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

Citation: *A. F. v. Canada Employment Insurance Commission,* 2017 SSTADEI 15

Tribunal File Number: AD-16-890

BETWEEN:

A. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 12, 2017

DATE OF DECISION: January 20, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

INTRODUCTION

[2] On May 27, 2016, the General Division of the Social Security Tribunal of Canada (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* (Act).

[3] On March 30, 2016, the Appellant filed an application for leave to appeal before the Appeal Division after having received the General Division's decision on June 2, 2016. Leave to appeal was granted on July 15, 2016.

ISSUE

[4] The Tribunal must decide whether the General Division erred in finding that the Appellant lost his employment by reason of his own misconduct under sections 29 and 30 of the Act.

SUBMISSIONS

[5] The Appellant submitted the following arguments in support of his appeal:

- The General Division committed a breach of a principle of natural justice by stating in its decision that there were no witnesses to corroborate his version of the events, whereas the General Division had never informed him that that was prejudicial to his case.

- The General Division imposed a burden of proof on him that was heavier than and different from that of the balance of probabilities.

- The General Division erred in finding that there was a causal link between his dismissal and the events of July 2015. He claims that the facts show that he was dismissed for other reasons. He claims that he has also filed a grievance disputing his dismissal.

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

- The General Division correctly interpreted subsection 30(1) of the Act and applied the legal context of misconduct, which consists of determining whether the claimant's alleged act was willful, or at least of such a careless or negligent nature that it affected their job performance and caused prejudice to the employer.

- The facts on file clearly show that the Appellant had been repeatedly warned about his language, as well as the requirement to use the patient-lift. Despite these warnings, the Appellant continued making inappropriate comments and, at one point, lifted a patient who had taken a fall without waiting for a nurse.

- The Appellant confirmed and admitted to the events stated in the termination letter. There's nothing in the file that support the Appellant was dismissed for other reasons.

- As regards the Appellant's submission relating to the burden of proof, the General Division properly rendered it decision on the balance of probabilities. The member had closely assessed the evidence submitted and did not attribute any credibility to the Appellant's version of events.

- It is the role of the General Division to assess the evidence and make findings of fact with regard to credibility. The Appeal Division must not intervene if the General Division's decision is reasonably consistent with the facts before it.

- The General Division's decision is well-founded in fact and in law, and is supported by relevant case law. The nature and the recurrence of the alleged incidents, as well as the lack of improvement with regard to the expectations stated by the employer, show that the Appellant had been the author of his own misfortune. His actions were deliberate and were of such a careless or negligent nature that one could say that he willfully decided not to take into account the repercussions of these acts on his job, which is the very definition of misconduct.

THE LAW

[7] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

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.

STANDARDS OF REVIEW

[8] The Appellant made no submissions concerning the applicable standard of review.

[9] The Respondent submits that the standard of review applicable to questions of law is correctness, and the standard of review applicable to questions of mixed fact and law is reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50).

[10] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when 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."

[11] The Federal Court of Appeal further indicated 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.

[12] The Court concluded that "Whe[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."

[13] 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 (Attorney General)*, 2015 FCA 274.

[14] 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

[15] The Tribunal will consider only evidence submitted to the General Division when rendering this decision. It is not the role of the Appeal Division to weigh evidence that ought to have been submitted at the hearing before the General Division. This is not a *de novo* hearing.

[16] The Appellant submits that the General Division committed a breach of a principle of natural justice by stating in its decision that there were no witnesses to corroborate his version of the events, whereas the General Division had never informed him that that was prejudicial to his case. By requiring that his version be corroborated, the General Division

had imposed on him a burden of proof that was heavier than that of the balance of probabilities.

[17] The Appellant also contends that the General Division erred in finding that there was a causal link between his dismissal and the events of July 2015.

[18] When it dismissed the Appellant's appeal, the General Division concluded the following:

> [translation]
>
> [57] The Appellant placed much emphasis on the fact that he was reproached for having failed to use the patient-lift at the time of an incident that occurred in July 2015. He submitted as evidence a procedure stating that if the person who had fallen was mobile, the patient-lift did not automatically need to be used. The Appellant underscores that, given the situation, he had used the appropriate procedure.
>
> [58] I have examined the documents on these instructions, which can, in fact, be found in page GD2-15.
>
> [59] However, I find that the Appellant had received a letter in July 2014 (GD3-18). It is clearly stated that the Appellant had been notified as of mid-February 2014 that he was to <u>always use the patient-lift.</u>
>
> [Underlined by the undersigned]

[19] The Tribunal does not have the authority to retry a case or to substitute its discretion for that of the General Division. However, the Tribunal must intervene when a decision is based on an erroneous finding of fact made in a perverse or capricious manner.

[20] The July 2014 letter, to which the General Division refers in support of its decision, instead indicates the following:

> [translation] In mid-February, your immediate supervisor notified you that you must always use the patient-lift <u>as indicated in your work plan, which must be followed.</u>
>
> [Underlined by the undersigned]

[21] The work plan (Exhibit GD2-25), which sets out the rules to be followed in the event of a fall, states the following:

> [translation] If an uncooperative patient is insistent on getting back up and is capable of doing so, it is preferable to assist the patient to get up, even if the nurse has not yet completed the exam. Leaving the patient on the floor may increase anxiety or aggressive behaviour.

[22] According to the employer's statement, the Appellant's employment was terminated as a direct result of him lifting a patient without first waiting for a nurse to attend to or evaluate the incident (Exhibit GD3-16). However, the Appellant's position before the General Division was that there was no misconduct on his part because he had respected his work plan. He alleges that there is no causal link between his dismissal and the events of July 2015, and that there was no way he could have known that he would be dismissed given that he had followed the rules for what to do in the event of a fall.

[23] The Tribunal must therefore intervene given that 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.

[24] In addition, it seems that the General Division required evidence corroborating the Appellant’s testimony before it could be convinced of his arguments when it indicated the following in its decision:

> [translation] Furthermore, I note that there has not been a witness, friend, or colleague who has submitted a corroborative version of events to prove that the Appellant may have been a victim in an incident for which he cannot be blamed.

[25] The Tribunal is of the opinion that the General Division imposed too much of a burden on the Appellant when it stated that no corroborating evidence supported his testimony. It is important to remember that the onus lies on either the Respondent or the employer to establish that the loss of employment by a claimant was by reason of his own misconduct. The General Division therefore made an error of law—an error that might have resulted in it making a finding of fact that is not reasonably supported by the evidence.

[26] For the above-mentioned reasons, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

CONCLUSION

[27] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

[28] The Tribunal orders that the General Division's decision dated May 27, 2016, be removed from the file.

Pierre Lafontaine

Member, Appeal Division