Federal Court of Appeal  Cour d'appel fédérale

Date: 20130215

Docket: A-65-12

Citation: 2013 FCA 39

CORAM: **BLAIS C.J.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JACQUES MARIER

Respondent

Heard at Québec, Quebec, on December 10, 2012.

Judgment delivered at Ottawa, Ontario, on February 15, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] The Employment Insurance Commission [the Commission] denied the claim for employment insurance benefits of Mr. Marier [the respondent] on the grounds that he had voluntarily left one of his two positions without just cause and that it was not his only reasonable alternative. The Board of Referees allowed Mr. Marier's appeal. The Commission appealed from the decision to the Umpire, who upheld the decision of the Board of Referees (CUB 78444, November 23, 2010). That decision is challenged by this application for judicial review, brought

by the Attorney General of Canada [the applicant or Attorney General], which I propose to dismiss without costs, but for reasons other than those identified by the Umpire.

[2] In this case, the Attorney General submits that a worker who voluntarily leaves one of his concurrent positions without just cause within the meaning of paragraph 29(*c*) of the *Employment Insurance Act*, S.C. 1996, c. 23 [the Act], is disqualified from receiving benefits unless he has, since leaving that employment, been employed in insurable employment for the number of hours required to be entitled to employment insurance benefits. In support of his claim, he cites this Court's decision in *Canada (Attorney General) v. Trochimchuk*, 2011 FCA 268 [*Trochimchuk*].

[3] With respect, I am of the view that *Trochimchuk* does not constitute the final word on the processing of employment insurance benefits claims from claimants holding more than one position concurrently.

[4] In the case of concurrent employment, when, as is the case here, the claimant does not create a situation of unemployment by leaving one of his positions, the Attorney General's position produces an absurd result that cannot reflect the intention of Parliament. The interpretation of the relevant provisions of the Act proposed by the Attorney General unduly penalizes those who hold more than one position simultaneously and is inconsistent with the overall purpose of the Act, which is to compensate those individuals who involuntarily find themselves without employment (*Canada (Attorney General) v. Lamonde*, 2006 FCA 44 at para. 9).

[5] This is clearly illustrated by the following example: Mr. X starts work at the ABC factory on January 1, 2005. In January 2012, he takes a second job at XYZ to cover some unforeseen expenses. On June 1, 2012, he leaves this second job voluntarily, fully aware that he has another job and that he will not find himself unemployed. Unfortunately for him, in August 2012, ABC downsizes and Mr. X loses his employment there through no fault of his own. According to the Attorney General, relying on *Trochimchuk*, Mr. X would not be entitled to employment insurance benefits, since he did not accumulate enough hours in two months at ABC to be eligible. Removed from the calculation are not only the hours that he had accumulated at XYZ before June 1, 2012, but also any hours that he had accumulated at ABC before that date.

The relevant facts

[6] The facts are simple. Mr. Marier filed an initial claim for regular benefits effective July 18, 2010. During his qualifying period, that is, the 52 weeks preceding the start date of the claim, Mr. Marier held two part-time positions. From June 13, 2009, to February 1, 2010, he worked for Nettoyage Solvanet [Solvanet]. He was on a daytime recall list and worked 25 to 30 hours a week. Mr. Marier voluntarily left that job in order to pursue a five-month cleaning course, while keeping his evening position.

[7] From July 1, 2009, to July 18, 2010, the respondent also worked 25 to 30 hours a week for the Coopérative des horticulteurs de Québec [Coopérative]. He also ended up voluntarily leaving this job in order to accept employment at the Centre de santé et de services sociaux de la

Vieille-Capitale [CSSS de la Vieille-Capitale], which was to begin on August 5. As a result of a decision by his new employer, he did not begin working for them until August 30, 2010, a few weeks later than anticipated. This was the reason for his claim for benefits for the period from July 18, 2010, to August 30, 2010.

