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

Citation: *H. H. v. Canada Employment Insurance Commission,* 2017 SSTADEI 252

Tribunal File Number: AD-17-32

BETWEEN:

H. H.

Appellant

And

Canada Employment Insurance Commission

Respondent

And

Exclusive Transfer Enterprise

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 22, 2017

DATE OF DECISION: June 29, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 10, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on January 12, 2017, after having received the General Division decision on December 15, 2016. Leave to appeal was granted on January 23, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue(s) under appeal;
- the fact that the parties' credibility was 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 as quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant attended the hearing. The Respondent and the employer did not attend, even though they had been notified of the hearing date.

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 been dismissed because of his own misconduct pursuant to sections 29 and 30 of the Act.

SUBMISSIONS

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

- The undisputed facts on file show that there was an argument, from which he removed himself and, upon "cooling off," he prepared to commence his assigned duties.

- This is not a case where an employee has failed to call or report for work, but rather one where an employee was absent from the workplace for a very short period before his shift was scheduled to begin.

- At no time, either verbally or in writing, did he quit his job. The employer merely assumed this to be the case and, when the Appellant returned to work, it was the employer—not the Appellant—who chose to sever the employment relationship.

- There are exhibits missing from the previous Board of Referees file that he assumed were present in the appeal before the General Division.

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

- There is a lot of conflicting evidence in this case. Case law has maintained that, based on the balance of probabilities, conflicting evidence should be resolved by accepting the evidence that is reasonable, reliable and credible having regard to the circumstances. However, if the evidence on each side of the issue is equally balanced, the client shall be given the benefit of the doubt pursuant to subsection 49(2) of the Act.

- In the present case, the Respondent determined that the evidence from both parties was equally credible and in accordance with subsection 49(2) of the Act. It thereby gave the Appellant the benefit of the doubt, and the claim was allowed.

- The General Division's decision is confusing in that, from the beginning, the member identifies the Appellant as the employer—Exclusive Transfer Enterprise. However, in paragraph 47, the member identifies the Appellant as the claimant.

- Furthermore, at paragraph 30, section (b), the General Division finds that the employer has been consistent in its evidence that the Appellant had returned to the premises half an hour later. The Respondent contends that the employer's evidence is inconsistent.

- The Appellant's alleged start time was 3:00 pm, but at RGD5-35, the employer's email states that "H. H. never showed up for his shift at 2:30 as he has always stated, he was not gone for only 15 minutes before the start of his shift […]." As an observation, the Respondent also notes that in the same email, the employer stated: "The driver showed up and found his logs," which is two years after the Appellant's last day of work in February 2012.

- The General Division’s finding of facts is unreasonable based on the evidence and based on the fact that the member erred when he “allowed” the employer’s appeal.

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’s 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 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 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.”

[13] The Federal Court of Appeal further indicated 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.

[14] 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.”

[15] 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.

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

ANALYSIS

Absence at the hearing

[17] The Tribunal proceeded in the Respondent’s and the employer’s absences, since it was satisfied that they had received the notice of hearing as per section 12 of the *Social Security Tribunal Regulations*.

Missing exhibits from previous Board of Referees file

[18] In the appeal, the Appellant claims that the appeal docket is incomplete, since exhibits from the previous Board of Referees file had not been transferred to the General Division.

[19] The Appellant argues that his initial application for benefits is missing and that this would have proven that he had left his job two days after his medical note. This would have contradicted the employer’s position that the Appellant had left on the day of the argument.

[20] The Appellant did not raise this issue before the General Division even though he had received the appeal docket before his hearing. If there were any exhibits missing, the Appellant should have filed them, or at least requested that the General Division obtain

them, prior to the hearing or requested an adjournment of the hearing. The Appeal Division will not allow this ground of appeal when a party takes a passive stance before the General Division.

