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

Citation: *S. T. v. Canada Employment Insurance Commission,* 2017 SSTADEI 14

Tribunal File Number: AD-16-813

BETWEEN:

S. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Eve Technologies Corp.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 9, 2017

DATE OF DECISION: January 20, 2017

Canada

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On May 9, 2016, the General Division determined that the Appellant had voluntarily left her employment without just cause pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on June 15, 2016, after receiving communication of the decision of the General Division on May 16, 2016. Leave to appeal was granted on June 27, 2016.

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- The fact that 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 present at the hearing and represented by P. T. Although notified of the hearing date, the Respondent and the Added Party (employer) were not present at the hearing.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development 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 had voluntarily left her employment without just cause pursuant to sections 29 and 30 of the Act.

ARGUMENTS

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

- Fundamental to any hearing is the right to be heard. The question of the exclusion of witnesses from a hearing, other than in the giving of their testimony, is one of natural justice and procedural fairness, especially if the credibility of the parties is anticipated to be a prevailing issue, and considering the seemingly contentious relationship between the Appellant and the former employer;

- The Appellant made the request for exclusion of witnesses twice in her submissions. The Appellant had a fundamental right to be heard on this issue prior to the Tribunal making a ruling;

- It is the Appellant's position that she was not fully and fairly heard prior to the decision of the General Division;

- It does not follow from the fact that the Social Security Tribunal hearings are informal hearings that witnesses can or should be present throughout a hearing. This is an error of law. If fairness and natural justice do not allow a desired degree of informality, it is not permissible. It was incumbent upon the Tribunal to hear the concerns of the parties, consider their submissions, and render a reasonable decision;

- It is an error of law to state that because a hearing is open to the public, witnesses have a right to be in attendance throughout a hearing. The exclusion of witnesses is a matter of discretion to be duly considered and exercised by the Tribunal as the circumstances and the considerations of fairness and natural justice permit. The presence of witnesses throughout a hearing is not dictated by the fact that a hearing is public;

- The General Division member recounts at length representations the employer is alleged to have made on the question of the exclusion of witnesses. This simply did not occur, either in the submissions to the General Division, or at the hearing;

- The Appellant was not fully and fairly heard on the question of the exclusion of witnesses;

- There is a reasonable apprehension that the Tribunal member pre-decided the question of the exclusion of witnesses, and thereby proceeded without hearing, or considering submissions from either party prior to her ruling.

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

- The General Division decision determined that the Appellant initiated the separation from employment, even if the Appellant’s intended timeline was shortened by the employer, and therefore, the decision is reasonable;

- The General Division reviewed the jurisprudence and weighed the evidence, namely that there was no indication the employer's intention was to dismiss the Appellant, but rather to try to resolve some workplace issues;

- It has long been held that where the claimant has voluntarily resigned and the resignation is accepted by the employer, the claimant has voluntarily left the employment;

- The correct legal test for voluntary leaving under section 29 of the Act is whether the claimant had no reasonable alternative to leaving immediately;

- The General Division, in reviewing the evidence, correctly applied legislation and jurisprudence, finding the facts did not support that the only alternative was to submit her resignation. The General Division reasonably found that, although the Appellant felt she had been dismissed, an open-ended notice did not support just cause (or eliminate a disqualification). The General Division found that a reasonable alternative would have been for the Appellant to remain employed while working on the employer's suggestion of resolution;

- There is a consistent line of authority to the effect that an employee's dissatisfaction with working conditions does not constitute just cause for leaving employment unless the employee can show that the conditions were so intolerable as to leave her with no option but to quit and that the employee had taken some steps to remedy the situation;

- On the issue of breach of natural justice related to the exclusion of witnesses other than to provide their testimony, there was no breach of natural justice. However, if the Appeal Division determines there was a breach of natural justice as alleged by the Appellant, the Respondent does not oppose returning the case to the General Division for a rehearing to allow the Appellant to fully present her arguments;

STANDARD OF REVIEW

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

[11] The Respondent submits that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division. It can intervene only if 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. The applicable standard of review for mixed questions of fact and law is reasonableness - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50

[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] The Tribunal proceeded with the hearing of the appeal in the absence of the Respondent and the employer since it was satisfied that the parties had received the notice of hearing in accordance with section 12 of the *Social Security Tribunal Regulations*.

[18] The General Division refused the motion for exclusion of witnesses presented by the Appellant for the following reasons:

> [151] The Tribunal considered the Appellant's request and sought submissions from the Employer who was present at the hearing.
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> [152] The Employer expressed his desire to have B.E. remain at the hearing because the witness could corroborate his position about the events leading up to and during the performance appraisal meeting and she could bring clarity to the facts and accusations in this case. The Employer stated that E.W. would provide context and firsthand knowledge of the Appellant's behavior. In addition, he stated that he had allowed for the absence of his employees in order to attend the hearing (GD16).
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> [153] The Tribunal considered both parties's submissions and determined that on the basis of natural justice of both parties that the witnesses would remain throughout the hearing because the hearing was public.

[19] The Appellant submits that the question of the exclusion of witnesses from a hearing, other than in the giving of their testimony, is one of natural justice and procedural fairness, especially if the credibility of the parties is anticipated to be a prevailing issue.

[20] She pleads that it is an error of law to state that because a hearing is open to the public, or that the role of the Tribunal is to conduct informal hearings, that witnesses have a right to be in attendance throughout a hearing.

