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

Citation: *C. B. v. Canada Employment Insurance Commission,* 2017 SSTADEI 352

Tribunal File Number: AD-16-345

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: October 3, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	C. B.
Representative for the Respondent (Commission)	Timothy Fairgrieve

INTRODUCTION

[1] On January 25, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had been dismissed from his employment due to misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act) and dismissed his appeal. The Appellant attended the teleconference hearing held before the General Division on December 18, 2015. No one attended on behalf of the Respondent, but it had filed written representations.

[2] The Appellant filed an application for leave to appeal (Application) with the Appeal Division. Leave to appeal was granted on July 25, 2016.

[3] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal;

b) The information in the file, including the need for additional information; and

c) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The Appellant was terminated by his former employer, in December 2014, due to his absenteeism.

ISSUES

[5] Did the General Division make an error in law, make erroneous findings of fact or breach a principle of natural justice in arriving at its decision to dismiss the Appellant's appeal before the General Division.

[6] Should the Appeal Division dismiss the appeal, give the decision that the General Division should have given, refer the case back to the General Division for reconsideration or confirm, rescind or vary the decision of the General Division.

THE LAW

[7] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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.

[8] Leave to appeal was granted on the following basis (reference to paragraphs of the leave to appeal decision):

> [18] As the arguments related to the ESA and the *Ontario Human Rights Code* were not raised before the GD, the GD decision did not consider the issues summarized in paragraph [16] above.
>
> [19] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified a possible error of law that does not appear on the face of the record.
>
> [20] I need not decide, at this stage, whether the GD based its decision on an error of law, but I need to be satisfied that the appeal has a reasonable chance of success on the grounds of error of law in order to grant leave to appeal.
>
> [21] In the circumstances, whether the GD erred in law in making its decision warrants further review.

> [22] On the ground that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.
>
> [23] On the other grounds asserted by the Applicant, the appeal does not have a reasonable chance of success.

[9] The powers of the Appeal Division include but are not limited to substituting its own opinion for that of the General Division. Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the General Division decision in whole or in part.

SUBMISSIONS

[10] The Appellant's submissions can be summarized as follows:

a) There was no liability, wrongdoing or misconduct on his part;

b) He was wrongfully dismissed by his former employer;

c) He has filed a complaint with the Ontario Human Rights Commission;

d) His union misrepresented him and he has filed a complaint with the Ontario Labour Board against the union; and

e) He is entitled to Employment Insurance (EI) because there was no misconduct on his part and he was wrongfully dismissed.

[11] The Respondent made the following submissions:

a) The General Division did not make an error in its conclusion that the Appellant's loss of employment constituted misconduct within the meaning of the EI Act;

b) The Appellant's grounds of appeal have not been proven;

c) The Federal Court of Appeal has determined that a human rights complaint in relation to an issue of drug dependence is not relevant to an EI matter;

d) The General Division followed Federal Court jurisprudence and concentrated on the Appellant's conduct, acts and omissions; and

e) The appeal should be dismissed pursuant to subsection 59(1) of the DESD Act.

[12] The employer was not an added party in this appeal.

STANDARD OF REVIEW

[13] The Respondent submits that for questions of law, the Appeal Division does not owe any deference to the General Division's conclusions. However, for questions of mixed fact and law, the Appeal Division must show deference to the General Division and can intervene only if 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.

[14] The Federal Court of Appeal determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in EI appeals from the Board of Referees (Board) is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[15] Until recently, the Appeal Division had been considering a General Division decision a reviewable decision by the same standards as that of a Board decision.

[16] However, in *Canada (A.G.) v. Paradis* and *Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the Tribunal's Appeal Division is reviewing appeals of EI decisions that the General Division has rendered.

[17] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 2015 FCA 274, referred to *Jean*, *supra*, and stated that it was unnecessary for the Court to consider the issue of the standard of review the Appeal Division is to apply to General Division decisions. The *Maunder* case related to a claim for a disability pension under the *Canada Pension Plan*.

[18] In *Hurtubise v. Canada (A.G.)*, 2016 FCA 147 and *Canada (A.G.) v. Peppard*, 2017 FCA 110, the Federal Court of Appeal considered applications for judicial review of Appeal Division decisions that had dismissed an appeal of a General Division decision. The Appeal Division had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact (or of mixed fact and law). The Appeal Division decision in *Hurtubise* was rendered before the *Jean* decision, and in *Peppard*, it was rendered after the *Jean* decision. While the Federal Court of Appeal did not comment specifically on the standard of review that the Appeal Decision should apply to General Division decisions, it affirmed the Appeal Division decisions and found them to be reasonable.