[21] In the Tribunal's opinion, the Appellant was aware of the evidence on file prior to appearing before the General Division, and he had ample time to prepare his defence. The General Division allowed him to present his arguments in respect of the entire case before it, and the Appellant had an opportunity to dispute the employer's position. The missing documentary evidence was simply intended to confirm the Appellant's already-known position and, therefore, the Appellant suffered no prejudice.

[22] This ground of appeal is therefore without merit.

Voluntary leave

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

> [43] It is reasonable for the employer to want to conduct their business the way they see fit and protect their interests by retaining their main customers. The Appellant considered that the Claimant abandoned his employment and considered it as a resignation. The Claimant, although he claimed that he did not resign, he stated that it did not occur to him to beg for his job back. He also stated that he is human and made a few mistakes.
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> [44] Based on all the above, the Tribunal finds that the Claimant voluntarily left his employment.
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> [45] Did the Claimant have no reasonable alternative to leaving? The evidence before the Tribunal indicates that he did.
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> [46] The Appellant submitted that a reasonable alternative in his case would have been to complete his job requirements as he was directed or ask for his job back after he resigned.
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> [47] The Tribunal is of the opinion that the Appellant did not exhaust all reasonable alternatives prior to leaving his employment. It was his choice to leave his position when he walked off the job and then return some time later but his run was given to someone else.

[24] The Appellant and the Respondent argue that there is a lot of conflicting evidence in the present case and that the Appellant should be given the benefit of the doubt pursuant to subsection 49(2) of the Act. They also allege that the General Division decision is confusing since the parties are not properly identified.

[25] From the beginning of this file, the Appellant has put great emphasis on the fact that he left his working premises to "cool down" and that he came back to work prior to his working shift. He pleads that he did not, either verbally or in writing, quit his job.

[26] The Tribunal finds that whether the Appellant left his working premises shortly before his working shift or shortly after his working shift is not a determinative issue in the present case. As the General Division has stated, it is the circumstances surrounding the Appellant's departure and his return to the workplace that are relevant.

[27] Contrary to the submissions of the Appellant and the Respondent, the evidence is consistent that the Appellant was persistently refusing to complete his work duties. The Appellant was advised in front of other employees that if he refused again to complete his job duties, the company would be forced to consider that he abandoned his employment. Out of frustration, the Appellant walked out of the premises and drove away in his personal vehicle. He came back later only to see that the employer had assigned his duties to another driver.

[28] The only real issue the General Division had to decide was whether the Appellant had voluntarily left his employment pursuant to sections 29 and 30 of the Act. Its conclusion was that the employer had accepted the Appellant's walking out as him having quit his job and that he had other reasonable alternatives.

[29] The Appellant submits that simply walking out of your workplace to "cool off" does not mean that you are quitting your job. He argues that he did not initiate the separation of employment. It was the employer who severed the Appellant's employment when the Appellant had come back on time to complete his shift.

[30] The evidence rather indicates that the Appellant's separation from work was a direct consequence of him telling the employer he was not going to perform his assigned duties and of him leaving the working premises. The employer did in fact see the Appellant storm out of the working premises. It was therefore not the employer who initiated the separation from employment. Had the Appellant not left the premises and had he performed his assigned duties, he would have still been employed.

[31] This Tribunal has established that a claimant whose employment is terminated because they give their employer notice of intention to leave employment—verbally, in writing or **by their actions**—must be considered to have left their employment voluntarily under the Act, even if they later express a desire to remain in their employment.

[32] Notwithstanding his return to the working premises, the Appellant's actions must be considered as demonstrating that the Appellant voluntarily left his employment within the meaning of sections 29 and 30 of the Act.

[33] As mentioned at the appeal hearing, the Tribunal does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD Act. 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.

[34] The Tribunal finds that there is no evidence to support the invoked grounds of appeal or any other possible ground of appeal. The General Division decision is clear, legible and supported by the evidence. Furthermore, it complies with the law and with other decided cases.

CONCLUSION

[35] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division