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

[TRANSLATION]

Citation: *G. M. v. Canada Employment Insurance Commission,* 2016 SSTADEI 194

Tribunal File Number: AD-15-853

BETWEEN:

G. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Agence du Revenu du Québec

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: March 31, 2016

DATE OF DECISION: April 11, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

I INTRODUCTION

[2] On June 11, 2015, the Tribunal's General Division concluded that:

> - The Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* ("the *Act*").

[3] On July 15, 2015, the Appellant filed an application for leave to appeal to the Appeal Division. Leave to appeal was granted on September 21, 2015.

FORM OF HEARING

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

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant was in attendance at the hearing and was represented by Rachel Paquette. The Employer was represented by Nathalie Caron, counsel.

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 finding that the Appellant had lost his employment because of his own misconduct within the meaning of sections 29 and 30 of the Act?

ARGUMENTS

[8] The Appellant's arguments in support of his appeal are as follows:

- The General Division accepted the Respondent's arguments in their entirety, relying essentially on the employer's allegations on termination, which the Appellant disputed before the appropriate administrative tribunals (grievances and complaint before the CRT), the proceedings of which are still pending hearings for a ruling;

- The Tribunal systematically rejected the Applicant's arguments despite the supporting documentation and ample documentary evidence filed with the Respondent;

- Given the foregoing facts, the General Division did not process the Appellant's case fairly, in accordance with the rules of natural justice;

- The General Division reached its conclusion in a capricious manner, without regard for the material before it.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The Appellant maintained that he knew Employer's policy but made his public disclosure in the belief that the Employer's transparency in the matter of business plans took precedence over his duty of non-disclosure. He also admitted that he had preferred not to attend the procedural fairness meeting on March 28, 2014 given that the Employer had not provided him with details;

- The Federal Court of Appeal has affirmed the principle that there is misconduct where the claimant's behaviour was wilful in the sense that the acts that led to dismissal were conscious, deliberate or intentional;

- The Federal Court of Appeal has also defined the legal concept of misconduct within the meaning of 30(1) of the *Act* as wilful misconduct where the claimant knew or ought to have known that his or her conduct was such that it could result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment;

- Moreover, the Federal Court of Appeal has confirmed that the role of the Board of Referees (now the Tribunal) is not to determine whether dismissal was the appropriate disciplinary action or to rule on the severity of the penalty, but rather whether the employee's conduct amounted to misconduct within the meaning of the *Act*;

- By making his public disclosure and by preferring not to attend the procedural fairness meeting, the Appellant's conduct was conscious, deliberate or intentional. The Appellant admitted to his actions and knew or ought to have known that his conduct was such that it could result in dismissal;

- Finally, as mentioned in the General Division's decision, the courts must focus on the claimant's conduct and not the employer's conduct. The General Division properly assessed the evidence and its decision is well founded.

The Employer's arguments against the Appellant's appeal are as follows:

- The Appellant admitted to the press releases and public criticism;
- The Appellant deliberately violated the Employer's code of professional conduct;
- The Appellant was aware of the Employer's code of professional conduct;
- The General Division's decision is well founded in fact and in law.

STANDARDS OF REVIEW

[10] Neither the Appellant nor the Employer made any submissions concerning the standard of review applicable in this case.

[11] The Respondent submits that the standard of review applicable to questions of mixed fact and law is reasonableness - *Martens v. Canada (AG)*, 2008 FCA 240.

[12] The Tribunal notes that the Federal Court of Appeal, in *Canada (AG) v. Jean,* 2015 FCA 242, states at paragraph 19 of its decision that where 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.

[13] The Federal Court of appeal goes on to underscore 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.

[14] The Federal Court of Appeal concluded by underscoring that where it 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 that Act.

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

ANALYSIS

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

> [Translation]
> 22] The facts on file are clear and the submissions made by the Employer and the Respondent are detailed and unambiguous. Herein, the Appellant did not present any valid argument to the Tribunal that he did not lose his employment by reason of his own misconduct. Indeed, the Appellant stated that he had sent out press releases in violation of the Employer's code of ethics and code of professional conduct.
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> [23] The Appellant therefore committed the alleged acts and the Tribunal agrees that his insubordination constituted misconduct within the meaning of the *Act*. Although the Appellant minimizes the facts and considers this criticism unreasonable, the comments made concerning his Employer are nevertheless the direct cause of his dismissal. The Appellant's submissions do not diminish the seriousness of these activities in respect of his Employer, and amply justify the severing of the bond of trust between the Appellant and the Employer.
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> [24] Consequently, the evidence shows that he caused his own unemployment and the prevailing arguments lead to a finding that the Appellant acted in a manner that meets the definition of misconduct within the meaning of the *Act*. The Tribunal also finds that the Appellant ought to have known that his conduct was such that it could result in dismissal given that he was familiar with the code of professional conduct relating to his duty of non-disclosure to the Employer.
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> [25] It is important to note that the Appellant is asking the Tribunal to find that there was no just or reasonable cause for his dismissal based on the Employer's misconduct against him.
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> [26] In fact, the role of the Tribunal is not to determine whether the dismissal or disciplinary action was justified. Rather, the issue to be decided is whether the Appellant's actions amounted to misconduct within the meaning of the *Employment Insurance Act* (*Marion* 2002 FCA 185).

> [27] The courts must focus on the claimant's conduct and not the employer's conduct. The question is not to determine whether the Employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in his losing his employment (*McNamara* 2007 FCA 107; *Fleming* 2006 FCA 16)
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> [28] One must recall that the Employment Insurance program was developed to compensate individuals who find themselves involuntarily unemployed. In the case herein, the deliberate non-compliance with the Employer's professional ethics policy constitutes misconduct and directly caused the loss of his employment.
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> [29] For these reasons, the Tribunal finds that the Appellant lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act. Therefore, the imposed disqualification applies and is supported by the case law.

[17] At the appeal hearing, the Appellant essentially restated his version of the events. He repeated that he had issued two press releases, considering himself justified in publicly criticizing his Employer which, in his opinion, had failed to respect his right to return to the Public Service. He mentioned that he had nothing left to lose in light of his personal situation. He was dismissed following the two press releases and for non-compliance with the Employer's professional ethics policy.

[18] As the General Division underscored, its role was not to judge the severity of the penalty imposed, but rather, whether the employee's conduct amounted to misconduct within the meaning of the *Act – Canada (AG) v. Marion*, 2002 FCA 185.

[19] Misconduct occurs 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.
Put another way, there is 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 was a real possibility - *Mishibinijima*, A-85-06.

[20] The General Division found that the Appellant's deliberate violation of the Employer's professional code of conduct amounted to misconduct and was the direct cause of his loss of employment. Furthermore, it found that the Appellant ought to have known

that these acts could lead to dismissal, considering that he was familiar with the code of conduct respecting his duty of non-disclosure to the Employer.

[21] The Federal Court of Appeal has stated several times that deliberate violations of the Employer's code of conduct are considered misconduct within the meaning of the *Act* - *Canada (AG) v. Bellavance*, 2005 FCA 87; *Canada (AG) v. Gagnon*, 2002 FCA 460.

[22] The Appeal Division is not empowered to retry a case or to substitute its discretion for that of the General Division; The Tribunal's powers are 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 its decision is unreasonable, the Tribunal must dismiss the appeal – Canada (AG) v. Ash, A-115-94.

[23] The Tribunal is not convinced that the General Division erred in this manner. The decision of the General Division is consistent with the evidence on the record and with the relevant legislative provisions and case law.

CONCLUSION

[24] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division