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

Citation: *J. V. v. Canada Employment Insurance Commission,* 2017 SSTADEI 410

Tribunal File Number: AD-16-1324

BETWEEN:

J. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: October 10, 2017

DATE OF DECISION: November 28, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. V., Appellant

Susan Prud'homme, Representative for the Respondent, the Canada Employment Insurance Commission

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance Commission (Commission) for Employment Insurance benefits on April 27, 2015. The Commission determined in June 2015 that he was disqualified from receiving benefits because he had lost his employment due to misconduct. A request for reconsideration was refused on July 27, 2015.

[2] The Appellant filed an appeal on August 13, 2015, but withdrew that appeal on October 26, 2015, because he had reapplied for benefits, also on October 26, 2015, on the basis that he had entered into a settlement with his employer and, per the terms of that agreement, obtained a new Record of Employment stating that he was terminated for "administrative reasons."

[3] On November 18, 2015, the Commission advised him that it would not be changing its earlier decision. This was later confirmed in a letter of February 18, 2016.

[4] On December 2, 2015, the Appellant refiled his appeal to the General Division. He was refused on the basis that his appeal was still considered as an appeal of the July 25, 2015, decision. It was therefore late, and the General Division did not accept his reasons for appealing late. The Appellant sought and obtained leave to appeal the General Division, and his appeal on the "late application" issue was accepted on March 15, 2016. The Appeal Division found that the General Division had not been made aware of the November 18, 2015, decision, and that an appeal of the November 18, 2015, decision had been filed in time.

[5] On November 2, 2016, the General Division determined that the Appellant had lost his employment on April 2, 2015, due to his misconduct and that a disqualification from benefits

under the *Employment Insurance Act* (Act) was properly imposed effective April 5, 2015. The appeal was dismissed.

[6] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on November 25, 2016, and leave to appeal was granted on March 29, 2017.

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

a) the fact that the Appellant will be the only party in attendance

b) the requirements under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit

ISSUE

[8] In concluding that the Appellant had lost his employment due to misconduct, did the General Division err in fact or law, or fail to consider a principle of natural justice?

THE LAW

[9] 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[10] Subsection 30(1)of the Act states that:

> [a] claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless
>
> (a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

SUBMISSIONS

[11] The Appellant has submitted that the General Division failed to properly consider the minutes of the settlement (Settlement) between himself and his employer, and that it also failed to consider his new Record of Employment and provided no reasons for doing so.

[12] The Appellant has further submitted that the General Division ought not to have relied on information from the period prior to October 26, 2015.

[13] The Respondent supported the General Division's decision. It has submitted that the General Division correctly applied the legal test for misconduct to the facts of this case to conclude that, the claimant had lost his employment on April 2, 2015, because he consciously and deliberately failed to respond to calls directed to him and not because of a 'lay-off'.

[14] According to the Respondent, the General Division's findings of fact were consistent with the evidence it had accepted and, the General Division committed no error in dismissing the appeal because the decision was a reasonable one which conforms to the Act, as well as the established case law. The Respondent considered the General Division decision and reasons to be reasonable, transparent and intelligible.

[15] More specifically, the Commission has argued that the second application does not render the initial application and decision null and void, and that the amended Record of Employment does not change the reason that the claimant finds himself unemployed.

ANALYSIS

Standard of Review

[16] The Respondent's reference to the reasonableness of the General Division decision suggests that it considers a standard of review analysis to be appropriate, although it does not specifically argue that I should apply the standards of review or that the General Division decision should be reviewed on the standard of reasonableness.

[17] The grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, recent case law from the Federal Court of Appeal has not insisted that the standards of review be applied, and I do not consider it to be necessary or helpful.

[18] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard of review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference. Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review. Where the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, its mandate is conferred on it by sections 55 to 69 of that Act.

[19] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it. The enabling statute for administrative appeals of Employment Insurance decisions is the DESD

Act, and the DESD Act does not provide that a review must be conducted in accordance with the standards of review.

[20] I recognize that there are other Federal Court of Appeal decisions that appear to approve of the application of the standard of review (such as *Hurtubise v. Canada (Attorney General*), 2016 FCA 147; *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the application of standard of appeal.

