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

[TRANSLATION]

Citation: *Y. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 215

Tribunal File Number: AD-15-860

BETWEEN:

Y. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Tele-Mobile Company

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: March 29, 2016

DATE OF DECISION: April 19, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 26, 2015, the Tribunal's General Division found 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] The Appellant filed an application for leave to appeal to the Appeal Division on July 21, 2015. He learned of the decision on June 29, 2015. Leave to appeal was granted on September 12, 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 Edouard Côté, counsel. The Respondent was represented by Manon Richardson. The Employer was represented by A. S.

[6] The hearing before the Appeal Division was held on March 29 and 30, 2016.

THE LAW

[7] 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

[8] Did the General Division of the Tribunal err in finding that the Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act?

ARGUMENT

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

- The General Division of the Social Security Tribunal of Canada failed to observe a principle of natural justice in this case;

- Section 3 of the *Social Security Tribunal Regulations* provides that the Tribunal must act in accordance with the rules of natural justice. One such rule includes the right to a hearing, which implies the right to be able to cross-examine witnesses;

- At the hearing, the Appellant's representative submitted an application to dismiss the proceedings after the Employer's representative stated she had no witnesses to call and that she had no personal knowledge of the facts at issue;

- Given that the General Division was sitting *de novo*, the Employer could therefore not discharge its burden of proof. For that reason, a request to dismiss the proceedings was presented;

- Given that the General Division had allowed the Employer's representative to testify at the hearing, this rule of natural justice had been violated since she could not be cross-examined on material of which she had no personal knowledge.

- An analysis of the initial ground raised by the Appellant's representative at the start of the hearing clearly shows that the General Division had erred in law by misinterpreting the regulatory provisions applicable to this case;

- Indeed, although the initial ground raised by the Appellant had been rejected, the decision of the General Division was based on material that had not been lawfully proven;

- In this case, the Tribunal should have found that the Employer had failed to discharge its burden of proof in establishing the Appellant's misconduct;

- Given the absence of witnesses at the hearing and because the Employer's representative had no personal knowledge of the facts at issue, the decision by the General Division was therefore based on facts that had not been lawfully entered into evidence;

- Furthermore, the decision of the General Division contains serious irregularities;

- The General Division allowed Exhibits GD5-1 to GD5-70 to be entered into evidence after the hearing; however, the Appellant had no opportunity to examine this documentary evidence prior to the hearing, and was therefore denied the possibility of making full answer and defence;

- Moreover, the Employer's representative could not validly testify or submit to cross-examination on these documents given that they were produced after the hearing;

- The Appellant submitted an amateur transcription of an audio recording of a conversation with his supervisor;

- The Appellant asked the General Division for permission to produce the audio excerpt of this conversation to demonstrate that the amateur transcription was an accurate rendition of his conversation with his supervisor. The General Division denied permission to produce the audio evidence in question;

- The General Division also refused to allow the Appellant to produce documents in support of his position;

- After refusing to admit the amateur transcription of the audio recording into evidence, the General Division member made inappropriate comments about the amateur transcription in her decision;

- The General Division Member blocked her screen for several minutes during the videoconference hearing and then returned wearing different clothing, all of which took place during the Appellant's testimony, in violation of the Appellant's right to a hearing.

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

- The General Division did not err in law or in fact and exercised its jurisdiction properly.

- The Appellant and his representative, as well as a representative of the Employer, were present and were able to give their version of the facts. The General Division made a decision within its jurisdiction, and the decision is not patently unreasonable in light of the relevant evidence;

- In *Olivier* (A-308-81), the Federal Court of Appeal informs us that a Board of Referees (now the General Division) cannot dismiss the Employer's evidence based on the fact that the Employer cannot be cross-examined;

- Boards of Referees (now the General Division), like other administrative tribunals, are not required to follow strict rules of evidence. They can receive and allow hearsay evidence and, more especially, evidence submitted by an employer by telephone. Where contradictions arise between the employer's testimony and the employee's testimony, the mere fact that one is present and the other is absent should not constitute a determining factor. The Board of Referees is free to show preference for the credibility of one or the other;

- Concerning the admission of audio evidence, the Respondent insisted that the said conversation was recorded after the dismissal;

- Next, concerning the submission of additional documents after the hearing, namely, GD5-1 to GD5-70, the Respondent claims that the facts they contained were known to the Appellant: the Employer's policy concerning ethics, training and the code of conduct. The Tribunal forwarded a copy to the parties and the Appellant could have made additional submissions had he considered it necessary. In any case, the General Division made no reference to any of these documents in its decision.

