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

[TRANSLATION]

Citation: *A. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 219

Tribunal File Number: AD-15-1026

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Les Services Ménagers Roy Ltée

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON April 12, 2016

DATE OF DECISION: April 20, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 12, 2015, the Tribunal's General Division found that:

> - The Appellant had failed to show just cause for voluntarily leaving his employment pursuant to sections 29 and 30 of the *Employment Insurance Act* (the "*Act*").

[3] The Applicant filed an application for leave to appeal to the Appeal Division on September 16, 2015 after the decision was communicated to her on August 27, 2015. Leave to appeal was granted on September 30, 2015.

FORM OF HEARING

[4] The Tribunal decided to hear this appeal by teleconference 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 information in the file, including the need for additional information;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] During the hearing, the Appellant was present and was represented by Jean-Guy Ouellet, counsel. The Respondent was represented by Julie Meilleur.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development 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 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 determine whether the General Division erred in finding that the Appellant had voluntarily left his employment without just cause within the meaning of sections 29 and 30 of the *Act*.

ARGUMENT

[8] The Appellant's arguments in support of his appeal are as follows:

- The General Division erred in law in finding that the Appellant had left his employment voluntarily whereas the employer repeatedly stated that the Appellant's position was an on-call position only and he had no assurance of guaranteed hours;

- The General Division erred in law by imposing a prior obligation to contact his supervisor again, given the circumstances of the employment;

- The General Division's decision constitutes an error in law in assessing the evidence, particularly by holding that the absence of notes on file at the human resources office was good reason to disregard sworn testimony by the Appellant

in person that he had requested a transfer from his place of work and had subsequently contacted the said employer;

- The Tribunal Member assumed that the Appellant had been assigned to the workplace the following day and stated that the Appellant [translation] “provided no explanation” concerning a possible reason for the dismissal. And yet, comments about the approach taken with users of the premises concerning the safety measures to be followed appear to have generated several notices from the immediate superior in question, and at the very least suggest some dissatisfaction with the Appellant’s job performance;

- Furthermore, despite his efforts to be assigned to a different location, the Appellant was not called back to work, even though the Employer had said it was willing to take him back (paragraph 16 (l)) of the General Division’s decision). The absence of a call back to work seems to support the claim that, following complaints on the last day of work, the said employer was no interested in using the Appellant’s services, contrary to the conclusions of the General Division Member;

- In its decision, the General Division erred in law and in fact in finding that, given the circumstances of the Appellant’s employment contract, he should have contacted another company representative immediately when his employer failed to assign him to another location, or should have continued working at the said location, although nothing on file shows that he was required to work at this location;

- Given the failure to take account of essential information in analyzing the case and in the absence of a clear explanation of the reasons, the General Division’s decision cannot be upheld and the matter is referred back to the General Division for a hearing before a different Member.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- the General Division did not err in law or in fact and it properly exercised its jurisdiction;
- the Appeal Division is not empowered to retry a case or to substitute its discretion for that of the General Division; The Appeal Division's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*;
- unless the General Division failed to observe a principle of natural justice, erred in law 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, and its decision is unreasonable, the Tribunal must dismiss the appeal;
- the issue that the General Division had to decide was whether the Appellant had just cause for voluntarily leaving his employment with Services ménagers Roy Ltée pursuant to sections 29 and 30 of the *Act*;
- In the circumstances, the Appellant did not show that his working conditions were so intolerable that he had no alternative but to resign, without taking certain steps to resolve his situation;
- The Appellant did not have just cause to leave his employment considering that none of the conditions provided in subsection 29c) of the *Act* apply, and considering that he did not show that leaving his employment was the only reasonable solution in his case, having regard for all of the circumstances.

STANDARDS OF REVIEW

[10] The parties submitted to the Tribunal that the standard of judicial review applicable to a decision of a Board of Referees (now the General Division) or an Umpire (now the Appeal Division) on questions of law is correctness (*Martens v. Canada (AG)*, 2008 FCA

240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

[11] The Tribunal notes that the Federal Court of Appeal, in *Canada (AG) v. Jean*, 2015 FCA 242, states at paragraph 19 of its decision that when the Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.