[21] I agree with the Court in *Jean* where it referred to one of the grounds of appeal set out in paragraph 58(1) of the Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will consider this appeal by referring to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standard of review.

Natural Justice or Jurisdictional error

[22] The Appellant had argued before the General Division that any information on the file prior to his reapplication on October 26, 2015, was irrelevant, including the decision and the reconsideration of July 27, 2015. In the Appellant's view, the second application for benefits in October 2015, and the information submitted in respect of that application was the only information that should be considered: The Appellant was unsuccessful in obtaining a decision specifically addressed to the second application, but he believes his appeal should properly have proceeded from such a decision (GD7 1-2).

[23] The Appellant appears to be arguing that the General Division committed a jurisdictional error in one of two ways: either by addressing itself to the initial decision of June 11, 2015, and the reconsideration decision of July 27, 2015, and the evidence in support of those earlier decisions, or; by failing to consider the decision of November 18, 2015, as a decision respecting a new claim.

[24] The decision that was before the General Division was the decision communicated to the Appellant verbally on November 18, 2015, which was later confirmed in writing on February 18, 2016. The written confirmation states as follows:

> We have re-examined your claim for benefits. However, we are still unable to pay you benefits starting April 5th, 2015, because you lost your employment with The Bell Telephone Company on April 2nd, 2015 as a result of your misconduct.

[25] I find that the General Division did not exceed its jurisdiction in considering the earlier reconsideration decision and the evidence that had been available at the time of that decision. There is no suggestion that the substance of the February 18, 2016, letter deviates from the November 18, 2015, communication. It is apparent from the letter that the Commission made a decision to maintain the July 27, 2015, decision, and the substantive matter at issue was the Appellant's misconduct and disqualification from benefits effective April 5, 2015. It would have been impossible to consider the February 18 re-examination decision without also considering the July 27 decision that was being re-examined.

[26] Subsection 64(1) of the DESD Act stipulates: "The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act." The Settlement and the amended Record of Employment are evidence that the General Division must take into account. However, they are not the only evidence. The General Division is not bound by the characterization of conduct in the Settlement or in the amended Record of Employment, and it did not exceed its jurisdiction in considering other evidence of conduct submitted prior to the Appellant's reapplication.

[27] Similarly, the General Division did not refuse to exercise its discretion by failing to consider the November 18, 2015, decision as a decision related to benefits for the period from October 26, 2015, forward. I am not convinced that the Commission's **failure** to provide a decision on benefits under a second claim constitutes an appealable decision.

[28] The June 11, 2015, decision on the first application disqualified the Appellant from benefits pursuant to section 30 of the Act. Subsection 30(2) of the Act states as follows:

> (2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[29] In other words, the Act disqualifies the Appellant from any benefits for the entire benefit period established in association with his first application (initial claim) for benefits in April 2015, irrespective of any subsequent claims for benefits within the benefit period, unless the claimant had been employed in insurable employment for the required number of hours per paragraph 30(1)(*a*) since leaving the employment.

[30] The Appellant was not employed in insurable employment since leaving his employment as required. He indicated in his second application for Employment Insurance that he had not worked since he completed his last application for Employment Insurance (GD3-41). This is consistent with the response to the questions that the General Division referred to under section 32 of the *Social Security Tribunal Regulations.* The Commission advised as follows:

> […] the claimant submitted a renewal application for benefits on October 26, 2015, which would have been a new application, however due to a disqualifying event; benefits were not payable to him. The application for benefits would have been considered a new application; however the claimant did not have any new employment since his last application dated April 27, 2015. The only change in the application was the claimant's claim that he experienced a shortage of work with The Bell Telephone Company on April 2, 2015.

[31] The October 2015 application for benefits was still within his benefit period established in April 2015 and therefore still subject to disqualification. Subsection 10(1) of the Act sets out when a benefit period commences as follows:

> (1) A benefit period begins on the later of
>
> (a) the Sunday of the week in which the interruption of earnings occurs, and
>
> (b) the Sunday of the week in which the initial claim for benefits is made.

