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

[TRANSLATION]

Citation: *J. L. v. Canada Employment Insurance Commission*, 2018 SST 683

Tribunal File Number: AD-17-586

BETWEEN:

J. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 20, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, J. L. (Claimant), made an initial application for Employment Insurance benefits. Upon review of his application, the Respondent, the Canada Employment Insurance Commission (Commission), informed him that he was not entitled to Employment Insurance benefits because he lost his employment due to his own misconduct. The Commission found that the Claimant's actions—namely missing work from July 25 to July 29, 2016, when the employer had refused his vacation time—constituted misconduct. The Claimant requested reconsideration of this decision. The Commission advised the Claimant that it was upholding its initial decision. The Claimant appealed the decision to the General Division.

[3] The General Division determined that the Claimant had lost his job due to his own misconduct because he had decided to take vacation time without his employer's permission. It found that the Claimant knew or ought to have known that dismissal was a real risk as a result of his actions.

[4] The Tribunal granted leave to appeal. The Claimant states that the General Division erred by failing to take into account that "the impression that his vacation time would be approved" had been made possible by his immediate supervisor. He submits that this was not a vague impression based on his own judgement, but rather the words spoken by his immediate supervisor, who stated that there would be no problems and that this was just a formality.

[5] The Tribunal must determine whether the General Division erred by finding that the Claimant was guilty of misconduct when the employer let him believe that his vacation request was just a formality. It must also determine whether the General

Division erred by giving credibility to the employer's version of events in spite of its absence at General Division hearing.

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

ISSUES

[7] Did the General Division err by finding that the Claimant's actions constituted misconduct when the employer let him believe that his vacation request was just a formality?

[8] Did the General Division err by giving credibility to the employer's version of events when it was absent from the hearing?

ANALYSIS

Appeal Division's Mandate

[9] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

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

[11] 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.

Issue 1: Did the General Division err by finding that the Claimant's actions constituted misconduct when the employer let him believe that his vacation request was just a formality?

[1] *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[12] The General Division's role is to determine whether the employee's conduct amounted to misconduct within the meaning of the *Employment Insurance Act* (EI Act) and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal.[2]

[13] 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. 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 his or her performance.[3]

[14] In his submissions on appeal, the Claimant submitted that his supervisor let him believe that the confirmation of his vacation time was a formality. He submits that because the General Division found his testimony credible, it should have taken his testimony into account in its entirety. He also argues that the General Division erred by finding the employer's version of events to be credible, because it contained obvious contradictions.

[15] The general decision shows that it based its decision on the uncontested evidence before it, which showed that the Claimant took vacation time when he had been notified, a few days before he left, of his employer's refusal.

[16] The General Division found that the Claimant lost his employment due to his own misconduct because he decided to take vacation time without the employer's permission. It found that in light of the seriousness of the action in question, the Claimant should have known that he would be dismissed.

[17] Jurisprudence is clear that absence from work without the employer's permission, and especially after being expressly notified that the employer has refused the absence, constitutes misconduct under the EI Act.

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[2] *Canada (Attorney General) v. Lemire*, 2010 FCA 314.
[3] *Canada (Attorney General) v. Hastings*, 2007 FCA 372; *Tucker*, A-381-85; *Mishibinijima*, A-85-06.

[18] Unfortunately for the Claimant, the jurisprudence that he presented does not help him because it deals with situations where the employer had clearly accepted the claimant's requested leave before later refusing it or not providing an official response, which was not the case here.

[19] There is a fundamental difference between leaving on vacation without receiving approval—still taking for granted that the request had been approved—and the General Division's conclusion that the Claimant left knowing that his request had not been approved.

[20] While it may be true that the employer later reached out to the Claimant to rehire him and that the employer told him that he wanted to make an example of him, these facts do not change the nature of the misconduct that initially led to the Claimant's dismissal.[4]

[21] The Tribunal does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Tribunal's powers are limited by s. 58(1) of the DESD Act.

[22] The Tribunal found that it was reasonable for the General Division to render a conclusion the way it did. It made a decision that complies with the law and jurisprudence.

[23] This ground of appeal fails.

Issue 2: Did the General Division err by giving credibility to the employer's version of events when it was absent from the hearing?

[24] The Claimant criticizes the General Division for having granted greater weight to the employer's evidence even though the employer did not attend the hearing and could not be cross-examined.

[25] As mentioned previously, the General Division decision is based on uncontested fact: the Claimant's decision to take vacation time in spite of the employer's refusal.

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[4] *Canada (AG) v. Boulton*, 1996 FCA 1682; *Canada (AG) v. Morrow*, 1999 FCA 193.

[26] Whatever the case may be, the Tribunal finds that the single fact that one party was present and the other was absent must not be 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] The General Division could not therefore reject the employer's evidence simply because the Claimant did not have the opportunity to cross-examine the employer.[6]

[28] The Tribunal believes 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 argument. The General Division allowed him to present his arguments in respect of the entire case before it, and the Claimant had an opportunity to contradict the employer's position.

[29] This ground of appeal fails.

[5] *Caron v. Canada (A.G.)*, 2003 FCA 254.
[6] *Olivier*, A-308-81.

CONCLUSION

[30] The Tribunal dismisses the appeal.

Pierre Lafontaine

Member, Appeal Division

HEARD ON:	June 12, 2018
METHOD OF PROCEEDING:	Teleconference
PERSONS IN ATTENDANCE:	J. L., Appellant Y. B., Appellant's representative Manon Richardson, Respondent's representative