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

[TRANSLATION]

Citation: *E. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 430

Tribunal File Number: AD-17-423

BETWEEN:

E. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: October 26, 2017

DATE OF DECISION: December 8, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing before a new member.

INTRODUCTION

[2] On April 27, 2017, the Tribunal's General Division found that the Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant filed an application for leave to appeal to the General Division on May 30, 2017, after learning of the General Division's decision on May 2, 2017. Leave to appeal was granted on June 12, 2017.

ISSUE

[4] The Tribunal must decide whether the General Division erred in determining that the Appellant had lost his employment due to his own misconduct under sections 29 and 30 of the Act.

THE LAW

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

STANDARD OF REVIEW

[6] The Federal Court of Appeal has determined that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the DESD Act. The Appeal Division cannot exercise the review and superintending powers reserved for higher courts—*Canada (Attorney General) v. Jean*, 2015 FCA 242, *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[7] 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

[8] The Appellant argues that the General Division decision does not meet the requirements of the Act. He submits that the General Division decision is erroneous and unreasonable because it was clearly demonstrated that the employer’s grounds for dismissal were just an excuse. He argues that the General Division disregarded the Appellant's evidence that only active members of the union were subject to disciplinary measures and that the General Division's findings disregarding evidence as to the employer's real grounds for dismissal are clearly insufficient or non-existent.

[9] The Appellant also argues that the General Division erred in fact when it was put into evidence that the directive was unknown or not enforced, particularly regarding the alleged written authorization and the fact that the alleged protocol had been put in place by the employer itself and permitted since the Appellant had been hired.

[10] The Appellant submits that he could not have admitted to stealing the alleged items when the protocol had been implemented by the employer itself and permitted by the person responsible for that service, and that the Appellant therefore could not have expected to be dismissed.

[11] The Respondent is of the opinion that it was the claimant's conduct that led to his dismissal. Taking wine without the employer's permission constitutes misconduct under the

Act because it broke the relationship of trust with the employer and because these actions constitute a breach of an implied duty under the Appellant's employment contract.

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

[13] 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.

[14] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, the General Division 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 its decision (*Bellefleur v. Canada (Attorney General)*, 2008 FCA 13; and *Parks v. Canada (Attorney General)*, A-321-97).

[15] In this case, the General Division disregarded the Appellant's evidence in its analysis. The Appellant attempted to demonstrate before the General Division the absence of a causal relationship between the alleged misconduct and his dismissal. He argues that the employer dismissed him, not because of his alleged misconduct, but because he was actively involved in his union.

[16] The Appellant noted that the three other employees who were dismissed at the same time were also involved in the union. In support of his position, the Appellant also filed decisions by the Labour Relations Board showing that the employer had previously suspended or dismissed employees due to their involvement in the union.

[17] The Tribunal is of the opinion that the General Division erred in law in disregarding the Appellant's evidence without explanation and in failing to consider, in its analysis, the question raised by the Appellant as to whether the alleged misconduct was the real reason for his dismissal.

[18] The General Division also overlooked the employer's various contradictions as to the discovery of the alleged actions. Indeed, the employer initially testified that it learned of the

situation by accident (GD3-16). Then it mentioned that an investigation had been initiated following reports from a co-worker (GD3-27) and finally, it stated that the whole thing had been discovered because it was investigating for other reasons (GD3-30).

[19] Furthermore, the General Division did not consider the fact that the employer, who based its allegations on an investigation and video evidence, refused to produce this evidence on file despite the Respondent's request. However, the General Division seemed to base its decision on this investigation and video evidence, which were not on file.

[20] The General Division also appears to have dismissed the Appellant's evidence that the employer tolerated what was going on because the employer stated otherwise. It is true that the General Division is free to give preference to the credibility of one party over the other, except that it must clearly explain its reasons in support of its findings on this issue.

[21] Finally, it was wrong for the General Division to assume that the Appellant knew the employer's policy because he was a union representative.

[22] For these reasons, the Tribunal is justified in intervening and returning the file to the General Division for a new hearing before a new member.

CONCLUSION

[23] The appeal is allowed and the matter is referred to the General Division (Employment Insurance Section) for a new hearing before a new member.

[24] The Tribunal orders that the General Division’s decision dated April 27, 2017, be removed from the file.

Pierre Lafontaine
Member, Appeal Division