her employment voluntarily when the evidence on record clearly shows the opposite;

- In deciding as it did, the Board of Referees ignored decisive evidence without any reason, which constitutes an error of law;

- The Federal Court of Appeal stated in *Bellefleur* that a Board of Referees must justify its determination and that when the Board of Referees is faced with contradictory evidence, as in this case, it cannot disregard it. If it decides that the evidence should be dismissed or assigned little weight, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law;

- Moreover, according to the case law on the subject, in light of the evidence before the Board of Referees, the Board had no choice but to decide on the issue of whether the Respondent had just cause for leaving her employment, which it did not do. In other words, the Board of Referees should ask whether, given all the circumstances, this was the only reasonable alternative;

- This is not a case of workforce reduction under section 51 of the *Employment Insurance Regulations* or work sharing under sections 42 to 49 of the Regulations.

[9] The Respondent submits the following reasons against the appeal:

- The Board of Referees' decision is not based on an error of law or of fact and it did not exceed or refuse to exercise its jurisdiction;

- The letter of intent was signed on January 12, 2001, between the union and the employees of the Régie intermunicipale du traitement des matières résiduelles de la Gaspésie (the Régie);

- The letter of intent essentially includes the provision that when the work team changes, the employees that are laid off cannot exercise the bumping rights set out in the collective agreement;

- To cancel the effects of the letter of intent, HRDC Gaspésie Region must no longer authorize the practice set out in the letter of intent or the parties must remove it from the collective agreement;

- Unless one of these situations applies, a grievance cannot claim that the rules set out in the collective agreement regarding bumping rights must be applied;

- The rules regarding the negotiation of working conditions are the sole purview of the union and the employer;

- Although the Appellant acknowledges that it cannot rule on the legality of the agreement between the employer and the union, it maintains that the agreement is not valid because it was not filed with the Minister of Labour;

- The letter of intent is an integral part of the collective agreement even if it has not been filed with the Minister of Labour;

- Obviously, this practice, which has been applied since 1999, had to be known to and accepted by HRDC Gaspésie Region;

- She was laid off on January 11, 2013;

- On January 14, 2013, Ms. Drapeau of the Régie was informed of the procedure to follow for the Records of Employment and she understood that Service Canada was no longer authorizing the practice that had existed since 1999. She informed Service Canada that the layoffs were made on January 11 and that she could not follow the instructions;

- The Régie was therefore going to apply section 7 of the letter of intent starting February 7, 2013. The Respondent returned to work on February 14, 2013, as a replacement for someone on sick leave;

- The call back to work by seniority meant that the Respondent could not be called back because a work team consists of five sorters and she was ranked seventh in seniority;

- The Respondent could not act at the time that she was laid off on January 11, 2013, because the letter of agreement was still being applied as it had been for many years;

- The evidence leaves no doubt about the fact that the Respondent's desire is not at issue in the decision regarding remaining employed on January 11, 2013;

- Consequently, the arguments made by the Appellant to this Tribunal are without basis in fact or in law;

- Of all the decisions submitted by the Appellant before the Board of Referees and before this Tribunal, only the decision in CUB 75519 may apply to this case;

- For all these reasons, the Board of Referees' decision must be upheld given that the Appellant wrongly decided that the Respondent had voluntarily stopped working on January 11, 2013, without just cause and that this was not the only reasonable alternative;

- She did not voluntarily stop working;

- The Board of Referees' decision is reasonable.

STANDARDS OF REVIEW

[10] The Appellant submits that the Federal Court of Appeal has ruled that the applicable standard for judicial review of the decision of a Board of Referees or Umpire regarding questions of mixed fact and law is reasonableness - *Canada (AG) v. Richard*, 2009 FCA 122.

[11] The Respondent submits that the Federal Court of Appeal has ruled that the applicable standard for judicial review of the decision of a Board of Referees or Umpire regarding questions of mixed fact and law is reasonableness - *Canada (AG) v. Burke*, 2012 FCA 139.

[12] The Tribunal agrees with the parties that the Federal Court of Appeal has ruled that the applicable standard for judicial review of the decision of a Board of Referees or Umpire regarding questions of mixed fact and law is reasonableness - *Canada (AG) v. Burke*, 2012 FCA 139; *Canada (AG) v. Richard*, 2009 FCA 122; and *Canada (AG) v. Hallée*, 2008 FCA 159. [12].