[8] On September 25, 2010, the applicant received the Commission's final decision (Applicant's Record at page 36). The first two paragraphs of this decision read as follows:

> [TRANSLATION]
>
> We wish to inform you that we cannot pay you regular employment insurance benefits because you voluntarily left your employment at [Solvanet] . . . without just cause . . . We are of the view that voluntarily leaving your employment was not the only reasonable alternative in your case. However, given that your benefit period started on July 18, 2010, the refusal to pay benefits will be effective as of that date only.
>
> We have checked whether you have worked the minimum number of insurable hours required since voluntarily leaving your employment without just cause. Unfortunately, you have accumulated only 581 hours of insurable employment, while you need 700 hours.
>
> [Emphasis added.]

[9] That finding results from a calculation that does not take into account the hours of insurable employment worked by Mr. Marier at the Coopérative prior to the date of his voluntary departure from Solvanet. The evidence shows that Mr. Marier had worked for the Coopérative for nearly 1000 hours. According to the Commission's decision, Mr. Marier had to accumulate 700 hours of employment after leaving Solvanet to be entitled to regular employment insurance benefits. Therefore, when he left Solvanet, the counter was reset to zero, regardless of any other insurable employment that he held concurrently.

Issues

[10] At paragraph 13 of his memorandum of fact and law, the applicant raises the following issues:

> [TRANSLATION]
>
> (a) Did the Umpire err in taking into account the insurable hours of employment accumulated at the [Coopérative] by the respondent prior to his voluntary departure from another job, at [Solvanet], thereby failing to apply paragraph 30(1)(*a*) and subsection 30(5) of the Act?
>
> (b) Did the Umpire err in law in failing to address the issue of whether the voluntary departure was without just cause, as required by sections 29 and 30 of the Act?

[11] I will limit my analysis to the second issue. Paragraph 30(1)(*a*) and subsection 30(5) of the Act would only be relevant if I were to conclude that the respondent voluntarily left his employment with Solvanet without just cause. That is not what I conclude.

[12] I am therefore departing from *Trochimchuk*, which only interprets subsection 30(5) of the Act, especially given that the Umpire and the Court of Appeal in that case did not provide a detailed description of the facts, making it difficult to compare the situations of the claimants. The issue of whether the claimant had left his first employment voluntarily and without just cause seems to have been taken for granted. In *Trochimchuk*, the claimant had, in fact, voluntarily left her employment on May 10, 2009, in order to return to school. The Court merely cited the long line of case law according to which leaving one's job in order to study does not constitute just cause within the meaning of the Act (*Trochimchuk* at para. 2, citing *Canada (Attorney General) v. Mancheron*, 2001 FCA 174). The Court then analyzed the Umpire's

decision (CUB 76124, December 16, 2010), which had dealt solely with the [TRANSLATION] "issue of the proposed interpretation to give to subsection 30(5) of the [Act]".

[13] My approach is quite different, as I have written above. In the light of this and of the facts in this case, I do not feel bound in any way by *Trochimchuk*. However, before I develop my reasoning, it would be useful to set out the relevant provisions of the Act and the parties' positions.

[14] Section 7 of the Act deals with the criteria for receiving benefits. Employment insurance benefits are payable if

7(2) An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person	7(2) L'assuré autre qu'une personne qui devient ou redevient membre de la population active remplit les conditions requises si, à la fois :
(*a*) has had an interruption of earnings from employment; and	*a*) il y a eu arrêt de la rémunération provenant de son emploi;
(*b*) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.	*b*) il a, au cours de sa période de référence, exercé un emploi assurable pendant au moins le nombre d'heures indiqué au tableau qui suit en fonction du taux régional de chômage qui lui est applicable.

[15] Section 30 falls under the heading "Disqualification and Disentitlement" and deals with, among other things, misconduct and leaving without just cause. It reads as follows:

30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless	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 justification, à moins, selon le cas :
(*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	*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;
. . .	[…]
(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).	(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.
. . .	[…]
[Emphasis added.]	[Je souligne.]

