Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *N. O. v. Canada Employment Insurance Commission*, 2016 SSTADEI 67

Tribunal File Number: AD-15-173

BETWEEN:

N. O.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

DATE OF HEARING: January 26, 2016

DATE OF DECISION: February 5, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 12, 2015, the Tribunals' General Division found that:

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

[3] The Appellant filed an application for leave to appeal to the Appeal Division on April 8, 2015. Leave to appeal was granted on June 12, 2015.

TYPE OF HEARING

[4] The Tribunal determined that this appeal hearing would be conducted in-person 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 attended the hearing and the Respondent was represented by Manon Richardson.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(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 in finding that the Appellant had 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:

- The Tribunal overlooked the evidence and disregarded that the company failed in its obligations towards its employee, given that the employee was not given any notice regarding wearing his uniform.

- Moreover, it is clearly stated in the regulations that an employee must receive a written notice from their employer before being sent home. However, he never received a written notice and, despite the company's failure in fulfilling this obligation, he was sent home nonetheless.

- The rules did not apply to all employees. This made him feel discriminated against.

- Employees have a timesheet to track what time they come into work and what time they leave. On the day he was sent home, he had punched in when he came

in that morning, but after he was sent home, someone from the office had erased his start time with white out. It was illegal for the employer to do this.

- According to the Respondent, the documentary evidence (the photos and video) that he provided are not credible; however, the opposing party did not submit any evidence that would prove the contrary.

- The Tribunal erred in law given that it granted greater weight to telephone conversations with the company representative, Mr. D. H., that were compiled by the Respondent than to his statement made under oath. After all, he has documentary evidence to support his statements.

- As regards the allowance offered by the company, he admits to having received $200 to buy a uniform for his job, but states that it was impossible to buy several work outfits with that amount of money; a shirt, two pairs of pants, and one pair of specialized footwear (bought at l'Équipeur) come up to $200. It's unfair of the company to expect an employee to buy several outfits and offer them only $200.

- The *Act respecting Labour Standards* states that the employer cannot expect an employee to buy, wear, or maintain a certain item of clothing.

- In the regulations, it is clearly stated that the employer must provide employees with $200 every 18 months so that they can purchase the necessary gear. However, he had worked for the company for around two years and a half and had received this amount only once.

- He was always working under physical and mental pressure. Mr. D. H. would call him several times while he was out making deliveries to see if he was finished so that he could give him more merchandise to deliver.

- Mr. D. H. stated to the Respondent that employees have the necessary gear to unload as well as assistance; however, the Appellant's evidence shows the reality of the situation.

- Another driver was dismissed because he was not able to unload and deliver the merchandise assigned to him.

- He makes many alcohol deliveries without even knowing what he is delivering. One day, after having unloaded pallets that were wrapped in black bags, he realized that these bags contained alcohol, wine to be exact.

- The Quebec laws on the transportation of alcohol are strict and require a permit to do so. He therefore worried about being pulled over by police given that he had no permit or anything to prove his innocence.

- This shows that the employer's practices broke the law and its activities were against regulations.

- He had to miss work to attend Court for a violation that occurred while he was making deliveries. The offence took place while he was making deliveries in an area that prohibits trucks. However, he had no choice but to follow his employer's orders and deliver the merchandise to this address.

- Many of his paychecks contained payment errors. He spoke to Mr. D. H. about this issue to no avail as he was never paid the missing amounts.

- All these incidents show all the physical and mental stress he endured while at work.

- Voluntary leaving was the only reasonable solution in his case.

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

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction.

- The Appellant was in attendance and was able to give his version of the facts. The General Division rendered a decision within its jurisdiction, and the decision is clearly not unreasonable in light of the relevant evidence.

- The General Division had to rule on the issue of whether the claimant had just cause for voluntarily leaving his employment on June 12, 2014, under section 29 of the Act. To do so, the General Division had to determine whether leaving was the claimant's only reasonable alternative, having regard to all the circumstances.

- In this case, the Appellant did not have just cause for leaving his employment. He could have discussed the stressful situation with his employer and he could have seen a doctor. He chose to leave his employment instead of exploring his alternatives.

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division.

- The Tribunal's jurisdiction is limited by subsection 58(1) of the *Department of Employment and Social Development Act*. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, and the decision is unreasonable, the Tribunal must dismiss the appeal.

STANDARDS OF REVIEW

[10] The Appellant made no submissions regarding the applicable standard of review.

[11] The Respondent submits that the applicable standard of review for questions of mixed fact and law is that of reasonableness - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

[12] Although the term "appeal" is used in section 113 of the Act (formerly section 115 of the Act) to describe the procedure introduced before the Appeal Division, the Appeal Division's authority is essentially identical to that previously granted to the Umpires and that which is granted to the Federal Court of Appeal by section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of the word, but rather a circumscribed review - *Canada (A.G.) v. Merrigan*, 2004 FCA 253.

[13] The Tribunal is of the opinion that the Appeal Division should provide a degree of deference to the General Division's decisions that is consistent with the degree of deference provided to the decisions of the former Board of Referees being appealed before the Employment Insurance Umpire.

[14] The Federal Court of Appeal determined that 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 and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] When it dismissed the Appellant's appeal, the General Division closely analyzed each of the reasons for leaving submitted by the Appellant and found the following:

> [*Translation*]
> [52] The Tribunal is of the opinion that, based on several points brought forth by the Claimant, it must also question if the Claimant's voluntary leaving, in light of the combination of the various factors, can constitute the only reasonable alternative on a balance of probabilities.
>
> [53] Nonetheless, as stated above, the Tribunal is of the opinion that the Claimant has a certain responsibility and must undertake certain steps before deciding to leave his job. Even given the points brought up by the Claimant, the Tribunal finds that he could have tried to find another job before quitting this one. And all while keeping in mind the pressures the Claimant was under and the fact that he felt harassed and discriminated against, he should have attempted to discuss the situation with his employer before quitting. The Tribunal is of the opinion that, on a balance of probabilities, the Claimant did not have just cause for leaving his employment.

[16] The Claimants submits in appeal the same reasons that, he maintains, justify his voluntary leaving within the meaning of section 29 of the Act.

[17] The issue of whether someone has just cause for voluntarily leaving an employment depends on whether the leaving was the only reasonable alternative given all the circumstances, particularly several specific circumstances listed in section 29 of the Act.

[18] The General Division's role was not to judge whether the employer's behaviour was acceptable, but rather to determine whether the Appellant's leaving was the only reasonable alternative given all the circumstances.

[19] The Tribunal is not satisfied of the evidence before the General Division and the arguments on appeal that the Appellant's work conditions were so intolerable or dangerous that leaving was his only reasonable alternative.

[20] In fact, the Appellant could have very well kept his job that he had held since November 2012, discussed with the employer the possibility of modifying his work conditions or functions before leaving, and looked for a new job in the meantime. This would have been a reasonable alternative for him and for the Employment Insurance system.

[21] The Tribunal finds that the evidence submitted does not support the grounds of appeal invoked or any other possible ground of appeal. The General Division's decision is based on the evidence before it and is consistent with the legislative provisions and case law.

[22] There is no reason for the Tribunal to intervene.

CONCLUSION

[23] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division