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

Citation: *M. J. v. Canada Employment Insurance Commission*, 2016 SSTADEI 115

Date: February 27, 2016

File number: AD-13-415

APPEAL DIVISION

Between:

M. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

M. M. of Ottawa

Added Party

Decision by: Shu-Tai Cheng, Member, Appeal Division

Heard by Teleconference

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	M. J.
Representative for the Appellant	George Radanovics
Representative for the Respondent (Commission)	Luce Nepveu
Counsel for the Added Party (Employer)	E. A.

INTRODUCTION

[1] On March 5, 2013 the Board of Referees (Board) determined that the claimant (Appellant) did not have just cause for voluntarily leaving his employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). The Appellant attended the in-person Board hearing. A representative of the Employer was present. No one attended on behalf of the Commission. The parties were not represented by legal counsel.

[2] A "Notice of Appeal to the Umpire" to appeal the Board decision was filed on April 9, 2013. It was treated as an application for leave to appeal at the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) and leave to appeal was granted on July 3, 2015.

[3] Attached to the Notice of Appeal to the Umpire were the following documents, which were not in the record before the Board or presented as evidence to the Board:

a) A typed statement signed by Benjamin van dem Ham of March 17, 2013;

b) A typed statement signed by Alex Leidensdorf; and

c) A written, signed statement by Joshua Taylor, dated March 26, 2013.

[4] This appeal proceeded by Teleconference for the following reasons:

a) The complexity of the issues under appeal;

b) The fact that the appellant or other parties are represented; and

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[5] Whether the Appeal Division can consider evidence not adduced before the Board, in the form of written statements.

[6] Whether the Board failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction 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.

[7] Whether the AD should dismiss the appeal, give the decision that the Board should have given, refer the case to the General Division for reconsideration or confirm, rescind or vary the decision of the Board.

THE LAW

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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, 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.

[9] For our purposes, the decision of the Board is considered to be a decision of the General Division.

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons which fell into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(a) and (c) of the DESD Act.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division.

[12] Section 120 of the EI Act, as it was prior to the 2013 amendments, stated:

> 120. (1) The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[13] Paragraph 66(1)(a) DESD Act currently states:

> 66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (*a*) in the case of a decision relating to the ***Employment Insurance Act***, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.

[14] Subsection 66(4) of the DESD Act provides that the AD can only rescind or amend an AD decision based on new facts. Sections 45 to 49 of the *Social Service Tribunal Regulations* provide a process for rescind or amend applications.

SUBMISSIONS

[15] The Appellant submitted that:

a) Neither he nor his Representative was aware that they needed to have other people employed by the same Employer attend at the Board hearing to testify;
b) They expected that the person who caused the problems at the workplace would be present at the Board hearing;

c) After the Board hearing, he obtained statements from three previous employees, which were filed with the application for leave to appeal;

d) An Ontario Labour Relations Board (OLRB) matter was pending the appeal of the Board decision;

e) An Ontario Human Rights Commission (OHRC) complaint was filed after the Board hearing;

f) The Board listened to what they wanted to hear and accepted what they wanted, whether it was hearsay or not, but there were things that the Appellant could not say because it was hearsay; and

g) The Board hearing was not recorded.

[16] The Respondent submitted that:

a) The Appellant cannot present new evidence before the Appeal Division, unless it relates to "new facts" as defined by the legislation and jurisprudence;

b) To be "new facts", the facts must have happened after the Board hearing and could not have been discovered before the Board hearing;

c) Before the Board rendered its decision, the Appellant could have requested more time to obtain witness statements; after the Board rendered its decision, the Appellant could have brought an application for revision of that decision;

d) The Federal Court of Appeal jurisprudence on exceptional circumstances in which new evidence may be submitted on appeal is limited to misconduct cases where there was a settlement agreement which contradicts a Board finding of misconduct; this matter is not a misconduct case and there is no settlement agreement;

e) In the alternative, if the new evidence is determined to be "new facts", the matter should be sent to the General Division (GD) of the Tribunal;

f) The main issue is whether the Appellant quit his job, and there is no dispute that he did quit his job;

g) The Appellant had reasonable alternatives to quitting his job when he did; and

h) The Appellant did not have just cause for voluntarily leaving his employment.