- The General Division had before it an issue in which it had to assess the facts. The courts have repeatedly stated that the Board of Referees (now the General Division) is best placed to assess evidence and credibility, and that the courts cannot substitute their opinion for the Board's unless the evidence as a whole could not reasonably support the decision reached;

- The General Division was not being asked to assess the severity of the penalty imposed by the Employer;

- The role of the Appeal Division is limited to deciding whether the view of facts taken by the General Division was reasonably open to them on the record;

- 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 Tribunal 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;

- 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:

- At the hearing before the General Division, the Employer's representative had personal knowledge of the facts of the case;

- She objected to production of the Appellant's amateur transcription on the basis that it was not authentic, but rather reflected the Appellant's opinion;

- The Appellant's audio recording contained no admission of any kind whatsoever by the Employer;

- She had not noticed that the General Division Member had blocked her screen during the hearing given that she had attended by telephone;

- The General Division's decision is well-founded in fact and in law.

STANDARDS OF REVIEW

[11] The Appellant and the Employer made no submissions concerning the applicable standard of review.

[12] The Respondent submits that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness – *Martens v. Canada (AG)*, 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

[13] 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 when the Appeal Division acts as an administrative 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.

[14] 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.

[15] 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 solely by sections 55 to 69 of that Act.

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

ANALYSIS

Request to Dismiss Proceedings

[17] The Appellant contends that the General Division erred in law by rejecting its ground for dismissing the proceedings at the start of the hearing.

[18] It argues that the General Division should have dismissed the Employer's appeal before hearing the case on its merits since the representative had no personal knowledge of the facts on the record and stated at the hearing that she had no witnesses to call in support of the Employer's position. It was therefore impossible for the Employer to discharge its burden of proving the Appellant's misconduct. Furthermore, in the absence of witnesses, it was impossible for the Appellant to cross-examine the Employer's witnesses, in violation of the principle of natural justice.

[19] The Tribunal listened carefully to the recording of the General Division hearing.

[20] In the Tribunal's opinion, the Employer's representative was aware of the important facts of the case. In fact, she had listened to the Appellant's recorded telephone conversations and watched the Appellant's videos. She also had access to the Appellant's emails. She therefore had knowledge of the Employer's evidence in support of the dismissal, and represented the Employer during the grievance procedure instituted by the Appellant.

[21] The Appellant was thus perfectly at liberty to cross-examine the Employer's representative in order to establish that he had not lost his employment by reason of his own misconduct.

[22] At any event, the Federal Court of Appeal decided in *Caron v. Canada (AG)*, 2003 FCA 254, that Boards of Referees (now the General Division) are not bound by strict rules of evidence applicable in criminal or civil courts and that they might receive and accept hearsay evidence.

[23] With good reason the General Division refused the Appellant's request to dismiss the proceeding. There was no reason to dismiss the Employer's evidence on the basis of the Appellant's argument that he had no opportunity to cross-examine the Employer – *Olivier*, A-308-81.

[24] In the Tribunal's opinion, the Appellant was aware of the Employer's evidence prior to appearing before the General Division, and had ample time to prepare his defence. The General Division allowed him to present his arguments in respect of the entire case before it, and the Appellant had an opportunity to dispute the Employer's position.

[25] This ground of appeal is therefore without merit.

Documents submitted by the Employer after the hearing

[26] The Appellant pleaded that the General Division admitted Exhibits GD5-1 to GD5-70 into evidence after the hearing. He argues that he was not given opportunity to examine this documentation prior to the hearing, and was therefore denied the opportunity to make full answer and defence. Furthermore, the Employer's representative could not validly

testify or submit to cross-examination on these documents given that they were produced after the hearing.

[27] The Tribunal has repeatedly stated that the General Division must show caution when it allows evidence to be entered on file after a hearing without giving the other party the opportunity to respond. Such a practice could give the injured other party a ground for appeal.

[28] The Tribunal is also aware that it must not automatically allow an appeal on this ground if the Appellant has not been caught off guard by the submission of documents after a hearing, or has raised no objection to the late submission, or has failed to respond after receiving copies of the documents submitted late by the opposing party from the Tribunal.

[29] In this case, the Employer's representative testified before the General Division about the documents in question. At that time, the General Division asked the representative to fax it the documents supporting her testimony after the hearing. The Appellant, however, made no formal objection. The Appellant submitted no argument whatsoever that he was caught off guard at the hearing, and did not request an adjournment in order to examine the documents. Moreover, the Appellant did not ask for any details about the documents in question when he had the opportunity to cross-examine the Employer's representative. Furthermore, the Appellant made no written response upon receiving a copy of the Employer's documents after the hearing.

[30] Is the Tribunal obliged to allow this ground of appeal when a party takes a passive stance before the General Division and after the hearing? The Tribunal thinks not.

