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

Citation: *Canada Employment Insurance Commission v. K. M.*, 2016 SSTADEI 242

Tribunal File Number: AD-13-1169

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

K. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON February 16, 2016

DATE OF DECISION: April 29, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative of the Appellant (Commission) Louise Laviolette

INTRODUCTION

[1] On April 3, 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 subsequently imposed a disentitlement for failing to prove his availability, pursuant to sections 18 and 29 of the *Employment Insurance Act* (EI Act). Neither the Commission nor the Respondent attended the in-person Board hearing.

[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 23, 2013. Leave to appeal was granted on July 3, 2015 on the grounds that there may be an error of law or of fact and law, in that the Board, in making its decision, failed to apply the correct legal test to the issue of voluntarily leaving and to the issue of availability.

[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.

[4] The AD first scheduled the teleconference to take place on October 27, 2015, but the Respondent was not present on the call. While the Notice of Hearing was delivered, the Appellant's records had two possible addresses for the Respondent and the AD Member was not satisfied that the Respondent received the Notice of Hearing.

[5] The AD hearing was adjourned and rescheduled to take place on February 16, 2016. The second Notice of Hearing was sent to the Respondent at both possible addresses for him and

voicemail messages were left at the telephone number on file for him. The Notice of Hearing was received and signed for at both addresses. The telephone calls were not returned.

[6] The Respondent was not present on February 16, 2016 at the time scheduled for the AD hearing. The AD Member waited more than fifteen minutes for the Respondent to join the call. When he did not, the AD hearing proceeded in his absence.

ISSUES

[7] Whether the Board based its decision on an error of law or an error of fact and law.

[8] 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

[9] 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.

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

[11] 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)(b) and (c) of the DESD Act.

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

SUBMISSIONS

[13] The Appellant's written submissions can be summarized as follows:

a) The Board erred in law when it failed to apply the correct legal test to the issue of voluntary leaving pursuant to subsection 29(c) of the EI Act;

b) The Board erred in fact and in law when it allowed the appeal on the issues of voluntary leaving and availability pursuant to subsections 29(c) and 18(a) of the EI Act;

c) The Board allowed the Respondent's appeal on the basis that he left his employment in order to obtain a better paying job to support himself, that he did what any reasonable person would do in order to better himself, and that he had reasonable assurance of other employment with either the RCMP or returning to his former employer;

d) The Board should have looked at what the reasonable alternatives were before finding that the Respondent had good cause for leaving;

e) A proper application of the legal test for just cause under subsection 29(c) of the EI Act to the facts of this case leads to the reasonable conclusion that the Respondent had reasonable alternatives to leaving when he did;

f) The Board erred in finding that the Respondent had proven availability for work, as there is a presumption of non-availability when a claimant is taking a full-time course of their own initiative, and the Respondent did not show exceptional circumstances to rebut this presumption; and

g) Therefore, the Board erred in allowing the appeal on the issue of voluntary leaving and the issue of availability for work.

[14] At the AD hearing, the Appellant conceded the issue of availability and made submissions only on the issue of voluntary leaving.

[15] The Respondent did not attend the AD hearing and did not make any written submissions.

[16] The AD of the Tribunal granted leave to appeal on the issues of voluntary leaving and availability on the grounds of error of law and error of mixed fact and law. The appeal proceeded only on the issue of voluntary leaving.

STANDARD OF REVIEW

[17] 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.

[18] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal 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.

[19] 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.

[20] Here errors of law and errors of fact and law are alleged.

ANALYSIS

[21] The decision of the Board referred to three (3) CUB decisions: 61362, 54372 and 34308. It did not set out the legal test that it applied to voluntary leaving.

[22] The Board concluded that the Respondent "did what any reasonable person would do in order to better himself", and it found that he had no reasonable alternative other than to leave

his employment and that he had reasonable assurance of employment after returning from his training course.

[23] In CUB 61362, the claimant had previously been approved to attend a training course which was later cancelled by the college. The following year, the college offered the same course and the claimant assumed that he remained EI eligible and quit his job to attend the training course.

[24] In its written submissions, the Appellant argued that CUB 61362 is distinguishable from the current case, because the Respondent was not approved to attend his training program. At the AD hearing, however, the Appellant stated that a referral had been made for the Respondent to attend his training program but that it had been done in error, on the basis that he was unemployed when he was to start the course. The Respondent was employed and quit his job in order to attend his training course, but the referral was not officially cancelled.

[25] In any event, CUB 61362 is distinguishable on the facts. That claimant had been approved for EI benefits prior to starting his training program in 2002, the program was cancelled and the claimant was employed, the following year he was offered a place in the same program, he quit his job and enrolled. The Respondent's situation is not analogous to the one in CUB 61362.

[26] In CUB 54372, the Umpire found that the conclusion of the Board (that the claimant had left his employment with a reasonable assurance of another employment) was well founded on the evidence and, therefore, that it could not be said that the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. The Board had dealt with the matter not as a case of leaving employment to take a course but rather leaving employment to accept another employment.

[27] In the current matter, the Board found that the Respondent stated in his Notice of Appeal that he will be returning to work with a better position in his application. It also found that the Respondent "had reasonable assurance of employment either with the RCMP or returning to his former employment". However, there is no evidence in the file that he had left his employment with a reasonable assurance of another employment (or his former employment) or any mention

of employment with the RCMP. An assertion in a Notice of Appeal alone is not evidence. The Board's finding about the RCMP appears to come from its discussion of CUB 54372 and not from the appeal file in the current matter. Also, in the current matter the Respondent left his employment to take a course and not to accept another employment.

[28] As the Board did not set out the legal test that it applied to the issue of voluntary leaving, did not apply the correct legal test, and relied on CUB cases that were distinguishable, I find that the Board erred in law. In addition, some of the Board's findings of fact were made in a perverse or capricious manner or without regard for the material before it.

[29] Therefore, the Appeal Division is required, under the correctness standard, 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 General Division, confirm, reverse or modify the decision.

[30] In the circumstances and given the deficiencies in the findings of the Board, I am unable to give the decision that the Board should have given.

[31] Considering the submissions of the parties, my review of the Board's decision and the appeal file, I allow the appeal on the issue of voluntary leaving and dismiss the appeal on the issue of availability. As this matter will require the parties to present evidence, a hearing before the General Division is appropriate.

CONCLUSION

[32] The appeal is allowed on the issue of voluntary leaving only. The appeal is dismissed as it relates to availability. The case will be referred to the General Division of the Tribunal for reconsideration in accordance with these reasons.

Shu-Tai Cheng
Member, Appeal Division