

[TRANSLATION]

Citation: *M. F. v. Canada Employment Insurance Commission*, 2015 SSTAD 1130

Date: September 24, 2015

File: AD-13-108

APPEAL DIVISION

Between:

M. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing on September 4, 2015, at Montreal, Quebec

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the case returned to the General Division of the Tribunal (Employment Insurance Section) for a new hearing.

INTRODUCTION

[2] On April 23, 2013, a Board of Referees found that:

- The Appellant lost her employment by reason of her own misconduct under sections 29 and 30 of the *Employment Insurance Act* (the Act).

[3] On May 23, 2013, the Appellant filed an application for leave to appeal the decision of the Board of Referees. The application for leave to appeal was granted on January 5, 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 fact that the credibility of the parties is not one of the main issues in this case;
- the information on record, including the kind of information that is missing, and the need for clarification;
- the fact that the Appellant is represented.

[5] The Appellant's representative, Benedict Bois, attended the hearing. The Respondent, represented by Me Chantal Labonté and Luce Nepveu, also participated in 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 Appellant had lost her employment by reason of her own misconduct under sections 29 and 30 of the Act.

SUBMISSIONS

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

- The Board of Referees did not take into account the violation of her rights and freedoms given that it was not within its jurisdiction;
- The Board of Referees based its decision on evidence acquired in a perverse and capricious manner by the employer since it was obtained in violation of her rights and freedoms;
- The Board of Referees did not take into account the incorrect and/or false statements made by the employer;
- The Board of Referees rendered a decision without taking into account the evidence before it;

- More specifically, the Board of Referees failed to take into account the evidence before it, labelled as Exhibits 22 and 23, since this evidence in the record raises a question of law regarding the provisions of Section VIII – Confidential Information of the Agence du Revenu du Québec, more precisely, section 69(1) of the Quebec *Tax Administration Act*.
- In the Appellant's case, disclosure or consultation of the files was done in compliance with section 69(1) of the *Tax Administration Act*; because she had written and/or verbal authorization from these people, Exhibits 22 and 23 that were filed before the Board of Referees clearly show that the Appellant did not breach section 69(1) of the *Tax Administration Act* or any contract of employment;
- The employer does not ask or require that authorizations be recorded in their computer system. Moreover, the employer also accepts verbal authorizations from taxpayers;
- The discretion declaration that the employer asks its employees to sign every year does not prevent an employee from working or giving information to a family member or some other person;
- The Appellant disclosed the information in compliance with section 69(1) of the *Tax Administration Act* and point (b) of the discretion declaration;
- The members of the Board of Referees interpreted the discretion declaration without taking into account paragraph (b);
- Interpreting the discretion declaration without taking into account paragraph (b) is incompatible and not aligned with the provisions of subsection 69(1) of the *Tax Administration Act*;
- She did not breach an express or implied duty in a contract of employment since she had authorizations to do the consultations as required by the employer in order to protect privacy and information security;

- It is logical to conclude that, when an employee pledges in the discretion declaration to [translation] “never consult a file for personal reasons, even out of simple curiosity or to help family or a friend,” this pledge only covers cases where the employee or the employee’s family or friend have not given authorization to the person concerned.

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

- Neither the Appellant nor the Tribunal can summon witnesses or have them heard during an appeal hearing;
- An appeal before the Tribunal’s Appeal Division is not a hearing *de novo*, but rather a type of judicial review;
- It objects to the evidence presented by the Appellant during this appeal hearing;
- Since the Board of Referees is the trier of fact, the Tribunal’s review authority is limited to deciding whether the view of facts taken by the Board of Referees was reasonably open to them on the record;
- Consequently, new documents are not admissible in evidence before the Tribunal’s Appeal Division unless they meet very strict criteria defined by the Federal Court of Appeal;
- In this regard, the Respondent argues that filing the documents does not meet the criteria for presenting new evidence, that is, showing that the documents were not available at the time of the hearing before the Board of Referees, that they were not known to the party involved or that they could not have been discovered by a claimant acting diligently, and that in all cases, they were decisive of the issue to be decided;
- The Board of Referees’ decision was not based on an error of law or fact, and it did not exceed or refuse to exercise its jurisdiction;

