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

Citation: *Canada Employment Insurance Commission v. N. K.*, 2016 SSTADEI 191

Tribunal File Number: AD-15-834

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

N. K.

Respondent

and

Westfair Foods Ltd

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON March 29, 2016

DATE OF DECISION: April 8, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated June 30, 2015, is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On June 30, 2015, the General Division of the Tribunal determined that:

- The Respondent did not lose her employment by reason of her 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 July 17, 2015. Leave to appeal was granted on September 12, 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 present and represented by Mark Crawford.

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 when it concluded that the Respondent did not lose her employment by reason of her own misconduct pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

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

- The General Division made an erroneous finding of fact when it concluded that the Respondent's actions were not willful and by concluding that the Respondent's loss of employment was not due to misconduct;

- The Federal Court of Appeal confirms that there will be misconduct where the conduct of a claimant is willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional; and where one knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility;

- The General Division recognized that the alleged breach of a harassment policy would constitute misconduct and from the Respondent's own admission, she did breach the policy;

- The Federal Court of Appeal has confirmed that knowingly contravening the provisions of the employer's code of conduct equates to misconduct under the *Act*;

- The General Division further erred when it found that the employer had misrepresented the number of previous warnings and accepted the Respondent's testimony that she was being treated unfairly by the employer;

- A proper application of the legal test for misconduct to the facts of this case, regardless of whether the Respondent had been disciplined twice or only once previously, leads to the reasonable conclusion that the Respondent lost her employment because of the final act of verbally abusing a co-worker which was in direct contravention of the employer's harassment policy;

- The actions of following the co-worker outside and calling him a 'faggot' whether due to frustration, emotions or the co-worker not responding to her questions, actions which she herself states she was aware could lead to dismissal, were willful and constituted misconduct within the meaning of section 30(1) of the *Act*;

- The role of the General Division is not to focus on the conduct of the employer leading up to the loss of employment but to resolve whether the Respondent was guilty of misconduct; and whether the loss of employment was the result of this misconduct.

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

- She does not deny calling her coworker a name and again this is recognized and admitted;

- She was under duress, and her actions were not willful or intentional, she was upset and blurted out the saying, she immediately regretted what she had said, reported it immediately to management and then tried to apologize and explain her actions to the coworker the very next day;

- It was a spontaneous reaction to the coworker ignoring her after he had pushed her and the incident occurred outside the workplace;

- She immediately took action to retract and had remorse over what she had said to the coworker.

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 notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.

[12] The Federal Court of Appeal further indicates that not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[13] The Court concluded that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *DESD Act*. In

particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *DESD Act*).

[14] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

ANALYSIS

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

> "[45] The Respondent presents the argument that the Claimant's actions of following the coworker outside and then calling him a faggot constituted misconduct within the meaning of the *Act* because she had previous warnings/suspensions and knew that further incidents would lead to dismissal.
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> [46] The Claimant presents the argument that there were extenuating circumstances regarding the incident on October 27, 2014. She provided oral evidence that she takes full responsibility for making the insulting comment to the coworker but in her defense it was made out of total frustration and she had total remorse immediately. She testified that she knew she had received the final warning and the statement could cost her job. She testified that she made her manger aware of the incident and made attempts to explain and apologize to the coworker.
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> [47] The Tribunal finds the Claimant presented mitigating factors that caused her to become frustrated with the coworker. She testified that the incident was triggered by the coworker himself. She provided oral evidence that while she was on a lunch break and trying to get her card swiped on the clock the coworker bumped into her and she asked why he did it, he would not answer. The Claimant testified that she continued to ask and when he left the room she followed still asking. The coworker still refused to answer her and she blurted out "faggot".
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> [48] The Tribunal finds that the evidence on the file from the employer supports the Claimant's version of events in their statement that the coworker did say excuse me, and then maybe bumped the Claimant (GD3-17) however the Tribunal finds the employer took only the side of the coworker and that perhaps the Claimant didn't hear him. There is no evidence to support the employer asked the Claimant if in fact she had heard him say excuse me. The Tribunal finds the statements of the coworker, who admits he may have bumped the Claimant, should have been provided as to why he did not answer the Claimant and let the situation escalate to where the Claimant had to follow him outside.

> [49] The Tribunal finds that an essential element of the kind of misconduct that warrants dismissal is that the conduct must have been willful and in disregard of the effect on the job performance.
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> [50] In this case the Tribunal finds the Claimant to be a credible witness and has provided evidence to satisfy the Tribunal that she was under a great deal of stress, she was emotional, she felt her employment was in jeopardy and that her coworkers were trying to make things even more difficult and when the coworker bumped into her she caused her to become defensive. The evidence on the file and the Claimant's oral evidence is that she made serious attempts to rectify the situation by immediately contacting her manager, union and the coworker. The Tribunal finds based on these facts that the Claimant's use of one word was a spontaneous reaction, and her immediate actions to save her job, cannot be considered as having been done willfully or recklessly.
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> [51] The Tribunal finds that the Commission failed to discharge the burden of proving the Claimant's misconduct within the meaning of the *Act*. Therefore with the evidence before it, the Tribunal finds the Claimant should not be disqualified from benefits because her dismissal was not caused by her own misconduct *Meunier v. Canada (A.G.)* A-130-96; and *Choinier v. Canada (A.G.)* A-471-95"
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> (Underlined by the undersigned)

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

[17] 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 she made serious attempts to rectify the situation by immediately contacting her manager, union and the coworker is of no relevance to whether her conduct constitutes misconduct – *Canada (AG) v. Hastings*, 2007 FCA 372.

[18] Furthermore, the General Division clearly based its decision on the behavior of the employer. However, the role of the General Division is 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.

[19] Finally, the General Division erred in law when it gave the benefit of the doubt to the Appellant. Section 49(2) of the *Act* only applies when the evidence on each side of the issue is equally balanced which is clearly not the case in the present file.

[20] Since the General Division made the above mentioned errors in law, the Tribunal is justified to intervene and will render the decision that should have been rendered.

[21] The undisputed evidence before the General Division demonstrates that the Respondent followed the coworker outside and called him a "faggot" after he was not responding to her questions. By doing so, the Respondent breached the zero tolerance company discrimination and harassment policy. This policy was well known to the Respondent prior to the incident that led to her dismissal. The policy, intended to provide a workplace free of violence, harassment and discrimination, clearly applied in the workplace and outside of the workplace if it involved working colleagues. The Respondent realized that the gravity of her actions could lead to her dismissal and that she could lose her job since she returned inside and immediately reported what she had done to management and apologized for her actions.

[22] Unfortunately for the Respondent, her actions of following the coworker outside and then calling him a "faggot", contrary to the company policy, constitutes misconduct within the meaning of the *Act*. In acting as she did, the Respondent knew or ought to have known that the conduct was such as to impair the performance of her duties owed to the employer and that, as a result, dismissal was a real possibility.

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

CONCLUSION

[24] The appeal is allowed, the decision of the General Division dated June 30, 2015, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division