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

Citation: *Canada Employment Insurance Commission v. B. Y.*, 2016 SSTADEI 481

Tribunal File Number: AD-16-351

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. Y.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 8, 2016

DATE OF DECISION: September 20, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated February 15, 2016, is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On February 15, 2016, the General Division of the Tribunal determined that the Respondent did not lose 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 February 25, 2016. Leave to appeal was granted by the Tribunal on March 11, 2016.

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- The credibility of the parties is not anticipated 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] The Appellant was represented by Carol Robillard. The Respondent was also present at the hearing.

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 Respondent did not lose 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 Respondent's actions did constitute misconduct within the meaning of the *Act*;

- The Federal Court of Appeal confirmed there will be misconduct where the act complained of was willful or at least of such a careless or negligent nature that one ought to have known it could result in dismissal;

- The misconduct must therefore constitute a breach of an express or implied duty related to a contract of employment and must be the cause of the dismissal;

- In the present case, the General Division recognized the Respondent did lose his job because of the offence alleged by the employer and that the personal use of his work computer was inappropriate;

- The General Division then erred when it determined that the act was not misconduct because the employer was not clear in its warning and did not articulate that viewing various sites or using his own flash drive could result in his dismissal;

- The Federal Court of Appeal has confirmed that knowingly contravening employment codes of conduct is deliberate and voluntary. The role of the General Division is not to focus on the conduct of the employer leading up to the loss of employment but to resolve whether the Respondent was guilty of misconduct; and whether the loss of employment was the result of this misconduct;

- A proper application of the legislation and jurisprudence to the facts of this case, regardless of whether the Respondent had been warned previously, leads to the reasonable conclusion that the Respondent lost his employment because he was accessing and viewing inappropriate material on his work computer;

- The Respondent, whether he downloaded this material, accessed it via the employer hard drive or brought in his own memory stick, is a breach of that behavior which an employer should expect from an employee and is wilful and constitutes misconduct within the meaning of subsection 30(1) of the *Act*.

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

- Downloading files from internet using the company computer is different from bringing your own files and personally using the company computer;

- There is no policy from the Employer prohibiting him from using the company computer for personal use during his lunch and breaks;

- He did not download any files after he received the warning from the Employer.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for a mixed question of fact and law is reasonableness - *Masic v. Canada (A.G.)*, 2011 FCA 212.

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

[12] 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."

[13] 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."

[14] 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.*"

[15] 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.

[16] 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

[17] When it allowed the appeal of the Respondent, the General Division made the following findings:

> [33] In the instant case, while the Tribunal finds the Appellant's use of his workplace computer for personal use was inappropriate, it is clear that the Appellant was not warned about that issue; only that he could not download movies and games.
>
> [34] Therefore the Tribunal finds, in accordance with decisions in *Lepretre v. Canada (AG)*, 2011 FCA 30; *Canada (AG) v. Granstrom*, 2003 FCA 485, that the employer's perception that what the Appellant was doing violated the issues raised in the warning letter the Tribunal finds no evidence to support this perception.
>
> [35] Having been warned only that he could not download movies or games on his office computer the Tribunal finds no evidence that the Appellant knew or ought to have known from this warning that he could not simply view various sites or that he could not use his own flash drive to view movies or games during his break time (*Canada (AG) v. Lemire*, 2010 FCA 314) t
>
> [36] The Tribunal finds, through a lack of evidence, that neither the employer or Commission have met the burden to prove the actions of the Appellant constituted misconduct within the meaning of the *Act* (*Canada (AG) v. Doucet*, 2012 FCA 105; *Canada (AG) v. Gagne*, 2010 FCA 237).

[18] Although the *Act* doesn't define misconduct, the test for misconduct is whether the act complained of was willful or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his actions would have on job performance. *Canada (A.G.) v. Tucker*, A-381-85.

[19] Put another way, there will be 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 – *Canada (A.G.) v. Mishibinijima*, 2007 FCA 36.

[20] The General Division found from the evidence before it that the Respondent's use of his workplace computer for personal use was inappropriate but concluded that there was no misconduct since he was only warned by the Employer not to download movies and games. According to the General Division, he did not know or could not have known from the warning that he could not simply view various sites or that he could not use his own flash drive to view movies or games during his break time.

[21] With great respect, the decision of the General Division cannot be maintained considering that its decision was made without regard for the material before it.

[22] The Respondent stated that in November 2014, he got a verbal warning because he was downloading movies and music and kids games on to his computer at work. He was on the Pirate Bay site, an admittedly inappropriate site, and would download movies and such from the company computer. After the Employer's warning, he stopped downloading from the company computer.

[23] The Employer's warning letter, although it does not specifically mention that the Respondent is prohibited from viewing movies and games from the computer company, states the following:

> "As mentioned, IT will perform a clean-up of your computer to rectify operating issues"

[24] By this procedure, the Employer obviously wanted to make sure that no viruses had been introduced in its computer system by the Respondent that would corrupt it and therefore make it non operative in the future.

[25] The Respondent admitted that he then proceeded to bring in a memory stick or disc and that he watched on his lunch hour or coffee breaks his own movies and games that he had downloaded from home. However, he sometimes would go directly through the hard drive if he was lazy as it was quicker. He thought that would be ok to only view movies and games from inappropriate sites.

[26] At the hearing before the General Division, the Respondent stated that he did access different websites from his office computer but did not download any material. He stated that he is not a "computer techy" and acknowledged that there was the risk of a virus getting through on a site that he visited. He stated he relied on the Employer's anti-virus software to protect the computer system. He stated "I know when you go to different sites you have a chance to get a virus" and that whenever he got a virus warning he would shut down the computer.

[27] The Employer's hand delivered termination letter dated June 10/15 states the following:

> "This letter confirms our discussion in which you were advised that your employment with FP Innovations is terminated with cause, effective immediately. Unfortunately, your misuse of our computer systems and equipment, including downloading, accessing and viewing inappropriate material, breach of our instructions, and failure to be forthright and honest regarding these issues have left us with no choice but to terminate the employment relationship."
>
> (Underlined by the undersigned)

[28] The evidence before the General Division clearly shows that the Respondent knew or ought to have known that continuing to access inappropriate sites from the company computer hard disk or to bring in a memory stick or disc from home during his breaks that included downloaded movies and games from inappropriate sites would affect the computer operations of his Employer and that if his Employer was made aware of these activities he would lose his employment.

[29] The Respondent broke the trust between himself and his Employer by his willful actions and this constitutes misconduct within the meaning of subsection 30(1) of the *Act*;

[30] For the above mentioned reasons, the appeal will be allowed and the decision of the General Division set aside.

CONCLUSION

[31] The appeal is allowed, the decision of the General Division dated February 15, 2016, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division