[13] The Tribunal also accepts that the Federal Court of Appeal has ruled that the applicable standard for judicial review of the decision of a Board of Referees or Umpire regarding questions of law is correctness - *Martens v. Canada (AG)*, 2008 FCA 240.

ANALYSIS

[14] When it allowed the Respondent's appeal, the Board of Referees determined as follows:

> [Translation]
> The claimant did not voluntarily leave his employment because, according to the known agreement, the employees are covered by an employment contract with a start date and an end date and they have to always remain available for work. As for voluntary leaving, this has to be a deliberate or voluntary choice by the employee to end his employment. That is not the case here.
>
> The Board of Referees is required to validate whether the claimant left voluntarily. On January 14, 2013, the employer was informed of how to proceed during a layoff. The employer already provided the Records of Employment for the three claimants who are appealing and these Records of Employment show shortage of work / end of contract or season.
>
> The claimants under investigation had an obligation on February 6, 2013, to inform the union and the employer that they had to exercise their bumping rights according to their seniority,

> given the letter of intent of January 12, 2001, which authorizes Human Resources Canada to end the current practice of changing teams (Exhibit 4-5 (7)). The employees had to return to their jobs on February 11, 2013, even before the letter from Human Resources Canada on February 12, 2013, informing them that they were no longer entitled to receive regular benefits. The Board of Referees is faced with a practice that is known to the employer, the union and Human Resources Canada and that has been in use since the sorting centre opened in 1999. According to the representative, the claimants were hostages to this practice and to the fact that, according to their testimony, they always had to be available for work, as indicated by the Records of Employment, which show more hours due to the fact that they worked five days a week for 40 hours for a period of six months.
>
> With reference to the Commission's position (Exhibit 11-3), we think that the claimant demonstrated that the letter of agreement setting out the work sharing practice was part of the hiring and employment contract. Therefore, the claimant could not [translation] "assert his seniority rights before agreeing to be laid off." We cannot accept the Commission's argument that [translation] "the claimant himself took the initiative to end his employment."

[15] The role of the Board of Referees (now the General Division) is to examine the evidence presented by both parties in order to identify the relevant facts, namely, the facts that concern the particular dispute that must be decided, and to explain in writing the decision that it made concerning these facts.

[16] A Board of Referees must obviously justify its determinations. 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 at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious - *Bellefleur v. Canada (AG)*, 2008 FCA 13.

[17] In this case, the Board of Referees ignored the Appellant's evidence, namely, the discussions since October 2012 between the employer and Service Canada concerning the employer's practice (Exhibits AD2-33 and AD2-35) and the letter of November 19, 2012, informing the employer that the work-sharing practice was not allowed under the Employment Insurance program (Exhibits AD2-33 and AD2-34).

[18] Given the above-mentioned error of law by the Board of Referees, the Tribunal is justified in intervening in this case and rendering the decision that should have been rendered.

[19] It was not disputed that, since at least 2001, the employer has been using two work teams to do the necessary work for his annual operations. The teams alternate working for a

period of six months each. Shortly before the six-month period expires, the employer normally sends an employee a letter notifying the employee that his employment contract is ending and reminding him that he must remain available to fill in during this period. He is also informed that his employer wants him to return for the next work period.

[20] To implement this alternating schedule, the employer and the union signed a letter of intent dated January 12, 2001, which includes the following:

> [Translation]
> 4. when the work team changes, laid-off employees cannot exercise their bumping rights as set out in the collective agreement.
>
> …
>
> 7. In the event that Human Resources Development Canada (HRDC) Gaspésie Region no longer authorizes the current practice of changing work teams, this letter of agreement automatically ceases to apply and the rules in the collective agreement become applicable.

[21] This letter of intent is obviously intended to suspend the application of article 9.09 of the collective agreement regarding the use of seniority. This article reads as follows:

> [Translation]
> 9.09 In all cases where employees are called back to work, the Employer proceeds, for regular employees, in order of seniority and for layoffs in reverse order of seniority, first with probationary employees and then with temporary employees.

