Date: 20080117

Docket: A-75-07

Citation: 2008 FCA 18

CORAM : DÉCARY J.A.
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JEAN LANGLOIS

Respondent

Heard at Montréal, Quebec, January 10, 2008.

Jugement delivered at Ottawa, Ontario, January 17, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] Did the claimant have just cause, under paragraph 29(*c*) of the *Employment Insurance Act*, S.C., 1996, c. 23 (the Act), to leave a permanent employment in order to take another permanent, but seasonal, employment at a higher wage? Second, having regard to the circumstances of the case, did he have "no reasonable alternative" to leaving, given how that phrase, which appears in the said paragraph, has been interpreted?

[2] These are the two questions before the Court. It is the first time our Court has been required to examine this issue and rule thereon.

Applicant's Arguments

[3] Having been unsuccessful before the Board of Referees and Umpire Gobeil, the Employment Insurance Commission (the Commission), through the Attorney General of Canada, is seeking judicial review of the Umpire's decision. The Commission argues that the Umpire erred in law with respect to the interpretation and application of subparagraph 29(*c*)(vi) of the Act. According to the Memorandum of Fact and Law, the error relates to the fact that leaving his job to take a permanent seasonal job was not the respondent's only reasonable alternative within the meaning of the aforementioned subparagraph.

[4] Before summarizing and analyzing the Umpire's decision, it is important to relate the main facts that gave rise to this litigation. These facts are key to answering both issues raised by the appeal.

The Facts

[5] The respondent had held permanent employment as a butcher since July 23, 2003. On August 19, 2005, he left that employment for other permanent employment in construction, at much

higher pay ($17.50 instead of $9.50 an hour). He began the new job on the following Monday, August 22, 2005. Having obtained his certificate of qualifications, he could now work as an apprentice plasterer initially and, later, as a journeyman plasterer.

[6] However, although the employment was permanent, it was seasonal. When he was hired on by Stuc Acrylique 2000 Inc., the respondent was informed in writing by the new employer that work was guaranteed until December.

[7] It turned out, however, that the new job ended earlier than anticipated, that is, on October 21, 2005, and no explanation was provided to us as to why it ended prematurely. Apparently, there was to be more work the following spring. There was also a possibility that the employer would be able to offer him a contract during the winter season, but it depended on the weather and no guarantees were made. The respondent's normal work week in the context of this new employment was forty (40) hours.

[8] A benefit period was established for the respondent effective October 23, 2005, on the basis that he had lost his job by reason of a work shortage. However, on December 15, the Commission informed the respondent that he was disqualified from receiving benefits because he had left his former employment at the butcher shop without just cause, which is to say that leaving was not the only reasonable alternative in his case.

[9] According to the Commission, there were reasonable alternatives available to the respondent other than to start collecting employment insurance benefits on October 25, 2005. The respondent could have waited to leave his job until he had found more remunerative employment that was not seasonal and did not end so early.

[10] When his construction job ended, the respondent approached his former employer to resume working as a butcher during the winter period, but to no avail.

Umpire's Decision

[11] The Umpire rejected the Commission's argument that the respondent could not leave permanent employment for seasonal employment. To accept such an argument would be to deny the benefit of the option offered by subparagraph 29(*c*)(vi), which enables a person to leave one job and take another.

[12] The Umpire determined that the respondent had just cause to leave his employment as a butcher because he had "reasonable assurance of another employment in the immediate future," as stipulated in subparagraph 29(*c*)(vi) of the Act. Furthermore, he felt that the respondent had acted prudently and reasonably under the circumstances in that he had obtained his apprenticeship qualifications prior to quitting his job and that he had started his new employment on the Monday following the Friday he had stopped working at the butcher shop.

[13] As well, in the Umpire's opinion, the fact that the respondent's first contract as an apprentice-plasterer was in a context of seasonal employment should not count against him, given that this is a field in which a labour shortage exists.