[17] The Employer submitted:

a) The Appellant had raised the work environment issue during the pre-hearing period while the matter was before the Board;

b) He did not ask to examine people from his previous workplace, and he did not tell the Board that he wanted to question other employees of the Employer;

c) No one was represented by a lawyer at the Board hearing and no one was restricted from asking questions or giving evidence;

d) There was a representative from the Employer present at the hearing who participated willingly;

e) The Appellant was not denied a fair hearing or natural justice;

f) There is nothing in the Board decision which the Appellant is asserting to be an error of fact;

g) There is no error of fact or of mixed fact and law;

h) The Appellant rethought the case after an unfavourable Board decision and then “retooled” to get over the obstacles in the Board decision;

i) The Appellant is not presenting something new; the workplace issue was surfaced before the Board hearing; the OLRB application and the OHRC complaint followed promptly after the Board decision; and

j) The statements being presented on appeal are not “new facts”, and they do not merit the application of an exception to accept new evidence at this stage of the appeal.

STANDARD OF REVIEW

[18] The Federal Court of Appeal has determined, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[19] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal recently suggested that this approach is not appropriate when the Appeal Division of the Tribunal is reviewing appeals of employment insurance decisions rendered by the General Division.

[20] I am uncertain how to reconcile this seeming discrepancy. Since the current matter relates to an appeal from a Board of Referees decision, and not from a General Division decision, I will proceed on the basis that the Umpires did: that the applicable standard of review is dependent upon the nature of the alleged errors involved.

[21] Here a breach of natural justice and errors of fact are alleged.

ANALYSIS

New Evidence

[22] The Tribunal must first determine whether the new evidence that the Appellant wishes to adduce can be received by the AD. There is no dispute that the new evidence (written statements) was not adduced before the Board.

[23] Federal Court of Appeal decisions have held that:

a) Umpires should never receive new evidence: *Canada (AG) v. Taylor*, [1991] F.C.J. No. 508, *Canada (AG) v. Hamilton*, [1995] F.C.J. No. 1230, *Brien v. Canada (EIC)*, [1997]

F.C.J. No. 492, *Canada (AG) v. Merrigan*, 2004 FCA 253, and *Karelia v. Canada (MHRSD)*, 2012 FCA 140;

b) Umpires were allowed to receive new evidence as long as it was "new facts" under (former) section 120 of the EI Act: *Canada (MEI) v. Bartone*, [1989] F.C.J. No. 21, *Canada (AG) v. Wile*, [1994] F.C.J. No. 1852, *Canada (AG) v. Chan*, [1994] F.C.J. No. 1916;

c) Umpires could consider new evidence that was not "new facts" in relation to a breach of natural justice: *Velez v. Canada (AG)*, 2002 FCA 343; and

d) Umpires could, in an exceptional case, consider new evidence that was not "new facts", on the basis of former section 120 of the EI Act: *Dubois v. Canada (EIC)*, [1988] F.C.J. No. 768, and *Canada v. Courchene*, 2007 FCA 183.

[24] In *Rodger v. Canada (AG)*, 2013 FCA 222, the Federal Court of Appeal was faced with an appellant who tried to adduce new evidence before the Umpire, tried to adduce the same new evidence as new facts on the basis of a rescind or amend application of the original Umpire's decision and later tried to adduce new evidence before the Federal Court of Appeal. The Federal Court of Appeal decision held:

> 26 Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. R.*, 2003 FCA 317, [2003] 4 C.T.C. 206 (F.C.A.) at paragraph 5). This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.
> 27 As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.
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> 43 As noted in *Canada (Attorney General) v. Chan* (1994), 178 N.R. 372 (Fed. C.A.) at paragraph 10 (*Chan*), reconsideration under this section of the *Act* should

> remain a “rare commodity”, and an Umpire should be careful not to let the process be abused “by careless or ill-advised claimants”. As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[25] Pursuant to the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, ss. 266- 267, the Office of the Umpire was been replaced by the AD of the Tribunal.

[26] To determine whether the AD can receive the new evidence requires a four part analysis, as follows:

a) Is the AD able to rescind or amend a decision of the Board?

b) Is the new evidence “new facts”?

c) If the new evidence is not “new facts”, is the new evidence in relation to a breach of natural justice?

d) If the new evidence is not “new facts”, are there other exceptional circumstances such as in the *Dubois* or *Courchene* cases?

(a) Is the AD able to rescind or amend a decision of the Board?

[27] Paragraph 66(1)(a) of the DESD Act is similar but not identical to former section 120 of the EI Act in that both state that a decision may be rescinded or amended “if new facts are presented” or if the Tribunal (previously Commission, Board or Umpire) is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[28] They differ in that former section 120 (EI Act) allowed for the Commission, the Board or the Umpire to rescind or amend a decision “in any particular claim for benefit” whereas current subsection 66(4) (DESD Act) states that the Tribunal may rescind or amend a decision given by it and a decision is rescinded or amended by the same Division that made it.

