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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. S. T.*, 2017 SSTADEI 86

Tribunal File Number: AD-16-1039

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

S. T.

Respondent

and

CSH Jardins de la Gare

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 9, 2017

DATE OF DECISION: March 3, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision dated July 26, 2016, is rescinded, and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On July 26, 2016, the General Division of the Social Security Tribunal (Tribunal) found that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On August 22, 2016, the Appellant submitted an application for leave to appeal to the Appeal Division. Leave to appeal was granted on August 26, 2016.

FORM OF HEARING

[4] The Tribunal determined that the hearing of this appeal would be conducted by teleconference for the following reasons:

- the complexity of the issue(s);
- the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice; and
- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice.

[5] At the hearing, Rachel Paquette represented the Appellant. Sylvain Pratte represented the Respondent, who participated in the hearing. The Added Party (employer) was absent, even though it had received notice of the hearing.

THE LAW

[6] Pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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

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] Did the General Division of the Tribunal err in finding that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the Act*?*

SUBMISSIONS

[8] The Appellant submitted the following reasons in support of its appeal:

- The General Division erred in its interpretation of subsection 30(1) of the Act.

- The General Division had a duty to decide whether the Respondent's alleged acts constituted misconduct. The legal notion of misconduct for the purposes of this provision has been defined by the case law as wilful misconduct where the claimant knew or ought to have known that their conduct was such that it could result in their dismissal.

- The Federal Court of Appeal established that the notion of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or

intentional. Finally, there must be a causal link between the misconduct and the employment. In other words, the misconduct must also constitute a breach of an express or implied duty resulting from the contract of employment.

- The General Division focused on the type of financial transaction specified in the code of ethics rather than on determining whether the Respondent's alleged actions had constituted a breach of an implied duty under her employment contract.

- The code of ethics specifies that staff must avoid confiding in others about financial difficulties, and clearly indicates that all forms of financial solicitation are prohibited. According to the *Canadian Oxford Dictionary*, "solicit" means the following:

  > **1.** [*transitive* & *intransitive*] ask repeatedly or earnestly for or seek or invite (business etc.).
  >
  > **2.** [*transitive*] [often foll. by *for*] make a request or petition to (a person).
  >
  > **3.** [*transitive* & *intransitive*] accost (a person) and offer one's services as a prostitute.

- A loan from a resident after confiding in them that you are experiencing financial difficulties is financial solicitation that, consequently, violates the employer's code of ethics. In these circumstances, the Respondent broke the bond of trust that must exist between an employer and their employees, which constitutes misconduct.

- It is true that the transactions did not occur at the Centre, that the resident was her spouse's friend and that it was the resident who offered his help.

  However, the transactions were made after the resident had been admitted to the Centre and while the Respondent was working for the residence. Given the circumstances, the Respondent had a duty to respect the employer's code of ethics.

- Case law has confirmed that it is not necessary for misconduct to have occurred on the work premises; an infraction committed outside of the workplace can be misconduct if the infraction ensures that an employee is no longer meeting the essential condition of employment and leads to the dismissal.

- The Respondent was aware of what she was doing when she accepted the payments. Furthermore, she specified at the hearing that she was not sure if she understood the code of ethics, but that she had consciously chosen not to discuss it with her employer. We can therefore say that the Respondent knowingly and wilfully committed the alleged acts.

- After taking training on financial exploitation, the Respondent should have reasonably known that she could not act as she did without breaking the bond of trust between herself and her employer, and that acting in such a way could result in her dismissal.

- The facts on the record show that the Respondent was dismissed for having borrowed money from a resident and that, under the circumstances, there was a causal link between the alleged misconduct and the loss of her job.

[9] The Respondent submitted the following arguments to refute the Appellant's appeal:

- The acts alleged by the employer had occurred in private, between parties who knew each other before said resident was admitted to the employer's Centre, and said acts are in no way connected to the employment.

- Because the facts in question have no link to the performance of the employment, she did not commit misconduct within the meaning of the Act. There must be misconduct in compliance with the Act, and not with the opinion or specific rules or interpretation of a specific employer.

- The General Division committed no error in law, and it is not the Appeal Division's role to intervene in the General Division's assessment of the facts.

[10] The employer made no arguments against the Appellant's appeal.

STANDARD OF REVIEW

[11] The Appellant maintains that the Appeal Division does not have to defer to the General Division's conclusions regarding questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, the General 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 had 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 Respondent and the employer made no submissions concerning the applicable standard of review.

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

[14] The Federal Court of Appeal continued by emphasizing 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.

[15] The Federal Court of Appeal concludes by emphasizing that when the Appeal Division "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."

[16] 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.

