[TRANSLATION]

Citation: ***M. I. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1262**

Date: October 27, 2015

File: AD-14-598

APPEAL DIVISION

Between:

M. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision rendered by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on October 22, 2015

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On November 3, 2014, the General Division of the Tribunal found that:

- The Appellant voluntarily left his employment without just cause under sections 29 and 30 of the *Employment Insurance Act* (the Act).

[3] On December 3, 2014, the Appellant filed an application for leave to appeal with the Appeal Division. Leave to appeal was granted by the Appeal Division on February 26, 2015.

TYPE OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference 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 and his representative, Me Karim Lebnan, participated in the hearing. The Respondent was represented at the hearing by Helena Kitova.

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 General Division erred in fact and in law in finding that the Appellant voluntarily left his employment without just cause under sections 29 and 30 of the Act.

SUBMISSIONS

[8] The Appellant submitted the following arguments in support of his appeal:

- In the decision under appeal in this case, the General Division rendered a decision that contained an error of law by failing to take into account the case law submitted and by failing to apply the law to the facts in evidence;

- Obviously, the General Division made a ruling without taking into account the evidence brought before it in this case;

- The brevity of the General Division's reporting of the evidence and the parties' arguments clearly shows that it did not feel bound to render quality justice in accordance with its basic mission;

- The Tribunal can grant probative value to one piece of evidence rather than another and determine the credibility of a witness, but nothing of the sort is indicated in the decision under appeal in this case;

- In Quebec law, good faith is always presumed. In addition, if the member of the General Division wanted to disregard the version of the facts on file and the Appellant's statement, the member should indicate why they should be disregarded;

- In this case, the law applicable to the litigious situation also included taking into account the reality of the union hiring system in place at the time the events giving rise to the right occurred;

- It was explained to the General Division that the union hiring system, as implemented at the time of the facts in dispute, resulted in the Appellant finding himself in a situation in which he was prevented from accumulating the hours needed to obtain his status of mechanical shovel operator journeyperson;

- His employer told him that he would complete work hours to qualify for his journeyperson status. However, in reality, the employer made him do non-construction work (sweeping) and paid him a very low hourly rate;

- However, it was clearly indicated before the member of the General Division that, in the same period, a representative from CSN-Construction, Claire, was offering jobs that were subject to the specific construction system and that enabled workers to accumulate hours in order to become a journeyperson to the people registered on the CSN-Construction list who had no job;

- In light of this dead-end situation, the Appellant either had to resolve to continue working as a labourer at low wages as a result of the false statements made by his employer, or leave his labourer-sweeper job in order to make himself available for a job that was subject to the specific construction system and that enabled him to become a journeyperson;

- The Appellant's clear and credible testimony also confirmed that as soon as he left his labourer job, he was quickly able to find a job that was subject to the specific construction system in Quebec, which in the end enabled him to obtain his mechanical shovel operator journeyperson card;

- Given the particular situation, namely, the union hiring system, and the fact that the Appellant had reasonable assurance of another employment in the immediate future, the member of the General Division should apply the Act and grant the Appellant Employment Insurance benefits;

- If the criteria required definite assurance of another employment on the day that he voluntarily left, the circumstance of reasonable assurance of another employment in the immediate future stipulated by Parliament in subparagraph 29(*c*)(vi) would lose its utility and reason for existence;

- The decision in *Nakatani* (CUB 42610) was brought to the General Division's attention and clearly explained the steps to take with regard to paragraph 29(*c*). It must first be determined whether the claimant's situation fell within section 29(*c*), and if whether in the circumstances, the claimant had no reasonable alternative but to leave the employment (decision added to the file on pages GD7-2 and subs.).

- CUB 49237 and CUB 66126, upheld on appeal by the Federal Court of Appeal (A-339-06), apply to the facts on file. The General Division did not take this case law into account in its decision;

- The General Division completely failed to consider that the Canadian Employment Insurance system is based on legislation and regulations aimed at social protection, and that the system thus requires a broad and liberal legislative interpretation to achieve its goals and true purpose.

