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

[TRANSLATION]

Citation: *R. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 374

Tribunal File Number: AD-15-1241

BETWEEN:

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Simbol Test Systems Inc.

Added party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 21, 2016

DATE OF DECISION: July 15, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 15, 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 filed an application for leave to appeal to the Appeal Division on November 20, 2015. The decision was sent to him on October 22, 2015. Leave to appeal was granted on November 30, 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 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 absent at the hearing but was represented by S. S. The employer was represented by A. D. The Respondent did not attend the hearing although it received the hearing notification.

THE LAW

[6] Pursuant to 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 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:

- The General Division properly exercised its jurisdiction, but it erred in fact and in law;

- At paragraph 39 of its decision rendered on October 16, 2015, the General Division analyzed an act by the Appellant while he was still employed by his employer;

- The Appellant took a photograph of a the number of a part for a laser device that was readily available on the Internet and sent the photo to a friend and former co-worker;

- The employer conceded that the information in question is public information (paragraph13 aa) of the General Division's decision);

- In finding that this act constituted misconduct within the meaning of the *Act* and the case law, the General Division imposed on the Appellant, who was bound by a general duty of loyalty to his employer under his employment agreement, a duty of non-disclosure stricter than that required under professional privilege;

- In this case, the Appellant shared publicly-available information with others;

- The Appellant therefore did not know, or definitely could not have known, that sharing publicly-available information with others would impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.

- The Appellant had always upheld his duty of loyalty to his employer.

[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 properly exercised its jurisdiction;

- The Appeal Division is not empowered to retry a case or to substitute its discretion for that of the General Division. The Appeal Division's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*;

- Therefore, since the General Division assessed all the facts on file and made a reasonable decision, the Appellant's appeal must be dismissed.

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

- The Appellant signed a confidentiality agreement with the Employer at the time of his hiring;

- The Appellant committed theft of intellectual property considering that the information sent was specific technical information pertaining to highly specialized equipment known only to persons working in the employer's laboratory;

- The Appellant sent the confidential information to a competitor to inform the competitor what part had to be used to repair a specific device;

- The Appellant allowed two former employees to benefit from expertise developed by the employer;

- The information disclosed by the Appellant was not public information and was not available on the Internet;

- The Appellant engaged in unfair competition with his employer;

- The Appellant assisted the creation of a competing company while he was still employed by the employer;

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

[11] The Appellant and the Respondent submit that the Federal Court of Appeal has held that the standard of judicial review applicable to 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).

[12] The employer made no submissions concerning the applicable standard of review.

[13] The Tribunal notes that in *Canada (AG) v. Jean,* 2015 FCA 242, the Federal Court of Appeal states in 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."

[14] The Federal Court of Appeal proceeded to note that:

> [N]ot 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 concludes by stating that "when the Appeal Division 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."

[16] 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 (A.G.)*, 2015 FCA 274.

[17] 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

[18] The Appellant contends that the General Division erred in fact and in law when it proceeded to analyse the action committed by the Appellant while he was still employed by the employer.

[19] He argued that he took a photograph of the number of a part for a laser device that was readily obtainable on the Internet and then sent this photograph to a friend and former co-worker. He therefore shared publicly-available information with others.

[20] The Appellant therefore did not know, or definitely could not have known, that sharing publicly-available information with others would impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility. According to the Appellant, he committed no misconduct within the meaning of the *Act*.

[21] The Employer argued before the General Division that the Appellant committed intellectual property theft since the information sent was specific technical information about highly specialized equipment known only to persons working in the employer's laboratory. The Employer argued that the Appellant sent confidential information to a competitor to inform the competitor of which part he needed to use to repair a specific device. The Appellant therefore allowed two former employees to benefit from expertise developed by the employer. The employer argued that this information was not public and was not available on the Internet. It contended that the Appellant engaged in unfair competition with the company, and is guilty of misconduct within the meaning of the *Act*.

[22] The Respondent argued before the General Division that the alleged action was not wilful, and that the Appellant could not reasonably have known that he was exposing himself to dismissal by sending the number of a part for a laser device that is easily retrievable and obtainable on the Internet to a friend and former co-worker, from a supplier other than the employer's company. Furthermore, although the employer showed that the client sent this information during his work hours, this ground could not be used to establish misconduct since it was not named in the notice of termination issued by the employer on December 17, 2014.

[23] On appeal, the Respondent now argues that the General Division's decision finding misconduct is not unreasonable based on the evidence on file and, therefore, that the Appellant's appeal should be dismissed. Unfortunately, the Respondent did not attend the hearing in order to explain this reversal in position to the Tribunal.

[24] When it allowed the employer's appeal, the General Division found the following:

> [Translation]
> [39] However, the act of taking photographs in the workplace and forwarding them to a group of persons with whom he is associated or from whom he hopes to obtain employment is misconduct within the meaning of the *Act*. The issue here does not concern personal photographs, but rather photographs of materials used by the employer for the purposes of its operations in relation to a specific machine. However, the employer did not prove, contrary to what it stated on file, that the claimant appropriated the employer's property or went rummaging in server locations where he had no authorization to be. Nevertheless, at the request of persons with whom he was associated and who had competitive aims regarding the company,

> he provided his personal knowledge or the Web links he submitted to the Tribunal (Exhibit GD10-1 to 7) not directly, but in a photo of a part that the employer had in stock to repair a device on which he worked. By the end of the discussion at the hearing it came to light that this photo had been taken using the employer's inventory. The claimant argues that he knew where to find this part because he repaired devices containing this part every week, but nothing compelled him to take the said photo and send it to a third party in competition with the employer.
>
> [40] In this case, although the information that the claimant sent to the group competing with the employer was "public," the act of sending a photo of a part belonging to the employer to a potential direct competitor in answer to a technical question from the same competitor constitutes misconduct within the meaning of the *Act*.
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> [41] It is unclear whether, at the time of his action, the claimant was looking for work, negotiating a salary or payment, or negotiating his role in this new company competing with his employer's company. The Tribunal believes that the claimant was acting as a collaborator on behalf of a group in competition with his employer. In this regard, the Tribunal believes that his conduct was careless or negligent within the meaning of Tucker (A-381-85) and he decided to disregard the effects of his actions on his job performance.

[25] In this case, the General Division had to decide whether the act committed constitutes misconduct within the meaning of the *Act* (*Canada (AG) v. Marion*, 2002 FCA 185).

[26] 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 differently, there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility (*Mishibinijima v. Canada (AG)*, 2007 FCA 36).

[27] The General Division found that the act of sending a photograph of a part belonging to the employer to a potential direct competitor in answer to a technical question from the said competitor constitutes misconduct within the meaning of the *Act*. Furthermore, it found that by taking such action without the employer's authorization, the Appellant decided to disregard the effects of his acts on his job performance.

[28] As the General Division correctly underscored, nothing compelled the Appellant to take the said photograph without his employer's authorization and from the employer's own

inventory, and to send it to a third-party competitor of the employer. The preponderant evidence before the General Division shows that by his act, the Appellant was disloyal to his employer, thus betraying the employer's trust. Therefore, the action alleged against the Appellant constitutes misconduct within the meaning of the *Act*.

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

[30] 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, as interpreted by the case law.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division