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

Citation: *G. L. v. Canada Employment Insurance Commission,* 2016 SSTADEI 338

Tribunal File Number: AD-14-148

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Construction Norascon Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: June 9, 2016

DATE OF DECISION: June 27, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

I INTRODUCTION

[2] On February 7, 2014, the Tribunal's General Division found that the Appellant had voluntarily left his employment without just cause 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 February 24, 2014. Leave to appeal was granted on March 23, 2015.

FORM OF HEARING

[4] The Tribunal determined that the hearing of 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 information on file, including the need for additional information; and
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant was absent at the hearing but was represented by Jessie Caron. The Respondent was represented by Julie Meilleur.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act* (*DESDA*), 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] The Tribunal must determine whether the General Division erred in fact and in law in finding that the Appellant had voluntarily left his employment without just cause 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:

- He was dismissed after legitimately calling attention to a situation tantamount to workplace harassment;

- He did not choose to leave his employment; he left the construction site at the insistence of his supervisor;

- His employer is the one that decided he had left voluntarily and had severed the employment relationship. The General Division, like the Respondent before it, disregarded all of the facts relevant to establishing this fact;

- Before considering the question of "just cause" within the meaning of the *Act*, we must first decide whether the Appellant left his employment voluntarily;

- The General Division erred in law by omitting to reach a decision concerning end-of-employment entitlement first and foremost, and subsequently relied on erroneous facts and hearsay to determine that the Appellant has voluntarily left

his employment, all the while disregarding convincing and decisive facts that would lead it to find otherwise;

- In finding that the Appellant had voluntarily left his employment, the General Division rendered an unreasonable decision.

- Since the Appellant had been terminated, the onus was on the Respondent to prove that his misconduct was warranted. Having failed to do so, the Appeal Division was correct to find the Appellant entitled to receive employment insurance benefits;

- The Appellant did not voluntarily leave his employment without just cause and is entitled to the benefits provided by the *Act*.

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

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

- The Appellant was present and was able to give his 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;

- To determine whether just cause for leaving an employment exists, it must be asked whether, on a balance of probabilities, the claimant had no reasonable alternative to leaving, having regard to all the circumstances;

- In this case, the Appellant did not have just cause for leaving his employment. The Appellant could have asked his supervisor for a few days off work to go and meet with the boss directly, in person, at a distance of 6 or 7 hours from his work site, instead of deciding himself on-the-spot and without permission. He could have contacted the employer by telephone to explain the situation and request transfer to another work site. He could have contacted his union and filed a grievance against his employer if he was dissatisfied with his working conditions;

- The Appellant left the work site after 4 days of work although he was scheduled to work for 10 consecutive days. The employer could not leave the truck unattended, and had to hire someone else because the Appellant left the work site and did not report to his work station. The Employer could have considered terminating his employment given that he left the work site without permission, but chose instead to view the situation as a case of voluntary departure;

- Although a claimant may believe that he or she has good reason to leave a work place because of unpleasant working conditions, such reason does not constitute just cause within the meaning of the *Act*;

- The Appellant informed his employer of a legitimate problem that occurred only once and did not direct concern him, mentioning that he did not like to be spoken to in such a manner. The employer responded that if he was not happy he could leave. He did not tell the Appellant to leave; the Appellant made the decision to leave. He could have returned to his position and waited to speak to the senior manager or his union to resolve the problem, but he preferred to leave the work site immediately.

- The Tribunal 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 *DESDA*.

- 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.

- The General Division properly assessed the evidence and its decision is well founded.

STANDARDS OF REVIEW

[10] The Appellant submits that determining what constitutes termination is subject to the correctness standard, and that questions of fact as well as mixed law are reviewable only if they are unreasonable.

