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

[TRANSLATION]

Citation: *F. B. v. Canada Employment Insurance Commission,* 2017 SSTADEI 443

Tribunal File Number: AD-17-495

BETWEEN:

F. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: December 7, 2017

DATE OF DECISION: December 20, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 29, 2017, the General Division of the Social Security of Tribunal of Canada (Tribunal) determined that the Appellant had lost his employment due to 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 Appeal Division on July 3, 2017, after receiving the General Division's decision on June 2, 2017. Leave to appeal was granted on July 17, 2017.

TYPE OF HEARING

[4] 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 prevailing 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.

[5] The Appellant did not attend the hearing but was represented by Richard-Alexandre Laniel (counsel). The Respondent was represented by Manon Richardson.

THE LAW

[6] 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.

ISSUE

[7] Did the Tribunal's General Division err in finding that the Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act?

STANDARD OF REVIEW

[8] The Federal Court of Appeal has stated that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the DESD Act. The Appeal Division does not 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.

[9] 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 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

Position of the parties

[10] The Appellant argues that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in accordance with paragraph 58(1)(*a*) of the DESD Act by not accounting for medical evidence establishing the Appellant's particular medical condition, namely, a diagnosis of paranoid schizophrenia. This condition has decisive impacts on several levels, the first of which was his behaviour at the time of his separation from employment as well as in his subsequent statements.

[11] The Appellant submits that the General Division erred in law by not accounting for the fact that, given that the *Labour Standards Act* is a public order, the right to be absent in cases of illness was implicitly part of his labour contract and that it could not have been misconduct in those circumstances.

[12] The Respondent argues that the Appellant explained during the hearing that he had been diagnosed with paranoid schizophrenia, but that he had not told his employer about his diagnosis because many employers are prejudiced against people with this condition. The Appellant confirmed that his condition was not the reason why he was absent from work on April 2, 2016. The General Division therefore found that this submission was irrelevant to the issue of whether the Appellant should be disqualified from receiving Employment Insurance benefits.

[13] The Respondent argues that, following its analysis, the General Division concluded that the employer's version was more plausible. According to the agreement signed with Labour Standards, the employer had agreed to pay the amounts owed as a provision after the separation from employment. This does not mean that the employer acknowledged that the Appellant had worked from March 27 to 31, 2016. In the Appellant's case, there was no question that his unauthorized and unannounced absences were the direct cause of the loss of employment.

General Division decision

[14] The General Division found that the documents showing that the Appellant suffers from paranoid schizophrenia were irrelevant in determining whether he should be disqualified from Employment Insurance benefits, because the Appellant had testified that this condition was not the reason for his absence from work and that the employer was unaware that he had this condition.

[15] From its analysis, the General Division found that the employer's version was more plausible. The Appellant had already received a number of warnings regarding his absences. Despite this, the Appellant was still absent for several days without notifying his employer. The General Division found from the evidence that the fact that the Appellant was absent from work without notifying the employer constituted a wilful and deliberate act and that the Appellant knew that, in doing so, he risked losing his employment. For the General Division, there was no question that the Appellant's unauthorized and unannounced absences were the direct cause of the loss of employment.

Did the General Division err in finding that the Appellant had lost his employment due to his own misconduct within the meaning of sections 29 and 30 of the Act?

[16] The Appellant argues that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in accordance with paragraph 58(1)(*a*) of the DESD Act by not accounting for medical evidence establishing the Appellant's particular medical condition, namely, a diagnosis of paranoid schizophrenia. This condition has decisive impacts on several levels, the first of which was his behaviour at the time of his separation from employment as well as in his subsequent statements.

[17] Based on the General Division's decision, it did not discount the Appellant's medical evidence. It did, however, consider it irrelevant in determining whether the Appellant should be disqualified from receiving Employment Insurance benefits because the Appellant had testified that his diagnosis was not the reason for his absence from work and that the employer was unaware that he had this condition.

[18] Furthermore, even if the Tribunal had considered the medical evidence relevant, the probative value of this evidence is weak. Indeed, nothing in the medical evidence shows a connection between the Appellant's condition and his repeated absences.

[19] The Tribunal cannot ignore the Respondent's evidence, as the Appellant would like, because he had previously been diagnosed with paranoid schizophrenia. Nothing in the medical evidence before the General Division enables the Tribunal to find that the Appellant did not know what he was doing and saying at the time of his separation from employment as well as in his subsequent statements.

[20] The Appellant also submits that the General Division erred in law by not accounting for the fact that, given that the *Labour Standards Act* is a public order, the right to be absent in cases of illness was implicitly part of his labour contract and that it could not have been misconduct in those circumstances.

[21] If it is true that the *Labour Standards Act* provides for the right to be absent in cases of illness, the employee must still notify the employer as soon as possible of any absences as well as the reasons why. If circumstances warrant it, the employer can ask the employee to provide documentation to justify the length or repetitive nature of the absences.

[22] On August 26, 2015, the Appellant received an evaluation from his employer noting that he had difficulty showing up on time. On October 30, 2015, he received written notice following three absences on Sundays informing him that in future he must notify the employer of any absences and provide a medical certificate; otherwise, he would be suspended without pay. On December 10, 2015, he was issued a notice of suspension after showing up late. On February 3, 2016, the employer issued the Appellant a final written notice indicating that any further unwarranted absences would lead to dismissal. The Appellant received a notice of termination of employment on April 3, 2016.

[23] In an interview with a representative of the Respondent on April 29, 2016, the Appellant stated that he had called the morning of April 2, 2016, to notify the employer of his absence and that he had spoken to the assistant manager. He did not receive clear authorization to be absent, but he was coughing up blood and was not in any state to work. Despite this condition, he did not seek medical help during the day. He knew that he should obtain a medical certificate to give to his employer given his previous disciplinary notices.

[24] In an interview with a representative of the Appellant on May 2, 2016, the Appellant stated that most of the time he called to notify the employer of his absences.

[25] It is established in the jurisprudence that being absent from work without notifying the employer constitutes misconduct. Being absent from work without notifying the employer, or giving them a valid reason, indicates wilful or wanton disregard for the employer’s interests and of the standards of behaviour that the employer has a right to expect of their employees.

[26] The Appellant argues that he was not absent for nine consecutive days, as the employer claimed when it dismissed him, and that he filed a pecuniary complaint in order to be paid for the days in question. However, the agreement signed by the Appellant shows that the employer maintains that the Appellant's nine-day absence was unauthorized.

[27] In any case, the evidence shows that on February 3, 2016, the employer gave the Appellant a final written notice informing him that any further incident of being late or absent without authorization would lead to dismissal. On April 2, 2016, the Appellant was absent without notifying his employer. As the General Division concluded, the evidence shows that the Appellant's conduct was wilful and that he risked losing his employment by acting as he did.

[28] The Tribunal also finds that the Appellant did not produce a medical certificate before the General Division justifying his absence on April 2, 2016.

[29] The Tribunal therefore finds that the General Division considered the Appellant's arguments, that its decision rests on the evidence submitted before it, and that this decision complies with the legislation provisions and with the jurisprudence.

[30] For the above-mentioned reasons, it is appropriate to dismiss the appeal.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division