[16] Finally, section 29 sets out interpretation guidelines for section 30, cited above. Paragraphs 29(*b.1*) and (*c*) read as follows:

29. For the purposes of sections 30 to 33,

. . .

(*b.1*) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(*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:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian*

29. Pour l'application des articles 30 à 33 :

[…]

b.1) sont assimilés à un départ volontaire le refus :

(i) d'accepter un emploi offert comme solution de rechange à la perte prévisible de son emploi, auquel cas le départ volontaire a lieu au moment où son emploi prend fin,

(ii) de reprendre son emploi, auquel cas le départ volontaire a lieu au moment où il est censé le reprendre,

(iii) de continuer d'exercer son emploi lorsque celui-ci est visé par le transfert d'une activité, d'une entreprise ou d'un secteur à un autre employeur, auquel cas le départ volontaire a lieu au moment du transfert;

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) harcèlement, de nature sexuelle ou autre,

(ii) nécessité d'accompagner son époux ou conjoint de fait ou un enfant à charge vers un autre lieu de résidence,

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

Human Rights Act,

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

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

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

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

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

(ix) significant changes in work duties,

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

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

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

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

(xiv) any other reasonable circumstances that are prescribed.

[Emphasis added.]

sur les droits de la personne,

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

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

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

(vii) modification importante de ses conditions de rémunération,

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

(ix) modification importante des fonctions,

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

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

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

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

(xiv) toute autre circonstance raisonnable prévue par règlement.

[Je souligne.]

Positions of the parties

[17] As mentioned above, the Attorney General submits that the Umpire erred in law by failing to apply paragraph 30(1)(*a*) and subsection 30(5) of the Act. In response to the questions of the Court during the hearing for this application for judicial review, particularly with respect to claimants in concurrent employment situations, counsel for the applicant kept pointing to *Trochimchuk*. The respondent submitted no record and did not attend the hearing. A memorandum, a copy of which the applicant received, states that Mr. Marier, at least in October 2012 when the memorandum was drafted by a registry officer, was hospitalized following a stroke. Neither the respondent nor his representative, Jacques Marier, was present at the hearing, but the Court notes that the latter intended to submit a few observations on the many levels involved in obtaining a final decision in an employment insurance case. This issue is not in dispute, and I do not intend to address it further.

Analysis

[18] Did Mr. Marier voluntarily leave his employment with Solvanet without just cause? No. The effect of the Attorney General's position, in my view, is to deprive the words "voluntarily leave one's employment without just cause" of any meaning.

[19] According to the wording of paragraph 29(*c*), above, to determine whether a claimant has "just cause for voluntarily leaving an employment", one must decide "whether, having regard to all the circumstances, on a balance of probabilities, the claimant had no reasonable alternative to

leaving the employment" (*Canada (Attorney General) v. White*, 2011 FCA 190 [*White*]; *Harold MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306). The claimant bears the burden of establishing just cause (*Canada (Attorney General) v. Patel*, 2010 FCA 95, cited at para. 3 of *White*).

[20] Paragraph 29(*c*) sets out a non-exhaustive list of situations that could constitute just cause for voluntarily leaving an employment, such as the following at subparagraph 29(*c*)(vi): "reasonable assurance of another employment in the immediate future". This same subparagraph played in Mr. Marier's favour when he left the Coopérative to begin working for the CSSS de la Vieille-Capitale, but here I am citing it for a different reason. In *Canada (Attorney General) v. Langlois*, 2008 FCA 18 [*Langlois*], this Court noted the difficulty of reading together harmoniously the words "if the claimant had no reasonable alternative to leaving or taking leave" from paragraph 29(*c*) and the wording of subparagraph 29(*c*)(vi) cited above. This Court's reasoning in that case is highly relevant here. Justice Létourneau wrote the following on behalf of the majority:

> [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 [*sic*] 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.