[21] The Respondent is of the view that if the Appeal Division determines there was a breach of natural justice, as alleged by the Appellant, it does not oppose returning the case

to the General Division for a rehearing to allow the Appellant to fully present her arguments.

[22] The Employer made no submissions prior to the hearing on the issue of natural justice and procedural fairness.

[23] The correct approach of administrative tribunals to this question was set out by the Federal Court of Appeal in *Wiebe v. Canada (C.A.)*, [1992] F.C.J. No. 308 :

> 6 While there can be no doubt that the Board is maker of its own procedure and that, in any event, the decision as to whether or not to exclude witnesses is a matter of discretion, it is my view that the discretion was here exercised upon a wrong principle.
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> 7 In a court of law the order to exclude witnesses is granted "as a matter of course". That is to say that there is a presumption in favour of exclusion when it is sought and it is for the party opposing such exclusion to demonstrate that the order should not be granted with respect to some or all of the witnesses. Very commonly, the parties themselves, or their representatives, are exempted from the exclusion order so as to ensure the fairness of the hearing. It is also common to exempt experts on the ground that their evidence, being a matter of opinion, is less likely to be improperly influenced by hearing the evidence of others. The matter being one of discretion, there are many other circumstances where the exclusion of witnesses may properly be refused, but they all have in common that it is the refusal rather than the exclusion which requires justification.
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> 8 Clearly, administrative tribunals are not always held to follow the same rules as courts. The requirements for any particular tribunal will depend upon the nature of the inquiry being conducted and whether and to what extent the procedure may properly be seen as adversarial. In the case of the Appeal Boards appointed under section 21 of the *Public Service Employment Act* generally, and more specifically in the particular circumstances of this case, it is my view that the Board should have approached its discretion in the same way as would a court.
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> 9 Proceedings under section 21, though styled an "inquiry", are very much adversarial in nature, with the applicant and the employer each being on opposite sides of the question and each generally being represented by persons experienced in this specialized type of dispute. The situation was aptly described by Cattanach J. in the Trial Division as follows:
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> > While there is not a lis inter parties [sic] in the true sense of that term, there is, nevertheless, a contest between two parties. The deputy head is before the board to justify that the selection of the successful candidate was on the basis of the merit system and the unsuccessful candidate is present to establish that

> this was not the case. Such situation has been described and established by authority as a quasi-lis between quasi-parties.
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> 10 Often there will be one or more other interested parties as well, notably successful candidates or persons whose names have been placed on the eligible lists. They are entitled as of right to participate and if they choose to give evidence they must submit themselves to cross-examination. The circumstances being so similar to those of a trial, the Appeal Board should be governed by the same considerations when considering the exclusion of witnesses.
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> 11 Turning to the particular facts of this case, it will be recalled that the request for exclusion was specifically directed (and limited) to the two members of the Screening Board and that the third member of the Selection Board, who was serving as the employer's representative, was necessarily going to be present throughout the hearing in that capacity. The inquiry itself was directed in particular to the process by which the applicant had been screened out by the Screening Board and to that by which the successful candidate had been selected by the Selection Board. Members of such Boards are only human and one can hardly expect other of them than to attempt to put their decisions in the best possible light when challenged. Those facts, of themselves, created a strong presumption in favour of the Appeal Board's ordering exclusion in the interests of fairness and accuracy in fact finding. It is not without significance that the final decision of the Board, when made, contained a number of favourable findings of credibility regarding the members of the Screening Board, findings upon which respondent's counsel was quick to rely when arguing another aspect of this application.
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> 12 In my view, the Appeal Board erred in law by exercising its discretion to exclude witnesses upon a wrong principle. Instead of asking itself whether there were any reasons why the two members of the Screening and Selection Boards should not be excluded, a question to which there could only be one answer in the circumstances, the Board asked itself whether it was convinced that they should be excluded. Since exclusion orders, by their very nature, are sought and obtained before the witnesses have testified, it is very difficult for a party to specify and articulate grounds for exclusion in advance. Such grounds will at that stage necessarily be based on the mere possibility or suspicion of bias, fabrication or tailoring of evidence. Once the evidence has been given and there is material upon which such an allegation may be supported, it is too late and the damage has been done.

[24] Applying these principles of the Federal Court of Appeal to the facts of the present case, there is no doubt that the proceeding before the General Division was adversarial in nature with the Appellant and the employer each being on opposite sides of the question. Furthermore, the two witnesses of the employer were present at the hearing to corroborate and substantiate the position of the employer. Those facts, of themselves, created a strong

presumption in favour of the General Division ordering exclusion of the witnesses in the interests of fairness and accuracy in fact finding.

[25] It is not without significance that the final decision of the General Division, when made, found that the Employer's statements were supported by witness testimony.

[26] The Tribunal agrees with the Appellant that the General Division erred in law in exercising its discretion when concluding that since the hearing was open to the public, or that since the role of the Tribunal was to conduct informal hearings, that the employer's witnesses had a right to be in attendance throughout the hearing. The witnesses in the present case were likely to be influenced by hearing the evidence of others and the exclusion should have been granted.

[27] In view of the above, the Tribunal grants the appeal and the file is returned to the General Division (Employment Insurance Section) for a new hearing before a different member.

CONCLUSION

[28] The appeal is granted and the file returned to the General Division (Employment Insurance Section) for a new hearing before a different member.

[29] The decision of the General Division dated May 9, 2016, is to be removed from the file.

Pierre Lafontaine

Member, Appeal Division