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

Citation: *Canada Employment Insurance Commission v. P. G.*, 2017 SSTADEI 92

Tribunal File Number: AD-16-975

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

P. G.

Respondent

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[1] The appeal is allowed, the decision of the General Division dated July 11, 2016, is rescinded and the appeal of the Respondent to the General Division is dismissed.

INTRODUCTION

[2] On July 11, 2016, the General Division determined that the Respondent did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act). The Appellant requested leave to appeal to the Appeal Division on July 29, 2016. Permission to appeal was granted on August 10, 2016.

TYPE OF HEARING

[3] 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 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.

[4] The Appellant was represented at the hearing by Carol Robillard. The Respondent was also present at the hearing.

THE LAW

[5] 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

[6] The Tribunal must decide if the General Division erred when it concluded that the Respondent did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the Act.

ARGUMENTS

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

- Misconduct occurs when the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility. However, the notion of wilful misconduct does not imply 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;

- Misconduct must be committed by the claimant while employed by the employer and constitute a breach of duty owed to the employer that is expressed or implied in the employment contract;

- The Respondent’s actions constitute misconduct and the decision of the General Division is not reasonable. The parties agree the Respondent was dismissed for discarding ad mail on several dates, intentionally delaying mail and having mail in his personal vehicle;

- The General Division decision argued that his actions were not misconduct as there was no element of willfulness due to his medical condition. The medicals, although they confirm depression and several other health issues, provide no evidence to the effect that the Respondent was not responsible for breaching the requirements of his position;

- Furthermore, the General Division failed to justify why little or no weight was given to the fact that the Respondent initially stated he intentionally discarded mail in retaliation to his employer;

- A proper application of the legal test for misconduct to the undisputed facts of this case leads to the conclusion that the Respondent, who held a position of trust but discarded and delayed mail, breached the employee Code of Conduct policy which equates to misconduct under the Act;

- The General Division made an erroneous finding of fact in a perverse or capricious manner and respectfully requests that the Appeal Division render the decision the General Division should have made pursuant to subsection 59(1) of the DESD Act.

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

- The employer was aware of him having mail in his personal vehicle but did not warn him on the first occasion;

- He was not aware that mail was not allowed in his personal vehicle;

- He was never disciplined for having mail in his vehicle;

- He had psychological issues since 2014 and the employer did not acknowledge this situation;

- As regards discarding ad mail, his brain was not right. It was not in a fully functional mode.

STANDARD OF REVIEW

[9] The Appellant 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 only intervene 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.

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

[11] 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."

[12] 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.

[13] 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."

[14] 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.

[15] 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

[16] When it allowed the Appellant's appeal, the General Division made the following findings:

> [40] The Tribunal has reviewed the evidence on the employer's allegation that the Appellant intentionally delayed delivery of the mail. Tribunal does not find the Appellant's actions meet the legal test for misconduct, because they lacked a mental element of willfulness. The Tribunal recognizes the Appellant's decision to temporarily keeping mail in his vehicle was probably unwise and imprudent. Nevertheless, the Tribunal finds the Appellant's actions did not meet the legal test for misconduct since he was never previously warned he could be dismissed for temporarily keeping mail in his vehicle.
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> [41] The Tribunal does recognize the Appellant's dismissal letter further indicated he discarded ad mail. The Tribunal realizes the Appellant has not disputed he discarded some ad mail in the days following a verbal dispute with a superintendent (Ms. Hewlett-Bedard). During the hearing, the Appellant testified that his brain was not right at the time he discarded the ad mail. He further explained that he was not in a full functional mode during this time. The Appellant also referred to medical documentation which showed he suffered from clinical depression among other medical problems.
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> [44] As cited above, the Appellant has not disputed that following a verbal altercation with Ms. Hewlett-Bedard he discarded some ad mail. Still, the question for the Tribunal remains: Does the Appellant's action meet the legal test for misconduct? In short: Should the Appellant have known (or ought to have known) that his action would lead to his dismissal? The Tribunal finds that the Appellant's serious medical problems (particularly his clinical depression) must be addressed in determining whether he meets the legal test for misconduct. The Appellant has argued that his brain was not right during this time. He also indicated he was not in fully functional form. In light of the medical reports on in the Appeal Docket (and the Appellant's oral testimony), the Tribunal finds that on a balance of probabilities the Appellant did not demonstrate a mental element of willfulness in his actions since he was overwhelmed by his medical problems during the time he discarded ad mail.

[17] With great respect for the General Division, its decision cannot be maintained.

[18] The notion of willful 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– *Canada (A.G.) v. Hastings*, 2007 FCA 372.

[19] The undisputed evidence before the General Division demonstrates that the Appellant, a letter carrier for almost ten years, kept mail in his car to go to physiotherapy without authorization by his employer, delayed delivery of mail and discarded ad mail on several occasions following a dispute with his superintendent, who refused to pay him overtime—all contrary to company policy known to him.

[20] The conclusion of the General Division that the Respondent was overwhelmed by his medical problems is not in itself sufficient to displace the voluntariness of his actions and to make the exclusion contained in subsection 30(1) of the Act inapplicable to the Respondent.

[21] The evidence before the General Division shows that he was a client at Psychiatric Outpatient Group Therapy Services at the Surrey Hospital from August 2014 to August 27, 2014, where he attended ISLW (Introductory Skills to Living Well) and from January 29, 2015, to March 19, 2015, where he attended the Depression Group. He was also seen at Surrey Mental Health for a concurrent disorders assessment and treatment planning for three sessions between December 22, 2014, and January 20, 2015. The family doctor wrote a letter dated October 15, 2015, detailing the Respondent's numerous health problems over the last 18 months.

[22] However, the events that led to the Respondent's dismissal occurred in June 2015, months after he attended the Depression Group and after his three sessions of treatment planning. The Respondent, more importantly, testified before the General Division that he was advised by his doctor to return to work with modified duties in March 2015, and that he returned to his normal work duties four weeks later (paragraph 27 of the decision).

[23] The Tribunal finds that the evidence before the General Division simply does not support a conclusion that the actions of the Respondent were not deliberate.

[24] A proper application of the legal test for misconduct to the facts of this case leads to the conclusion that the Respondent, who held a position of trust, discarded and delayed mail and therefore breached the employee Code of Conduct, which equates to misconduct under the Act.

[25] In acting as he did, the Respondent ought to have known that his conduct was such that it might lead to his dismissal - *Canada (A.G.) v. Secours*, 1995 FCA 210, *Mishibinijima v. Canada (A.G.)*, 2007 FCA 36.

[26] For the above-mentioned reasons, the appeal will be allowed.

CONCLUSION

[27] The appeal is allowed, the decision of the General Division dated July 11, 2016, is rescinded and the appeal of the Respondent to the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division