[29] The AD may rescind or amend a decision made by it but may not rescind or amend a decision of the General Division. Decisions of the Board are considered to be decisions of the General Division. Therefore, the AD may not rescind or amend a decision of the Board. An

application to rescind or amend a decision of the Board would need to be brought to the General Division of the Tribunal.

[30] Given that there is a one year time limit within which an application to rescind or amend must be made, it may be too late for the Appellant to bring an application before the General Division. In the circumstances, I will discuss the remaining questions despite my conclusion that the AD cannot rescind or amend a decision of the Board.

(b) Is the new evidence "new facts"?

[31] In the *Chan* case, the Federal Court of Appeal stated that reconsidering a decision on the basis of new facts should be a rare occurrence:

> ¶ 11 Reconsideration of a decision by an umpire on the basis of "new facts" having been submitted is and should remain a rare commodity. Unemployment insurance claimants are given an exceptionally large number of opportunities to challenge the decisions affecting them and umpires should be careful not to let the reconsideration process be abused by careless or ill-advised claimants. (…)

[32] The new evidence that the Appellant seeks to adduce is in the form of written statements of previous employees of the Employer. The Appellant relies on these statements to show that he and other employees were mistreated. He submits that he was not aware that he needed to have witnesses attend the Board hearing to testify or that the Employer would not have his former immediate manager present at the hearing. He only realized after the Board's decision that having other previous employees give evidence might be helpful to his case.

[33] The issue of mistreatment by management was raised before the Board and during the hearing. The Appellant had given evidence before the Board (and in the Board docket) that he was mistreated by management of the Employer. This was referred to in the Board's decision at pages 1, 2, 4, 5 and 6. The Board concluded, at page 6 of its decision, that it was not convinced that the Appellant had shown evidence of being berated and demeaned, or having an antagonistic relationship with the employer.

[34] There is a difference between new facts and new evidence supporting facts already known. As stated in *Chan, supra*: "A different version of facts already known to the claimant,

mere afterthoughts or the sudden realization of the consequences of acts done in the past are not new facts."

[35] Evidence available at the time of the hearing before the Board, but not produced, cannot be considered as a new fact: *Velez, supra*.

[36] "New facts" must have occurred after the decision was rendered or occurred prior to the decision but could not have been ascertained by diligence: *Chan, supra*.

[37] The question is not whether the Appellant was aware that the new evidence had to be produced at the Board hearing but whether the Appellant acting diligently could have produced this evidence: *Canada (AG) v. Hines* 2011 FCA 252.

[38] Here, the new evidence which the Appellant seeks to adduce (in the form of written statements) go to supporting facts already known and could have been produced at the Board hearing.

[39] The written statements which the Appellant seeks to adduce on appeal to the AD do not meet the legal test of "new facts". Therefore, they cannot be accepted by the AD as such.

(c) *Is the new evidence in relation to a breach of natural justice?*

[40] The Appellant relied on a breach of natural justice, namely the lack of opportunity to be heard, as a ground of appeal, and leave to appeal was granted, in part, on this basis.

[41] At the AD hearing, the Appellant's Representative specified that the lack of opportunity to be heard was that the Board listened to only parts of the evidence and it categorized some of the Appellant's evidence as hearsay but did not do the same in relation to the Employer's evidence. The evidence which was hearsay and accepted by the Board related to the Employer's evidence on the Appellant's absences from the workplace and the vehicle damage that the Appellant was asked to repay.

[42] The Respondent submitted that the Board was the trier of fact and its role was to weigh the evidence and make findings based on its consideration of the evidence. In this process, the Board can decide what evidence to keep and not to keep.

[43] The Added Party submitted that the Board decision did not reject any evidence on the basis of hearsay and that the evidence accepted about the vehicle damage was based on admitted facts. What the Appellant may have wanted to adduce at the Board's hearing, in relation to other employees' relationships with the Employer, was not an admitted fact.

[44] In any event, the Appellant's Representative was clear about the new evidence: it did not occur to the Appellant at the Board hearing (or before) to ask other people to testify at the hearing.

[45] A breach of natural justice must be brought up at the earliest practicable opportunity and if no objection is made at the hearing, the party alleging the breach is taken to have provided an implied waiver of any perceived breach of unfairness: *Benitez et al* v. *Minister of Citizenship and Immigration*, 2006 FC 461, at paras. 204-220. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection: *Ibid.* at para 221. However, the doctrine of waiver does not preclude an applicant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of, for example, badgering in cross-examination: *Ibid.* at para 222.

