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

[TRANSLATION]

Citation: *S. B. v. Canada Employment Insurance Commission,* 2016 SSTADEI 96

Tribunal File Number: AD-15-188

BETWEEN:

S. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON February 9, 2016

DATE OF DECISION: February 18, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 20, 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 14, 2015. Leave to appeal was granted on June 22, 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 did not attend the hearing, but was represented by Sylvain Bergeron. The Respondent was represented by Luce Nepveu.

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 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:

- From the outset, the General Division showed that it accept neither the employer's nor the Appellant's statements to the effect that this was a dismissal rather than a voluntary leaving.

- The Appellant's direct testimony was not ever cited despite the fact that it gave the file an essential nuance. By reading the analysis section of the General Division decision, it would seem as though the Appellant was not even in attendance.

- The General Division does not explain why it rejects the Appellant's testimony and grants precedence to the testimony of a third party who did not attend the discussion between the employer and the Appellant.

- A direct testimony has more probative value than hearsay from an unsigned statement from a third party.

- Evidence being equal, the claimant should be granted the benefit of the doubt in accordance with subsection 49(2) of the Act.

- The General Division contradicts itself in paragraph 36 when it states that the Claimant should have entered into discussions to reduce his hours, whereas in the evidence presented, the Appellant rightly explained that he had already had this discussion with the employer. This shows blatant bias.

- The evidence file clearly shows that the decision was rendered via a telephone interview in which the agent provides the Commission's point of view and at no point asks the Claimant to provide his own version of the facts.

[9] The Respondent submitted the following arguments to counter 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 Tribunal had before it an issue in which it had to assess the facts. That being said, the courts have repeatedly stated that the Board of Referees (now the General Division) is best placed to assess evidence and credibility and that they cannot substitute their opinion for the General Division’s unless the evidence as a whole could not reasonably support the decision reached.

- Although dismissal for misconduct and voluntary leaving are two distinct and abstract notions, they are still covered by the same provisions of the Act. In either case, the Claimant's behaviour caused him to lose his employment. These two notions are logically related by the fact that both refer to situations in which job loss is the result of a deliberate act on the part of the employee.

- As the legal issue in this case concerns a disqualification under subsection 30(1) of the Act, the Board of Referees' or Umpire's decision can be based on two grounds for disqualification as long as it is supported by the evidence. There is no prejudice to a claimant in so doing because the claimant knows that what is sought is a disqualification from benefits and he is the one who knows the facts that led to the seeking of the disqualification order.

- In this case, it was the Appellant who had requested a change in his work schedule, but he had already made his decision. He decided to enroll in a course.

- The Boards of Referees are not bound by the strict rules of evidence applicable in criminal or civil courts and they may receive and accept hearsay evidence.

- In this case, the facts are not in dispute. Both the Claimant and the employer agree with the fact that the Claimant had asked for his work schedule to be modified so that he could take a course. The employer refused to make the requested changes, and it does not matter that these facts were obtained directly from the employer or from his spouse, who presented herself as his associate and whose name is included in the Record of Employment.

- The role of the Appeal Division is limited to deciding whether the interpretation of the facts by the General Division was reasonably consistent with the evidence in the file.

- The General Division properly assessed the evidence and its decision is well founded.

STANDARDS OF REVIEW

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

The Respondent submits that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness - *Martens v. Canada (A.G.)*, 2008 FCA 240 and that the standard of review applicable to questions of mixed fact and law is 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 - *Chaulk v. Canada (A.G.)*, 2012 FCA 190, *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] The facts on file are relatively simple.

[16] The Appellant worked for Plomberie J. B. & Fils Inc. from June 13, 2013, to October 3, 2014. When he submitted his claim, he stated that he had been dismissed. He enrolled in a construction course. The course runs in the evenings and every other Saturday, so he told his

employer that he would like to finish at 4 p.m. and that he could no longer be on call during the weekends.

[17] The Appellant talked to the owner on Monday morning and at 5 p.m. that Monday he told him that he was dismissing him. The employer was contacted and he stated that the Appellant was dismissed because he no longer wanted to abide by the work schedule. This time restriction did not work for the employer and he decided to put an end to the employment relationship. The Appellant was then contacted. When asked about the possibility of abandoning his training once he found out that the Employer would not accept the modified schedule he requested, the Appellant stated that he could not give up his training as he had been planning for it for a long time, despite the fact that he had not yet told his employer this.

[18] In his appeal, the Appellant argued that the General Division did not take into account that he had offered his employer that he extend his work day up to 4-4:30 p.m. in order to keep his job and that his employer had accepted before changing his mind. He submits that he did not quit his job, but that he was dismissed and that his employer later regretted this decision. He maintains that the General Division did not take into account the nuances in his testimony and that the Respondent had not given him the chance to present his version of the facts.

[19] The Tribunal is of the opinion that the Respondent had plenty of opportunity to present his version of the facts, namely in the questionnaire in support of his claim (GD3-9, GD3-10), during the telephone interview of November 7, 2014 (GD3-19), during the reconsideration telephone interview of December 18, 2014 (GD3-25), and during the hearing before the General Division.

[20] Even while taking into account the nuances presented by the Appellant, the evidence shows that the Appellant had decided a while back to take a training course and that he suggested a change of schedule to his employer, who did not accept.

[21] The employer, after having initially accepted the Appellant's adjusted schedule, had clearly changed his position since he dismissed the Appellant that same day because he

could no longer stick to his work schedule. The fact that the employer had afterwards regretted his decision does not change the fact that the Appellant had in fact lost his job.

[22] The evidence clearly shows that it was the Appellant--not the Employer--who had triggered the job loss by no longer being able to respect his work schedule. The Appellant could have very well kept his job had it not been for his decision to enroll in training.

[23] It is therefore wrong for the Appellant to attempt to shift the issue to who, himself or the Appellant, had taken the initiative. An employee who advises their employer that they are less available than previously is, for all intents and purposes, asking the employer to terminate the employment contract if the employer cannot accommodate the employee's reduced availability. The dismissal is therefore merely the penalty of the actual cause of the job loss, namely the employee's decision to enroll in training in conditions that would render him no longer available. The dismissal is in fact but the logical consequence of the employee's deliberate act and does not change the fact that there was, first and foremost, a voluntary leaving on the employee's part - *Canada (A.G.) v. Côté*, 2006 FCA 219.

[24] Therefore, The General Division was correct in applying the Federal Court of Appeal's consistent case law that states that voluntarily leaving an employment to go back to school or to enroll in training does not constitute "just cause" within the meaning of sections 29 and 30 of the Act - *Canada (A.G.) v. King*, 2011 FCA 29, *Canada (A.G.) v. MacLeod*, 2010 FCA 201, *Canada (A.G.) v. Beaulieu*, 2008 FCA 133, *Canada (A.G.) v. Caron*, 2007 FCA 204, *Canada (A.G.) v. Côté*, 2006 FCA 219, *Canada (A.G.) v. Bois*, 2001 FCA 175.

[25] The Federal Court of Appeals has many times reiterated that it is of the very essence of the Employment Insurance program "that the assured shall not deliberately create or increase the risk" - *Smith v. Canada (A.G.)*, (C.A.), 1997 CanLII 5451. In this case, the Appellant had clearly created the risk and he cannot impose the economic burden of his decision on the Employment Insurance funds.

[26] 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.

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

CONCLUSION

[28] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division