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

[TRANSLATION]

Citation: *L. S. v. Canada Employment Insurance Commission,* 2017 SSTADEI 353

Tribunal File Number: AD-17-261

BETWEEN:

L. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: October 3, 2017

DATE OF DECISION: October 5, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file is returned to the General Division of the Social Security Tribunal of Canada (Employment Insurance Section) for a new hearing by a different member.

INTRODUCTION

[2] On March 2, 2017, the Tribunal's General Division 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 filed his application for leave to appeal to the Appeal Division on March 24, 2017. Leave to appeal was granted on May 1, 2017.

FORM OF HEARING

[4] The Tribunal determined that the appeal would be heard 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 information on file, including the type of information missing;
- the need to proceed as informally and quickly as possible in accordance with the criteria in the Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[5] The Appellant and his representative, Réal Labarre, attended the hearing. The Respondent did not attend, even though it had received the notice of hearing.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

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.

SUBMISSIONS

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

- There are contradictions between the statements of the two parties. Unlike the employer, he attended the General Division hearing in person to deliver his testimony.

- Although hearsay is admissible into evidence, the General Division must give precedence to the Appellant's direct testimony.

- He did not leave his position specifically to physically harm his colleague. He simply wished to smooth things over and put an end to his co-worker’s verbal harassment.

- He could not have known that he would be dismissed for his actions.

- The General Division did not comment on the causal relationship between the dismissal and the alleged misconduct. At paragraphs 5(f) and 6(g) of the Tribunal's decision, it mentions that the employer dismissed the Appellant two hours after having received the document from the *Commission de la santé et de la sécurité au travail* (CSST) [workplace health and safety commission].

- The Tribunal based its decision on the employer's hearsay evidence. No witness is cited in the file; no witness was questioned by the Respondent; no witness attended the hearing.

- He produced a document (GD6) from a witness stating that his co-worker hit him first, as is reported in paragraph 4(k) of the General Division decision.

- The General Division determines misconduct based on a balance of probabilities, as evidenced by paragraph 26 of the decision, which suggests a subjective analysis of the facts and the evidence.

- According to the case law, misconduct is a sanction with serious consequences and, therefore, the General Division cannot rely on hearsay evidence over direct testimony.

- Alleged misconduct must be determined based on solid, tangible, relevant and accurate evidence. Failing this, if serious doubt remains, it must be resolved in the claimant's favour.

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

- The General Division did not err in law or in fact and properly exercised its jurisdiction.

- The Appellant was in attendance and was able to give his version of the facts. The General Division rendered a decision within its jurisdiction, and the decision is clearly not unreasonable in light of the relevant evidence.

- Put another way, there will be "misconduct where the claimant knew or ought to have known that his 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."

- Like other administrative tribunals, the General Division is not required to follow strict rules of evidence. It can receive and allow hearsay evidence and, more especially, evidence submitted by an employer by telephone.

- Where contradictions arise between the employer’s testimony and the employee’s testimony, the mere fact that one is present and the other is absent should not constitute a determining factor. The General Division is free to find one party more credible than the other.

- It is not for the General Division to judge how the employer penalized the employee or the severity of the penalty.

- The Appellant acknowledges that he hit his co-worker. He acknowledges that he left his workplace to go to his co-worker’s workplace. He alleges that he acted in self-defence, but he nevertheless breached the employer's existing rules regarding the altercation.

- The Appellant's actions were against the company's policy and rules and, regardless of their scale, they undoubtedly constitute misconduct.

- Even if the claimant tries to deny the severity of his actions and claims he was trying to defend himself, the fact remains that a reasonable person who wished to keep their employment would not have acted in such a way.

- The new item of evidence submitted to the General Division (GD6) does not change the fact that the Appellant acknowledged that he hit his co-worker on two occasions and failed to respect the company's policy.

STANDARD OF REVIEW

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

[11] The Respondent submits 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.

[12] The Tribunal notes that the Federal Court of Appeal, in *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 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 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."

[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 (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

[17] The General Division had to decide whether the Appellant had lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the Act.

[18] 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.

[19] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it; it must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious—*Bellefleur v. Canada (Attorney General)*, 2008 FCA 13.

[20] In this case, the General Division disregarded the Appellant's evidence in its analysis and merely cited its position in the "Submissions" section. The General Division attempted to demonstrate the causal relationship between the alleged misconduct and the dismissal. The Appellant argued before the General Division that the employer had dismissed him

because he had submitted a claim to the CSST and not because of the alleged misconduct. He noted before the General Division the fact that his co-worker with whom he had the altercation had not been dismissed by the employer.

[21] Subsection 30(1) of the Act states a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.

[22] The Tribunal is of the opinion that the General division committed an error in law by disregarding the Appellant's evidence without explanation and by failing to consider in its analysis the question raised by the Appellant, namely, whether the alleged misconduct was the real reason for his dismissal.

[23] The Tribunal is therefore justified to intervene in this case and to refer the matter back to the General Division for a new hearing.

CONCLUSION

[24] The appeal is allowed and the matter is referred back to the Tribunal’s General Division (Employment Insurance Section) for a new hearing by a difference member.

[25] The General Division decision dated March 2, 2017, should be removed from the file.

Pierre Lafontaine

Member, Appeal Division