



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. M. B.*, 2016 SSTADEI 144

Tribunal File Number: AD-13-1141

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARING: Via teleconference

DATE OF DECISION: March 15, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative: Julie Meilleur

INTRODUCTION

[1] On March 30, 2013, the Board of Referees determined that Employment Insurance benefits were payable.

[2] An application for leave to appeal to the Appeal Division was filed on May 21, 2013, and leave to appeal was granted on June 16, 2015.

[3] This appeal was heard via teleconference for the following reasons:

- a) The complexity of the issue or issues;
- b) The need to proceed as informally and quickly as possible in accordance with the criteria in the Social Security Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[4] The hearing was scheduled for 10 a.m. on October 1, 2015. Neither the Respondent nor the employer attended the hearing. The hearing was adjourned because the Tribunal was not sure that the Respondent had received the notice of hearing. The parties were given notice that a new hearing would take place at 11:30 a.m. on November 26, 2015. The Tribunal received confirmation from Canada Post that the Respondent had received the second notice of hearing by messenger. When the Respondent failed to attend the hearing, the Appeal Division Member remained on the telephone line for 20 minutes before finally proceeding in the Respondent's absence.

ISSUE

[5] The Tribunal must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the matter back to the General Division, or confirm, rescind, or vary the decision.

SUBMISSIONS

[6] In support of the appeal, the Appellant submits that the Board of Referees erred in law and in fact in making its decision.

[7] The Respondent did not file any submissions.

THE LAW AND ANALYSIS

Standard of Review

[8] The Appellant made the following submissions regarding the standard of review:

- a) The interpretation of the term "misconduct" involves a question of law and the applicable standard of review is correctness.
- b) The question of whether the Claimant lost their employment for misconduct is a question of mixed fact and law. The standard of review is reasonableness.

[9] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision on questions of jurisdiction or law is correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, cited by *Atkinson v. Canada (A.G.)*, 2013 FCA 187. The standard of review applicable to questions of mixed fact and law is reasonableness—*Atkinson v. Canada (A.G.)*, 2013 FCA 187.

[10] However, in *Canada (A.G.) v. Paradis*; *Canada (A.G.) 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.

[11] This seeming discrepancy needs to be resolved; however, the present case concerns an appeal of a Board of Referees decision, not a General Division decision. For these reasons, I will proceed on the same basis that the Umpires did: that the applicable standard of review is dependent upon the nature of the alleged errors involved.

Legislative Provisions

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

- (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.

[13] For the purposes of this analysis, a decision of the Board of Referees is considered to be a decision of the General Division.

[14] The Tribunal's Appeal Division must be able to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is an error of law, fact or jurisdiction that may lead to the setting aside of the decision under review.

Decision of the Board of Referees

[15] The Board of Referees' decision notes:

[Translation]

FINDING OF FACT AND APPLYING THE ACT

Although misconduct is not defined in the Act, case law defines it as: In order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance. (TUCKER A-381-85)

The Board of Referees must decide whether the Claimant's alleged actions constitute misconduct.

The employer states that the Claimant was not available for work. The Claimant has denied everything and has shown in his testimony that he was available for work. He states that the "alleged acts" were misinterpreted and they do not constitute misconduct.

The Board of Referees must decide between the two completely contradictory versions based on the evidence presented. The Board of Referees is of the opinion that the employer had no reason to accuse the Claimant of not being available whereas he was available.

There was no misconduct as far as the Board of Referees is concerned. The Claimant's alleged acts were not willful and did not stem from such a careless or negligent nature that one could say that he wilfully decided not to take into account the repercussions of these acts on his job performance. (TUCKER A-381-85)

The Claimant's testimony was very credible. He answered every question, even the difficult ones, by clearly establishing the facts. His honesty and integrity throughout the hearing helped to establish the credibility granted to him by the Board of Referees.

The Board of Referees underscored that the Commission's decision was appropriate based on the information known at the time. However, at the hearing, the Claimant introduced new evidence, in that he provided credible explanations and justifications, which the Board took into account. The Claimant stated that his absence on Wednesday was initially approved by his supervisor, so he therefore did not work the Wednesday following this approval. However, at the end of that week, a leave on Wednesday was rejected. He therefore worked the following Wednesday, as shown by the pay stub he submitted to the Board of Referees (Exhibit 18). Nonetheless, the following Friday, he was dismissed without cause.

The Board of Referees must also determine if the Claimant was available for work. Was he capable of working and available to do it? Did he make any efforts to find a job? Did he impose conditions with regard to employment?

The members of the Board of Referees believe that the claimant was capable of working, that he had made efforts to do so, and that he did not impose any specific conditions.

The members of the Board of Referees took into account his work/study history and it complies with the requirements of case law, which has clearly established that "a student who, over the years, has established a history of holding a regular job while going to school would be eligible for Employment Insurance benefits"(A-719-91). This was the Claimant's case.

The members of the Board of Referees find that the Claimant's evidence is preponderant, complies the Act, and is supported by case law.