[12] The Federal Court of Appeal goes on to underscore that not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal, and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of “federal boards,” for the Federal Court and the Federal Court of Appeal.

[13] The Federal Court of Appeal concluded by underscoring that where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*.

[14] In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" or whether 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."

[15] The mandate of the Appeal Division of the Social Security Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

ANALYSIS

[16] The Appellant worked for the employer, Les Services ménagers Roy Ltée, during the period from September 17, 2012 to September 26, 2012. Over this time, he accumulated a total of 23 hours of work. He worked on call, with no guaranteed hours.

[17] The Appellant contends that he therefore did not have an employment within the meaning of the *Act* because could not work unless he was called in, and he had no guaranteed hours, as the employer confirmed.

[18] On the matter of employment, the record clearly shows that the Appellant was employed by Les Services ménagers Roy Ltée and that an employer-employee relationship existed. He therefore had employee status within the meaning of subsection 2(1) of the *Act*. Moreover, section 29 of the *Act* provides that, for the purposes of interpreting sections 30 to 33, "employment" means any employment held by a claimant within the claimant's qualifying period or benefit period.

[19] This ground of appeal must therefore be rejected.

[20] The Appellant complains that the General Division did not take account of his evidence at the hearing that he had not left his employment, but had instead requested a transfer to a different workplace.

[21] The Tribunal, however, notes that the General Division did not give credibility to the Appellant's version submitted at the hearing, when it stated the following:

> [Translation]
> [25] The Tribunal underscores that in several of his statements prior to the hearing, the Appellant clearly said he had left his employment voluntarily. He gave various reasons to explain the circumstances that had led him to voluntarily quit his employment, only to try to show later that he had not voluntarily left the employer Les Services ménagers Roy Ltée.

[22] Indeed, the Appellant had stated in his application for reconsideration that he had quit his job because he felt he was being mistreated, and because he preferred to try to find another job or start a new career during his benefit period (GD3-32).

[23] In an interview intended to support his application for reconsideration, the Appellant said he had left for a number of reasons, including the fact that his mother was ill. He also felt he was not getting enough hours and he did not like his work environment (GD3-33).

[24] In a subsequent interview, he mentions that he thought he was entitled to benefits and that he could accept or leave an employment because he was already qualified (GD3-34).

[25] In the Tribunal's opinion, the General Division rightly gave more weight to the Appellant's initial, spontaneous statements attesting to a voluntary departure without just cause. Furthermore, the employer confirmed that the Applicant had quit his job in the record of employment (GD3-16), in the request for payroll information (GD3- 18, 20) and during an interview with a representative of the Respondent (GD3-21).

[26] The evidence before the General Division shows that it was the Appellant, not the employer, who instigated the job loss given that, as the Appellant mentioned in his testimony before the General Division, he had refused to return to work unless he was assigned to a different workplace. The Appellant could very well have kept his job but for the fact that he refused to put up with his supervisor's complaints.

[27] The Tribunal is not satisfied that the Appellant's working conditions were unbearable to the point that he had no alternative but to leave his employment immediately.

[28] The Appellant also criticizes the General Division for giving more weight to the employer's evidence even though the employer was absent from the hearing. The Tribunal does not consider that the mere fact one party is present and the other is absent should be a decisive factor. The General Division is free to give preference to the credibility of one over the other.

[29] The Tribunal is not empowered to retry a case or to substitute its discretion for that of the General Division. The Tribunal's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act.* Unless the General Division failed to observe a principle of natural justice, erred in law 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, the Tribunal must dismiss the appeal.

[30] The Tribunal cannot conclude that the General Division made such an error. The decision of the General Division is compatible with the evidence on file and consistent with the relevant legislative provisions and case law.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division