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

Citation: *P. S. v. Canada Employment Insurance Commission,* 2016 SSTADEI 152

Tribunal File Number: AD-15-445

BETWEEN:

P. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON: March 15, 2016

DATE OF DECISION: March 16, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 15, 2015, the General Division of the Tribunal determined that:

> - The Appellant left his employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (the "*Act*")

[3] The Appellant requested leave to appeal to the Appeal Division on July 9, 2015. Leave to appeal was granted on September 3, 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 present at the hearing. The Respondent was also present and represented by Luce Nepveu. The hearing was conducted in English at the request of the Appellant.

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 Appellant left his employment without just cause in accordance with sections 29 and 30 of the *Act*.

ARGUMENTS

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

- That contrary to the conclusions of the General Division, he had an agreement with his employer regarding his vacation period and that the employer did not respect it;

- He filed an agreement with his employer following his complaint to the *Alberta Human Rights Commission* that explains why his employer did not appear at the hearing before the General Division;

- He respectfully submits that in the present matter the General Division failed to observe a principle of natural justice and based its decision on an erroneous finding of fact that it made in a perverse manner without regard for the material before it.

[9] The Respondent submits the following arguments against the appeal:

- The decision of the General Division is not based on any error in law or fact and that there is no evidence to suggest that there was a breach of the fundamental rules of procedure;

- Subsection 30(1) of the *Act* states that a claimant will be disqualified from receiving benefits if he voluntarily left his employment without just cause. While the onus of proof initially rests with the Respondent to show that a claimant left his employment voluntarily, the claimant must prove that he had just cause for doing so;

- Paragraph 29 (c) of the *Act* indicates that just cause exists if, having regard to all the circumstances, the Appellant had no reasonable alternative to leaving or taking leave from the employment;

- There are situations where it may be difficult to determine if the loss of employment was due to misconduct or voluntary leaving;

- The notions of dismissal for misconduct and voluntarily leaving may be two distinct abstract notions, but they are dealt with under the same section of the *Act*. In each case, the Appellant has acted in such a manner that loss of employment resulted. These two notions are rationally linked together because they both refer to situations where loss of employment results from a deliberate action of the employee;

- When a leave of absence is granted by an employer, it is considered that an employment exists at the end of the leave period. Failure to return to work at the end of the agreed upon leave of absence is voluntary leaving;

- The Respondent took the initiative to set his return date to June 17 without first obtaining the permission of his employer;

- The General Division considered the Appellant's submissions however it found that the employer's statement were more relevant;

- The General Division reviewed the evidence, applied the correct legal test to the issue of voluntarily leaving and made a clear finding of fact on the issue before it;

- The Appellant also alleges that he lodged a complaint at the *Alberta Human Rights Commission* and submitted a copy of an agreement dated March 17, 2015 to explain why the employer did not attend the hearing of the General Division (Pages AD1-4 and AD1-5). This document does not meet the definition of new fact because it could have been submitted to the General Division. In any event, this document does not change the facts and does not bring anything more to this case;

- The General Division committed no error in its decision; its findings were reasonable and compatible with the evidence, jurisprudence and legislation that was before it; there is nothing to suggest that its decision was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

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

[12] The grounds of appeal in section 58 of the *DESDA Act* are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in subsection 115(2) of the *Act*. Therefore, the Federal Court of Appeal jurisprudence on the nature of the appeal regarding former EI Umpires is relevant and persuasive.

[13] The Tribunal is of the opinion that the degree of deference the Appeal Division accords to the General Division decisions should be consistent with the deference accorded to the decisions of former board of referees by the Employment Insurance Umpires. An appeal before the Appeal Division is not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) c. Merrigan*, 2004 CAF 253.

[14] The Tribunal therefore 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

[15] The evidence before the General Division demonstrates that the Appellant was never authorized more time by his employer and that he was expected back to work on June 2, 2013 (Exhibits GD3-11, GD3-22, GD3-25, GD3-26, GD3-44, GD3-46).

[16] The evidence before the General Division also shows that the Appellant knew that his extension had not been approved; yet he chose not to comply with the requirements of his employment that he report for work as scheduled.

[17] The Appellant made a personal choice to extend his leave of absence during a period which was not approved by his employer and therefore left without just cause. It has been held that good reason or good cause does not provide just cause under the *Act*.

[18] For the Appellant to conclude that he could return at will after the granted leave period, even when no positive answer was given by the employer to his request for an extension, shows carelessness in regards to one's employment obligations. Absence from work without permission is also considered misconduct under the *Act*.

[19] The Appellant pleads that he lodged a complaint at the *Alberta Human Rights Commission* and submitted a copy of an agreement dated March 17, 2015 to explain why the employer did not attend the hearing of the General Division (Pages AD1-4 and AD1-5). Without ruling on the admissibility of said evidence at the appeal level, the Tribunal finds that the document in question does not change the facts of this case.

[20] The Tribunal does not have the authority to retry a case or to substitute his discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the *DESD Act*. Unless the General Division failed to observe a principle of natural justice, erred in law, 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 or its decision was unreasonable, the Tribunal must dismiss the appeal.

[21] In *Canada (AG) v. Le Centre de valorisation des produits marins de Tourelle Inc.* 2003 CAF 34, the Federal Court of Appeal stated that the Umpire's (now the Appeal Division) role was limited to deciding whether the view of facts taken by the board of referees (now the General Division) was reasonably consistent with the evidence in the record.

[22] The jurisprudence as also established that unless particularly evident circumstances, the question of credibility must be left to the General Division that is in a better position to decide. The Tribunal will intervene only if it is clear that the position of the General Division on that issue is unreasonable considering the evidence before it.

[23] The Tribunal finds that the view of facts taken by the General Division is consistent with the evidence before it and that there is no reason to intervene on the issue of credibility as determined by the General Division.

[24] In conclusion, there is no evidence to support the grounds of appeal invoked or any other possible ground of appeal. The decision of the General Division was open to it and is a reasonable one that complies with the law and the decided cases.

CONCLUSION

[25] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division