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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. D. B.*, 2016 SSTADEI 169

Tribunal File Number: AD-13-1137

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**D. B.**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Shu-Tai Cheng

DATE OF HEARING: Teleconference

DATE OF DECISION: March 30, 2016

## REASONS AND DECISION

## PERSONS IN ATTENDANCE

Appellant's representative: Rachel Paquette

Respondent: D. B.

Respondent's representative: Mr. Jean-Guy Ouellet

## INTRODUCTION

[1] On April 17, 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 3, 2013, and leave to appeal was granted on August 5, 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.

## ISSUE

[4] 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

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

[6] The Appellant and the Respondent filed written submissions at the hearing.

## THE LAW AND ANALYSIS

### Standard of Review

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

a) Under the circumstances, the reasonableness standard applies. Applying the legal test to the facts in this case is a question of mixed fact and law and the standard of review on appeal is reasonableness.

b) The question of whether the Claimant had no reasonable alternative to leaving her employment is a question of mixed fact and law. The standard of review is reasonableness.

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

a) The standard of review of reasonableness should, in principle, be applied.

b) The Board of Referees' decision is founded, fair, and reasonable.

[9] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a Tribunal 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, or breaches of natural justice that may lead to the setting aside of the decision under review.

## Decision of the Board of Referees

[15] The Board of Referees' decision states:

> [Translation]
> CONCLUSIONS AND APPLICATION OF THE LAW
>
> With regard to voluntary leaving, the Board must evaluate if, taking all the circumstances into consideration, leaving their employment at that time constituted the claimant's only reasonable alternative.

In this case, the Board finds that the claimant left her employment after Casino officials restructured the management of traffic by removing a number of parking lot attendants and supervisors.

This restructuring resulted in dissatisfaction among clients whose emotions were already running high as a result of the activity surrounding the casino's games.

The day she resigned, the claimant's supervisor made certain decisions that further undermined the safety of users and workers, hence the claimant's decision to leave the premises.

The Board finds that the Claimant had no choice but to resign as she did in order to protect her safety in the circumstances.

**Submissions of the Parties**

[16] The Appellant submits that the Board of Referees did not correctly apply the legal test for voluntary leaving. The legal test consists of determining whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to leaving their employment.

[17] The Appellant submits that:

a) The Federal Court of Appeal stated that a reasonable solution for someone who is apprehensive of their dangerous working conditions "would be to explore the possibility with his employer that the nature or conditions of work at his employment could be changed in response to his concerns".

b) The facts on file show that the Claimant did not speak to her employer to attempt to resolve the issue. She decided to resign that very evening.

c) The Claimant did not show that the working conditions were so intolerable that she was left with no other choice but to quit.

d) A reasonable alternative would have been to discuss the issue with her employer, Garda Gestion de Stationnement Inc., and to wait for her employer's response to her complaint. She could have also requested a leave while waiting for the problem to be resolved, or she could have found another job before quitting. The Board committed an unreasonable

error by failing to apply these principles when assessing just cause within the meaning of the *Employment Insurance Act* (Act).

e) The Board initially set out the Claimant's argument to the effect that she had resigned from her job on the basis that she was the subject of an abuse of authority on the regulator's part. However, the Board's decision does not conclude that there was an abuse of authority. Rather, the Board found that the Claimant had no choice other than to resign in order to protect her safety. The Commission states that it's difficult to see how the facts on file point to an abuse of authority that could constitute just cause for the Claimant to quit her job. As regards the alleged statements on safety, beyond the Claimant's submissions before the Board, her safety was not in jeopardy the day she resigned.

f) In accordance with subsection 49(2) of the Act, the benefit of the doubt is conferred only when the evidence on both sides is equally balanced. In this case, the Commission states that subsection 49(2) does not apply because given all the circumstances, the Commission states that leaving was not the only reasonable alternative in the Claimant's case.

[18] The Respondent submits that:

a) The Respondent had an issue with a senior Casino employee rather than an issue with her employer or her supervisors at Garda.

b) The Board members, who were the only ones who had the opportunity to assess the employee's credibility, believed that she, as well as the clients, could have felt threatened that evening.

c) The Board members found that the decision to quit that the employee made that evening had no motive other than concern for her own safety as well as the safety of others and that, under the circumstances, the Respondent believed that she had no other alternative than to resign the way she did.

d) This decision was in no way unreasonable.

e) The members of the Board applied the correct test, namely, the only reasonable alternative under the circumstances, to decide in the Respondent's favour and that, contrary to the Commission's claims, the Board in no way erred in fact or in law.

f) The members of the Board justly applied the legal principles relating to resignation cases in light of the facts submitted to them through testimony and documentary evidence and it is completely at their discretion whether or not to grant credibility to the employee's testimony at the hearing, by virtue of being the only trier of facts.