[31] The case herein is not one where post-hearing evidence has been entered without the knowledge of the opposing party or where the evidence is completely new and likely to catch the opposing party off guard. The documentary evidence was simply intended to confirm the Employer's already known position.

[32] The Appellant had an opportunity at the hearing to object to production of the documentary evidence, to question the Employer's representative about the said documents, to request an adjournment in order to examine the documents or even to reply after receiving

a copy of the documents before the General Division gave its decision, and yet the Appellant did not.

[33] This ground of appeal is therefore rejected.

Refusal to admit the Appellant's audio evidence and certain documents

[34] The Appellant sought the General Division's permission to produce an audio excerpt in order to demonstrate that the amateur transcription he entered on file (GD2-68 to GD2-77) was an authentic reproduction of his conversation with his employer. He argued that the General Division had erred when it refused him permission to enter this audio evidence on the record. The Appellant argued that the General Division Member then made inappropriate comments in her decision concerning the transcription of the audio recording, but only after refusing to allow the audio recording into evidence.

[35] The Tribunal listened carefully to the recording in question.

[36] While it is true that the General Division could have shown greater moderation on this matter in its decision, the Tribunal fails to see how this audio evidence supports the Appellant's position. It contains no admissions of any kind whatsoever by the Employer, despite the Appellant's obvious efforts to elicit some kind of admission from his supervisor. Instead, the audio recording gives the impression that the Appellant acknowledges the misconduct alleged against him by his Employer.

[37] Accordingly, the Appellant has not been prejudiced by the General Division's exclusion of the audio of the audio recording from the evidence.

[38] Although the purpose of the audio evidence was to confirm that the amateur transcriptions accurately reflected the conversation between the Appellant and his supervisor, the Tribunal considers that the General Division did not err when it chose to place little weight on this evidence by the Appellant.

[39] Concerning the refusal of the General Division to allow the Appellant to produce documents, the Tribunal noted on listening to the hearing that the documents were not produced as evidence at the hearing, but rather "offered" to the General Division as it

deemed necessary. The documents in question pre-dated the events that had led to the Appellant's dismissal.

[40] The Tribunal is of the opinion that the Appellant was not subjected to any prejudice by the exclusion of certain documents. The documents in question were essentially intended to support the Appellant's testimony at the hearing that he had always been considered a good employee prior to his union activities, which the Employer did not dispute.

[41] This ground of appeal is therefore rejected.

Member's absence while the hearing was in progress

[42] The Appellant states that the General Division Member blocked her screen for several minutes during the videoconference hearing and later returned wearing different clothing, all of which transpired during his testimony, thereby violating the Appellant's right to be heard.

[43] Indeed, the Tribunal heard the General Division Member mention that she would not be visible but would continue to listen to the evidence during the hearing.

[44] The Tribunal considers that it would have been far better if the General Division Member had adjourned the hearing rather than proceed in such manner.

[45] However, the audio recording of the hearing does not lead us to find that the Member was absent during the hearing. Rather, she reassured the parties of her continuing presence even though she was temporarily not visible on screen.

[46] This ground of appeal is therefore rejected.

Conclusions

[47] When it rejected the appeal of the Appellant, the General Division found the following:

> [Translation]
> [78] The Respondent exhibited a great deal of intensity during the proceedings and some struggle for power that he might have believed was vested to him by reason of his union duties. However, in deciding the question presently at issue, the Tribunal must limit itself to the employer/employee relationship and the obligations of both parties. The Tribunal considers that the Respondent confused his obligations as a union representative with his duties as an employee, and surmises that the former regularly took precedence over the latter in his time management. Yet the Employer's representative stated that union representatives had the possibility of obtaining time off work to attend to union business, upon request.
> [79] In this case, the Respondent may have lost sight of the nature of his relationship with his Employer, and the attendant ties of subordination. The Employer asked him to comply with the company's internal policies. The Respondent was seen, received warnings to comply and was made subject to suspensions. He had been informed that his refusal to comply with the Employer's requests could result in his dismissal. Nothing on file shows that the Respondent tried to correct the situation. He must have known 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.
>
> [80] The Tribunal is compelled to find that the Respondent acted in a willful or deliberate manner, with reckless disregard for the effects of his actions on his employment. The Tribunal acknowledges the causal relationship between the Appellant's actions and the dismissal in question. The Tribunal finds misconduct within the meaning of the *Employment Insurance Act*.

[48] 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;

[49] The Tribunal cannot conclude herein that the General Division made such an error. The decision of the General Division is compatible with the evidence on file and with the relevant legislation and jurisprudence.

CONCLUSION

[50] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division