- The Board of Referees had to decide whether the Appellant's actions to disclose confidential information to her brother and to access her sister's file constituted misconduct under section 30 of the Act;
- The Respondent argues that the Board of Referees correctly applied the conditions regarding misconduct, as defined by the Federal Court of Appeal, that are found in its conclusion;
- The fact that the Appellant did not have any wrongful intent or any criminal or penal conviction changes nothing; she admitted the actions of which she was accused. She admitted having consulted personal files as a favour for her brother and having accessed her sister's file to find out if the processing was still ongoing or had been completed;
- In these circumstances, it seems the Board of Referees applied the objective test of determining whether the acts were conscious, deliberate or intentional and the explanations or nuances given by the Appellant at the hearing to minimize the scope of the actions she was accused of do not change the fact that the actions were committed;
- The Respondent argues that the Board of Referees did not have to decide on the possibility that the Appellant's rights and freedoms under the *Canadian Charter of Rights and Freedoms* (the Charter) were violated;
- In any case, the Appellant was not under arrest or in detention when she met with the employer's investigator, so section 10 of the Charter does not apply;
- The Appellant was the subject of an administrative procedure. Therefore, she was not charged with anything so she is not covered by the protection that this provision guarantees;
- This argument might be useful if criminal or penal charges are brought against her, but it does little to satisfy the Tribunal that the Board of Referees committed an Employment Insurance-related error;

- It has already been decided (CUB 43153A) that it is wrong and inappropriate to bring up the criminal law requirements of the Charter at a hearing before the Umpire (today the Tribunal's Appeal Division) to deny any probative value to evidence that actually is admissible;
- Therefore, contrary to the Appellant's claims, the Respondent argues that the Board of Referees based its decision on documents that were admissible in evidence;
- The Respondent argues that the Board of Referees correctly examined the facts presented after rigorously reviewing the probative value of the statements by both parties and applied the principles of misconduct under the Act as it is required to do in Employment Insurance matters, rather than focussing on the violation itself;
- The Board of Referees, therefore, did not err by not ruling on this Charter argument;
- Moreover, the Board of Referees did not have to analyze each of the Appellant's arguments in its decision, in the same way as it did not have to analyze each piece of evidence in its reasons;
- As stated, after rigorously evaluating the probative value of the statements made by both parties, and assessing the evidence on record to which the Board of Referees referred throughout its decision, it found that the Appellant's behaviour was irreconcilable with the regular performance of her duties;
- The Board of Referees also correctly decided that the Appellant's complaint against her union was outside its jurisdiction;
- As for the Appellant's allegation regarding her right to union representation during the initial meeting with the investigator in August 2012, this is not a right protected by the Charter and the employer's position in any case was confirmed by the adjudicator's decision regarding the dismissal, which the Appellant herself submitted (pages AD7-22 and seq.) and which was analyzed by the LRB;

- In any event, this case does not involve trying the employer or determining whether the Appellant's dismissal was fair and adequate;
- The Board of Referees had to decide, on a balance of probabilities, on the issue of misconduct by analyzing, among other things, whether there was a breach of an implied or express duty in the employment contract. It decided that the Appellant's breach of her code of ethics, as well as her behaviour that contravened the *Conflict of Interest Act*, was enough to answer the question;
- The Board of Referees did not commit an error that would justify the Tribunal's intervention just because it did not draw specific conclusions regarding the *Tax Administration Act*.

STANDARDS OF REVIEW

[10] The parties did not make any representations regarding the applicable standard of review.

[11] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a Board of Referees or an Umpire regarding questions of law is the standard of 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

[12] In this case, the Board of Referees had to decide whether the Appellant's disclosing confidential information to her brother and accessing her sister's file constituted misconduct under section 30 of the Act.

[13] The role of a 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 it must decide, and to explain in writing the decision that it made concerning these facts.

[14] 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 (A.G.)*, 2008 FCA 13.

[15] In this case, the Board of Referees ignored the Appellant's evidence, namely, the evidence presented as Exhibits 22 and 23. This evidence supports the Appellant's position that she did not breach a duty that is express or implied in her contract of employment because she disclosed or consulted files under section 69(1) of the *Tax Administration Act*, the discretion declaration and the *Conflict of Interest Act*, since she had written and/or verbal authorization from these people.

[16] The Respondent also admitted in its representations that the Board of Referees did not draw specific conclusions regarding the Quebec *Tax Administration Act* in its decision.

[17] Given the Board of Referees' above-mentioned error of law, the Tribunal is justified in intervening in this case.

[18] With respect to the Appellant's arguments regarding the Charter, the Board of Referees was correct in deciding that it did not have jurisdiction. However, the Tribunal's General Division now has jurisdiction to hear arguments regarding the Charter. As mentioned during the appeal hearing, the Appeal Division holds a judicial review and not a hearing *de novo*. Since the General Division is the trier of fact and in a better position to assess the credibility of witnesses, the Tribunal finds it preferable to charge it with settling the Charter arguments raised by the Appellant.

[19] Finally, to support her appeal, the Appellant produced new documents upholding her position. In the interest of justice, a new hearing before the General Division would enable the Appellant to present this evidence and a complete record will be sent to the General Division for assessment and decision.

CONCLUSION

[20] The appeal is allowed and the case will be returned to the Tribunal's General Division (Employment Insurance Section) for a member to hold a new hearing.

[21] The Tribunal orders that the April 23, 2013, decision of the Board of Referees be removed from the record.

Pierre Lafontaine
Member, Appeal Division