[14] Finally, to the question of whether the respondent had no reasonable alternative to leaving his employment, the Umpire answered in the affirmative, stating that in order to work full time in the plastering trade, the respondent necessarily had to quit his full-time job at the butcher shop.

Analysis of the Umpire's Decision and the Arguments of the Parties

a) Was the respondent entitled to leave non-seasonal permanent employment to take higher-paying seasonal permanent employment?

[15] Since they are at the heart of the case at bar, I will reproduce paragraph 29(*c*) and section 30 of the Act below:

29. For the purposes of sections 30 to 33,	**29.** Pour l'application des articles 30 à 33 :
…	[…]
(*c*) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:	*c*) le prestataire est fondé à quitter volontairement son emploi ou à prendre congé si, compte tenu de toutes les circonstances, notamment de celles qui sont énumérées ci-après, son départ ou son congé constitue la seule solution raisonnable dans son cas :
(i) sexual or other harassment,	(i) harcèlement, de nature sexuelle ou autre,
(ii) obligation to accompany a spouse,	(ii) nécessité d'accompagner son époux ou

common-law partner or dependent child to another residence,

conjoint de fait ou un enfant à charge vers un autre lieu de résidence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,

(iii) discrimination fondée sur des motifs de distinction illicite, au sens de la Loi canadienne sur les droits de la personne,

(iv) working conditions that constitute a danger to health or safety,

(iv) conditions de travail dangereuses pour sa santé ou sa sécurité,

(v) obligation to care for a child or a member of the immediate family,

(v) nécessité de prendre soin d’un enfant ou d’un proche parent,

(vi) reasonable assurance of another employment in the immediate future,

(vi) assurance raisonnable d’un autre emploi dans un avenir immédiat,

(vii) significant modification of terms and conditions respecting wages or salary,

(vii) modification importante de ses conditions de rémunération,

(viii) excessive overtime work or refusal to pay for overtime work,

(viii) excès d’heures supplémentaires ou non-rémunération de celles-ci,

(ix) significant changes in work duties,

(ix) modification importante des fonctions,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(x) relations conflictuelles, dont la cause ne lui est pas essentiellement imputable, avec un supérieur,

(xi) practices of an employer that are contrary to law,

(xi) pratiques de l’employeur contraires au droit,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xii) discrimination relative à l’emploi en raison de l’appartenance à une association, une organisation ou un syndicat de travailleurs,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiii) incitation indue par l’employeur à l’égard du prestataire à quitter son emploi,

(xiv) any other reasonable circumstances that are prescribed.

(xiv) toute autre circonstance raisonnable prévue par règlement.

30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any

30. (1) Le prestataire est exclu du bénéfice des prestations s’il perd un emploi en raison de son inconduite ou s’il quitte volontairement un emploi sans

employment without just cause, unless

(*a*) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(*b*) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(*a*) hours of insurable employment from that or any other employment before the employment was lost or left; and

(*b*) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in

justification, à moins, selon le cas :

a) que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;

b) qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.

(2) L'exclusion vaut pour toutes les semaines de la période de prestations du prestataire qui suivent son délai de carence. Il demeure par ailleurs entendu que la durée de cette exclusion n'est pas affectée par la perte subséquente d'un emploi au cours de la période de prestations.

(3) Dans les cas où l'événement à l'origine de l'exclusion survient au cours de sa période de prestations, l'exclusion du prestataire ne comprend pas les semaines de la période de prestations qui précèdent celle où survient l'événement.

(4) Malgré le paragraphe (6), l'exclusion est suspendue pendant les semaines pour lesquelles le prestataire a autrement droit à des prestations spéciales.

(5) Dans les cas où le prestataire qui a perdu ou quitté un emploi dans les circonstances visées au paragraphe (1) formule une demande initiale de prestations, les heures d'emploi assurable provenant de cet emploi ou de tout autre emploi qui précèdent la perte de cet emploi ou le départ volontaire et les heures d'emploi assurable dans tout emploi que le prestataire perd ou quitte par la suite, dans les mêmes circonstances, n'entrent pas en ligne de compte pour l'application de l'article 7 ou 7.1.