In the Appellant's case, the later of these dates is the date on which he first applied: April 27, 2015.

[32] Subsection 10(2) determines the length of the benefit period. The benefit period is 52 weeks subject to extensions in certain circumstances.

[33] Therefore, the Appellant's benefit period from the first application would extend to at least April 27, 2016, and he would have been within the benefit period when he reapplied for benefits on October 26, 2015.

[34] The July 27, 2015, reconsideration decision in which the Commission maintained its initial decision was based on the Appellant's disqualification for misconduct in his initial claim. Given that the General Division has upheld this disqualification decision, subsection 30(2) of the Act continues to operate to preclude the payment of benefits. By necessary implication, the July 27, 2015, decision incorporates a refusal of any future claim made within the benefit period. The General Division is therefore not required to separately consider the effect of the Commission's refusal in response to the October 26, 2015, application. The ultimate issue was whether the Appellant was disqualified from benefits as of (enter April date) because he had lost his employment as a result of his own misconduct.

[35] Thus, I find that the General Division exercised its jurisdiction appropriately, and that it neither acted beyond its jurisdiction nor refused to exercise its discretion. There is no error under paragraph 58(1)(*a*) of the DESD Act.

Error in Law

[36] The General Division identifies the conduct that was alleged to constitute misconduct as the Appellant's refusal to accept calls directed to him despite being warned that he might be dismissed for this reason.

[37] The General Division explicitly finds that the Appellant had "committed the alleged offence:" He failed to respond to at least some of the calls directed to him.

[38] The General Division also explicitly finds that the Appellant's actions in failing to respond to calls directed to him were the cause of the Appellant's dismissal.

[39] The General Division applies the correct test to the facts at paragraph 50, finding that "[t]he [Appellant's] actions were conscious and deliberate and he 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."

[40] I find that the General Division considered all the relevant facts, made the appropriate findings and applied the correct test. There is no error of law per paragraph 58(1)(*b*) of the DESD Act.

Erroneous finding of fact made without regard to material

[41] The Appellant has argued that the General Division failed to consider the Settlement and the amended Record of Employment.

[42] I disagree. I find that the General Division decision considers both the Settlement and the Appellant's Record of Employment. In the Settlement, the employer agrees to amend the Record of Employment and, in the amended Record of Employment, the employer indicates that the reason for termination was "administrative reasons."

[43] It is also apparent that, in weighing the evidence, the General Division takes these documents into account when making its decision. The Member understands that the terms of the Settlement included a term that the employer would amend the Record of Employment to indicate "separation for administrative reasons" and that he would respond to enquiries by confirming that the Claimant's termination was not for cause (paragraphs 25 and 42).

[44] However, the General Division also considers the earlier statements, as well as documentary evidence, from both the employer and the Appellant regarding the Appellant's actual conduct, which, in the General Division's view, justifies its finding that the Appellant had been dismissed (paragraph 43).

[45] The substance of this appeal is not so much that the General Division is ignoring or misapprehending the Settlement or the Record of Employment. Rather, the Appellant does not agree that the General Division gives this evidence sufficient weight. The Appellant regards these two documents as the definitive reason for his dismissal and believes that they are determinative of whether he was terminated for misconduct. The General Division does not see it that way.

[46] As noted at paragraph 42 of the General Division decision, "[…] the Tribunal must consider the evidence and the conduct of the Claimant within the meaning of the EI Act and not

what is considered ‘cause’ (or ‘not cause’) under the provisions of other legislation and/or any settlement or agreement between the employer and the Claimant.” The General Division supports this assertion with the Federal Court of Appeal decision of *Canada (Attorney General) v. Morris* (A-291-98), and I accept it as correct at law.

[47] I appreciate that the Appellant disagrees with the General Division’s assessment of the evidence, but it is not my place to reweigh the evidence. I cannot find in the Appellant’s favour, unless he has made out one of the three grounds for appeal set out in subsection 58(1) of the DESD Act. In this case, I do not find that the General Division has failed to observe a principle of natural justice, exceeded its jurisdiction or failed to exercise its discretion, that it has made an error of law, or that it has based its decision on an a erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it.

CONCLUSION

[48] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division