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

Citation: *M. L. v. Canada Employment Insurance Commission,* 2017 SSTADEI 38

Tribunal File Number: AD-16-887

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 10, 2017

DATE OF DECISION: January 25, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 27, 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 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on July 4, 2016, after receiving the decision of the General Division on June 7, 2016. Leave to appeal was granted on July 12, 2016.

TYPE OF HEARING

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

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated to be 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. The Respondent was not present although it had been notified of the hearing date.

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 was dismissed because of his own misconduct pursuant to sections 29 and 30 of the Act.

ARGUMENTS

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

- The facts show that the school board put pressure on his employer to fire him; otherwise, the employer would not have taken said action;

- The conduct was permitted by the employer;

- What the employer allows in his presence directly influences what the "implied code of conduct is";

- He had been following the previous code of conduct of not swearing around clients, specifically teachers and students, but it was tolerated between coworkers;

- There was no swearing at any point during which he could have reasonably expected to be heard outside of his immediate conversation.

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

- The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the affects the actions would have on the duty owed to the employer. Misconduct may manifest itself in a violation of the law, of a regulation, or of an ethical rule, and may mean that an express or implied requirement of the employment contract ceases to be met;

- In the present case, the General Division considered the evidence and determined the focus should not be placed on the employer's conduct but on that of the Appellant;

- Applying the legal test and jurisprudence, the General Division determined the Appellant's actions of swearing with a co-worker on elementary school property led to the dismissal. His actions undermined the employer's relationship with the school board and were careless and negligent to the point that he should have known dismissal was a possibility;

- That the decision of the General Division is one of the reasonable outcomes given all the facts. As stated in submissions to the General Division, the medicals and recorded conversation would not influence the decision.

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 – *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 in the absence of the Respondent since it was satisfied that it had received the notice of hearing as per section 12 of the *Social Security Tribunal Regulations*.

[18] When it dismissed the appeal of the Appellant, the General Division made the following findings:

> [22] Whether or not the School Board exerted pressure on the employer to dismiss the Appellant is irrelevant. The facts in this case show that the employer made the decision to dismiss.
>
> [23] **Tribunals have to focus on the conduct of the Appellant, not the employer**. The question is not whether the employer was guilty of misconduct by dismissing the Appellant such that this would constitute unjust dismissal, but whether the Appellant was guilty of misconduct and whether this misconduct resulted in losing their employment (McNamara 2007 FCA 107; Fleming 2006 FCA 16).
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> [24] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities LARIVEE A-473-06, FALARDEAU A-396- 85.
>
> [25] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).
>
> [26] The fact that the claimant acted impulsively is not relevant to determine whether his actions constitute misconduct. In acting as he did, the claimant ought to have known that his conduct was such that it might lead to his dismissal (Kaba 2013 FCA 208; Hastings 2007 FCA 372).
>
> [27] It was the issue with the Appellant being involved in a verbal altercation, which included swearing, with a co-worker on an elementary school property that led to his dismissal.
>
> [28] This incident immediately undermined the relationship between the Appellant and the employer as well as the relationship between the employer and the School Board.
>
> [29] I find that, even in the absence of a written code of conduct, the Appellant knew that the use of profanities on school property was a breach of acceptable behavior as attested to by him when he asserts that such behavior would never take place in proximity of students or teachers.
>
> [30] When the confrontation in question got loud and was peppered with profanities, it was not possible to ascertain if students and/or staff were within hearing range.

> [31] I find that the Commission and the employer have shown, as the onus is on them to do so, that the Appellant's actions were careless and negligent to the point that he would / could assume they would lead to his dismissal.

[19] During an interview with an Employment Insurance agent held on November 25, 2015, the Appellant confirmed that he used profanities (the "F word" on school premises), and stated that he and a co-worker had their voices raised but was not sure whether school teachers could hear him say it. He stated that he knew it was the wrong thing to say on school premises, but that the children were not around when he used inappropriate language, and that he did not think teachers could hear him either, but that if they did, they should have been able to handle this kind of language as adults.

[20] During an interview that occurred the same day, the employer declared that there were witnesses (teachers who worked at the schools) to the heated verbal dispute between the Appellant and another contractor. The witnesses stated that both employees were yelling, but that the Appellant was the one who used profanities.

[21] The undisputed evidence before the General Division therefore demonstrates that the Appellant was involved in a verbal altercation, which included swearing, with a co- worker on elementary school property and that this led to his dismissal.

[22] The Appellant pleads that he did not expect to be dismissed for using foul language since the behavior was tolerated by the employer. However, when reviewing the Appellant's own statements in the file, the Tribunal finds that the Appellant confirmed on several occasions that he knew it was wrong to use foul language on school premises.

[23] The Appellant argues that he suffered from stress at work and that he did not know that teachers or students were present or that they could hear him and that, therefore, he did not act intentionally or wilfully.

[24] The Tribunal finds that the Appellant showed carelessness to the point that one could say that he wilfully disregarded the consequences his actions would have on his duty owed to the employer when he proceeded to use foul language, while under stress, without knowing for sure that no students or teachers were present on school premises.

[25] The Appellant further pleads that the employer was pressured by the school board to fire him. He filed a recording of the employer's statement stating this to be accurate. This argument provides no relief to the Appellant since, as mentioned by the General Division, it is the employer who, in the end, made the final decision to dismiss him. Furthermore, it is for the General Division to assess the evidence and come to a decision on the issue of misconduct– *Canada (A.G.) v. Boulton*, A-45-96.

[26] Jurisprudence has also constantly held that the reasonableness of the sanction imposed by an employer on an employee is not a deciding factor in determining whether a claimant's behaviour amounts to misconduct within the meaning of the Act -*Canada (A.G.) v. Marion*, 2002 FCA 185.

[27] As stated during the appeal hearing, the Appeal Division does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD Act. 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.

[28] The Tribunal finds that there is no evidence to support the grounds of appeal invoked by the Appellant or any other possible ground of appeal. The decision of the General Division is supported by the facts and complies with the law and the decided cases.

CONCLUSION

[29] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division