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

[TRANSLATION]

Citation: *J. L. v. Canada Employment Insurance Commission*, 2018 SST 130

Tribunal File Number: AD-17-411

BETWEEN:

J. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: February 6, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

INTRODUCTION

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

[3] The Appellant is assumed to have filed an application for leave to appeal to the Appeal Division on May 23, 2017. Leave to appeal was granted on June 5, 2017.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard by teleconference for the following reasons:

- The complexity of the issue or issues;
- The parties' credibility was not a key issue;
- The cost-effectiveness and expediency of the hearing choice; and
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant attended the hearing. The Respondent did not attend the hearing, even though it had received notice of the hearing.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that 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 because of his own misconduct within the meaning of sections 29 and 30 of the Act?

STANDARDS OF REVIEW

[8] The Federal Court of Appeal 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.

[9] As a result, unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

ANALYSIS

[10] The facts in the file are relatively simple and uncontested.

[11] An initial claim for Employment Insurance benefits was established effective March 6, 2016. When he filed his benefit claim, the Appellant stated that he had been suspended by the employer as of March 4, 2016, and that he was to resume work on June 6, 2016.

[12] When he filled in the questionnaire to that effect, the Appellant stated that he had been accused of loitering in the workplace.

[13] The March 3, 2016, suspension letter the employer gave the Appellant states that the alleged events happened on February 25, 2016. A supervisor surprised him in a broom closet while he was viewing material of a sexual nature during working hours.

[14] The Appellant admits that he was looking for a broom and dustpan to clean up. He went to the broom closet and closed the door so that it would not get in the way of people passing by. That is how he came across the images that a co-worker had put there. The supervisor arrived immediately and opened the door. The Appellant insists that he had been in the closet no more than 30 seconds.

General Division Decision

[15] The General Division found that the preponderant evidence showed that the Appellant had taken time to look at the posted photos, although he had received a number of warnings about failing to comply with his schedule. Even though the Appellant maintained that it was only for a few seconds, this could be categorized as wasting time, particularly in a situation where a person has received numerous warnings about complying with his schedule. Furthermore, the Appellant was in an isolated area and could not be seen by other employees.

[16] The General Division therefore found that the Appellant's actions constituted misconduct within the meaning of the Act.

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

[17] As the General Division stated, its role is to determine whether the employee's conduct amounts to misconduct within the meaning of the Act and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct is a valid ground for dismissal – *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[18] In addition, the concept of misconduct does not necessarily imply that the wrongful behaviour was a result of wrongful intent; it must simply be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance—*Canada (Attorney General) v. Hastings*, 2007 FCA 372; *Tucker* (A-381-85); *Mishibinijima* (A-85-06).

[19] The Appellant maintains that his behaviour was not wilful. His intention was by no means to look at the images but rather to get his work tools. Furthermore, the employer tolerated the images, which were displayed all over the work site.

[20] The Tribunal is of the opinion that the General Division did not commit an error when it determined, based on the evidence before it, that the Appellant had taken time to look at the displayed photos, despite having received a number of warnings about not obeying his schedule. Although the Appellant argued that he took only a few seconds, this should be considered wasted time and non-compliance with his schedule.

[21] The Tribunal is of the opinion that the evidence before the General Division clearly demonstrates that the Appellant's actions were wilful.

[22] In any case, the fact that the Appellant stopped and took time to look at the posted pictures when he knew he was being monitored by his supervisor and that he had already received a number of warnings about wasted time reflects, at the very least, flagrant recklessness and negligence verging on wilfulness, which falls under misconduct within the meaning of the Act.

[23] In his appeal submissions, the Appellant repeatedly insisted on the fact that the employer tolerated images being posted throughout the work site. On this point, the Tribunal is of the opinion that the employer's tolerance of images did not excuse the Appellant from obeying his schedule.

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

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

CONCLUSION

[26] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division