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

[TRANSLATION]

Citation: *M. C. v. Canada Employment Insurance Commission*, 2017 SSTADEI 197

Tribunal File Number: AD-16-139

BETWEEN:

M. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 20, 2017

DATE OF DECISION: May 11, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 9, 2015, 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). On January 8, 2016, the Appellant filed an application for leave to appeal to the Appeal Division. Leave to appeal was granted on January 19, 2016.

TYPE OF HEARING

[3] The Tribunal determined that the appeal would be held via teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not a key 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.

[4] The Appellant did not attend the hearing, despite having received notice of the hearing. Julie Meilleur represented the Respondent.

THE LAW

[5] 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

[6] Did the Tribunal's General Division err in finding that the Appellant had lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the Act*?*

SUBMISSIONS

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

- The General Division ignored the evidence that she had always had the intention of continuing to work for her employer, which is confirmed by the filing of her grievance and her eventual reinstatement.

- The General Division also ignored the evidence according to which she had gone to work only to be turned away by her employer.

- The General Division is downplaying the effect of her mental health on her judgement, while at the same time acknowledging that this may have played a role. This goes against Federal Court of Appeal case law.

- The General Division mentions in its decision that the burden is on the employer and the Respondent, but in its written decision, it appears that the burden of proof is on the Appellant, contrary to Federal Court of Appeal case law.

[8] The Respondent submits the following arguments to refute the Appellant's appeal:

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

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. Subsection 58(1) of the DESD Act limits the Tribunal's jurisdiction. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, and the decision is unreasonable, the Tribunal must dismiss the appeal.

- The General Division was not convinced of the Appellant's credibility in this case, and it argued that the employer's version was more credible and plausible. It was of the opinion that the evidence showed clearly that the Appellant had not complied with the employer's policy for explaining or justifying her absence after May 4, 2014, and, according to the General Division, it was hardly credible that the Appellant had relied on the media to infer that she no longer had a job.

- There is misconduct where a claimant knew or ought to have known that his or her conduct would result in dismissal. The notion of misconduct does not imply a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. There must also be a causal relationship between the misconduct and the employment. In other words, the misconduct must consist of a violation of an explicit or implicit employment contract requirement.

- Despite the fact that the Appellant had affirmed that she had been apprised that she still had a job at the Canada Postal Service, the General Division determined that the Appellant's behaviour was deliberate and that the responsibility to report to work was incumbent upon her.

- The General Division found no credibility in the Appellant's explanations concerning the media rumours and the card's malfunctioning, and it maintained that in not reporting to work after having received her physician's consent, she had committed a deliberate act.

- Reporting to work regularly is one of the essential conditions in the contract of employment between the employee and the employer, and wilfully breaching that condition constitutes misconduct within the meaning of the Act.

- The responsibility was incumbent upon the Appellant to contact her employer after her sick leave and, considering the numerous warnings issued to the Appellant, she knew that her behaviour could result in her dismissal.

- The General Division argued that the Appellant had plausibly refused to return to work and, under the circumstances, it reasonably concluded that her behaviour was conscious and deliberate, and that she could expect to lose her job.

STANDARDS OF REVIEW

[9] The parties have made no submissions regarding the appropriate standard of review.

[10] 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 Social Security Tribunal's General Division, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court."

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

[12] 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 Appeal Division's mandate is conferred to it by sections 55 to 69 of that Act."

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

[14] 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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

The Appellant's multiple requests for extension of time and adjournment

[15] Since the Tribunal held the hearing in the Appellant's absence, it was appropriate to specify the background of the docket.

[16] Leave to appeal was granted on January 19, 2016. The parties then had 45 days to file their submissions pursuant to section 42 of the *Social Security Tribunal Regulations*.

[17] On March 4, 2016, the Appellant filed an application for a time extension in order to present her submissions because she was awaiting significant documents from the archives. The application was granted on March 24, 2016. The Appellant had to produce her submissions by April 15, 2016, at the latest.

[18] On April 15, 2016, the Appellant submitted a new request for a time extension in order to file her submissions because she was still awaiting significant documents. The application was granted on April 25, 2016. The Appellant had to produce her submissions no later than 15 days before the hearing date. The hearing was then scheduled for July 21, 2016.

[19] On July 8, 2016, the Appellant, who still had not produced her submissions, requested an adjournment of the hearing date for medical reasons. On July 19, 2016, the Tribunal granted the adjournment request. A new hearing date was set for September 22, 2016.

[20] On September 19, 2016, the Appellant, who had still not produced her submissions, asked for an adjournment of the hearing date for medical reasons and because she was waiting to hear back from her union, which had to assign her a representative. On September 20, 2016, the Tribunal granted the adjournment application. A new hearing date of January 26, 2017, was peremptorily scheduled.