ANALYSIS

[17] Upon allowing the Appellant's appeal, the General Division found the following:

> [translation]
>
> [21] Although the Tribunal can understand the employer's impulsive reaction in this case given its discovery of the nature of the exchanges between the claimant and the resident, it cannot conclude that they are truly actions that constituted misconduct within the meaning of the Act.
>
> [22] The Tribunal is of the opinion that, although the claimant's actions can be morally reprehensible, the Commission failed to prove that it is actually misconduct within the meaning of the Act. It is unclear from looking at the evidence and the facts presented that the claimant was capable of committing a potential breach of the employer's code of ethics that could endanger her employment.
>
> [23] The Commission failed to prove that the claimant solicited the resident to receive the amount that is alleged in this case. The claimant maintains that it was on the resident's impulse, in private between consenting individuals of sound mind, that the transaction occurred. Nothing in the evidence that the parties have submitted makes it possible to contradict this version of the facts, not even, for that matter, the grounds of the letter of dismissal that was provided by the claimant. For this reason, the employer seems to be associating a donation with a loan that has not yet been reimbursed. However, nothing in the evidence leads the Tribunal to believe that such an assessment makes it possible to state that a claimant committed acts of misconduct within the meaning of the Act.
>
> [24] Finally, the employer's code of ethics does not allow the claimant to accept a [translation] "donation or a gift if that donation or gift was provided when the donor or testator was receiving care or services in the residence." In looking at the evidence, it seems that the Commission failed to prove that the amounts that the claimant had received were anything other than what she has claimed them to be: loans. Even while the Tribunal may acknowledge that the fine line between donations and loans is blurred in certain situations, it has not been proven that the sums, although not yet reimbursed by the claimant, were anything other than loans, a concept that the employer's code does not cover.

[18] The General Division seems to conclude that there is a lack of misconduct because the Respondent received money as a loan from a resident, while the code of ethics forbids any [translation] "donation or a gift if that donation or gift was provided when the donor or testator was receiving care or services in the residence." However, the General Division acknowledges in its decision that the Respondent's alleged acts are "morally reprehensible" and that the [translation] "line between donations and loans is a fine one."

[19] In the Tribunal's opinion, upon reading the same text, the General Division's interpretation of the code of ethics is erroneous and overlooks the purpose of the code.

[20] It is appropriate to reproduce the text of the employer's code of ethics, which reads as follows:

> CODE OF ETHICS
>
> In accordance with section 36 of the Regulations
>
> The operator of a private seniors' residence must adopt a code of conduct, for all the residence's directors, staff members, volunteers and any other person working in the residence, setting out expected practices and behaviour toward residents and specifying, as a minimum,
>
> (1) the right of residents and close relatives to be treated with respect and courtesy;
>
> (2) the right to information and freedom of expression;
>
> (3) the right to confidentiality and discretion; and
>
> (4) the prohibition preventing the operator, staff members, volunteers and any other person working in the residence from accepting donations or bequests from a resident made while the resident is or was housed at the residence, or from soliciting residents in any way.
>
> [translation]
>
> Donations, Gifts and Solicitation
>
> An operator or a member of that operator's staff who is neither the spouse nor a close relative of the donor or testator may not accept a donation or a gift if that donation or gift was provided when the donor or testator was receiving care or services in the residence.
>
> Staff may not solicit residents financially <u>or in any other manner</u>.
>
> [Emphasis added by the undersigned.]

[21] The "or in any other manner" mentioned twice in the code of ethics clearly aims to not limit the prohibition of donations, gifts and financial solicitation. It represents the entirety of all eventualities not mentioned explicitly in the code, while respecting the purpose of the code, namely, to avoid any financial relationships between staff and

residents. It is indisputable that the prohibition targets financial transactions between staff and residents, including loans.

[22] There is misconduct where the claimant's conduct is wilful, i.e. in the sense that the acts that led to the dismissal were conscious, deliberate or intentional. In other words, there is misconduct where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility— *Mishibinijima*, A-85-06.

[23] The Federal Court of Appeal has specified several times that deliberate violations of the employer's code of conduct are considered misconduct within the meaning of the Act— *Canada (Attorney General) v. Bellavance*, 2005 FCA 87; *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[24] The undisputed evidence shows that the Respondent, a staff member, accepted money from a resident over a one-year period, namely, an amount of approximately $5,600.00. The employer refers to a cheque of $1,600.00 that the Respondent completed but that the resident signed, as well as amounts of $200.00 or $300.00 per week thereafter. The sister of the resident in question filed a complaint.

[25] The Respondent was familiar with the code of ethics, had signed several documents to the effect that she had been aware of it, and had taken training that covered financial exploitation.

[26] The fact that the resident is her spouse's friend and knowingly provided loans on his own initiative outside the workplace in no way changes the prohibition provided for in the code of ethics, which, for obvious reasons, proscribes financial relationships between residents and staff.

[27] The Tribunal determines 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, and that it is justified in intervening in order to give the decision that the General Division should have given.

[28] The evidence before the General Division clearly shows the Respondent's deliberate non-compliance with the employer's code of ethics, which constitutes misconduct and was the direct cause of the loss of her employment. Furthermore, the Respondent ought to have known that her conduct was such that it could result in dismissal, because she was familiar with the code of ethics and had received training in this regard.

[29] It appears, from the Respondent's initial statements, that she acknowledged committing a "gaff" and thereafter regretted her actions (Exhibits GD3-9, GD3-10). However, such regret is irrelevant in determining whether there was misconduct within the meaning of the Act—*Canada (Attorney General) v. Hastings*, 2007 FCA 372.

[30] For the above-mentioned reasons, the appeal is allowed.

CONCLUSION

[31] The appeal is allowed, the General Division's decision dated July 26, 2016, is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division