[46] The Appellant did not allege that there was a breach of natural justice during the Board hearing, at any point. The Appellant first raised allegations of breach of natural justice in his Notice of Appeal to the Umpire.

[47] I find that the Appellant did not bring up a breach of natural justice at the earliest practical opportunity. However, the doctrine of waiver does not preclude the Appellant from arguing that the manner in which the hearing was conducted breached the duty of fairness by reason of badgering in cross-examination or other similar circumstance. By the Appellant's description of the Board hearing, there was no evidence of badgering of the Appellant during the hearing.

[48] While the Appellant did not raise any fairness issues at the Board hearing and, therefore, can be taken to have waived any perceived breach of unfairness, the Tribunal will discuss the alleged breach of natural justice.

[49] The Appellant alleges that he was denied the right to fully present his case. Specifically, he asserts that testimony that he sought to give was categorized as hearsay.

[50] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22.

[51] I have reviewed in detail the appeal file before the Board, and it is clear that the Board had the documentary file (which included the Appellant's application, questionnaires and other statements, his request for reconsideration, and documents related to interviews of the Employer). The Board also summarized, in its written decision, the Appellant's testimony about his employment history with the Employer and his reasons for leaving that employment. The opportunity for the Appellant to present his case did not depend solely on oral testimony at the Board hearing.

[52] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[53] Even taking the Appellant's statements about the Board's comments about hearsay - as described in paragraph 41 above - as proved, the evidence falls short of showing that the Board did not give the Appellant a sufficient opportunity to be heard or that the Board was prejudiced or biased. While the Appellant may have had the impression that he was not being heard, the evidence does not demonstrate that the conduct of the Board derogated from the standards of the right to be heard and the right to an impartial hearing.

[54] For the reasons given above, I conclude that the Board did not fail to observe a principle of natural justice by not according the Appellant a fair hearing.

[55] Therefore, the new evidence that the Appellant seeks to adduce is not in relation to a breach of natural justice and cannot be received by the AD under the *Velez* exception.

(d) *Are there other exceptional circumstances such in the Dubois or Courchene cases?*

[56] In *Canada (AG) v. Courchene*, 2007 FCA 183, the Federal Court of Appeal decided on an application for judicial review based on the Umpire having ruled that Minutes of Settlement related to a loss of employment were admissible as "new facts" or a material fact that was unknown to the Board of Referees at the time of its decision under (former) section 120 of the EI Act. The Court stated that:

> ¶ 3 The applicant argues that the Minutes of Settlement are inadmissible before the Umpire since they existed prior to the hearing of the Board. Whether the Minutes of Settlement constituted "new facts" or a material fact that was unknown to the Board of Referees at the time of their decision, the decision of the Umpire to admit the Minutes of Settlement into evidence was permissible under section 120 of the Act. In relation to the appropriate approach to be accorded to the admission of new evidence by an Umpire, we
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> would refer to the decision of this Court in *Gilles Dubois v. Canada Employment Insurance Commission and Attorney General of Canada*, [1998] F.C.J. No. 768, 231 N.R. 119 at 129- 121, in which Marceau J. states:
>
> > Suffice it to say that the Umpire refused to admit the new evidence based on a strict application of the principles established by the courts holding that on appeal or judicial review, new evidence implies that either the party involved was unaware of the evidence or it was impossible to produce the evidence, at the time of the hearing at first instance.
> > . . .
> > We must express serious reservations about the application by an Umpire of formal rules developed for the smooth functioning of the courts. The Umpire is one level in the process of the administration of the **Unemployment Insurance Act**, an eminently social piece of legislation, where claimants usually represent themselves and where the boards of referees sitting a first instance have no legal training. The principles of justice suggest that submissions by claimants should be accepted very liberally at all levels; in fact this very liberal approach is required by s. 86 [now section 120] of the Act.

On this basis, the Federal Court of Appeal concluded that the Umpire's decision in *Courchene* was reasonable.

[57] The Respondent argued at the Appeal hearing that *Courchene* is distinguishable because it related to misconduct and a settlement agreement between the claimant and the employer which contradicted a finding of misconduct on the part of the claimant.

[58] In the current situation, it is agreed that the Appellant quit his job with the Employer. Misconduct was not the reason for his job separation. There was no settlement agreement between the Appellant and the Added Party.

[59] In addition, the *Dubois* and *Courchene* decisions were decided under former section 120 of the EI Act, within a regime that permitted an Umpire to rescind or amend a decision of the Board. As stated above, the AD cannot rescind or amend a decision of the GD or the Board.