Misconduct

[16] The Appellant submits that the Board of Referees did not correctly apply the legal test for misconduct to all the facts in this case. The legal test for misconduct consists of determining whether the claimant's alleged act was willful, or at least of such a careless or negligent nature that it affected their job performance and caused prejudice to the employer. The Commission submits that the Board's decision was unreasonable given the facts on file. The Commission states that in this case, the undisputed evidence shows that the Claimant was dismissed for refusal to work. The Claimant did not want to work on Wednesday so that he could have a day off between his work shifts. The employer then offered the Claimant another position, which he declined because the schedule conflicted with his course schedule. By refusing the work offered to him by the employer, the Claimant put himself in a position in which he could lose his job.

Availability

[17] The Appellant submits that:

- a) Availability is determined by assessing the following three factors: the sincere desire to return to the labour market as soon as suitable work is offered, the expression of such desire through job search efforts, and not setting personal conditions that unduly limit the chances of returning to the labour market.

- b) The Board of Referees' decision with regard to availability is unreasonable in light of the facts on file. The Claimant had a day job with a 7 a.m. to 3 p.m. schedule. His classes started at 3:30 p.m. He wanted to continue working, but only on Monday, Tuesday, Thursday, and Friday. He no longer wished to work on Wednesday because the workload was getting heavy and he wanted a break between his work shifts. According to the facts on file, the Claimant did not prove that he was available because he had already held a job and had made the personal choice of reducing his availability. The employer had then offered him another position, and the Claimant chose to decline the offer because of his training course and because he could not work during the evenings.

- c) At the hearing, the Claimant stated that he would have ended studies in favour of a job because, in his view, a job is more important than school. However, the Claimant had declined the employer's job offer because it conflicted with his studies.

Error of the Board of Referees

[18] As for the legal test relating to misconduct, the Board of Referees cited *Tucker*, [1986] 2 F.C. 329 (C.A.). The Appellant cited the same case in its submissions.

[19] The Board of Referees found that: "The Claimant's alleged acts were not willful and did not stem from such a careless or negligent nature that one could say that he wilfully decided not to take into account the repercussions of these acts on his job performance."

[20] The Respondent was dismissed for having refused work. This fact is undisputed. However, the Board of Referees accepted that the Respondent's leave had initially been approved by his supervisor, and at the end of the week, leave on Wednesday was declined, and he therefore worked the following Wednesday. The following Friday, he was dismissed; the Board of Referees determined that it was "without cause". Therefore, there is a contradiction between an undisputed fact and the Board of Referees' finding on this question of fact.

[21] As regards the Respondent's availability, the Board of referees cited *Landry* (A-719-91 and (1992), 152 N.R. 121) for the proposition that "a student who, over the years, has established a history of holding a regular job while going to school could be eligible for Employment Insurance benefits".

[22] However, availability is determined by assessing the following three factors: the sincere desire to return to the labour market as soon as suitable work is offered, the expression of such desire through job search efforts, and not setting personal conditions that unduly limit the chances of returning to the labour market: *Faucher* (A-56-96/A-57-96 in appeal of CUB 30987 and CUB 380988).

[23] The Federal Court of Appeal has confirmed that there is a presumption of non-availability when a claimant is engaged in full-time studies and that this presumption may be rebutted only by exceptional circumstances: *Landry, supra*.

[24] When the claimant has a work history showing that he or she held regular employment while studying, it is possible to rebut the presumption of non-availability: *Canada (A.G.) v. Gagnon*, 2005 FCA 321.

[25] Nonetheless, the claimant's main intention must be to find and accept suitable full-time employment, to make serious efforts to find employment, and be willing to accept such employment even if it required changes to schooling: *Canada (A.G.) v. Wang*, 2008 FCA 112.

[26] In this case, the Claimant had a day job with a 7 a.m. to 3 p.m. schedule. His classes started at 3:30 p.m. He wanted to continue working, but only on Monday, Tuesday, Thursday, and Friday. He no longer wished to work on Wednesday because the workload was getting heavy and he wanted a break between his work shifts. The employer had then offered him another position, and the Claimant chose to decline the offer because of his training course and because he could not work during the evenings. At the hearing, the Claimant stated that he would have ended his studies in favour of a job because, in his view, a job is more important than school. However, the Claimant had declined the employer's job offer because it conflicted with his studies.

[27] The Respondent showed that he was not willing to accept suitable full-time employment. He could not, therefore, refute the presumption on non-availability. The Board of Referees' conclusion that the situation complied with the requirements of case law regarding availability was an error in law.

[28] An error of law is reviewable on the standard of correctness. The correct decision would have been to dismiss the appeal at the level of the Board of Referees.

[29] Given that the Board of Referees erred in law, and considering the parties' submissions, my review of the Board of Referees' decision and the appeal file, I allow the appeal. Further, because this matter does not require new evidence or a hearing before the General Division, I am issuing the decision that the Board should have issued.

CONCLUSION

[30] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division