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

Citation: *Y. P. v. Canada Employment Insurance Commission,* 2017 SSTADEI 101

Tribunal File Number: AD-16-717

BETWEEN:

Y. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 23, 2017

DATE OF DECISION: March 16, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On April 20, 2016, the General Division determined that the Appellant had lost his job by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant is deemed to have requested leave to appeal to the Appeal Division on May 20, 2016. Leave to appeal was granted on June 24, 2016.

TYPE OF HEARING

[4] 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; and
- 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 at the hearing. The Respondent did not attend, although it had been duly informed of the hearing.

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 whether the General Division erred when it concluded that the Appellant had lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the Act.

ARGUMENTS

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

- The General Division failed to consider his state of mental health in determining whether there had been misconduct on his part and, in determining mitigating circumstances, whether it was willful.

- The General Division erred in considering only the version of events of the employer and it did not properly consider his version of events in its finding of facts.

- He was terminated by his employer while he was on modified duties following an injury, and he has filed a claim against his employer for wrongful dismissal.

- He is filing a new Record of Employment (ROE) stating he was dismissed without cause and the settlement agreement with this employer.

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

- The General Division determined that the Appellant's actions of being repeatedly late for work and leaving work early constituted misconduct in that he knew or ought to have known that his actions would have a negative impact on the performance of the duties he owed to his employer such that dismissal could result.

- In light of the Tribunal's findings in this case, its decision to uphold the disqualification would appear to fall within the parameters of the above-mentioned legislation and jurisprudence and, as a result, is not an error in either the interpretation or the application of the law.

- The Tribunal did not base its decision or order on an erroneous finding of fact that it had made in a perverse or capricious manner without regard of the material before it. The Tribunal weighed all the evidence, arrived at a reasonable finding of fact based on that evidence and decided the case accordingly. The Tribunal appears to have an appreciation of the evidence that was before it, and its conclusions do not appear to be perverse either.

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 General Division for its conclusions with respect to questions of law, regardless of whether 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 – *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 the following:

> 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.

[14] The Court concluded that "[w]here 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] When it dismissed the Appellant's appeal, the General Division made the following findings:

> [29] The Tribunal has sympathy for the fact that the Appellant had injured his shoulder in January 2015. His doctor had prescribed two weeks of modified duties, which the employer accommodated. However, the Tribunal finds that the Appellant's injured shoulder did not excuse him from coming to work on time, punching out when he left work, or for meeting the company's performance standards after his period of modified duties.

> [30] The Tribunal finds that the Appellant's actions were willful, deliberate, and intentional when he continued to arrive late for work, or leave early without punching out. The Tribunal finds that the Appellant had an obligation to the employer to arrive to work on time and to punch in and out when he arrived or left work.
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> […]
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> [32] The Tribunal finds that the Appellant knew or should have known that his actions would result in his dismissal, as evidenced by his four warning letters.
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> […]
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> [35] The Tribunal finds that the Appellant's actions were willful, deliberate, or conscious to the extent that he knew that they could result in his dismissal and do constitute misconduct, pursuant to sections 29 and 30 of the Act.

[18] The Appellant argues in appeal that he was dismissed without cause as per his new ROE and the settlement document with his employer (Exhibit AD3-2, Exhibit AD4-1).

[19] Although is true that the new ROE filed by the Appellant indicates that he was dismissed without cause by his employer, the settlement document filed by the Appellant consists only of correspondence from his attorneys attesting that a wrongful dismissal action was settled in favour of the Appellant.

[20] On the day of the hearing, the Tribunal requested that the Appellant file the complete settlement documents within five business days of the hearing. The appeal hearing was held on February 23, 2017. Numerous calls were made to the Appellant to submit the settlement documents but, to this day, the Appellant has never followed upon the Tribunal's requests.

[21] The Tribunal finds it necessary to reaffirm that the mere existence of a concluded settlement agreement is not in and of itself determinative of the issue of whether an employee was dismissed for misconduct. It is for the General Division to assess the evidence and come to a decision. It is not bound by how the employer and employee or a third party may characterize the grounds on which an employment has been terminated.

[22] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct that would

contradict the position taken by the employer during the investigation by the Respondent at the time of the hearing before the General Division. The Tribunal finds that the settlement document filed in the present case does not have this effect.

[23] There is nothing in the settlement document in question that would permit one to infer that the employer withdrew its allegation of misconduct against the Appellant. It neither expressly nor implicitly includes admissions that the facts on file with the Appellant were erroneous or did not accurately reflect the events as they had occurred. The settlement document simply does not contain any retraction from the employer regarding the events that had initially led to the dismissal of the Appellant.

[24] The evidence before the General Division supports its conclusion that the Appellant was refusing to follow policies and was frequently late. The Appellant even admitted that sometimes he would be late for work and that he would leave work early (GD3-92), corroborating the employer's evidence that he was arriving late to the production line and leaving without authorization. There is also no medical evidence or other evidence before the General Division that could lead the Tribunal to the conclusion that the Appellant's behaviour was not deliberate.

[25] As stated by the General Division, the Appellant had an obligation to the employer to arrive to work on time, and to punch in and out when he arrived or left work. Under the circumstances, the Appellant had to have been aware that the breach of his obligations under his employment contract was of such scope that it was normally foreseeable that it would be likely to result in his dismissal.

[26] Although it is true that the Appellant's dismissal was later changed to a dismissal without cause by the involved parties, this fact does not change the nature of the misconduct that initially led to the Appellant's dismissal – *Canada (A.G.) v. Boulton*, 1996 FCA 1682; *Canada (A.G.) v. Morrow*, 1999 FCA 193.

[27] For the above mentioned reasons, the appeal is dismissed.

CONCLUSION

[28] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division