Citation: ***Canada Employment Insurance Commission v. A. A.*****, 2015 SSTAD 1309**

Date: November 10, 2015

File number: AD-14-460

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

A. A.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Teleconference on November 3, 2015

REASONS AND DECISION

DECISION

[1] The appeal is granted, the decision of the General Division dated August 1, 2014 is rescinded and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On August 1, 2014, the General Division of the Tribunal determined that:

- The Respondent had just cause to leave his employment pursuant to sections 29 and 30 of the *Employment Insurance Act (the "Act").*

[3] The Appellant requested leave to appeal to the Appeal Division on August 21, 2014. Leave to appeal was granted by the Appeal Division on March 19, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant, represented by Rachel Paquette, and the Respondent were present at the hearing.

THE LAW

[6] 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.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the Respondent had just cause to leave his employment pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

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

- It is not disputing the General Division decision on the issue of availability. However, it submits that the General Division erred in finding that the Respondent did not voluntarily leave his employment; and consequently, allowing the appeal on the issue of voluntarily leaving employment;

- Regardless of whether the Respondent was not contacted by his employer with a new shift schedule, it was the Respondent, not the employer, who initiated the separation from employment;

- The Federal Court of Appeal has held that an employee who advises his employer that he is less available than previously is asking the employer to

terminate the employment contract if the employer cannot accommodate the employee's reduced availability;

- In this case, the Respondent left a letter confirming that once he started school, he would no longer be able to work day shift even though his employer had confirmed that he could not accommodate his requests;

- Dismissal is therefore only the sanction of the real cause of the loss of employment, that is, the employee's decision to continue his studies under conditions which do not allow him to be available as before;

- Once voluntary leaving has been established, the claimant must meet the legal test for voluntary leaving pursuant to section 29(c) of the *Act*; no reasonable alternative to leaving, having regard to all the circumstances;

- A proper application of the legal test to the facts of this case leads to the reasonable conclusion that just cause did not exist in accordance with section 29(c) of the *Act* and the Respondent is therefore, subject to disqualification pursuant to section 30(1) of the *Act*. He had the reasonable alternative of remaining available as before to preserve his employment;

- The Respondent may have made a good personal choice to decide to not let this opportunity pass to better his life and career but the Federal Court of Appeal confirms that voluntarily leaving one's employment to undertake studies does not constitute "just cause";

- Jurisprudence is abundant and consistent that the loss of employment as a result of the claimant's priority to his studies is a personal choice that does not amount to just cause; and in such a case, a claimant cannot impose the economic burden of his decision on contributors to the fund;

- The General Division erred and requests that the Appeal Division give the decision that should have given in accordance with section 59(1) of the *DESD Act*.

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

- At the time of his dismissal he was working 2pm to 10pm shifts and weekends. His schooling schedule was going to be from Monday to Thursday from 8am to 2pm. So he was asking to come into work an hour later changing his schedule working weekdays 3pm to 11pm and on weekends. This would have given him the 30+ to 40+ hours weekly to work and continue with his education;

- In the past, the manager would come out with the new schedules every 6 to 8 weeks and then adjust to employee needs;

- Minor adjustments never seemed to be an issue and trading scheduled shifts were allowed pending on managers approval;

- When he approached the manager at the time regarding his schooling, the manager said that he would have to get approval from the board of directors. Which he found to be odd as it seemed unreasonable as they were in Florida and this was new news and no one else had heard of this;

- Also no one was allowed to change shifts with him, even though it was an hour adjustment to his schedule and others wanted the earlier shift, even though we were doing the same work;

- He questioned why some other employees were allowed to do this, as there were three females who would work and go to school;

- There is no reason why he should not have been allowed to work based on other events that had occurred allowing others to do the same;

- They did not give him a response. Nor give him an opportunity to respond and properly negotiate equal opportunities like other employees in his situation;

- He truly did everything on his end to keep his job and needed this job to help pay for living and schooling expenses. He was discriminated, bullied and pushed out of his work place;

- The employer just did not feel it would work out for him and did not want to give him the opportunity, like they had with others, not explaining why.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for questions of mixed fact and law is that of reasonableness – *Blais v. Canada (AG)*, 2011 FCA 320.

