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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. Y. B.,* 2017 SSTADEI 354

Tribunal File Number: AD-17-97

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

Y. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 28, 2017

DATE OF DECISION: October 5, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On February 8, 2016, the Tribunal's General Division found that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On July 11, 2016, the Appeal Division refused the Appellant's application for leave to appeal.

[4] On January 31, 2017, the Federal Court granted the Appellant's application for judicial review and sent the file back to the Appeal Division so that it could determine, with reasons, whether the allegation of an error of law that the General Division committed with respect to the notion of misconduct had a reasonable chance of success on appeal.

[5] On April 3, 2017, the Tribunal's General Division granted leave to appeal, since the appeal had a reasonable chance of success.

TYPE OF HEARING

[6] The Tribunal decided that the hearing of this appeal would proceed by 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

- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice

[7] At the hearing, Carole Vary represented the Appellant. The Respondent also attended the hearing.

THE LAW

[8] 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

[9] Did the Tribunal's General Division err in finding that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the Act?

SUBMISSIONS

[10] The Appellant's arguments in support of its appeal are as follows:

- The facts, as they have been relayed by the General Division in its decision, are undisputed, corroborated and admitted to by the parties.

- 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.

- It was perfectly reasonable for the General Division to attach a preponderant value directly to the Respondent's testimony, but the General Division completely neglected to consider the entirety of the evidence, including the written evidence that the employer had filed that the Respondent has not disputed.

- The evidence of misconduct comprises an investigation report, the various policies of the employer that the Respondent did not respect, as well as a written statement by the Respondent.

- It was therefore unreasonable for the General Division to find that, despite the fact that the Respondent had committed serious professional fault and that she had violated the employer's various policies, it had not shown evidence of misconduct pursuant to subsection 30(1) of the Act.

- The General Division erred in law when it applied a subjective rather than objective test to the element of foreseeability on the loss of employment.

- The General Division erred in law when it considered the Respondent's justification rather than assess whether she had lost her job due to her misconduct.

- The General Division erred in law when it assessed the legitimacy of the dismissal by ruling on the severity of the penalty;

- The Federal Court of Appeal determined that the General Division is not bound by how the employer and employee might characterize the grounds on which an employment has been terminated;

- Nothing in the agreement enabled the General Division to find that the employer had withdrawn its initial allegation of misconduct; it does not contain any express or implied admission by the employer with respect to the facts in the docket that had been misreported or that are inconsistent with the events leading up to the dismissal.

- The General Division neglected to consider that the Respondent had provided evidence of misconduct, which led to the loss of her job and to the waiving of the reinstatement.

- The Federal Court of Appeal informs us that, if it is not a matter of misconduct, it must be determined whether the claimant left their job without just cause;

- The memorandum of understanding between the Respondent and the employer expressly provides for a waiving of the reinstatement. Therefore, if the Respondent had not lost her job due to her own misconduct, the General Division had to ask itself whether the Respondent was also disqualified from benefits on the ground that she had left her job without just cause.

- The Respondent lost her job due to actions she took willfully. She tried to extricate herself from the disqualification by negotiating an agreement with her employer and by waiving her reinstatement.

- Whether the Respondent lost her job due to misconduct or due to leaving voluntarily, she must be disqualified from receiving benefits, in accordance with section 30 of the Act.

[11] The Respondent has submitted the following arguments to refute the Appellant's appeal:

- She had been working at the Correctional Service of Canada full-time for six years. She always paid her Employment Insurance contributions, as she was required to do;

- In 2013, she committed a work-related error in judgment. Following that event, she was suspended in March 2014 and laid off in July that same year due to her professional misstep;

- The employer recognized the mitigating factors, namely, the absence of good faith on its part, the absence of interest in the failing committed, the positive performance assessment and the denunciation of an increased risk of violence of the offender when he was following his program;

- The General Division correctly found that there was no willful decision on its part to disregard the repercussions of her actions on her work;

- The General Division correctly found that she had not acted deliberately or wilfully or that she had shown such a recklessness or negligence to the point of inciting her dismissal;

- The General Division properly assessed the evidence before it, and its decision is well-founded.

STANDARDS OF REVIEW

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

[13] 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."

[14] 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.

[15] The Federal Court of Appeal concludes by emphasizing that when the Appeal Division "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."

[16] 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.

[17] 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 or its decision was unreasonable, the Tribunal must dismiss the appeal.

ANALYSIS

The Facts

[18] The Respondent held a job as program officer at the Correctional Service of Canada (CSC). She began working there in 2008. She was suspended without pay on March 4, 2014, and then dismissed on July 8, 2014.