[21] The case law is well settled : the overall purpose of the Act is to make benefits available to the unemployed (*Canada (Attorney General) v. Abrahams*, [1983] 1 S.C.R. 2). In *Langlois*, above, this Court wrote the following at paragraph 32:

> 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.

[22] The case law is rich with examples in which a claimant's particular circumstances have been examined to determine whether the decision to leave his or her employment voluntarily was with just cause within the meaning of the Act (see, for example, the following: *Lakic v. Canada (Attorney General),* 2013 FCA 4; *Green v. Canada (Attorney General),* 2012 FCA 313; *Canada (Attorney General) v. White,* 2011 FCA 190; *Canada (Attorney General) v. Langevin*, 2011 FCA 163; *Canada (Attorney General) v. Greey,* 2009 FCA 296; *Canada (Attorney General) v. Richard*, 2009 FCA 122; *Canada (Attorney General) v. Langlois***,** 2008 FCA 18; *Canada (Attorney General) v. Imran*, 2008 FCA 17; *Canada (Attorney General) v. Murugaiah*, 2008 FCA 10; *Canada (Attorney General) v. Bordage,* 2005 FCA 155 and *Canada (Attorney General) v. Laughland*, 2003 FCA 129).

[23] It mainly stands for the proposition that a claimant voluntarily leaves an employment without just cause within the meaning of paragraph 29(*c*) when this act results in a period of immediate unemployment of which he or she could not have been unaware (e.g., quitting a job to return to school) or of deferred unemployment of which he or she should have been aware (e.g., leaving full-time employment to accept part-time employment) and that it is not justified because it is not the only reasonable alternative for that claimant. This principle is easily explained in the context of an employment insurance program based on a system of calculated risks. This interpretation of the phrase "just cause for voluntarily leaving an employment" is perfectly consistent with the overall purpose of the Act, which, I repeat, is to provide benefits to those who are truly unemployed, and not those who have contributed to their state of unemployment when this was not the only reasonable alternative.

[24] In this case, Mr. Marier voluntarily left his employment with Solvanet to enrol in daytime courses, knowing that he still had a position with the Coopérative occupying him for 25 to 30 hours a week, and that this position was in no way threatened. Under the doctrine of *Langlois*, he was creating neither a risk nor a certainty of unemployment. He was evidently "capable of and available for work" within the meaning of section 18 of the Act, since he was still performing his duties for the Coopérative.

[25] In my view, the Attorney General's position puts at risk anybody who holds concurrent employment and chooses to leave one position voluntarily. Without a demonstration of one of the situations described in paragraph 29(*c*), above, or any other similar or prescribed circumstances, the worker's decision can never meet the "only reasonable alternative" test. In practice, according to this position, the only reasonable alternative open to Mr. Marier was to maintain the *status quo* and never quit either of his concurrent jobs for fear of risking disqualification from benefits. However, nothing in the Act requires claimants to hold more than one position at a time.

[26] I must point out this Court's decisions in *Canada (Attorney General) v. Leung*, 2004 FCA 160, and *Gennarelli v. Canada (Attorney General)*, 2004 FCA 198, in which it was held that the claimants had just cause for leaving one of their two concurrent positions voluntarily because each had "reasonable grounds to believe" that the other position would continue.

[27] I have reached the same conclusion in this case. Mr. Marier had just cause to leave his employment with Solvanet voluntarily, knowing that he would be keeping his second job with the Coopérative. He did not quit the Coopérative until he was assured of a new position at the CSSS de la Vieille-Capitale, a voluntary departure that was justified according to the Commission.

[28] In the light of this finding, there is no need to address the issue of the interpretation of subsection 30(5) of the Act.

Conclusion

[29] For these reasons, I propose that the application for judicial review be dismissed without costs.

"Johanne Trudel"
J.A.

"I concur.
Pierre Blais C.J."

"I concur.
J.D. Denis Pelletier J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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