(6) Les heures d'emploi assurable dans un

any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.	emploi que le prestataire perd ou quitte dans les circonstances visées au paragraphe (1) n'entrent pas en ligne de compte pour déterminer le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées, au titre du paragraphe 12(2), ou le taux de prestations, au titre de l'article 14.
(7) For greater certainty, but subject to paragraph (1)(*a*), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.	(7) Sous réserve de l'alinéa (1)*a*), il demeure entendu qu'une exclusion peut être imposée pour une raison visée au paragraphe (1) même si l'emploi qui précède immédiatement la demande de prestations — qu'elle soit initiale ou non — n'est pas l'emploi perdu ou quitté au titre de ce paragraphe.

(my emphasis)

[16] My main challenge is to provide an interpretation of the phrase "had no reasonable alternative" in paragraph 29(*c*) harmonious with that of "reasonable assurance of another employment in the immediate future" in subparagraph 29(*c*)(vi).

[17] Indeed, it is by no means obvious that these two phrases exist harmoniously with one another: it is difficult, if not impossible, to contend or conclude that a person who voluntarily leaves employment to occupy different employment is doing so necessarily because leaving is the *only* reasonable alternative. A person may simply wish to reorient his career or advance within his trade or profession by changing employers.

[18] This notion of "no reasonable alternative" does apply, without a doubt, to many of the situations provided for in paragraph 29(*c*). Thus, it is often possible to resolve the issues posed by

the following situations through methods other than leaving one's employment: sexual or other harassment (subparagraph 29(*c*)(i)), discrimination (subparagraph 29(*c*)(iii)), working conditions that constitute a danger to health or safety (subparagraph 29(*c*)(iv)), excessive overtime work (subparagraph 29(*c*)(viii)), to name just a few.

[19] For example, one could mitigate the problem of dangerous employment by improving working conditions, by wearing a mask or other safety equipment, or by arranging to be relocated in another part of the factory or company: see *Canada (Attorney General) v. Hernandez*, 2007 FCA 320. An employee resigns in such situations as a last resort, and the legislator's requirement that there be no reasonable alternative to leaving is understandable.

[20] Most of the situations envisaged by paragraph 29(*c*) relate to incidents or actions that arise in the context of the employment held by the claimant. Subparagraph 29(*c*)(vi) is intended for an entirely different scenario, one that involves a change of employment, so it is not a matter of coming up with or applying a remedy within a single employment context where alternatives to leaving can be easily envisaged.

[21] There is another important characteristic of subparagraph 29(*c*)(vi) that sets it apart from the other section 29 scenarios. As this Court emphasized in *Canada (Attorney General) v. Campeau*, 2006 FCA 376 and *Canada (Attorney General) v. Côté*, 2006 FCA 219, subparagraph 29(*c*)(vi) is the only one, along with the residual clause in subparagraph 29(*c*)(xiv) (any other reasonable circumstances that are prescribed), that does not assume intervention by a third party. In other

words, the circumstances provided for in subparagraph 29(*c*)(vi) will come into being solely through the will of the claimant. As I shall point out below, this pecularity of subparagraph 29(*c*)(vi) brings us back to the very foundations and principles of insurance, which is, need one be reminded, a compensation system based on risk.

[22] Under the circumstances, I believe that one must view the legislator's *no-reasonable-alternative* requirement and related case law from a different perspective when applying it to situations contemplated by subparagraph 29(*c*)(vi), where the person leaves his employment with the reasonable assurance of another employment in the immediate future.

[23] The applicant acknowledges that the respondent had the reasonable assurance of another employment in the immediate future. Indeed, the respondent quit his old job on Friday and began his new job the following Monday.

[24] At the hearing, counsel for the applicant distanced herself from her client's position as set out in the memorandum of fact and law, which, as I stated above, consisted in the assertion that leaving was not the respondent's only reasonable alternative because he could have waited to find a higher-paying, non-seasonal job before leaving the employment he held. Rather, she submitted that we needed to come at the question of the respondent's leaving from the perspective of the principles and objectives of employment insurance. For the reasons set out below, I believe she is correct on that point. First, however, it is important to mention another point on which counsel for the applicant changed position at the hearing.

