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

Citation: *Canada Employment Insurance Commission v. P. B.*, 2016 SSTADEI 155

Tribunal File Number: AD-13-1144

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

P. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON December 17, 2015

DATE OF DECISION: March 18, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant (Commission)	Carole Robillard
Respondent	P. B.

INTRODUCTION

[1] On April 2, 2013 the Board of Referees (Board) allowed the Respondent's appeal where the Canada Employment Insurance Commission (Commission) had determined that he (the claimant) had voluntarily left his employment without just cause and had imposed an indefinite disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). The Respondent attended the in-person Board hearing. No one attended on behalf of the Commission.

[2] An application for leave to appeal the Board decision was filed with the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) on April 9, 2013. Leave to appeal was granted on July 29, 2015 on the ground that there may be an error in the finding of facts, made in a perverse or capricious manner or without regard for the material before it, in relation to "no reasonable alternative".

[3] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal; and

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

ISSUES

[4] Whether the Board 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 in relation “no reasonable alternative”.

[5] 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

[6] 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.

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

[8] 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 paragraph 58(1)(c) of the DESD Act.

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

SUBMISSIONS

[10] The Appellant submitted that:

a) The Board erred in law when it relied solely on the claimant's (Respondent in this appeal) testimony at the hearing that he quit his job due to a "significant change in his work duties"; in so doing, it failed to base its decision on all the relevant evidence and to resolve contradictions in the claimant's reasons for leaving;

b) It was unreasonable for the Board to find that the claimant proved just cause in the circumstances associated with "significant changes in work duties" under paragraph 29(c)(ix) EI Act as there was no employment contract in evidence to support the claimant's allegation that his employment contract was modified from sales clerk to manager; and that the change in duties was significant;

c) A proper application of the legal test for just cause under subsection 29(c) EI Act to the facts of this case leads to the reasonable conclusion that the claimant had the reasonable alternative to remain employed until he found more suitable employment;

d) The Board should have looked at what reasonable alternatives were before finding that the claimant had good cause for leaving (due to the change of work duties); and

e) Therefore, the Board erred in allowing the appeal on the issue of voluntary leaving.

[11] The Respondent submitted that:

a) The Board hearing was not recorded;

b) There was evidence given at the Board hearing that the Commission did not consider or know about, which relates to the issues that the Commission argues were wrong in the Board decision;

c) The Board decision does not summarize all of the testimony given at the hearing; and

d) He does not want the matter to go back for another hearing before the General Division.

[12] The AD of the Tribunal granted leave to appeal on only the issue of whether there was an error in the finding of facts, made in a perverse or capricious manner or without regard for the material before it, in relation to "no reasonable alternative".

[13] The leave to appeal decision specifically refused leave on the grounds that the Board erred by basing its finding on “significant changes in work duties”. Specifically, the leave to appeal decision stated:

> [22] In terms of “significant changes in work duties”, the Board did make findings of fact. It found that:
>
> > … the claimant left his employment on September 29, 2011 because he did not want to accept the only position available (Manager) and the season was ending, meaning that his retail clerk position would be eliminated, and the renovations he had been working on were completed.
> >
> > … the claimant had just cause for voluntarily leaving his employment on September 29, 2011 because of a significant change in work duties. It is understandable that he would choose not to take the job as "Manager," a commitment for life.
>
> [23] The Applicant submits that the Board erred by basing its finding of “significant changes in work duties” solely on the claimant’s testimony at the hearing, as there was no evidence to support the claimant’s assertion. This argument presumes that the claimant’s testimonial evidence must be supported by other evidence in order for the Board to properly base a finding of fact on the testimony. The Applicant does not point to any case authorities to support this submission or provide any substantiation for this presumption. Also, had the Applicant attended the hearing, it could have cross-examined the claimant on his testimony. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

[14] Therefore, only the submissions in relation to “no reasonable alternative” will be considered on this appeal, despite the Appellant’s efforts to argue that the Respondent did not have a significant change to his work duties.

STANDARD OF REVIEW

[15] 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.

[16] 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.

[17] 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.

[18] Here an error of fact or of fact and law is alleged.

ANALYSIS

No recording of the Board hearing

[19] The Respondent 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.

[20] 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.

[21] 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 Respondent made such a request, and the Board decision indicates that the hearing was audio recorded.

