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

[TRANSLATION]

Citation: *M. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 157

Tribunal File Number: AD-15-1154

BETWEEN:

M. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: March 17, 2016

DATE OF DECISION: March 21, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Tribunal allows the appeal.

INTRODUCTION

[2] On September 22, 2015, the General Division of the Tribunal found that:

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

[3] On October 28, 2015, the Applicant filed an application for leave to appeal to the Appeal Division after being notified of the General Division's decision on October 2, 2015. Leave to appeal was granted on December 17, 2015.

ISSUE

[4] The Tribunal must decide whether the General Division erred in fact and/or in law in finding that the Appellant lost her employment by reason of her own misconduct under sections 29 and 30 of the Act.

THE LAW

[5] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

> (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.

STANDARDS OF REVIEW

[6] The parties made no submissions concerning the applicable standard of review.

[7] Although the term "appeal" is used in section 113 of the Act (formerly section 115 of the Act) to describe the procedure introduced before the Appeal Division, the Appeal Division's authority is essentially identical to that previously granted to the Umpires and that which is granted to the Federal Court of Appeal by section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of the word, but rather a circumscribed review - *Canada (A.G.) v. Merrigan*, 2004 FCA 253.

[8] The Tribunal is of the opinion that the Appeal Division should provide a degree of deference to the General Division's decisions that is consistent with the degree of deference provided to the decisions of the former Board of Referees being appealed before the Employment Insurance Umpire.

[9] The Federal Court of Appeal determined that 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 questions of law is correctness and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[10] The Appellant filed a claim for Employment Insurance benefits effective January 4, 2015. She was a supervisor at Abattoir Ducharme from November 9, 2011, until she was dismissed on February 18, 2015.

[11] An investigation revealed that the Appellant had been aware that an employee was stealing chicken but did not report it. The employer stated that the Appellant had broken the relationship of trust. The Appellant has maintained that she was afraid of this particular

employee, that he had a criminal record, that he had threatened her, and that he was aggressive.

[12] On March 30, 2015, the Respondent informed the Appellant that she was not eligible for benefits because her employment at Abattoir Ducharme had ended as a result of her own misconduct. The Appellant requested a reconsideration of this decision, which was upheld by the Respondent. The Appellant therefore appealed this decision to the General Division, which dismissed her appeal on September 22, 2015.

[13] The Appellant is now appealing to the Appeal Division on grounds (*a*), (*b*), and (*c*) of subsection 58(1) of the *Department of Employment and Social Development Act*.

[14] The Appellant states that the evidence submitted to the General Division shows that she was being threatened by her co-worker, that she was terrified of his threats, and that the investigation conducted by the employer had revealed that the threats were most likely sincere given that this investigation showed that the individual in question had a [*translation*] "violent criminal record" and could have used his reputation to scare his co-workers. The evidence also shows that the Appellant was vulnerable as a result of her past experiences as a threatened and abused woman.

[15] The Appellant states that the General Division could not find misconduct in light of its own findings, of the Act, and of jurisprudence.

[16] Before the General Division, the Respondent stated that the Appellant had willingly turned a blind eye whereas she was in a position of authority and that she should have reported the incident to her employer. In the appeal, the Respondent changed its position and now states that the evidence is insufficient to confirm whether or not the Appellant had acted deliberately in the situation of harassment and insecurity in which she found herself. The Respondent therefore recommends that the Tribunal allow the Appellant's appeal.

[17] Misconduct, within the meaning of section 30 of the Act, is defined as an intentional behaviour, meaning that it is conscious or deliberate.

[18] To determine whether the Claimant's actions constitute misconduct justifying termination essentially entails a review and appreciation of facts – *Canada (A.G.) v. Larivée*, 2007 FCA 312.

[19] The Tribunal is of the opinion that by finding that the Appellant had lost her employment as a result of her misconduct, the General Division failed to take into consideration the overall relevant facts in the file and therefore has committed an error in law – *Bellefleur v. Canada (A.G.)*, 2008 FCA 13.

[20] The evidence before the General Division clearly shows that the Appellant was being threatened by her co-worker, that she was terrified of his threats, and that this individual had a criminal record and would have used his reputation to scare his coworkers. The evidence also shows that the Appellant was vulnerable as a result of her past experiences as a threatened and abused woman.

[21] The General Division itself, based on the evidence, found that the Appellant [*translation*] "*though powerless, had contributed to a theft, yet chose not to report it to her employer for fear of reprisal from the person threatening her"* and that her *"fear of her co-worker had perhaps given her a reason to keep quite."*

[22] In this case, the evidence presented to the General Division cannot support the conclusion that the Appellant's conduct was conscious, deliberate, or intentional within the specific context of harassment and insecurity in which she found herself. The Tribunal is of the opinion that the General Division erred when it found that the Respondent had satisfied its burden of proof.

[23] Having regard to the arguments in support of the Appellant's appeal and to the Respondent's position on appeal, and after reviewing the file, the Tribunal agrees that the appeal should be allowed.

CONCLUSION

[24] The Tribunal allows the appeal.

Pierre Lafontaine
Member, Appeal Division