



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *G. T. v. Canada Employment Insurance Commission*, 2016 SSTADEI 241

Tribunal File Number: AD-15-1079

BETWEEN:

G. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON April 28, 2016

DATE OF DECISION: April 29, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

I INTRODUCTION

[2] On September 9, 2015, the General Division of the Tribunal 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 had filed an application for leave to appeal to the Appeal Division on October 2, 2015. Leave to appeal was granted on October 15, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference 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 and his representative informed the Tribunal that they would not be present at the hearing. They asked that a final decision be made in this matter. The Respondent was represented at the hearing by Elena Kitova.

THE LAW

[6] Under 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 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

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

- It is false to state that he decided to disregard his duty to his employer. It is false to state that he knew that his conduct could result in his dismissal, otherwise why would he have made an admission and not have kept quiet or told a lie instead?;
- It is false to state that he breached an implied duty of his contract of employment. He always performed his work to the best of his ability and no complaints were made against him in this regard;
- His action did not cause any prejudice to the employer;

- The Appellant is a human being and young; it was by no means his intention to get himself dismissed. All that he wanted was to do his best to perform his work well;
- Dishonesty aside, the courts seem willing to concede that employees are human beings, that they sometimes fall sick and become unable to meet their obligations, and that they sometimes make mistakes under the effects of stress or inexperience;
- Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when the conduct of the employee evinces willful or wanton disregard of the employer's interest, as in wilful violations, or disregard of standards of behavior which the employer has a right to expect of his employees, or in carelessness or negligence of such a degree or recurrence as to manifest wrongful intent;
- That the employer breached numerous commitments made to the Appellant.

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

- the General Division's decision is well-founded in fact and in law, and is supported by relevant cases law;
- the General Division correctly interpreted subsection 30(1) of the *Act* and the legal concept of misconduct, as defined by the *Act* and the case law. Its decision was also reasonable based on the material entered in the record and presented at the hearing;
- the evidence on file shows that the Appellant lost his job for writing graffiti in the company's public washroom. The Appellant admitted to making a graffiti marking;
- In doing so, the Appellant violated an implied duty of this employment contract to respect the employer's property, which constitutes misconduct within the

meaning of the *Act* and the case law, contrary to what the Appellant's representative submits;

- The Appellant emphasizes the minor nature of the act in question. In this regard, the content and size of the graffiti are not determining factors in establishing misconduct. The Appellant had to have known that damaging the employer's property, even if it had been damaged by other persons before him, involved certain aspects of "negligence" and that his action in adding his graffiti to the existing overall graffiti, however small, was certainly willful;
- The Appellant's actions were intentional, conscious and deliberate, and he 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.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits that an interpretation of the term "misconduct" is a question of law and the applicable standard of review is correctness (*Canada (AG) v. Coulombe*, 2008 FCA 292). The matter of whether the Appellant's behaviour constitutes misconduct is a question of mixed fact and law, primarily of a legal nature. With respect, the applicable standard of review is reasonableness: *Hickey v. Canada (AG)*, 2008 FCA 330.

[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 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.

[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]

[20] Unfortunately, after examining and weighing the facts, the Tribunal finds that the claimant committed misconduct within the meaning of the *Act*. (*Larivée* (2007 FCA 312)). As the claimant's representative pointed out at the hearing, the washroom that the claimant used was covered in graffiti. However, the act alleged against the claimant is that he added his own graffiti to the existing graffiti. The Tribunal is not required to assess the actions of “others,” but only the action of the claimant. The claimant had to have known that damaging the employer's property, even if it had been damaged by other persons before him, entailed aspects of “negligence” (*Tucker* (A-381-85)) and that to add his mark, however small, to the graffiti already present was certainly wilful. The Tribunal believes that the claimant's actions were intentional, conscious and deliberate, and that he 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. (*Hastings* (2007 FCA 372))

[21] On the matter of the causal link, the Tribunal finds that the claimant's action is the operative cause of his loss of employment. It was certainly shown with considerable alacrity that the claimant's union membership was imminent at the time of his dismissal, but the evidence in this regard is not substantial enough to raise genuine doubts on this matter. In short, the Tribunal finds that the graffiti is the cause of his loss of employment because he breached the duty to respect the employer's property, implied in any contract of employment. (*Cartier* (2001 FCA 274))

[17] There is 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. 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).

[18] The role of the General Division is not to analyze the employer's behavior or decide whether the penalty imposed was appropriate. Rather, the issue to be decided is whether the Appellant's action amounted to misconduct within the meaning of the *Act* (*Canada (AG) v. Marion*, 2002 FCA 185).

[19] In this case, the uncontested evidence shows that the Appellant lost his employment for writing graffiti in the company's public washroom, thus compounding the deterioration of property owned by his employer. The General Division found that the Appellant's wilful disregard for company property constituted misconduct and was the direct cause of his loss of employment.

[20] By writing graffiti in the employer's public washroom, the Appellant obviously ignored the standard of conduct that his employer was entitled to require from its employees, which constitutes misconduct within the meaning of the *Act* and disqualifies him from receiving benefits.

[21] 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*.

[22] 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, the Tribunal must dismiss the appeal (*Canada (AG) v. Ash*, A-115-94).

[23] The Tribunal cannot conclude that the General Division made such an error. The decision of the General Division is compatible with the evidence on file and consistent with the relevant legislative provisions and the case law.

CONCLUSION

[24] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division