**Assessment of the Board of Referees' Decision**

[19] The Board of Referees did not cite any jurisprudence, but set out the correct legal test regarding voluntary leaving: if, taking all the circumstances into consideration, leaving her employment at that time constituted the claimant's only reasonable alternative.

[20] The Board of Referees finds that: [*translation*] "the Claimant had no choice but to resign as she did in order to protect her safety under the circumstances."

[21] The Federal Court of Appeal imposes an obligation on claimants, in most cases, to attempt to resolve workplace conflicts with an employer, or to demonstrate efforts to seek alternative employment before taking a unilateral decision to quit a job: *Canada (A.G.) v. White*, 2011 FCA 190.

[22] The Respondent states having left her employment for safety reasons. However, the Federal Court of Appeal has held that a reasonable solution for someone who is concerned with dangerous working conditions "would be to explore the possibility with his employer that the nature or conditions of work at his employment could be changed in response to his concerns": *Canada (A.G.) v. Hernandez*, 2007 FCA 320.

[23] The Respondent complained to the Garda manager on duty that evening, but did not wait for the employer to respond to her complaint before she quit. According to the Respondent, before the day in question, the regulator (who was the subject the complaint) was responsible for the decisions that put the employees' safety at risk. The Board found that the Respondent had no choice but to resign as she did in order to protect her safety under the circumstances.

[24] The Appellant maintains that the Respondent should have established that her working conditions were so intolerable, that she had no choice other than to immediately resign without discussion or attempting to resolve the issue with her employer.

[25] This is what the Board of Referees had concluded. The Respondent maintains that this conclusion implied that leaving her employment at that time was the only reasonable alternative.

[26] The deficiencies of the Board of Referees decision identified by the Appellant are possibly the result of sparse reasons. The Appellant indeed submits that the reasons are not sufficiently detailed.

[27] Subsection 54(2) of the *Department of Employment and Social Development Act* requires that the General Division provide written reasons for its decision. In this case, a decision of the Board of Referees is considered to be a decision of the General Division. The Board of Referees provided written reasons for its decision.

[28] In *Roberts v. Canada Employment and Immigration Commission*, [1985] FC No. 413, the Federal Court of Appeal held that:

a) The Board of Referees, after having based its conclusion on the main question of fact relevant to its decision, was not strictly required to state its conclusions on all the sub-questions.

b) Hearings before the Board and the decisions it issues are intended to be an informal process designed to resolve the problems of ordinary people, and its reasons should not be examined in great detail.

[29] Even if the Board of Referees did not include all the key words and did not state its conclusions on all of the sub-questions, it is clear from its brief reasons that it believed that the Claimant had quit her job that evening for safety reasons and that she had no choice other than to resign like she did. However, on the question of fact regarding whether or not there was another reasonable alternative, the Board of Referees did not make a finding.

[30] The Board of Referees cited the legal test, on page 3 of its decision. However, the Board did not assess whether or not there was another reasonable alternative. The Board did not analyse whether the Respondent had attempted to resolve her workplace conflicts or made any effort to find another employment before leaving her employment (*White, supra*), or if she had explored the possibility with her employer that the nature or conditions of work at her employment could be changed in response to her concerns (*Hernandez, supra*).

**Error and Standard of Review**

[31] The Appellant maintains that the Board of Referees made an unreasonable error by failing to apply these principles. The Respondent maintains that the Board had justly applied the legal principles to resignation cases in light of the facts submitted. I do not agree with these submissions.

[32] It is not enough to merely set out the legal test without properly applying it. Failing to apply the legal test constitutes an error in law, which is a reviewable error under paragraph 58(1)(*b*) of the *Department of Employment and Social Development Act.*

[33] Given the error of law and under the correctness standard, the Appeal Division may conduct its own analysis and substitute its own opinion: *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[34] The Respondent maintains that she testified at the hearing before the Board of Referees on the issue of the lack of reasonable alternatives. However, the Board of Referees did not summarise this evidence in its decision and there is no audio recording available in order to assess the testimony that was given on this issue. The testimony at the hearing summarised in the Board's decision (pages 1 and 2) describes the events of January 12, 2013, and the risk to the Respondent's safety, but does not include information regarding other alternatives.

[35] In light of the submission of the parties, my review of the Board of Referees' decision, and the appeal file, I allow the appeal. Under the circumstances, I am unable to issue the decision that the Board of Referees should have issued.

[36] In coming to this conclusion, I acknowledge that the Respondent left her employment in 2013. Nonetheless, as it will be necessary to present evidence, a hearing before the General Division is applicable.

**CONCLUSION**

[37] The appeal is allowed and the matter is referred back to the Tribunal's General Division for a de novo hearing.

Shu-Tai Cheng
Member, Appeal Division