[TRANSLATION]

Citation: *A. O. v. Canada Employment Insurance Commission*, 2015 SSTAD 961

Date: August 5, 2015

File number: AD-14-270

APPEAL DIVISION

Between:

A. O.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision rendered by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on July 28, 2015

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On April 11, 2014, the Tribunal's General Division concluded that:

> - The Appellant lost her employment because of her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (the Act).

[3] On May 14, 2014, the Appellant filed an application for leave to appeal before the Appeal Division. On February 6, 2015, the application for leave to appeal was granted.

TYPE OF HEARING

[4] The Tribunal determined that this appeal would proceed by way of teleconference for the following reasons:

- the complexity of the issue(s);
- the fact that the credibility of the parties was not among the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while observing the rules of natural justice.

[5] The Appellant attended the hearing. Although it received the notice of hearing, the Respondent did not attend.

THE LAW

[6] In accordance with 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] Did the General Division err in fact and in law by concluding that the Appellant had lost her employment because of her own misconduct within the meaning of sections 29 and 30 of the Act?

SUBMISSIONS

[8] The Appellant submitted the following grounds in support of her appeal:

- On September 15, 2013, she did not lose her employment because of her own misconduct;
- There must be a causal link between the loss of employment and the misconduct, which is not the case here;
- The General Division noted that the Appellant's acts or omissions on September 9 and 10, 2013, are of such a nature as to constitute misconduct;
- It appears from the various letters from the employer that the employer did not intend to dismiss the Appellant for her absence on September 9 and her late arrival on September 10, which is confirmed by the employer's attitude toward the Appellant's spouse, who held the same job as her and who was not dismissed for those reasons, even though he was absent and late on those same days;

- Rather, all the evidence on file shows that the real reason for the employer's dismissal of Appellant is apparently her presumed attempt to organize a "no show" day on September 10;

- However, based on the General Division's decision, the employer failed to demonstrate that the Appellant had attempted to organize a "no show" day;

- The Tribunal committed a determinative error of law by finding that the absence and late arrival constituted misconduct, whereas the employer did not consider these breaches as grounds for dismissal;

- Since the main reason for the dismissal was not retained by the General Division, it cannot be presumed that the Appellant committed misconduct.

[9] The Respondent submitted the following reasons against the Appellant's appeal:

- The General Division did not err in fact or in law and did not act beyond or refuse to exercise its jurisdiction. There was no failure to observe the rule of natural justice;

- The Appeal Division does not have the authority to retry a case or substitute its discretion for that of the General Division. The General Division's authority is 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 that that decision is unreasonable, the Tribunal must dismiss the appeal;

- As noted by a member of the General Division, the Respondent submitted that the Appellant committed misconduct under the Act and the case law and that, consequently, she must be disqualified from receiving Employment Insurance benefits;

- The General Division's decision is consistent with the legislation and the relevant case law and is reasonably compatible with the facts on file.

STANDARDS OF REVIEW

[10] The Appellant did not make any submissions with regard to the applicable standard of review in this case.

[11] The Respondent submitted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on a question of law is correctness – *Martens v. Canada (AG*), 2008 FCA 240, and that the applicable standard of review on questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

[12] The Tribunal notes that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on a question of law is correctness – *Martens v. Canada (AG*), 2008 FCA 240, and that the applicable standard of review on questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] The Appellant submitted on appeal that she did not lose her employment on September 15, 2013, because of her own misconduct and that there was no causal link between the loss of employment and the alleged misconduct. She claimed that the General Division committed a determinative error of law by finding that her absence and late arrival constituted misconduct, whereas the employer himself had not considered these breaches as grounds for dismissal.

[14] She also submitted that all the documents on file show that the real reason for the dismissal by the employer was her presumed attempt to organize a "no show" day on September 10. However, based on the General Division's decision, the employer failed to demonstrate that she attempted to organize a "no show" day. Since the main reason for the

dismissal was not retained by the General Division, it could not be presumed that she committed misconduct.

[15] The issue before the General Division was whether the employer effectively dismissed the Appellant for misconduct – *Cartier,* A-168-00, *MacDonald,* A-152-96.

[16] When the General Division dismissed the Appellant's appeal, it stated the following:

> [Translation]
>
> [35] Lastly, the Tribunal believes that the claimant's actions pertaining to the days of Monday, September 9, and Tuesday, September 10, 2013, are of such a nature as to be considered misconduct within the meaning of the Act and case law.
>
> [36] The claimant was being monitored by her employer, and he had asked her to change her attitude and actions in late August 2013. Therefore, it could certainly not be ruled out that, by deliberately not coming to work on the Monday and by failing to notify the employer of her absence, the claimant would suffer the disciplinary consequences of her choices. The Tribunal believes that the claimant could expect a sanction, which she herself predicted, or a sanction that could result in dismissal following the discussion with her employer in late August 2013.
>
> Since the claimant herself predicted receiving a disciplinary consequence for her actions on Monday, September 9, 2013, the claimant's situation on that day reflects the definitions of misconduct provided in *Tucker* (A-381-85) and *Hastings* (2007 FCA 372). The Tribunal believes that her late arrival to work on Tuesday, September 10, with or without a "no show" day, sealed the employer's decision to dismiss her. As the claimant previously told the Tribunal, she has a mobile telephone, which allowed her to call her employer on the road or before leaving her house to tell him that she might be late and why. By acknowledging that her late arrival on the previous day was deliberate, the claimant should have known that, by arriving late for work on the Tuesday without notifying her employer, she would probably be dismissed for her actions, as outlined in *Locke* (2007 FCA 262).
>
> [37] Lastly, the Tribunal believes that the claimant committed misconduct within the meaning of the Act and the case law and that, consequently, she should be disqualified from receiving Employment Insurance benefits.

[17] In support of her claim for benefits, the Appellant herself indicated that she had been dismissed for failing to report for work and failing to call her supervisor to justify her absence (Exhibit GD3-6).

[18] During her October 25, 2013, interview with an Employment Insurance officer, the Appellant stated that, about one week before her dismissal, her employer effectively met with her to inform her of complaints from certain clients about her behaviour. The employer allegedly told her that they would verify whether disciplinary action would be taken against her. A few days later, on September 9, 2013, she did not report for work because she was out of town at a festival and decided to extend her weekend and return to X on Monday instead of Sunday. She stated that she did not call to notify her employer of her absence because her cellular telephone was not working, adding that she would likely not have called even if it had been working since she knew that she did not have a good reason and the employer would not have approved her day off (Exhibit GD3-16).

[19] The evidence before the General Division shows that the employer wanted to meet with the Appellant the previous week because her behaviour did not seem to have improved, because she was ignoring her supervisor and because things could not continue that way (Exhibit GD3-28).

[20] On September 10, the Appellant arrived late for work without notifying her employer. She was told to go home because this was inacceptable. The employer subsequently decided to dismiss her (Exhibit GD3-28). The Appellant was called to a meeting on Wednesday, September 11. At the meeting, the employer told the Appellant that, given everything that had recently happened, namely, her attitude, her absence and her late arrival, her employment was being terminated (Exhibit GD3-22).

[21] Contrary to the Appellant's allegations, and as stated by the General Division in its decision, the sum of the Appellant's actions led to her dismissal, and the Appellant's actions constituted misconduct within the meaning of the Act.

[22] The Appeal Division does not have the authority to retry a case or substitute its discretion for that of the General Division. The General Division's authority is 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.

[23] The Tribunal cannot conclude that the General Division erred in that way. The decision is reasonably compatible with the evidence on file and is consistent with the relevant legislative provisions as interpreted in the case law.

CONCLUSION

[24] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division