[9] The Respondent submitted the following arguments against the Appellant's appeal:

- The General Division's decision is well founded in fact and in law. The General Division made a decision within its jurisdiction that is reasonable in light of the relevant evidence;

- The reasons given to justify the voluntary leaving are not sufficient;

- The Appellant stated that he had reasonable assurance of another employment in the immediate future. When he left his job, it was to wait for a telephone call from his

union, which was supposed to find him a job in his field. He did not have assurance of employment when he left. His union told him to be reachable and that he would have a job very soon (Exhibit GD2-100);

- A conditional job offer is not "reasonable assurance of another employment." Searching for or obtaining other employment shortly after leaving employment does not in itself constitute proof that the person had reasonable assurance of employment at the time of leaving;

- For the employment to be in the "immediate future", it must occur in the near future. Although time limitations are not defined by the legislation, the Courts have ruled in cases where the delay was eight and thirteen weeks that this was not employment in the immediate future;

- He found another job through his union, which complied with his trade qualifications, only in August 2009. This shows that he did not have assurance of another employment when he left on May 3, 2009 (Exhibit GD2-100);

- The Appellant made the decision to leave his job to wait for a telephone call at home. It was a personal choice.

STANDARDS OF REVIEW

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

[11] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on questions of law is correctness – *Martens v. Canada (AG*), 2008 FCA 240, and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[12] This file has already been the subject of an appeal to the Appeal Division. The file was referred back to the General Division for a new hearing given that the Board of Referees failed to take into account the Appellant's evidence.

[13] After hearing the arguments submitted on behalf of the Appellant and the Respondent, and after carefully reviewing the transcripts of the hearing before the General Division, the Tribunal finds that the General Division also made errors warranting the Tribunal's intervention.

[14] The Appellant testified before the General Division that his spouse received a call from the CSN to verify whether he was available for work. Since he had a non-construction job, the CSN contacted another person on the list for the position being filled. This event, as explained by the Appellant in his testimony, resulted in him leaving his job in order to be available and unemployed if the CSN were to call him back (Exhibit AD1B-38).

[15] On August 9, 2013, the Appellant's former representative provided written submissions to the Tribunal. In the submissions, the Appellant's representative stated the following:

> [Translation]
> In addition, in May 2009, the claimant's union confirmed to him that it would be able to find him a job in his field very soon, but he had to make himself reachable at all times.

[16] On the basis of these submissions, the General Division rejected the Appellant's testimony at the hearing, without calling into question his credibility, and found that [translation] "a reasonable solution would have been not to leave his employment and to make himself quickly reachable at all times."

[17] However, the "representations," whether they are made by the claimant or the Commission and submitted to the General Division, do not constitute at any time evidence of the facts that they summarize. The General Division must pay attention to each file to ensure that the facts alleged in the representations are indeed supported by the evidence on file.

[18] Since the facts indicated by the Appellant's former representative in his submissions are not at all supported by the evidence before the General Division, it is clear to the Tribunal that the General Division's decision is unreasonable and based on an erroneous finding of fact that it

made in a perverse or capricious manner. In addition, if the General Division wished to not give any weight to or disregard the Appellant's testimony, it had to explain the reasons in its decision, which it did not do.

[19] Given the foregoing, the Tribunal is justified in intervening in this case and for making the decision that should have been made by the General Division.

[20] The facts on file are relatively simple and undisputed.

[21] The evidence before the General Division shows that the Appellant left his non-construction job to make himself available for a job in the construction field. The Appellant's spouse received a call from the CSN to verify whether the Appellant was available for work. Since the Appellant already had a non-construction job, the CSN contacted another person on the list for the position being filled. This event, as explained by the Appellant in his testimony, resulted in him leaving his job in order to be available and unemployed if the CSN were to call him back.

[22] The Appellant's representative argued under appeal that given the particular situation, namely, the union hiring system, and the fact that the Appellant had reasonable assurance of another employment in the immediate future, the Appellant should be granted Employment Insurance benefits.

[23] The Appellant is no longer arguing under appeal to the Tribunal that he had just cause for leaving his employment because of the significant modification of terms and conditions respecting wages or salary.