[22] Following a request for information by the employer on October 29, 2012, the Appellant informed the employer on November 19, 2012, of the following (Exhibits AD2-33 and AD2-34):

> [Translation]
> This is in response to your October 29 request for information regarding the terms and conditions for application of the Employment Insurance program.
>
> First of all, we need to specify that the practice of job sharing is not a concept that is recognized by the Employment Insurance program.
>
> …
>
> However, we want to point out that any clause regarding seniority – included in a collective agreement – is taken into consideration when analyzing the eligibility of a claim.
>
> Therefore, when a unionized employee is laid off – and he does not assert his seniority rights when there would have been work for him – the situation is considered a voluntary leaving

> within the meaning of the *Employment Insurance Act*. In such a case, the employee risks being disqualified from receiving benefits.

[23] Despite the claims by counsel for the Respondent that this letter is not a clear refusal on the part of the Appellant, it seems obvious to the Tribunal that this letter indicates that Human Resources Development Canada (HRDC) Gaspésie region does not authorize the employer's practice of changing work teams.

[24] The Tribunal also cannot accept the position of counsel for the Respondent that the Appellant's January 14, 2013, correspondence represents the actual letter of refusal since this letter is obviously a letter of instruction on how the employer should follow up on the Appellant's position expressed in its correspondence of November 19, 2012.

[25] Therefore, the Tribunal concludes that when the team changed in January 2013, the employees who were laid off could exercise the bumping rights set out in the collective agreement.

[26] Given this conclusion by the Tribunal, there is no need to decide, for the purposes of this appeal, whether the January 12, 2001, letter of intent between the employer and the union is binding on third parties when not filed with the Minister of Labour according to the requirements of section 72 of the *Labour Code*.

[27] The Tribunal notes that there is a long line of authority to the effect that, when an employee has a right to continue working because of his seniority but chooses to refuse to do it so that another employee can work, that employee has voluntarily left his employment and has not shown just cause within the meaning of the *Employment Insurance Act*.

[28] However, counsel for the Respondent maintains that she was unaware that she could exercise her bumping rights in January 2013. Therefore, she was not refusing to work so that another employee could work but complying with the letter of intent signed by the union and the employer.

[29] She argues that, consequently, the Respondent did not voluntarily leave her employment within the meaning of sections 29 and 30 of the Act.

[30] There was in fact a lack of evidence before the Board of Referees regarding the employees' knowledge of discussions between the Appellant and their employer on the subject of the cancellation of the letter of intent. The union did not follow up on the Appellant's offer to communicate since it was of the opinion that the letter of intent allowed it to act this way (Exhibit AD2-36). Therefore, it is quite likely that, in the circumstances, the employees were not informed by either the union or the employer.

[31] Counsel for the Appellant maintains that even if the Respondent was not informed by her employer or union, she should have asked for information or insisted on her seniority rights, which would have ensured she continue working.

[32] The Tribunal must first determine whether the Respondent voluntarily left her employment. Voluntary leaving is when the employee and not the employer takes the initiative to terminate the employment. If so, the Tribunal must determine whether, on a balance of probabilities, the Respondent had no reasonable alternative to leaving her position, given all the circumstances.

[33] In this case, there was no evidence before the Board of Referees showing that the employees had been previously informed by the employer, the union or the Appellant that the letter of intent signed on January 12, 2001, by the employer and union had been cancelled.

[34] Therefore, it was reasonable for the Respondent to believe that, when her work ended in January 2013, the letter of intent still applied as it had since 2001 and that her bumping rights had been suspended.

[35] The Appellant maintains that the Respondent should have asked for information or insisted on her seniority rights. The Tribunal wonders why the Respondent should have asked for information or insisted on her seniority rights when the letter of intent had applied since 2001 and she did not receive any information to the contrary from her employer or her union. The Tribunal cannot support the Appellant's position, which it considers untenable and unrealistic in the current context.

[36] It seems obvious to the Tribunal that the Respondent was not the one who ended her employment. The evidence leaves no doubt about the fact that the Respondent's willingness

was not at issue in the decision regarding remaining employed on January 11, 2013. A distinction should be made here in the long line of authority regarding bumping rights since, in this case, the Respondent did not choose to refuse to work so that another employee could work in her place.

[37] For the above-mentioned reasons and given the specific circumstances in this case, the Tribunal concludes that the Respondent did not voluntarily leave her employment.

CONCLUSION

[38] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division