[11] The Appellant submits that the interpretation of the legal concept of "just cause" in voluntarily leaving an employment is a question of law and the applicable review standard is that of a proper decision. Applied to the facts herein, the legal grounds for judicial review relate to a question of mixed fact and law, and the judicial review standard is reasonableness. *Canada (AG) v. Richard, 2009 FCA 122.*

[12] The Tribunal notes that the Federal Court of Appeal, in *Canada (AG) v. Jean*, 2015 FCA 242, mentions at section 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 continued by underscoring 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 stating 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 Tribunal's Appeal Division described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

[16] Therefore, 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;

ANALYSIS

[17] In dismissing the Appellant's appeal, the General Division found the following:

> [Translation]
> [25] In this case, the facts show that the claimant did not prove he had just cause to leave the work site and refuse to work. The claimant admits that he made the decision to quit his job because he was not obliged to endure a supervisor who refused to speak to him properly.
>
> [26] Based on all of the circumstances, the claimant clearly left the work place because of a personality conflict with a supervisor. The jurisprudence shows that in most cases, claimants have an obligation to attempt to resolve workplace conflicts with the employer or to demonstrate that an effort was made to seek alternative employment before taking a unilateral decision to quit a job (*White,* 2011 FCA 190; *Murugaiah*, 2008 FCA 10; *Hernandez,* 2007 FCA 320; *Campeau*, 2006 FCA 376).
>
> [27] The Tribunal believes that, in the claimant's situation, he should have remained at work and that his circumstances were not unbearable to the point that he had no reasonable alternative but to quit his job. If he personally considered himself unable to continue working in such a situation, the claimant had an obligation to find alternative employment before quitting the job he had. He simply failed to prove that he had no reasonable alternative but to leave his employment.

[18] The Appellant vigorously objects to the General Division's finding of evidence that he had left voluntarily and had not been dismissed by the employer. He argued that at no time did he quit his job.

[19] His position is based essentially on the remarks of the foreman on the morning of April 8, 2013, which he said left little room for interpretation. More specifically, he referred the Tribunal to page AD1A-30 of the General Division hearing transcripts, which reads:

> [Translation]
> A I tried to talk to him but it was no better than the day before. I said:
>
> "That's no way to talk to people ..." I said. . .

"...I don't give a damn about you, do what you want, I don't care. Get the hell out, get out of my sight."

That's it, that's how he talked to me, just like that.

Q So then what did you do?

A Well he was my boss, so he needed to talk to me some, but it wasn't right.

Q Then what did you say to him, how did you respond to that?

A Well, I said:

"I'm going to see M. B. and we'll sort things out.

Q And M. B., where was he?

A Amos.

Q And how did C. A. react when you told him you were going to see M. B.?

A He swore:

"Do what you want, I don't want to know, I don't give a damn."

[20] With respect, the Tribunal sees no indication in this exchange that the employer is terminating the Appellant's employment. On the contrary, the evidence shows that the foreman clearly preferred not to discuss the situation, and had left it up to the Appellant to do as he pleased, even after the Appellant informed him that he planned to take the matter up with his superior.

[21] The Appellant also argued that he did not leave his employment but simply left the work site in order to try to resolve the conflict by discussing it with his supervisor. However, the Appellant could easily have returned to his station and waited to speak with his superior at the end of his 10-day posting, or he could have contacted his superior or his union by telephone. Instead, he chose to leave the work site immediately rather than work, thus leaving the employer a driver short in a remote region.

[22] The evidence before the General Division does not show that the Appellant's employment conditions were unbearable to the point that he had to leave his employment immediately. Granted, the work atmosphere was unpleasant, but it was not urgent for the

Appellant to leave the work site. Furthermore, the Appellant did not seek alternative employment before quitting his job.

[23] The evidence before the General Division therefore clearly shows that it was the Appellant, not the employer, who instigated the loss of employment when he left the work site rather than work, and that leaving was not the only reasonable solution.

[24] Although the Tribunal had to consider the Appellant's argument that he had been dismissed, the jurisprudence clearly establishes that a claimant's failure to return to his or her work station without obtaining advance authorization from the employer constitutes misconduct within the meaning of the *Act*. It is plain to the Tribunal that the Appellant's unauthorized absence from the work site adversely affected the employer's operations and constitutes misconduct within the meaning of the *Act*.

[25] The Federal Court has repeatedly held that it is of the essence of the Employment Insurance program "that the assured shall not deliberately create or increase the risk" - *Smith v. Canada (PG)*, [1998] 1 FC 529. The appellant herein clearly created risk by leaving the work site and cannot oblige the Employment Insurance fund to bear the economic burden of his decision.

[26] The Tribunal finds that the General Division's decision is based on the evidence before it and is consistent with the legislative provisions and case law.

[27] Intervention by the Tribunal is unwarranted.

CONCLUSION

[28] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division