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

Citation: *G. G. v. Canada Employment Insurance Commission*, 2018 SST 527

Tribunal File Number: AD-17-602

BETWEEN:

G. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 11, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, G. G. (Claimant), established a claim for benefits. The Respondent, the Canada Employment Insurance Commission (Commission), approved the Claimant for sickness benefits and notified the Claimant that after receiving special benefits, he would not be paid regular benefits since it was determined that he had lost his employment by reason of his own misconduct.

[3] The Commission determined that the Claimant had had an altercation with another employee, which had escalated when the Claimant spat on the co-worker and then punched the co-worker in the stomach. The Claimant made a request for reconsideration, but the Commission maintained its original decision.

[4] The Claimant appealed the Commission decision to the Tribunal's General Division. The General Division concluded that the undisputed evidence demonstrated that the Claimant had called his co-worker an offensive name, then approached the co-worker and spat at him. By doing so, the Claimant had breached the company's zero-tolerance harassment policy. In acting as he did, the Claimant knew or ought to have known that his conduct was such as to impair the performance of his duties owed to the employer and that, as a result, dismissal was a real possibility.

[5] The Claimant was granted leave to appeal to the Appeal Division. He submits that he never spat *on* the co-worker, but *at* him on the floor. He argues that the General Division ignored that he was not aware of the zero-tolerance policy in the workplace. He submits that the fact that he signed the policy does not mean that he was aware of what he was signing. He further submits that he did not have any discussions with his employer regarding a zero-tolerance policy prior to his dismissal. The Claimant disputes the General Division's interpretation of ss. 29 and 30 of the *Employment Insurance Act* (Act).

[6] The Tribunal must decide whether the General Division considered all of the evidence before it, whether it properly interpreted ss. 29 and 30 of the Act, and whether it erred in law by giving more weight to the hearsay evidence of the employer, even though it did not attend the hearing.

[7] The Tribunal dismisses the Claimant's appeal.

ISSUES

[8] Did the General Division ignore the Claimant's evidence that he was unaware of the zero-tolerance policy in the workplace?

[9] Did the General Division err in law in its interpretation of ss. 29 and 30 of the Act?

[10] Did the General Division err in law when it gave more weight to the hearsay evidence of the employer, even though it did not attend the hearing?

ANALYSIS

Appeal Division's Mandate

[11] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to s. 58(1) of the *Department of Employment and Social Development Act*, the Appeal Division's mandate is conferred to it by ss. 55 to 69 of that Act.[1]

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[13] 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 made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

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[1] *Canada (A.G.) v. Jean*, 2015 FCA 242; *Maunder v. Canada (A.G.)*, 2015 FCA 274.
[2] *Ibid*.

Issue 1: Did the General Division ignore the Claimant's evidence that he was unaware of the zero-tolerance policy in the workplace?

[14] This ground of appeal is without merit.

[15] The General Division did consider the Claimant's evidence but found the employer's evidence to be more credible. The employer provided a copy of the handbook outlining the policy on respect in the workplace. This handbook was signed by the Claimant. The employer also provided documentary evidence, signed by the Claimant, to support that the company's policies were reviewed on a regular basis.

[16] The General Division found that the Claimant had provided contradictory statements—he initially testified that he did not understand the policies, but later stated that he did understand the polices on safety in the workplace and that he knew fighting in the workplace was wrong.

[17] The Tribunal is also of the view that even if the Claimant was not aware of the company policy, the General Division could still conclude that there was misconduct. Aggressive behaviour in the workplace does not have to violate any policy. It has been well established in many cases that aggressive or violent behaviour at work constitutes misconduct.

Issue 2: Did the General Division err in law in its interpretation of ss. 29 and 30 of the Act?

[18] This ground of appeal is without merit.

[19] The General Division found that although the Claimant argued that he had not punched or threatened his co-worker, he did admit that he used the word "Bangla" to refer to his co-worker, who then showed him his middle finger, and that he was directly involved in a conflict when he angrily approached the co-worker, asking him why he had given him the middle finger, and spat at him towards the floor.

[20] Therefore, the undisputed evidence before the General Division shows that the Claimant was so mad at his co-worker that he spat in his direction on the floor, which is an unacceptable action.

[21] The Tribunal reiterates that the notion of misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent. It is sufficient that the misconduct be conscious, deliberate, or intentional. The test for misconduct is whether the act complained of was willful or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects their actions would have on job performance.[3]

[22] The Tribunal is of the opinion that the General Division committed no error when it found, based on the material before it, that the Claimant knew or ought to have known that spitting in a co-worker's direction was a breach of his duty to the employer, such that dismissal was a real possibility.

[23] The fact that the Claimant became offended by the co-worker's gesture and that he made attempts to rectify the situation by returning the following day to apologize is of no relevance to whether his conduct constituted misconduct.[4]

Issue 3: Did the General Division err in law when it gave more weight to the hearsay evidence of the employer, even though it did not attend the hearing?

[24] This ground of appeal is without merit.

[25] The Claimant argues that the General Division erred in law when it gave more weight to the hearsay evidence of the employer, even though it did not attend the hearing.

[26] The Tribunal is of the opinion that the mere fact that one party is present whereas the other party is absent is not necessarily a determining factor. The General Division is free to find one party more credible than the other.

[27] Furthermore, the Federal Court of Appeal has decided that Boards of Referees (now the General Division) are not bound by the strict rules of evidence applicable in criminal or civil courts and that they may receive and accept hearsay evidence.[5]

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[3] *Tucker* (A−381−85), *Mishibinijima* (A−85−06).
[4] *Canada (A.G.) v. Hastings*, 2007 FCA 372.
[5] *Caron v. Canada (A.G.)*, 2003 FCA 254.

[28] The Tribunal finds that the Claimant was aware of the evidence on file prior to his appearance before the General Division and that he had plenty of time to prepare his arguments. The General Division allowed the Claimant to fully present his case, and he was given the full opportunity to challenge the employer's position.

CONCLUSION

[29] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	May 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. G., Appellant S. G., Representative for the Appellant S. P, Representative for the Respondent