[11] The Respondent did not make any representations regarding the applicable standard of review.

[12] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada* (*Attorney general)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness – *Blais v. Canada (AG)*, 2011 FCA 320, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] When it granted the appeal of the Respondent, the General Division made the following findings:

> "[56] The Claimant indicated that he did not quit his employment but rather he was awaiting a response from his employer regarding his request of a potential schedule change. Further the Claimant indicated that he had to contact his employer to get clarification on his potential schedule. At this time the Claimant was informed that he had quit and that his record of employment was sent to Service Canada electronically but not to him.
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> [57] The Tribunal finds that it prefers the evidence of the Claimant as it relates to voluntarily leaving his employment. The Tribunal finds as fact that the Claimant indicated that the employer gave the Claimant 3 day to decide what he wanted to do and the Claimant went into the office 3 days later to inform the employer as to his decision but there was no one there to meet with the Claimant. Therefore the Claimant left his letter for the HR department and awaited their response.
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> [58] The Tribunal further find as fact that the employer did allow for a flexible schedule for a co-worker. This is based on all of the details that the Claimant

> provided regarding the co-workers situation including the university she attended. As a result the Tribunal finds that it was possible for the Claimant to have a genuine expectation that the employer would get back to him with a new shift schedule.
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> [59] The Tribunal further finds that the Claimant was not made aware that he was dismissed until he contacted the HR department inquiring as to whether a new shift was granted to him. The Tribunal finds that it took 4 weeks from the submission of the letter to HR, to the dismissal of the Claimant by the employer as the Claimant was not given the opportunity to respond to HR as he was not notified until after he inquired about his status which was also after the employer had indicated on his ROE that he had quit.
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> [60] As a result of the above findings the Tribunal further finds that the Claimant did not voluntarily leave his employment as he was dismissed by the employer without an opportunity to respond given that the employer did grant another employee the ability to have flexible hours."

[14] With great respect, the decision of the General Division cannot be maintained.

[15] The undisputed evidence before the General Division demonstrates that the Respondent left his employment to go back to school. The employer gave the Respondent a couple of days to think about what he wanted between going back to school or keeping his job. The Respondent chose to go back to school and proposed to the employer a changed in his schedule. The employer did not accept the change of schedule since it considered it would not work out for the Respondent. It was clearly the Respondent, not the employer, who initiated the separation from employment.

[16] In the present case, dismissal is only the sanction of the real cause of the loss of employment, that is, the Respondent's decision to continue his studies under conditions which did not allow him to be available as before.

[17] It is settled law that voluntarily leaving one's employment to undertake studies does not constitute "just cause" under the Act: *Canada (AG) v. King*, 2011 FCA *29*, *Canada (AG) v. MacLeod*, 2010 FCA 201, *Canada (AG) v. Beaulieu*, 2008 FCA 133, *Canada (AG) v. Caron*, 2007 FCA 204, *Canada (AG) v. Côté*, 2006 FCA 219, *Canada (AG) v. Bois*, 2001 FCA 175.

[18] The Federal Court of Appeal has constantly repeated that an employee who voluntarily leaves his employment to take a course which is not authorized by the

Commission certainly has an excellent reason for doing so in personal terms but it is contrary to the very principles underlying the unemployment insurance system for that employee to be able to impose the economic burden of his decision on contributors to the fund.

[19] Consequently, the General Division could not reasonably conclude that the Respondent had just cause for leaving his employment.

[20] For the above reasons, the appeal is allowed.

CONCLUSION

[21] The appeal is granted, the decision of the General Division dated August 1, 2014 is rescinded and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division