[19] When she was hired in 2008, the Respondent had agreed to and signed a letter of offer of employment requiring her to comply with the *Code of Discipline* and with the *Standards of Professional Conduct*, as well as with the *Values and Ethics Code for the Public Service*.

[20] When filing her benefit claim, the Respondent filled out the questionnaire on dismissal. The Respondent reported that on September 13, 2013, she was accused of inappropriate conduct toward an offender (invitation to have coffee outside of work premises). The Respondent claimed to have been aware of the employer's policy and that she had contravened that policy by downplaying the scope of the incident (pages GD3-7 and GD3-8). She mentioned, in a subsequent interview with the Appellant, that it was not a

romantic relationship and that there was no intimate contact. She did not think it was that serious, and she emphasized that it was all completely and purely friendly (GD3-18).

[21] On May 9, 2014, the Appellant contacted the employer and talked to the director of the CSC to obtain more information on the Respondent's suspension. The employer stated that the Respondent had a relationship with an offender who was under treatment. The employer specified that the ethics code is very clear and that she had no right to engage in a relationship, even a platonic one, outside her work environment with a person that she had already seen in treatment. Furthermore, she had to notify her employer of any relationship with a person with a criminal record, which she did not do. At the outset, the Respondent flatly denied the facts and then confessed in part. The employer mentioned the relationship of trust had been broken (page GD3-17).

[22] In fall 2013, the Respondent sent the offender a friend request on Facebook, which he accepted. He allegedly printed photos of her dating back to a trip that she had gone on in the past, when she was wearing a bathing suit in these photos.

[23] Although she was furious with this move by the offender and urged him to delete her from his friends list on Facebook, the Respondent nonetheless proceeded to invite the offender to her home a few weeks later, in October 2013. She had arranged to get together at a metro station, where she went to meet him. She apprised him of her personal contact information, namely her cellular phone number and her residential address. They made a few purchases together, then they visited a second-hand store for her and a retro-furniture store for him. They then went to the Respondents home to have pastries and tea in the late afternoon. They went around the house, chatted superficially, browsed Facebook and also listened to a concert on Google. The offender's visit lasted about two hours. The offender then contacted his halfway house from a payphone so that his call would not be traced to the Respondent's home.

[24] The Respondent's superiors met her initially on December 6, 2013, in order to be confronted on the information that the employer had gathered and to delineate the Respondent's behaviour. The question was then asked of her clearly about whether she was engaged in or had been engaged in a more personal or intimate relationship with that offender. At least, she was asked whether her relationship with the offender exceeded the bounds of a typical relationship between program officer and an offender. The Respondent assured her superiors that her contact with the offender always remained strictly professional. She maintained her position during a second encounter with her superiors in February 2014, to finally admit to specific facts, after having been apprised of the offender's specific statements.

[25] Following the issuance of an investigation warrant on March 17, 2014, a report was filed by the investigating committee on April 30, 2014, confirming that, over a four-month period, the Appellant [*sic*] had unprofessional contact with the offender. She had specifically:

- connected with the offender on Facebook;
- invited the offender to her home;
- gone shopping with the offender; and
- shared information about her private life with the offender.

[26] The layoff letter from the employer on July 8, 2014, reiterates the findings of the investigation report and concludes that the Respondent's behaviour directly violated the very nature of CSC operations, its mission, the correctional program officer functions and her status as peace officer.

[27] Following the Respondent's filing of the grievance, a memorandum of understanding was established between the Respondent and the employer. The Respondent agreed to withdraw her grievance in line with her layoff, and the employer proceeded to amend the Record of Employment, not to make representations to Employment Insurance and to

provide proof of employment to the Respondent. The mitigating factors that led to the memorandum of understanding are described in detail (GD1-72 to GD1-74).

The General Division's Decision

[28] The General Division found that there was professional fault on the part of the Respondent. It accounted for the Respondent's admission that she had met the offender outside of work without having notified her employer. The General Division nonetheless found that the Respondent had not wilfully decided to disregard the repercussions of her actions on her work. The General Division arrived at the conclusion that it was an error in judgment that justified dismissal in the employer's eyes, but that it did not constitute misconduct within the meaning of the Act.

Did the Tribunal's General Division err in finding that the Respondent had not lost her employment by reason of her own misconduct within the meaning of the Act?

[29] The Tribunal is of the opinion that the General Division committed several errors that justify its intervention.

