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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. D. L.*, 2017 SSTADEI 112

Tribunal File Number: AD-16-1001

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. L.

Respondent

and

Le Géant Motorisé Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 9, 2017

DATE OF DECISION: March 21, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision of July 22, 2016, is rescinded, and the Respondent's appeal to the General Division is dismissed.

INTRODUCTION

[2] On July 22, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) found that the Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On August 10, 2016, the Appellant applied for leave to appeal to the Appeal Division. Leave to appeal was granted on August 18, 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 fact that the credibility of the parties is not a prevailing issue;
- 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. Adam Minier represented the Respondent, who attended the hearing. The Added Party (employer) did not attend the hearing, even though it had received notice of the hearing.

THE LAW

[6] Under 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

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 his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act?

ARGUMENTS

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

- The General Division had to determine whether the Respondent's absence, without authorization or notice, and despite his employer's warnings, constituted misconduct within the meaning of the Act. Yet, the General Division focused more on justifying the Respondent's behaviour.

- The General Division erred in its application of subsection 49(2) of the Act, because we are not dealing with contradictory versions. The evidence in this case is undisputed, corroborated and accepted. The Respondent, who had a record of being absent, missed work again on June 19, 2015, and neglected to notify his employer.

- 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. Thus, the disciplinary notice on file clearly indicates that any absence from work must be submitted and pre-approved by the president, Mr. A. B. The notice also mentions that the next absence could jeopardize the Respondent's employment. The Respondent admitted that he had received the disciplinary notice. He confirmed that he was absent on June 19, 2015, and that he had failed to communicate with Mr. A. B. on the day of his absence.

- The medical evidence on file does not indicate that the Respondent was unable to notify his employer. In view of this evidence, the General Division could not have reasonably concluded that the Employer had not adequately informed the Respondent and so the Respondent could not have known that his behaviour could lead to his dismissal;

- The fact that the situation had been tolerated before is irrelevant. The Respondent had clearly been warned to correct his behaviour, to respect his work schedule, and to follow the clearly defined procedure in case of absence.

- The General Division's finding is contrary to the case law on misconduct. Case law has established that attendance at work is an essential condition of the employee-employer contract. Wilfully breaching that condition constitutes misconduct within the meaning of the Act.

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

- The General Division's decision is well-founded in fact and in law;

- He has shown no evidence of misconduct;

- His absence was justified by his health status, as attested by the medical evidence on file.

STANDARDS OF REVIEW

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

[11] 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."

[12] The Federal Court of Appeal further indicated that:

> 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 Federal Court of Appeal concludes by emphasizing 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."

[14] 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.

[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 of capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

[16] The General Division's role is to consider the evidence that both parties have presented to it, to determine the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[17] In this case, it is clear that the General Division, in wrongly concluding that there had not been misconduct on the part of the Respondent, made its decision without taking into consideration the facts before it. Moreover, the General Division erred in law by giving the Respondent the benefit of the doubt under subsection 49(2) of the Act. Indeed, this subsection applies only in the case of contradictory versions, which is not the present case.

[18] On these grounds, the Tribunal is justified in intervening and giving the decision that the General Division should have given.

[19] The evidence before the General Division demonstrates that the Respondent was absent from work several times without notifying his employer, despite receiving numerous warnings.

[20] On April 8, 2015, the employer gave the Respondent a disciplinary notice in which it indicated that his repeated and unjustified absences constituted insubordination and that the situation would no longer be tolerated. From then on, he would have to obtain permission from his employer before missing work due to illness, vacation or any other leave. The notice states that any recurrence or any other act in this manner would result in further disciplinary measures, which may include dismissal (Exhibits GD3-24, GD3-25).

[21] Following this disciplinary notice, the Respondent missed work on two occasions without notifying his employer—on May 6 and June 19, 2015. After several unsuccessful attempts to reach the Respondent on the cellphone that had been provided to him, the employer made the decision on June 19, 2015, to dismiss him.

[22] In an interview with one of the Appellant's representatives on October 2, 2015, the Respondent confirmed that he had not gone to work and that he had not telephoned on Friday, June 19, 2015. He also confirmed that he had received the written warning of April 8, 2015, and that he knew he would be dismissed the next time he was absent. He acknowledged that employers have the right to be informed when an employee is going to be absent, especially since he held an important position within the company (GD3-34).

[23] The Respondent argues that his absence on June 19, 2015, was justified by his health condition. Yet, nothing in the medical evidence demonstrates that the Respondent was unable to communicate with his employer to notify him of his absence. The Respondent's failure to do so resulted in his dismissal. The probative value of the medical evidence is also weak because it follows the Respondent's unreported absences on May 6 and June 19. The Respondent also admitted that he had not consulted a doctor before his dismissal (Exhibit GD3-34).

[24] Furthermore, the Respondent's behaviour immediately after his unreported absence on Friday, June 19, 2015, also reduces the weight of the medical evidence. Indeed, the evidence shows that the Respondent had the capacity to text a co-worker on Sunday, June 21, 2015, to notify that co-worker that he had a doctor's appointment on Monday, June 22, 2015. The co-worker then explained to him that he had to communicate with Mr. A. B. to obtain authorization, which he failed to do once again.

[25] It is established in the jurisprudence that being absent from work without notifying the employer constitutes misconduct. Being absent from work without notifying the employer, or giving them a valid reason, indicates wilful or wanton disregard for the employer's interests and of the standards of behaviour that the employer has a right to expect of their employees.

[26] What constitutes an act of misconduct in this case is the fact that the Respondent failed to notify his employer of his repeated absences. By repeatedly neglecting to notify his employer that he was unable to work, the Respondent committed misconduct.

[27] For the above reasons, the appeal is allowed.

CONCLUSION

[28] The appeal is allowed, the General Division's decision of July 22, 2016, is rescinded, and the Respondent's appeal to the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division