Conclusion on New Evidence

[60] After consideration of the Federal Court of Appeal jurisprudence on new evidence at this stage of the proceedings, I conclude that the AD cannot receive the new evidence of the Appellant.

Breach of Natural Justice

[61] The Appellant relied, in this Appeal, on a breach of natural justice, namely the lack of opportunity to be heard by categorizing some of the evidence that the Appellant sought to give as hearsay. However, I concluded in paragraphs [40] to [55], above, that the Board did not fail to observe a principle of natural justice in relation to weighing the evidence and make findings based on its consideration of the evidence.

[62] The Appellant also argued that the Board did not record its hearing. No substantive arguments were made on this point, but the suggestion was that this is a reviewable error. Therefore, I will consider whether the Board failed to observe a principle of natural justice because a recording of the hearing was not made.

[63] The Supreme Court of Canada (SCC), in *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels) [1997] 1 S.C.R. 795*, determined that the failure to record is not necessarily a breach of natural justice if there is no legal obligation to record. The SCC held that in the absence of a legal obligation to record, courts must determine whether the file record allows it to properly dispose of the application. If so, the unavailability of the recorded hearing will not violate the rules of natural justice. The SCC concluded that the evidence, in conjunction with the application, provided a more than adequate record of reviewing the factual findings of the decision-maker to determine whether the respondent's claim was grounded.

[64] The Board did not have a legal obligation to record its hearings. The Notice of Hearing which each party to the hearing received indicated that the claimant could request that the hearing be recorded. The Appellant did not make a request.

[65] The Federal Court of Appeal, in *Canada (AG) v. Scott* 2008 FCA 145, held that the Umpire could not use the unavailability of the tapes as a ground for setting aside a decision of the Board of Referees unless it could be shown that the absence effectively denied the respondent her right of appeal before the Umpire. Since that had not been established, the FCA quashed the Umpire's decision.

[66] In *Patry v. Canada (AG)* 2007 FCA 301, the Board of Referees failed to provide an audio recording of the hearing. The Umpire ruled that the failure to provide a tape recording did not invalidate the proceedings. The FCA confirmed the Umpire's decision.

[67] Based on the jurisprudence cited above, failure to record the Board hearing is not, in and of itself, a breach of natural justice.

[68] The Appellant did not argue that absence of a recording effectively denied him his right of appeal or that the appeal record was not adequate for the AD to determine whether his appeal was grounded.

[69] The new evidence sought to be adduced did not relate to the absence of a recording (or the consequences of this) but rather to the issue of how the Appellant was treated by the Employer.

[70] I find that the appeal record is adequate for me to review the findings of the Board, to determine whether the Appellant's appeal is grounded and to properly decide on this appeal. Therefore, the failure to record the Board hearing is not a breach of natural justice.

Errors of Fact or of Mixed Fact and Law

[71] The Appellant argued, in his Notice of Appeal, that the Board based its decision on errors, in particular the findings related to the Employer's treatment of him in the workplace.

[72] For a Board decision to be reviewable because of an erroneous finding of fact, the Board must have 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.

[73] In terms of the Appellant's evidence and argument before the Board in relation to mistreatment in the workplace, the Board decision noted, at page 9 and 10:

a) "The claimant stated that he was being berated and demeaned … The example he provided … seems to be fairly benign";

b) "The Board is not convinced that the claimant has shown evidence of being berated and demeaned, or having an antagonistic relationship with the employer"; and

c) "The Board considers that the claimant was generally unhappy in his employment and his personal progress ...

[74] In arriving at each of these findings, the Board did take into consideration the material before it. It considered and referred to evidence in the docket and testimony at the hearing, in addition to the submissions of the parties. These findings were not made in a perverse or capricious manner.

[75] The Board applied the correct legal test, namely whether or not the claimant had other reasonable alternatives to quitting his employment.

[76] The Federal Court of Appeal stated the following in *Guay v. Canada (A.G.)*, 1997 CanLII 5521 (FCA):

> "In any event, it is the Board of Referees - the pivot of the entire system put in place by the Act for the purpose of verifying and interpreting the facts - that must make this assessment. The Commission therefore maintains the Board's decision is entirely compatible with the evidence before it; and that the claimant has not shown that his decision to voluntarily leave his employment constituted the only reasonable alternative under the circumstances."

[77] In the current Appeal, while the Appellant asserts errors in the Board's decision, he was unable to point to any reviewable error as set out in subsection 58(1) of the DESD Act. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo*.

[78] Considering the submissions of the parties, my review of the Board's decision and the appeal file, I find that the Board's decision in relation to the Appellant's voluntarily leaving his employment was reasonable.

CONCLUSION

[79] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division