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

[TRANSLATION]

Citation: *A. F. v. Canada Employment Insurance Commission*, 2018 SST 172

Tribunal File Number: AD-17-596

BETWEEN:

A. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Centre de santé de services

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: February 19, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On July 28, 2017, the Tribunal's General Division found that the Appellant had lost his employment by reason of his own misconduct within the meaning of ss. 29 and 30 of the *Employment Insurance Act* (Act).

[3] On August 28, 2017, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on September 8, 2017.

TYPE OF HEARING

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

- the complexity of the issue or issues;
- the fact that 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 as quickly as possible while complying with the rules of natural justice.

[5] The Appellant participated in the hearing. The Respondent was represented by M. R.

THE LAW

[6] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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 General Division err by finding that the Appellant had lost his employment by reason of his own misconduct within the meaning of ss. 29 and 30 of the Act?

STANDARDS OF REVIEW

[8] The Federal Court of Appeal has determined that the Appeal Division's mandate is conferred to it by ss. 55–69 of the DESDA. 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] Therefore, 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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

General Division Decision

[10] With regard to the employer's first allegation, the General Division concluded from the evidence before it that the Appellant had acted in accordance with Centre procedures when he decided to lift a patient without waiting for a nurse because the situation fell under the allowed exceptions to these procedures. As a result, the General Division found that this incident did not constitute misconduct under the Act.

[11] With regard to the employer's second allegation, the General Division concluded from the evidence before it that the explicit language used by the Appellant in the presence of a patient and another employee did not conform to one of the employer's expectations, which states that the Appellant must, [translation] "at all times, use respectful language and maintain a respectful attitude towards staff, management, and clients" of the institution.

[12] The General Division concluded that the Appellant knew, or should have known, that in using such language, he was failing to respect his obligations towards his employer and faced a real risk of dismissal.

Position of the Parties

[13] The Appellant argues that the General Division erroneously found that he had lost his employment because of his own misconduct. The Appellant also argues that, according to the employer's statement, the event that led to the end of his employment was the lifting of a resident without waiting for the arrival and assessment of a nurse. This event took place in July 2015. The General Division concluded from the evidence that he had not violated the existing procedures at his place of employment.

[14] He argues that the General Division made an error of law by considering his previous statements as misconduct, even though the employer itself did not consider those violations a reason for dismissal. The Appellant argues that there is no causal relationship between the loss of his employment and the alleged misconduct.

[15] The Respondent argues that the Appellant was dismissed for two reasons, according to the letter of dismissal: for lifting a person without waiting for the arrival and assessment of a nurse and for using disrespectful language. The General Division determined that lifting a person without the patient-lifter did not constitute misconduct, but that the Appellant's language did constitute misconduct because he had been warned about his language on several occasions.

[16] Despite these warnings, he used inappropriate language. The Appellant's actions were deliberate and were of such a careless or negligent nature that one could say that he

willfully decided not to take into account the repercussions of these acts on his job, which is the very definition of misconduct.

Did the General Division err by finding that the Appellant had lost his employment by reason of his own misconduct within the meaning of ss. 29 and 30 of the Act?

[17] The General Division highlighted the fact that, over the years leading up to his dismissal, the Appellant had been reprimanded by his employer on several occasions and had been subjected to disciplinary actions for various acts and failures, particularly the failure to use appropriate language towards other staff, patients, and visitors.

[18] On September 4, 2014, the employer suspended the Appellant for a period of five days: September 12, 19, 20, 21, and 26, 2014. The Appellant had used an inappropriate tone towards his colleagues.

[19] On February 20, 2015, the employer suspended the Appellant for a period of three months, from February 20 to May 22, 2015. The Appellant had made the following statement out loud in a hallway at the institution about a resident with Down syndrome: “I would put her in a horror movie.” The employer then repeated to the Appellant that he must at all times maintain a respectful attitude and use respectful language towards staff, management, patients, and visitors. If he failed to do so, any recurrence of such behaviour would lead to the end of his employment.

[20] On August 27, 2015, the Appellant was dismissed following an investigation by the employer into the events brought to its attention on August 12, 2015. During the investigation, the Appellant admitted to having used explicit language in front of a patient and another employee a few weeks before the employer’s first reprimand, which was in July 2015.

[21] The evidence before the General Division leaves no doubt that the Appellant was dismissed for the explicit language that he used in the presence of a patient and another employee, in spite of the conclusion that the General Division reached regarding the first allegation.

[22] As the General Division rightly concluded, the Appellant knew or should have known that after a long, three-month suspension, repeat offences would lead to immediate disciplinary measures up to and including dismissal.

[23] Furthermore, the Tribunal is of the opinion that the General Division did not commit any error by concluding that the employer had in fact dismissed the Appellant for misconduct. This is clearly the real reason for the dismissal and not a pretext (*Davlut v. Attorney General of Canada*, [1983] 1 F.C. 398 (FCA)).

[24] The Tribunal finds that the General Division made its decision based on the evidence before it, and that it is a reasonable decision that complies with both the legislative provisions and the case law.

[25] There is no basis for intervention by the Tribunal.

CONCLUSION

[26] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division