[21] On January 26, 2017, the Appellant, who had still not produced her submissions, requested an adjournment of the hearing date for medical reasons and because she had filed a complaint against her union, which was refusing to assign her a representative. The Tribunal granted the adjournment request on January 26, 2017. A new hearing date was scheduled for April 20, 2017. The Appellant was advised that no other adjournment would be granted, since the application for leave to appeal dates back to January 19, 2016.

[22] On April 20, 2017, the appeal hearing was held in the absence of the Appellant, whom the Tribunal had duly summoned, all in compliance with subsection 12(1) of the *Social Security Tribunal Regulations*. The Appellant signed for the notice of hearing on February 8, 2017.

[23] The Tribunal considers that the Applicant has had ample time to file her submissions and prepare her docket, namely, more than 15 months since the filing of her application for leave to appeal.

[24] The Appellant submitted her adjournment application after the hearing of April 20, 2017—on April 24, 2017. The Appellant, who claims to have communicated her request for adjournment before the hearing, requested an adjournment for medical reasons and because she had filed a complaint against her union, which was refusing to assign her a representative. The Tribunal found in the docket no application for adjournment before the hearing of April 20, 2017. The Tribunal therefore did not consider the late request for

adjournment because the docket had already been deliberated on. In any case, the Tribunal would have rejected this for the reasons mentioned above.

Misconduct

[25] The General Division's role is to consider the evidence that both parties have presented to it, to establish the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. It must clearly justify the conclusions at which it has arrived.

[26] When the General Division dismissed the Appellant's appeal, it justified its findings as follows:

> [Translation]
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> [52] The Tribunal relies on the Federal Court of Appeal, which determined that, "for there to be a ruling of misconduct under the Act, the act complained of must be wilful or deliberate or so reckless as to approach wilfulness." This therefore means deliberate, offensive behaviour and, by definition, "deliberate" implies stubbornness to act as it sees fit *(Canada (Attorney General) v. Tucker*, 1986 FCA 381. Given the evidence submitted, the Tribunal finds that the Appellant's behaviour was deliberate. She argues that she was not apprised that she still had a job at Canada Post. Nonetheless, the responsibility was incumbent upon her to report to work. Besides the media rumours, she had no reason to believe that the employer had ended her employment. Furthermore, the fact that her card did not work anymore could not be considered proof of dismissal. It could have been a temporary measure during her interruption of work for medical reasons or even a technical breakdown. The Tribunal does not consider it a credible explanation in this case. The fact that the Appellant stopped going to work after getting approval to do so from her physician corresponds to a deliberate act.
>
> [53] The FCA concluded that misconduct is a breach of such scope that its doer could normally foresee that it would be likely to result in dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96). Considering the numerous warnings, the Appellant knew that her behaviour could lead to her dismissal. It was her responsibility to contact her employer after her sick leave. The Appellant plausibly refused to return to work or contact her employer after her sick leave. Given the circumstances, the Tribunal can therefore conclude that the Appellant's behaviour was conscious and intentional. The evidence submitted makes it possible to conclude that the Appellant should have

> known that refusing to report to work was such as to impair the performance of the duties owed to the employer *(Canada (Attorney General) v. Mishibinijima*, 2007 FCA 85). The Tribunal is of the opinion that the Appellant could expect to lose her job under those circumstances.

[27] The evidence submitted before the General Division supports its conclusion that the Appellant did not comply with the employer's policy to explain or justify her absence after May 4, 2014. She had been absent without authorization since March 23, 2014, and her employer attempted by all means to reach her so she could resume her work, but it was unsuccessful.

[28] The General Division did not find the Appellant's explanations credible when she denied having had news from her employer and having concluded that she no longer had a job due to the rumours in the media on the movement of personnel and the terminations at Canada Post.

[29] As the General Division has emphasized, the Appellant had the obligation to her employer to report to work. The fact that the Appellant stopped reporting to work after having received her physician's approval corresponds to a deliberate act. Furthermore, there is also no medical evidence or other kinds of evidence before the General Division that could lead the Tribunal to conclude that the Appellant's behaviour was intentional. Under the circumstances, the Appellant had to have known that the breach of her obligations under her employment contract was of such a scope that it was normally foreseeable that it could result in her dismissal.

[30] Although it is true that the employer ultimately took the Appellant back, this fact does not change the nature of the misconduct that had initially led to the Appellant's dismissal—*Canada (Attorney General) v. Boulton*, 1996 FCA 1682; *Canada (Attorney General) v. Morrow*, 1999 FCA 193.

[31] It is well-established case law that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the members of the General Division, who are better able to make a decision on it. The Tribunal will intervene only if it is obvious that the General Division's decision on the issue is unreasonable or arbitrary, in light of the evidence before it.

[32] The Tribunal does not find any reason to intervene in this case on the issue of credibility as the General Division has assessed.

[33] The Tribunal finds that the General Division's decision was made based on the evidence submitted before it, and that its decision complies with both the legislation and the case law.

[34] There is no basis for intervention by the Tribunal.

CONCLUSION

[35] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division