Citation: ***Canada Employment Insurance Commission v. C. H.*, 2015 SSTAD 1350**

Date: November 23, 2015

File number: AD-14-545

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

C. H.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Teleconference on November 17, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated October 23, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On October 23, 2014, the General Division of the Tribunal determined that:

- The Respondent did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the "*Act*").

[3] The Appellant requested leave to appeal to the Appeal Division on October 30, 2014. Leave to appeal was granted by the Tribunal on April 8, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was represented at the hearing by Carol Robillard. The Respondent was not present but the Tribunal is satisfied that the Respondent received notice of the hearing on June 4, 2015.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the "*DESD Act"*) states that the only grounds of appeal are the following:

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.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the Respondent did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- There will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal is a real possibility. It is not necessary that there be wrongful intent for an act to amount to misconduct;

- The General Division erred in finding that the dismissal was the result of a history with a supervisor as the policy read such actions 'could result in termination' not 'would lead to termination';

- The General Division decision determined whether the severity of the penalty imposed was justified and whether the Respondent's action was a valid ground for dismissal. However, the sole question was whether the employee's conduct amounted to misconduct within the meaning of the *Act*;

- The Respondent was an advanced care paramedic with 22 years' experience. He admitted to having taken the picture. He was well aware of the policies governing his employment, a profession which requires the utmost professional and ethical conduct;

- Although the General Division gave credibility to the fact the Respondent felt he was taking a picture of a 'co-worker' and later regretted his actions, deleting the picture and writing an apology, the breach was of such scope that the Respondent should have known his actions could result in his dismissal;

- A reasonable conclusion based on the application of the legal test to the facts of this case is that the Respondent lost his employment due to his misconduct and consequently, he should be disqualified from benefits in accordance with section 30 of the *Act*;

[9] The Respondent did not submit any arguments against the appeal.

STANDARD OF REVIEW

[10] The Appellant submits that the standard of review applicable to questions of fact and law is reasonableness - *Canada (PG) v. Hallée*, 2008 FCA 159. The Respondent did not make any representations regarding the applicable standard of review.

[11] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada* (*AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[12] The Tribunal proceeded with the appeal hearing in the absence of the Respondent since it was satisfied that he had received proper notice of the hearing on June 4, 2015, in accordance with section 12(1) of the *Social Security Tribunal Regulations*.

[13] When it allowed the appeal of the Respondent, the General Division made the following findings:

> "[29] The Tribunal finds that there is agreement that the Claimant did take a picture of his colleague/patient and that the Claimant immediately deleted the photo once he considered the company policy.
>
> [30] The Tribunal finds that the Claimant was aware of the policy regarding patient's, however he felt that he was taking a picture of a colleague and once he considered the policy he immediately deleted the photo. The Tribunal finds that it prefers the evidence of the Claimant regarding his thoughts when taking the photo and then deleting them upon considering the policy, as the Claimant could have easily denied taking the photo and then just deleted it if he knew that he was breaching policy.
>
> [31] The Tribunal further finds that there was history between the Claimant and his supervisor and although this does not prove that there was bias against the Claimant, it certainly provides the presumption of bias based on the fact that there were other multi-media violations committed by other colleagues that went without discipline.
>
> [32] The Tribunal also finds that the company policy indicates that a breach of this policy "could lead to termination", and not "will lead to termination" which implies that it would then be under the discretion of the employer whom the Tribunal has found to have created a presumption of bias against the Claimant.
>
> [33] In light of reviewing and considering the evidence in the docket, the Tribunal finds that the act complained of was not willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his actions would have on his job performance."

[14] With great respect, the decision of the General Division cannot be maintained.

[15] The notion of willful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. The fact that the Respondent had a momentary lapse of judgment and that he immediately deleted the photo and apologized to the patient shortly thereafter is of no relevance to whether his conduct constitutes misconduct – *Canada (AG) v. Hastings*, 2007 FCA 372

[16] Furthermore, the General Division clearly based its decision on the behavior of the employer and the severity of the sanction imposed on the Respondent. The role of the General Division is however to determine if the employee's conduct amounted to misconduct within the meaning of the *Act* and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal – *Canada (AG) v. Lemire*, 2010 FCA 314.

[17] Since the General Division erred in its interpretation and application of the legal test of misconduct, the Tribunal is justified to intervene and render the decision that should have been rendered.

[18] The undisputed evidence demonstrates that the employer had a multi-media policy in place (GD2-59-60). This policy was known to the Respondent prior to the incident that led to his dismissal since he had been given a written statement and had read it (GD2-21). The policy, intended to ensure the privacy of all patients, clearly prohibited "The use of personally owned cell phone cameras, stand-alone cameras, or cameras contained on any other such personal device to create picture, video or audio files while on duty or when performing and patient care function…" (GD2-59). The Respondent also realized that the gravity of his actions could lead to his dismissal (GD2-20) since he was for 22 years an advanced care paramedic, a profession which requires the utmost professional and ethical conduct.

[19] In acting as he did, the Respondent ought to have known that his conduct was such that it might lead to his dismissal - *Canada (AG) v. Secours*, 1995 FCA 210, *Mishibinijima v. Canada (AG)*, 2007 FCA 36.

[20] For the above mentioned reasons, the appeal will be allowed.

CONCLUSION

[21] The appeal is allowed, the decision of the General Division dated October 23, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division