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

Citation: *S. G. v. Canada Employment Insurance Commission,* 2016 SSTADEI 294

Tribunal File Number: AD-14-608

BETWEEN:

S. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: **Shu-Tai Cheng, Member, Appeal Division**

DATE OF DECISION: **Decided on the record on June 8, 2016**

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 6, 2014, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that benefits under the *Employment Insurance Act* were not payable.

[2] An application for leave to appeal the GD decision was filed with the Appeal Division (AD) of the Tribunal on December 9, 2014 and leave to appeal was granted on August 5, 2015.

[3] This appeal proceeded on the record for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the Appellant or other parties are represented.

c) The request of the Appellant.

d) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Whether the GD failed to observe principles of natural justice and the duty of procedural fairness or made erroneous findings of fact in a perverse or capricious manner without regard for the material before it.

[5] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the matter to the GD for reconsideration or confirm, rescind or vary the GD decision.

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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, 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.

[7] Leave to appeal was granted on the basis that the Appellant had set out reasons which fell into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(a) and (c) of the DESD Act.

[8] Subsection 59(1) of the DESD Act sets out the powers of the AD.

SUBMISSIONS

[9] The Appellant submitted that the GD:

a) disregarded the Appellant's evidence, including her testimony;

b) relied solely on evidence provided by the Appellant's former employer (Employer);

c) did not find the Appellant's testimony to be credible or not credible and favoured the Employer's evidence without providing reasons why it did so.

[10] By so doing, the Appellant argued that the GD erred as follows:

a) The GD decision was not a reasonable outcome given all the facts before it;

b) The legal test for misconduct was misapplied;

c) The Appellant's evidence was not considered on many points;

d) Her evidence has remained consistent throughout the proceedings whereas the Employer's evidence has been inconsistent, yet the Employer's evidence was preferred by the GD; and

e) The matter should be sent back to the GD for a hearing *de novo*.

[11] The Respondent submitted that the GD decision is one of the reasonable outcomes given all the facts before them.

STANDARD OF REVIEW

[12] The Appellant and the Respondent both submitted that applicable standard of review for mixed questions of fact and law is reasonableness based on *Canada (AG) v. Hallée*, 2008 FCA 159.

[13] The Federal Court of Appeal has determined, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[14] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[15] However, in *Canada (AG) v. Paradis; Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of employment insurance decisions rendered by the GD.

[16] The Federal Court of Appeal, in *Canada (AG) v. Maunder*, 2015 FCA 274, referred to *Jean, supra* and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the AD to decisions of the GD. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan*.

[17] In the recent matter of *Hurtubise v. Canada (AG)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the AD which had dismissed an appeal from a decision of the GD. The AD had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The AD had concluded that the decision of the GD was "consistent with the evidence before it and is

a reasonable one…" The AD applied the approach that the Federal Court of Appeal in *Jean, supra,* suggested was not appropriate, but the AD decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[18] There appears to be a discrepancy in relation to the approach that the AD of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the GD, and in particular, whether the standard of review for questions of law and jurisdiction in employment insurance appeals from the GD differs from the standard of review for questions of fact and mixed fact and law.

[19] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

ANALYSIS

[20] The Appellant's initial claim for employment insurance benefits was established effective November 10, 2013 and the Commission had first concluded that the Appellant's actions did not constitute misconduct and approved her claim for benefits. The Employer submitted a request for reconsideration, and the Commission modified its original decision to conclude that the Appellant had lost her employment due to misconduct.

[21] The GD decision stated in the "Analysis" section:

> [23] In this case, the Tribunal accepts the submissions of the employer and finds that on a balance of probabilities, the claimant's behaviour on job sites resulted in the termination of her employment.
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> [24] The Tribunal finds that the evidence from the employer is overwhelming in demonstrating that the claimant's actions were the cause of her termination.
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> [25] The employer in this case has demonstrated through direct evidence that their clients (contractors) had issues with the claimant's conduct and performance. They have also demonstrated that the claimant was aware of the company's violence and harassment policy which she violated.
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> …

> [28] Through the employer's submissions, the Tribunal was able to establish that the claimant's conduct placed their interest at risk and justifies the dismissal by reason of misconduct. It is well versed that an employer has the right to set and
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> expect a proper standard of behaviour from its employees. In this case, it has been demonstrated that the claimant's conduct was not what was expected from the employer and the conduct was the direct cause of her unemployment.
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> [29] The evidence in this case demonstrates that the claimant failed to act in accordance with the employer's policies. Also, her behaviour on the job sites, as demonstrated by the employer, inevitably led to her dismissal.
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> [30] In this case, there is a clear causal relationship between the claimant's conduct and her resulting dismissal.
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> [31] The Tribunal finds that the claimant knew or ought to have known that her actions could result in her termination. Unfortunately for the claimant, the Tribunal is satisfied with the information presented to make a finding of misconduct under the Act.
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> [32] When giving regards to all submissions the Tribunal maintains that the claimant lost her employment by reasons of her own misconduct and a disqualification is appropriate.

[22] The GD decision noted the "evidence" in paragraphs [13] and [14] which were letters, emails and a workplace policy submitted by the Employer.

[23] There is no reference to the Appellant's evidence, documentary or oral, in the GD decision, despite the Appellant's testimonial evidence given at the GD hearing for more than forty (40) minutes, the record on appeal containing evidence of the Appellant, and other documentary evidence provided by the Appellant.

[24] In general terms, the Appellant's counsel argues that the GD erred in fact and in law (by ignoring important evidence) when it concluded that the Appellant lost her employment by reason of her own misconduct. The Respondent submits that there is no evidence that the GD acted impartially, erred in law or made an erroneous finding of fact in a perverse or capricious manner. However, I find that the fundamental problem with the GD decision concerns the sufficiency of its reasons.