[25] Whereas the Commission contested the respondent's right to leave a permanent non-seasonal employment for a seasonal employment, the applicant acknowledged, correctly in my view, that the respondent could in fact quit to take a seasonal employment: see in applicant's record, at pages 43 and 63, the Commission's representations to the Board of Referees and its submission in support of the appeal to the Umpire. I can think of at least three grounds for that conclusion.

[26] First of all, subparagraph 29(*c*)(vi) allows a claimant to leave one employment for another employment. The legislative provision neither qualifies nor restricts the term "another employment." Had the legislator intended for claimants who voluntarily leave non-seasonal employment in favour of seasonal employment to be disqualified from receiving benefits, it could have easily worded subparagraph 29(*c*)(vi) as follows: "reasonable assurance of another non-seasonal employment in the immediate future."

[27] Second, paragraph 30(1)(*a*) allows a person who has left one employment in favour of another to receive benefits if, since leaving the employment, he has been employed in insurable employment for a sufficient duration (i.e., the number of hours required) to qualify to receive benefits. There again, the term "insurable employment" used in section 30 does not exclude seasonal employment and the hours accumulated from that employment.

[28] Finally, the employment insurance scheme entitles seasonal workers in the fields of fishing, hunting and construction, among others, to receive benefits.

b) Having regard to the circumstances of the case, did the respondent have just cause to voluntarily leave his employment?

[29] A voluntary leaving of one employment in favour of a seasonal employment is covered by subparagraph 29(*c*)(vi); that being established, how does one determine whether the respondent had just cause to leave his employment for another, seasonal or not? Beyond the reasonable assurance of another employment in the immediate future, paragraph 29(*c*) invites one to have regard to all the circumstances surrounding the claimant's leaving in order to determine whether it was the only reasonable alternative.

[30] In the case before us, the Board of Referees and the Umpire both identified as circumstances justifying the respondent's voluntary leaving the fact that he was improving his situation in life by obtaining higher pay and better working conditions and the fact that he was moving into a promising industry where there was a labour shortage.

[31] While it is legitimate for a worker to want to improve his life by changing employers or the nature of his work, he cannot expect those who contribute to the employment insurance fund to bear the cost of that legitimate desire. This applies equally to those who decide to go back to school to further their education or start a business and to those who simply wish to earn more money: see *Canada (Attorney General) v. Tremblay (F.C.A.)*, [1994] F.C.J. no. 896; *Astronomo v. Canada (Attorny General)*, [1998] F.C.J. no. 1025; *Canada (Attorney General) v. Martel (F.C.A.)*, [1994]

F.C.J. no. 1458. In the words of this Court in *Campeau*, *supra,* at paragraph 21, "… sincerity and inadequate income do not constitute just cause under section 30 of the Act, allowing [the claimant] to leave her employment and making the employment insurance system bear the cost of supporting her."

[32] The reason for this approach, dictated by the legislator and followed consistently by the courts, goes to the foundation of employment insurance scheme. The insurance offered by the scheme is a function of the risk run by an employee of losing his employment. Apart from certain exceptions, it is the responsibility of insured persons, in exchange for their participation in the scheme, not to provoke that risk or, *a fortiori,* transform what was only a risk of unemployment into a certainty: see *Tanguay v. Canada (Unemployment Insurance Commission)*(F.C.A.), [1985] F.C.J. no. 910. That is why an employee's voluntary leaving in favour of seasonal employment poses a special problem in the context of the rules of employment insurance. Indeed, seasonal employment, by its very nature, involves a risk—if not a certainty—of a cessation of work that may or may not give rise to benefits, depending on whether or not the number of hours required under section 30 of the Act has been reached.