[24] It is therefore useful to reproduce below subparagraph 29(*c*)(vi) of the Act, which is relevant to this issue:

> 29(*c*) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
>
> (vi) reasonable assurance of another employment in the immediate future

[25] In *Canada (AG) v. Lessard*, 2002 FCA 469, the Federal Court of Appeal stated the following on the concept of "reasonable assurance of another employment":

> [13] The situation described in section 29(*c*)(vi) assumes three things: "reasonable assurance", "another employment" and "the immediate future".
>
> [14] I doubt that there can be "reasonable assurance of another employment" within the meaning of the subparagraph when obtaining the employment is conditional on completion of a thirteen-week course which has not yet been started. However, I do not have to decide this point since it is in any case clear, in my view, that the "immediate future" test was not met in the case at bar.
>
> [15] As regards the "immediate future", we know first that the future employment was conditional on completion of a course, and second that the time lapse in question was thirteen weeks. Both of these observations are inconsistent with the idea of the "immediate future".
>
> [16] The *Grand Robert de la langue française*, 2001, defines "immédiat" [immediate] as follows:
>
> II. 1. Qui précède ou suit sans intermédiaire, dans l'espace ou le temps.
>
> 2. Qui suit sans délai; qui est du moment présent, a lieu tout de suite.
>
> [17] The Canadian Oxford Dictionary, 2001, defines "immediate" as follows:
>
> 1. occurring or done at once or without delay (*an immediate reply*).
>
> 2a. nearest in time or space (*the immediate future; the immediate vicinity*)
>
> [18] In *Canada (Attorney General) v. Traynor* (F.C.A.) (1995), 185 N.R. 81, Marceau J.A. very properly used the phrase "in the near future".

[26] In *Canada (AG) v. Muhammad Imran*, 2008 FCA 17, the Federal Court of Appeal examined the issue and stated the following:

> [12] Mr. Imran argues that because jobs in the field of civil engineering were plentiful, he had reasonable assurance of another employment in the immediate future, which constituted just cause for voluntarily leaving his employment, pursuant to subparagraph 29(*c*)(vi) of the Act. In *Canada (Attorney General) v. Bordage*, 2005 FCA 155 (CanLII), Décary J.A. expressed the view at paragraph 11 that:
>
> > Subparagraph 29(*c*)(vi) requires that there be reasonable assurance of another employment in the immediate future. In this case, none of the three requirements have been met. The offer made by the Commission de la Construction du Québec is an offer for a course, not an offer of employment. At the moment when he himself chose to become unemployed, the respondent did not know if he would have employment, he did not know what employment he would have with what employer, he did not know at what moment in the future he would have employment (see *Canada (Attorney General) v. Sacrey*, 2003 FCA 377 (CanLII), [2004] 1 F.C.R. 733; *Canada (Attorney General) v. Laughland*, (2003) 301 N.R. 331 (F.C.A.); *Canada (Attorney General) v. Bédard* (2004) 2004 FCA

21 (CanLII), 241 D.L.R. (4th) 763 (F.C.A.); *Canada v. Wall*, (2002) 293 N.R. 338 (F.C.A.); *Canada (Attorney General) v. Lessard*, 2002 FCA 469 (CanLII)).

> [13] While Mr. Imran was successful in finding an engineering job shortly after leaving his employment, at the moment when Mr. Imran left his job it cannot be said that he knew what future employment he would have or the identity of his future employer. As such, just cause for leaving his employment on the basis provided in subparagraph 29(*c*)(vi) of the Act has not been established.

[27] In accordance with the teachings of the Federal Court of Appeal, the Tribunal finds that there cannot be "reasonable assurance of another employment" under subparagraph 29(*c*)(vi) of the Act when the evidence shows that the Appellant, when he made the decision to become unemployed, did not know which job that he would obtain or what his employer would be, and he did not know when in the future he would have a job.

[28] To support his position, the Appellant referred to the decisions in CUB 49237 and *Cloutier*, 2007 FCA 161. These matters should be distinguished from this case for the following reasons:

(a) In the decision in CUB 49237, the claimant knew that there was a good job coming up in Kamloops and the Kamloops positions had been posted on the union rumour sheet. It was well known within the union that the Kamloops job was about to commence.

(b) In the aforementioned decision in *Cloutier*, the Board of Referees noted that because of the information received from the dispatcher at the hiring hall at the end of January 2005, the claimant expected immediate employment in his chosen field.

[29] The Tribunal accepts that the Appellant certainly had an excellent reason for doing as he did in personal terms. However, it is contrary to the very principles underlying the Employment Insurance system for the Appellant to be able to impose the economic burden of his decision on contributors to the fund.

[30] The Appellant therefore failed to establish that he had just cause for leaving his employment for the reasons set out in subparagraph 29(*c*)(vi) of the Act.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division