[25] The GD based its decision on accepting the evidence and the submissions of the Employer that the Appellant's behaviour on job sites resulted in the termination of her employment. However, it did not undertake any meaningful analysis of the evidence and submissions of the Appellant.

[26] In *Page v Workplace Health, Safety and Compensation Commission of New Brunswick,* 2006 NBCA 95, Turnbull J.A., in partial dissent, examined the issue of the sufficiency of reasons, in reviewing the decision of the Appeals Tribunal established under that province's *Workplace Health, Safety and Compensation Commission Act,* S.N.B. 1994, c. W-14.

> [40] . . . In para. 9, I found that had the Appeals Tribunal had jurisdiction to make the decision it did I would still have remitted the matter because the reasons for its decision do not comply with the standard for reasons set by this Court in the *Boyle* case. In *Boyle*, Bastarache, J.A., as he was then, defined the standard for written decisions required by s. 21(10) of the *WHSCC Act.* He said in para. 26 as follows:
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> […] Reasons must explain to the parties why the Tribunal decided as it did; it must avoid the impression that its decision was based on extraneous considerations or that it did not consider part of the evidence. Reasons must also be sufficient to enable the Court of Appeal to discharge its appellate function; the Tribunal must therefore set out the evidence supporting its findings in enough detail to disclose that it has acted within jurisdiction and not contrary to law.
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> [41] Sufficient reasons also avoid, to a considerable degree, the perception of decisions that are arbitrary or capricious and do enhance public confidence in the judgments and fairness of administrative tribunals; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.
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> [42] In *Mattina v. Workplace Health, Safety and Compensation Commission (N.B.)* 2005 NBCA 8 (CanLII), (2005), 279 N.B.R. (2d) 104, [2005] N.B.J. No. 22 (C.A.)(QL) Robertson, J.A. noted in para. 6 that the "Appeals Tribunal [has an] obligation to provide intelligible reasons that adequately address the arguments that had been advanced […] This Court might well […] set aside its decision because of the failure to give adequate reasons," and he listed previous decisions of this Court that have discussed that issue.
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> [43] In summary, sufficient reasons must generally contain an analysis of the evidence, the issues or position of the parties, the findings of fact and principal evidence that supports those facts and, where applicable, the statutory provisions that are relied on to support the authority of the administrative tribunal to decide as it does.
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> [44] Of particular importance to a reviewing court's judicial review of an administrative tribunal's decision is a reasoned decision that permits the reviewing court to do its task: a "pragmatic and functional analysis" to select the applicable standard, or standards, to review the tribunal`s finding or findings.

[27] The Supreme Court of Canada, in *R. v. Sheppard*, 2002 SCC 26, [2002] SCR 869, stated that one of the purposes of written reasons is to explain to parties why the decision was made.

This purpose was not achieved without some explanation of how the evidence was assessed and weighed.

[28] In *R. v. R.E.M.*, 2008 SCC 51, [2008] SCR 3, the Supreme Court of Canada referred to *Sheppard, supra,* and a number of other cases and confirmed the principles relating to sufficiency of reasons, as follows:

a) Appellate courts are to take a functional, substantive approach to sufficiency of reasons reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered;

b) The basis for the trier of fact's decision must be "intelligible", or capable of being made out. In other words, a logical connection between the decision and the basis for the decision must be apparent. A detailed description of the trier of fact's process in arriving at the decision is unnecessary.

c) In determining whether the logical connection between the decision and the basis for the decision is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

d) The question is whether the reasons, viewed in light of the record and submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand and the decision on the other.

e) The degree of detail required depends on the circumstances. Less detailed reasons may be required in cases where the basis of the decision is apparent from the record; more detail may be required where the trier of fact is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue".

f) To justify intervention, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the

trial focused, must fail to disclose an intelligible basis for the decision, capable of permitting meaningful appellate review.

[29] In the present case, I find that the GD failed to consider contradictory evidence on the central issue of misconduct, namely the Appellant's evidence, both documentary and oral. Read in the context of the evidentiary record and the live issues, the GD's reasons failed to disclose an intelligible basis for its decision, capable of permitting meaningful review.

[30] For these reasons, I find that the GD breached a principle of natural justice and erred in law.

[31] While the Applicant did not assert an error in law, subsection 58(1)(b) of the DESD Act refers to an error in law in making its decision, whether or not the error appears on the face of the record. This error was not apparent on the face of the record but only after the submissions of the parties, review of the audio recording of the GD hearing, consideration of the case law and comprehensive analysis by the AD.

[32] As this matter requires a review of the evidence, documentary and oral, returning the matter to the GD is appropriate.

[33] In *Comité exécutif du Collège des médecins du Québec c. Pilorgé*, 2013 QCCA 869, the Quebec Court of Appeal allowed an appeal on the grounds of insufficiency of reasons and returned the matter to the <u>same trier of fact</u> who had made the decision appealed from (with specific directions).

[34] I have considered doing this in the present case, returning the matter to the same GD Member who held the teleconference hearing on October 22, 2014. However, I have decided not to order this specifically, as neither of the parties made this request and I did not ask them for submissions on this point.

[35] Considering the submissions of the parties, my review of the GD's decision and of the appeal file, I allow the appeal.

CONCLUSION

[36] The appeal is allowed. The case will be referred to the General Division of the Tribunal for reconsideration in accordance with these reasons.

Shu-Tai Cheng
Member, Appeal Division