[33] In my view, in the case of seasonal employment, the time of the voluntary separation and the remaining duration of the seasonal employment are the most important circumstances to consider in determining whether leaving was a reasonable alternative and, accordingly, whether there was just cause for it.

[34] Switching to seasonal employment late in the season when it is about to end and when it is obvious that the requirements of section 30 will clearly not be met creates a certainty of unemployment for which there can be no just cause. The employee is free to quit his non-seasonal job, but it is he alone then who must assume the risk of his voluntary leaving. How does this apply to the case at bar?

[35] The Board of Referees and the Umpire did not address and analyze these two important circumstances. As mentioned above, they relied on one initial circumstance that cannot constitute just cause, namely, the fact that the respondent was improving his situation.

[36] They also attached importance to the fact that he was transitioning into an industry where there was a labour shortage. On that point, the Umpire briefly referred to the seasonal nature and uncertain duration of the employment, thus minimizing the impact of these two circumstances and emphasizing the shortage of labour. On page 2 of his reasons for decision, he wrote as follows:

> Since there was a shortage in the field, the claimant's behaviour cannot be invalidated by the fact that his first employment contract was seasonal and that its exact duration was therefore unknown.

[37] The labour shortage in the industry chosen by the respondent was indeed a relevant circumstance weighing in his favour that was open for consideration because it has an impact on the risk of unemployment, but it could not on its own supplant the circumstances of the seasonal nature and uncertain duration of the employment.

[38] The Board of Referees should have focused on the date of the respondent's voluntary separation, namely, August 19, 2005, and on the time remaining in the anticipated period of seasonal employment, namely, until December 2005. I note that there is no indication as to the exact end date in December. Was it first day or the last day of the month? The new employer's laconic letter indicates that, after December, the job depends on the weather: see applicant's record at page 48. The record seems to indicate that the work was in the Québec City area, although the evidence in that regard is inconclusive.

[39] Let us take the hypothesis that is most favourable to the applicant, i.e., the end of December, and assume a period of employment of approximately four months, including Christmas vacation. Was this four-month period sufficient to allow the respondent to accumulate the number of hours required under section 30? Or was it too short, such that his voluntary separation caused an unreasonable risk, an unjustified certainty of unemployment? What was the number of hours required in the area where respondent was working? How realistic was the possibility advanced by the respondent that he could secure work from the employer after December, given that the employer states in his letter that, because of the weather, he cannot guarantee employment after December? How is it that the respondent's employment ended on October 21, 2005 when it was supposed to continue until December? Was it reasonably foreseeable that the new employment might end earlier than anticipated? If so, why? If not, why not?

[40] All of these questions are relevant to determining whether there was just cause for voluntary separation from employment, and neither the Board of Referees nor the Umpire addressed them.

However, they are also relevant questions to which the record offers no answer or evidence, and as such, I cannot accede to the application before me, which would have me rule that the respondent did not have just cause to leave his employment.

[41] As this is an application for judicial review and we cannot render the judgment that ought to have been rendered—which, in any event, given the state of the evidence, would have been impossible—I have no alternative other than to order a new hearing before the Board of Referees, barring earlier resolution of the matter. It was clear to me that the applicant was interested in obtaining a ruling on a matter of broad principle relating to voluntary separation from employment in favour of seasonal employment, and it was clear to me that this interest went far beyond the limits of the instant case.

[42] It was also clear to me, on reading the record, that the debate between the parties took place in a context characterized by a certain ambiguity, confusion even, as to the Commission’s position. The respondent is not responsible for that state of affairs, and so I would not impose the costs of the judicial review application upon him.

[43] For these reasons, I would allow the application for judicial review, but without costs. I would set aside the Umpire’s decision and refer the matter back to the Chief Umpire, or Umpire

designated by him, to be returned to a Board of Referees with instructions to hold a hearing *de novo* taking the present reasons for judgment into account, unless the parties reach an earlier resolution.

"Gilles Létourneau"

J.A.

"I concur
Robert Décary, J.A."

"I concur
Marc Nadon, J.A."

Certified true translation

Stefan Winfield, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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