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

[TRANSLATION]

Citation: *L. B. v. Canada Employment Insurance Commission,* 2017 SSTADEI 64

Tribunal File Number: AD-16-1259

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 6, 2017

DATE OF DECISION: February 16, 2017

Canada

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On October 3, 2016, the General Division of the Social Security of Tribunal of Canada (Tribunal) determined that the Appellant had lost her employment due to her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on November 2, 2016. Leave to appeal was granted on November 9, 2016.

ISSUE

[4] The Tribunal must decide whether the General Division erred in determining that the Appellant had lost her employment due to her own misconduct under sections 29 and 30 of the Act.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, 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
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> 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.

SUBMISSIONS

[6] The Appellant's arguments in support of her appeal are as follows:

- The General Division decided on the issue of the Appellant's credibility on the basis of an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

- The General Division claims that, at the hearing, the Appellant did not recall the content of the complaints that she had filed against her colleagues in paragraphs 17 and 46 of that decision.

- On the contrary, as the recording of the hearing reveals, from 9:27 to 21:35, the Appellant testified about the abuses that she had reported, and she provided details about them, particularly the residents whose rights were allegedly infringed upon, as well as the attendants who allegedly acted improperly, according to her.

- With utmost respect for the General Division, simply listening to the audio recording, shows that there was an erroneous finding of fact made on paragraph 46, according to which the Appellant's credibility was tainted, because she did not remember what she had written against her work colleagues.

- Not only did she provide details about the reported abuses, but she also testified that, contrary to what is alleged in paragraphs 46 and 17 of the decision, the complaints that she had filed were not written down, but rather that she had made them verbally, and she had gone directly to her supervisor's office to advise her supervisor of her discontent.

- Based on an erroneous finding of fact, namely, the absence of the Appellant's recollection, the General Division determined that the testimony was not credible.

- Yet, the Appellant testified in detail about the abuses that she had allegedly seen, just as she had refuted credibly and in detail all the complaints that had been addressed to her, and her credibility should therefore not be undermined in such a way.

- Absent this erroneous finding of fact, made without regard for the material before the General Division, the credibility of the Appellant's testimony would have been maintained.

- Given that more weight should be given to the direct evidence provided by the Appellant's testimony, we are of the view that her version of facts, according to which she was laid off because she had reported the mistreatment of certain residents, should have been retained.

[7] The Respondent's arguments against the appeal are as follows:

- The issue that the Tribunal had to decide was whether the Appellant had lost her job by reason of her own misconduct under sections 29 and 30 of the Act.

- In order to constitute misconduct under section 30 of the Act, the act complained of must have been wilful or deliberate or so careless or reckless as to approach wilfulness.

- The role of the Appeal Division of the Tribunal is limited to deciding whether the General Division's interpretation of the facts was reasonably consistent with the evidence in the file.

- The function of an umpire (now the Appeal Division) is limited to deciding whether the view of facts taken by the Board of Referees (now the General Division) was reasonably consistent with the evidence in the file.

- Furthermore, it is not the responsibility of the Board of Referees (now the General Division) to judge how the employer penalized the employee or to judge the severity of the penalty, and that is what the General Division determined.

- On February 23, 2015, the Appellant in this case received written notice stating that it was the final warning. It specified that the Appellant's role was to assist residents as needed, without worrying about the time or the paperwork that can be done later. On December 9, 2015, she received another warning informing her that if this happened again, there would be measures such as leave without pay, up to and including dismissal. Further to the latest warning, the complaints continued, and the employer had no other choice than to suspend the Appellant without pay and then to lay her off.

- The Appellant knew that she had to comply with her employer's code of conduct, because she risked dismissal.

STANDARDS OF REVIEW

[8] The parties submit that the appropriate standard of review regarding questions of law is the standard of correctness and that the appropriate standard of review for mixed questions of fact and law is reasonableness – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[9] 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 "[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."

[10] The Federal Court of Appeal further indicated:

> 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.

[11] The Federal Court of Appeal concludes by stating, "Where 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."

[12] The mandate of the Appeal Division of the Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[13] Consequently, 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. The parties made no submissions regarding the appropriate standard of review.

ANALYSIS

[14] The Appellant submits that the General Division decided on the issue of her credibility on the basis of an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it. She also argues that the General Division erred in fact by determining that the Appellant did not remember the content of the complaints that she had filed against her colleagues (paragraphs 17 and 46 of the decision).

[15] The General Division came to the following conclusion regarding the Appellant's credibility:

> [translation]
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> [46] From the Appellant's testimony, the Tribunal observed a selective memory of facts, and that this selective memory taints the Appellant's credibility. Although she comments on the complaints made against her, she does not remember what she alleged in writing against her coworkers.

[16] Given the grounds of appeal in this case, the Tribunal carefully listened to the recording of the hearing before the General Division.

[17] Contrary to the General Division's conclusion, the Tribunal notes from the recording of the hearing that the Appellant did testify, in detail, about the abuses that she had verbally reported, by giving even the names of the residents whose rights were allegedly infringed upon, as well as the attendants who, according to her version of events, allegedly acted improperly.

[18] For quite some time, the case law has consistently established that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it. The Tribunal will intervene only if the General Division's ruling on the matter is based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material brought before it to make its decision.

[19] The Tribunal has no choice but to intervene on the issue of credibility as assessed by the General Division, because there are particular circumstances that are obvious. The General Division's determination that the Appellant's testimony was not credible was based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, namely the absence of the Appellant's recollection.

[20] Furthermore, the General Division ignored the material that the Appellant had brought before it. In its decision, the General Division concluded that the Appellant was confining herself to denying the content of the employer's documents. Yet, the Tribunal noticed from listening to the recording of the hearing that, far from confining herself to denying the employer's documents, the Appellant actually responds in detail to the employer's rebukes.

[21] For the reasons above, the Tribunal is of the view that the matter should be referred back to the General Division for a new hearing by a new member.

CONCLUSION

[22] The Tribunal allows the appeal and refers the matter back to the General Division (Employment Insurance Section) for a new hearing by a new member.

[23] The Tribunal orders that the General Division's decision of October 3, 2016, be removed from the record.

Pierre Lafontaine

Member, Appeal Division