[22] However, the Respondent did not know that he needed to request a copy of the audio recording and he thought that it was available in the appeal file. He realized that this was not the case when the appeal hearing was started on October 29, 2015. An adjournment was granted to allow for the Respondent to request a copy of the audio recording and to review it. The hearing was adjourned to December 1, 2015 but did not resume on that date, because the audio recording had not been provided. On December 14, 2015, the Commission advised that it "made several attempts to obtain a copy of the now defunct BOR hearing audio with no success".

[23] The Appellant requested that the AD make a determination on whether in the absence of the audio recording, the facts on the record allow the AD to give the decision the Board should have given or if it is necessary to return the case to the GD for a redetermination.

[24] The appeal hearing was continued on December 17, 2015, and the AD invited submissions on this issue. The Appellant stated that it would not object to the return of the matter to the GD for re-hearing. The Respondent opposes the matter being re-heard by the GD, despite being frustrated that he cannot refer to an audio recording for testimony given at the Board hearing which the Appellant disputes.

[25] 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 his or her right of appeal before the Umpire. Since that had not been established, the FCA quashed the Umpire's decision.

[26] 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.

[27] Based on the jurisprudence cited above, failure to record the Board hearing (or provide a recording) is not, in and of itself, a breach of natural justice.

[28] The Appellant did not argue that the absence of a recording effectively denied it its right of appeal before the AD. On the contrary, the Appellant submits that the facts on the record allow the AD to give the decision the Board should have given.

[29] The Respondent did not argue that absence of a recording effectively denied his ability to respond to the appeal or that the appeal record was not adequate for the AD to make a decision on this appeal. However, he did state that he gave lengthy testimony at the Board hearing on the very issues that the Commission argues were wrongly decided by the Board. Given the passage of time, he is losing specific recollection of things that occurred in 2011.

[30] 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

[31] The Appellant argued that the Board based its decision on errors, in particular the findings related to there being no reasonable alternative to the Respondent's leaving.

[32] 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.

[33] In terms of the Appellant's submissions before the Board in relation to "reasonable alternative", the Board decision noted, at page 3: "the Commission maintains that a reasonable alternative to leaving the employment would have been to remain employed until he had secured new employment or discussed his situation with the employer to see if a request for adjusted hours or time off could be accommodated". The Appellant makes the same submissions to the AD on this appeal.

[34] In terms of evidence before the Board on this issue, the Board decision found as a fact that the Respondent left his employment on September 29, 2011 because he did not want to accept the only position available (Manager) and the season was ending, meaning that his retail

clerk position would be eliminated, and the renovations he had been working on were completed. The Board also accepted the Respondent's evidence at the hearing that "he was not educated in management, nor did he wish to make a lifelong commitment to the job offer of manager, which was expected, since it was a family run business for more than a quarter of a century. It was a small business, with few employees, seasonal in nature."

[35] 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.

[36] The Board cited the correct legal test, at page 5 of its decision, namely that the claimant must establish that he had no other reasonable alternative but to leave when he did.

[37] However, the Board did not make a specific finding of fact in relation to whether the Respondent had a reasonable alternative but to leave when he did. It may be that this was inherent in the Board's finding that the Appellant had just cause for voluntarily leaving, but on the face of the record the Board appears not to have applied the legal test which it stated.

[38] It is insufficient to simply state the legal test related to reasonable alternative without properly applying it. Not applying the applicable legal test is an error of law, which is a reviewable error pursuant to paragraph 58(1)(c) of the DESD Act.

[39] Given this error of law, the AD is required to make its own analysis and decide whether it should dismiss the appeal, give the decision that the Board should have given, refer the case to the GD, confirm, reverse or modify the decision: *Housen v. Nikolaisen,* [2002] SCR 235, 2002 SCC 33 (CanLII) at para. 8 and subsection 59(1) of the DESD Act.

[40] The Respondent maintains that he gave evidence at the Board hearing about the lack of reasonable alternatives to leaving his employment when he did. However, the Board decision does not include a summary of that evidence and there is no audio recording available in order to review the testimony that was given.

[41] In the circumstances, I am unable to give the decision that the Board should have given.

[42] Considering the submissions of the parties, my review of the Board's decision and the appeal file, I allow the appeal on the specific issue of whether the Respondent had any reasonable alternative to leaving his employment when he did.

[43] In coming to this conclusion, I acknowledge that the Respondent does not want another hearing on his claim for employment insurance benefits filed in 2011. Nevertheless, as this matter will require the parties to present evidence, a hearing before the General Division is appropriate.

CONCLUSION

[44] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration on only the issue of whether the Respondent had any reasonable alternative than to leave his employment when he did.

Shu-Tai Cheng
Member, Appeal Division