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

Citation: *K. F. v. Canada Employment Insurance Commission*, 2018 SST 157

Tribunal File Number: AD-17-585

BETWEEN:

K. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: February 15, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 19, 2017, the General Division of the Social Security Tribunal determined that the Appellant had left his employment without just cause in accordance with sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on August 18, 2017. He was deemed to have received communication of the General Division's decision on May 29, 2017. The late application for leave to appeal and leave to appeal were granted on September 13, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue under appeal;
- the fact that the credibility of the parties is not anticipated being a prevailing issue;
- the information in the file, including the need for additional information;
- the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant attended the hearing and was represented by S. F. The Respondent was represented by Suzanne Prud'homme.

APPLICABLE 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] The Tribunal must decide whether the General Division erred when it concluded that the Appellant had left his employment without just cause in accordance with sections 29 and 30 of the Act.

STANDARD OF REVIEW

[8] 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 does not exercise a superintending power similar to that exercised by a higher court—*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, the Tribunal must dismiss the appeal.

ANALYSIS

Undisputed facts

[10] The Appellant was employed by Norcon Marine Service Ltd. until April 18, 2016. The employer proceeded at that time with a random drug test according to its drug and alcohol policy. The Appellant had read and signed the policy. When it was his turn to submit to a random test, the Appellant refused to submit to the test and walked off the job site. If the test had produced a positive result, the Appellant would have been given the chance to provide a clean test within a three-week turnaround.

Position of the parties

[11] The Appellant submits that he did not quit his job. He states that he was fired by his employer. Furthermore, the General Division's decision did not take into consideration recent case law that determined that random drug testing of employees is on its face discriminatory, even for safety sensitive positions, since it does not reflect actual or future job impairment.

[12] The Appellant submits that the day he refused the employer's drug test was a normal working day and that he did not, at any time since he began his employment, exhibit any behavior to discredit his work or personality. There was no reason for his employer to believe he had used drugs or that he would have a positive test.

[13] The Appellant submits that the employer violated its own procedures. All the workers that tested positive for cannabis received their jobs back. The employer clearly wanted him fired.

[14] The Respondent submits that when the Appellant refused to take the random drug and alcohol test, it was the Appellant and not the employer who initiated the termination of the employer-employee relationship.

[15] The Respondents submits that the Appellant was fully aware of the employer's drug and alcohol policy, that the employer had the right to conduct a random drug test at any time, and that reasonable suspicion was not necessary. The Appellant agreed to this policy

and gave his employer authorization to obtain samples and medical information, and to search his person, personal effects and other personal property on June 18, 2015.

[16] The Respondent submits that the General Division considered all of the evidence before it and that it did not misunderstand or misinterpret the evidence, make findings of fact that were capricious or unreasonable in this case or misapply the legal test for voluntary leaving under the Act.

General Division's decision

[17] The General Division concluded that the Appellant could have remained in his job had he agreed to the drug test as requested. As to the other complaints the Appellant raised regarding his working conditions, he could have remained employed and addressed these issues while, at the same time, looking for another job.

Did the General Division err when it concluded that the Appellant had left his employment without just cause in accordance with sections 29 and 30 of the Act?

[18] The evidence is undisputed that the Appellant refused to submit to the random drug and alcohol test, even though he had read and agreed to the employer's zero-tolerance drug and alcohol policy prior to the testing.

[19] As concluded by the General Division, the Respondent could have remained in his job if he had not made the decision to refuse the test. If the test had produced a positive result, the Appellant would have been given another chance to provide a clean test within a three-week turnaround. All the workers that tested positive for cannabis received their jobs back. The evidence clearly shows that it was the Appellant—not the employer—who triggered the job loss by refusing to submit to the random test.

[20] The Appellant insists that he did not quit but that he was fired by the employer who told him to pack his bags and leave the vessel.

[21] The Appellant, who advised the employer that he would not submit to the random test, for all intents and purposes, gave the employer no choice but to terminate the Appellant's employment contract.

[22] The dismissal was therefore merely the penalty for the actual reason for the job loss, namely the Appellant's decision to refuse the random test.

[23] The dismissal was in fact the logical consequence of the Appellant's deliberate act and does not change the fact that there was, first and foremost, a voluntary leaving on the Appellant's part—*Canada (Attorney General) v. Côté*, 2006 FCA 219.

[24] The Appellant argues that the General Division's decision did not take into consideration recent case law that determined that random drug testing of employees is on its face discriminatory, even for safety sensitive positions, since it does not reflect actual or future job impairment.

[25] The only real issue the General Division had to decide was whether the Appellant had voluntarily left his employment pursuant to sections 29 and 30 of the Act, and not whether the Appellant's conduct was a valid ground for dismissal—*Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[26] The General Division's conclusion was that the Appellant could have stayed in his employment had he agreed to the drug test as requested and that he had other reasonable alternatives.

[27] The Tribunal finds that the Appellant's case law is to be distinguished from the facts of the present case. From the beginning, the Appellant was fully aware of the employer's zero-tolerance drug and alcohol policy since it was an essential condition of his employment. This policy was not imposed unilaterally upon the Appellant by the employer during the course of his employment. His first day at work was June 18, 2015 (GD3-5, GD3-13), and the policy was read and signed by the Appellant on the same day (GD3-45). The Appellant recognized that if he wanted the job, he had to accept this policy (GD3-26).

[28] The Appellant agreed to and signed this policy, giving his employer the right to conduct a random drug test at any time, without reasonable suspicion. He did not contest this employment condition at any time prior to the random test. In fact, the random test was only performed ten months later, on April 18, 2016.

[29] Considering all of the evidence, a reasonable alternative to leaving would have been to comply with the employer's drug testing policy and submit to the drug test, especially since he would have been given the chance to provide a clean test within a three-week turnaround. Other recourses existed for the Appellant, instead of leaving the vessel, if he had failed the drug test.

[30] Furthermore, as concluded by the General Division, the Tribunal is not convinced from the evidence that the Appellant's working conditions were so intolerable as to leave him no option but to resign.

[31] As stated during the appeal hearing, the Appeal Division does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Appeal Division's jurisdiction is limited by subsection 58(1) of the DESD Act. 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.

[32] The Tribunal finds that there is no evidence to support the grounds of appeal invoked by the Appellant or any other possible ground of appeal. The General Division decision is supported by the facts and complies with the law and the decided cases.

CONCLUSION

[33] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division