[30] After reviewing all the evidence, including the contents of the docket, the Tribunal is of the opinion that the General Division erred in law (notably on the notion of misconduct within the meaning of the Act), that it erred regarding the interpretation of the facts and that it did not account for the material before it in finding that there had been no misconduct on the part of the Respondent.

[31] At first, the General Division erred in law, since it did not consider whether, based on the proven facts, it was foreseeable that the Respondent would lose her job. There is misconduct where the claimant **knew or ought to have known** that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility—*Mishibinijima*, A-85-06.

[32] The General Division also erred in law when it considered, in support of its finding, the Respondent's justifications rather than assess whether she had lost her job due to her misconduct—*Canada (Attorney General) v. Hastings*, 2007 FCA 372.

[33] Furthermore, the General Division clearly based its decision on the severity of the sanction imposed on the Respondent. However, the General Division's role is to determine whether the employee's conduct amounted to misconduct within the meaning of the Act and not whether the severity of the penalty that the employer imposed was justified or whether the employee's conduct was a valid ground for dismissal—*Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[34] It seems also from its decision that the General Division erred in assigning disproportionate weight to the memorandum of understanding established between the employer and the Respondent, because it specified therein the mitigating factors in the Respondent's favour.

[35] There was almost nothing in the memorandum of understanding in question to enable the General Division to infer that the employer had withdrawn its allegation of misconduct against the Respondent. It neither expressly nor implicitly includes admissions that the facts in the Respondent's docket were erroneous or that they did not accurately reflect the events as they occurred. The agreement document simply does not contain any retraction from the employer regarding the events that had, initially, led to the Respondent's dismissal.

[36] Finally, the General Division based its finding of absence of misconduct on the fact that the Respondent had been going through a difficult period and that her judgment may have been impaired. Yet, no evidence supports a finding on the fact that the Respondent's judgment was impaired to the point of the Respondent being unable to control her faculties at the time she took those actions.

[37] For the above-mentioned reasons, the Tribunal is justified in intervening and rendering the decision that the General Davison should have rendered.

[38] It is granted that the Respondent engaged in inappropriate conduct by maintaining a person relationship with an offender when he was on parole. Furthermore, it is not disputed that the employer's ethics code specifically provides that an employee shall not engage in a relationship with an offender outside of their work hours. Although the code provides that the employee must inform their employer of such a relationship, the Respondent never did so.

[39] As the Tribunal has previously emphasized, it is not appropriate to judge the severity of the penalty imposed but, rather, whether the action constituted misconduct within the meaning of the Act—*Lemire*, *supra*.

[40] It is important to recall that the notion of misconduct does not require the breach of conduct be the result of a wrongful intent. There will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts that led to the dismissal were conscious, deliberate or intentional. In other words, there is misconduct where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility—*Mishibinijima*, *supra*.

[41] The Tribunal is of the opinion that the Respondent's deliberate non-compliance with the employer's code of workplace ethics constituted misconduct and was the direct cause of the loss of her employment. At the most, it is clear that the Respondent could foresee that her actions were such that they could result in dismissal, because her behaviour directly violated the very nature of CSC operations and its functions as a correctional program officer and her status as a peace officer.

[42] For five years, the Respondent had been working in an important position with the CSC, which has the right to require a high level of honesty, trust and seriousness from every employee. She had to have known that, by meeting the offender outside of work without notifying her employer, she was risking her job and, thereby, breaking the relationship of trust that the employer had to keep with her.

[43] The Respondent also knew the consequences of her actions, because she neglected to mention to her superiors the facts that had led to the investigation warrant, when she was aware that her actions violated the standards, directives and codes imposed by her work.

[44] In response to the investigating committee (GD9-51), and during her testimony before the General Division (shorthand notes from the hearing on October 14, 2015, Annex C, Tab 1, page 35, line 22 at page 36, line 8, Annex C, Tab 1, page 37, lines 3 to 8), the Respondent acknowledged that it was a professional fault, a flagrant lack of judgment, which led to a serious breach on her part and her employer would not have approved of the actions she had taken. By her behaviour, she admitted to committing breaches of the *Values and Ethics Code* despite her knowledge with those documents (GD9-52).

[45] The Federal Court of Appeal has specified on several occasions that deliberate violations of the employer's code of conduct are considered misconduct within the meaning of the Act—*Canada (Attorney General) v. Bellavance*, 2005 FCA 87; *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[46] The Tribunal must conclude, from the entirety of the evidence and the case law, that the actions that the Respondent took constituted misconduct within the meaning of the Act. The Respondent knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.

CONCLUSION

[47] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division