[19] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Division should take on reviewing appeals of EI decisions that the General Division has rendered and, in particular, whether the standard of review for questions of law and jurisdiction in EI appeals from the General Division differs from the standard of review for questions of fact and mixed fact and law.

[20] I am uncertain how to reconcile this apparent discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[21] Leave to appeal was granted on the basis of a possible error of law in the General Division's failure to consider the *Employment Standards Act* (ESA) and the *Ontario Human Rights Code* (OHRC).

[22] Consequently, I will consider whether the General Division erred in law in making its decision, whether or not the error appears on the face of the record.

ANALYSIS

[23] The following facts are not in dispute:

a) The Appellant applied for regular benefits under the EI Act.

b) He was terminated by his employer on December 15, 2014.

c) The Appellant had an alcohol addiction and had missed work for this reason.

d) The employer was prepared to terminate the Appellant in 2014, because he was in breach of the company policy and the collective agreement by his absenteeism, but because they were aware that he had attended rehabilitation programs in the past for an alcohol dependency, they felt that they would give him one more chance to correct his attendance.

e) On October 1, 2014, the Appellant and the union signed off on a Settlement in Lieu of Termination agreement, which gave the Appellant a suspension from work from September 19, 2014, to October 21, 2014, and he was explicitly advised in this settlement agreement that the next step would be termination if he breached their attendance policy again.

f) The Appellant was to return to work on December 8, 2014, but he did not do so.

g) The employer terminated the Appellant's employment based on his breach of the Settlement in Lieu of Termination agreement, because he was absent without a valid reason under the collective agreement and because he was absent due to illness without a doctor's note.

[24] The Appellant's main argument is that he was wrongfully terminated due to his illness (alcohol addiction) and that he has complaints pending at the Ontario Human Rights Commission (against the employer) and at the Ontario Labour Board (against his union).

[25] When the Appellant filed his application for leave to appeal, he was represented by a lawyer. However, he no longer had legal representation at the time of the appeal hearing and was unable to present specific arguments pertaining to the ESA and the OHRC. The submissions of his lawyer were essentially that the Appellant suffers from an illness and the employer failed to provide reasonable accommodation.

[26] The Respondent submits that the matters before the Ontario Human Rights Commission and the Ontario Labour Board are irrelevant to this appeal and that the issues related to the ESA

and the OHRC are properly dealt with by the Ontario Humans Rights Commission and the Ontario Labour Board, not by the Tribunal.

[27] In *Canada (A.G.) v. McNamara*, 2007 FCA 107, the claimant was terminated from his employment because his drug testing returned a positive result for the presence of an active ingredient in marijuana. He argued that he was the victim of wrongful dismissal because the drug test administered was not justified in the circumstances. The Federal Court of Appeal held that:

> [23] In the interpretation and application of section 30 of the Act, the focus is clearly not on the behaviour of the employer, but rather on the behaviour of the employee. This appears neatly from the words "if the claimant lost any employment because of their misconduct". There are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.

[28] The *McNamara* case was recently cited by the Federal Court in *Paradis v. Canada (Attorney General)*, 2016 FC 1282 (*Paradis 2016*). In *Paradis 2016*, the Federal Court held that "[t]he question of whether the employer should have provided reasonable accommodation to assist the applicant to deal with his drug dependency is a matter for another forum."

[29] Jurisprudence from the Federal Court and the Federal Court of Appeal are binding on the Appeal Division.

[30] Applying the principles in *McNamara* and *Paradis 2016*, it is clear that whether the Appellant's former employer should have provided more accommodation to the Appellant and whether the Appellant was wrongfully dismissed are matters to be dealt with in other forums. The General Division focused on the behaviour of the employee, the Appellant, and it did not err in law in so doing. Also, the General Division did not err in law because it was silent on issues related to the ESA and the OHRC.

[31] The remainder of the Appellant's submissions in this appeal reargue the facts and arguments that he asserted before the General Division.

[32] The General Division is the trier of fact, and its role includes weighing the evidence and making findings based on its consideration of that evidence. The Appeal Division is not the trier of fact.

[33] It is not my role, as a member of the Tribunal's Appeal Division, on hearing this appeal, to review and evaluate the evidence that was before the General Division with a view to replacing the General Division's findings of fact with my own. It is my role to determine whether a reviewable error set out in subsection 58(1) of the DESD Act has been made by the General Division and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division's role to rehear the case anew.

[34] The Appellant has not identified any errors in law or any erroneous findings of fact that the General Division made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

CONCLUSION

[35] Considering the parties' submissions, my review of the General Division decision and the appeal file, I find that no reviewable error was made by the General Division.

[36] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division