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

Citation: *J. M. v. Canada Employment Insurance Commission,* 2016 SSTADEI 473

Tribunal File Number: AD-16-553

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

VuPoint Systems Ltd.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 8, 2016

DATE OF DECISION: September 14, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file returned to the General Division (Employment Insurance Section) for a new hearing by a different Member.

INTRODUCTION

[2] On March 11, 2016, the General Division of the Tribunal determined that the Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on April 11, 2016 after receiving the decision of the General Division on March 22, 2016. Leave to appeal was granted on April 22, 2016.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated as being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] At the hearing, the Appellant was present, the Respondent was represented by Warren Dinham and the Employer was represented by S. G. and G. T.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the only grounds of appeal are the following:

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.

ISSUE

[7] The Tribunal must decide if the General Division erred when it concluded that the Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the Act.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- The General Division rendered its decision without regard for the material before it;

- The General Division ignored emails and details regarding emails that he supplied contradicting the position of the Employer;

- The decision from the General Division was based on speculation and hearsay and that there was no proof that he violated any company policies that would have resulted in termination of employment;

- He disputes the finding of the General Division on his credibility since it is based on a wrong interpretation of his representations to the Tribunal;

- He submits that the Crown withdrew the theft charges against him on April 1st, 2016, after the hearing before the General Division.

[9] The Respondent submits the following arguments against the appeal:

- The failure by the Tribunal to provide an explanation of the basis of their decision and in particular to address the additional information submitted by the Appellant, more particularly a contradicting email from Mr. J. G., is considered to be an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it;

- The Respondent recommends that the case be returned to the General Division of the Social Security Tribunal to be heard as a case *de novo*.

[10] The Employer submits the following arguments against the appeal:

- The Appellant failed to inform the Tribunal that he negotiated a resolution with the Crown Attorney to withdraw the charges in exchange for making a restitution payment in the amount of $1500.00 to the Employer;

- The Appellant omitted information in a way that leads to a wrong conclusion. It's the Employer's position that this misleading statement is further proof of the Appellant's lack of credibility, as determined by the General Division;

- The email from Mr. J. G. to the Appellant is false. Given the time and date on the forwarded email, it is hard to believe that Mr. J. G. sent the email to the Appellant at the same time and date that we were all still involved in the telephone hearing with the General Division;

- It is respectfully submitted that the Employer has proven that the theft occurred based on the balance of probabilities;

- The role of the General Division is not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act;

- The focus is clearly not on the behavior of the Employer, but rather on the behavior of the employee;

- The decision of the General Division is within the range of possible, acceptable outcomes which are defensible on the facts and the law.

STANDARD OF REVIEW

[11] The Appellant did not make any representations regarding the applicable standard of review.

[12] The Respondent submits that the applicable standard of review for questions of fact and law is reasonableness and for questions of law, is correctness – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[13] The Employer submits that the Federal Court of Appeal has held that the standard of review applicable to questions of mixed fact and law is reasonableness - *Canada (A.G.) v. Hallee*, 2008 FCA 159; *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[14] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (A.G.) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it 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".

[15] The Federal Court of Appeal further indicated 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."

[16] The Court concluded that "[w]he[n] 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".

[17] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[18] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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

[19] In the present matter, the parties were given permission by the General Division to file additional evidence after the hearing.

[20] The Appeal Division has reiterated on many occasions the risks for the General Division to proceed in this fashion regarding principles of natural justice. This case raises another issue with parties filing evidence after the hearing. It deals with the situation that additional evidence might be ignored or overlooked by the General Division when rendering its decision on the merits.

[21] The hearing before the General Division was held on February 29, 2016. After the hearing, the Employer filed an email from J. G. stating that he was getting the Employer's stock, including cable and connectors, for a reduced cost directly from the Appellant (Exhibit GD11-1).

[22] The Appellant was given a copy of this email filed by the Employer. He replied on March 6, 2016, as permitted by the General Division, with an email from J. G. stating that he had given a false statement under duress, as it was only to save his job with the Employer. He states that he was forced into his statement by G. T., one of the witnesses for the Employer, or he would be fired on the spot. He states that he was actually fired two

weeks later and that he did not at any time purchase or trade with the Appellant for materials. That statement, he states, was actually 100% false in all matters (Exhibit GD12-1).

[23] The General Division took notice of the additional evidence filed by the parties in its decision (paragraphs 8 and 9).

[24] The determination of whether a claimant's action constitutes misconduct leading to termination of employment basically entails a review and determination of facts - *Canada (A.G.) v. Larivée*, 2007 FCA 312.

[25] Under the heading Analysis and in particular in paragraph [35] of its decision, the General Division makes direct reference to the additional evidence submitted by the Employer on February 29, 2016 (Exhibit GD11-2) However the Tribunal failed to make any reference or provide an explanation as to why it had disregarded the additional evidence submitted by the Appellant on March 6, 2016 (GD12-1), although this new statement of J. G. raised a significant issue regarding credibility which the General Division had the role and the duty to assess, to then make a finding and, above all, justify it.

[26] The Tribunal finds that the General Division did not consider all the relevant facts of the case and therefore committed an error in law. When faced with contradictory evidence, the General Division must analyze all of the evidence, and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain why. The General Division cannot just ignore it – *Bellefleur v. Canada (A.G.)*, 2008 FCA 13, *Parks v. Canada (A.G.)*, A-321-97.

[27] The Employer was also frustrated by the General Division process since it could not reply to the email filed by the Appellant on March 6, 2016. Its response was in fact refused by the Tribunal. This confirms again the dangers of accepting evidence after the hearing.

[28] Finally, the Crown withdrew the theft charges against the Appellant on April 1st, 2016, after the hearing before the General Division. This evidence did not exist at the time

of the hearing before the General Division and might have a decisive influence on the result of the case.

[29] For all the above mentioned reasons, the file is returned to the General Division for a new hearing by a different Member, considering the issues of credibility.

CONCLUSION

[30] The appeal is allowed and the file returned to the General Division (Employment Insurance Section) for a new hearing by a different Member.

Pierre Lafontaine
Member, Appeal Division