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

Citation: *Canada Employment Insurance Commission v. H. E.*, 2018 SST 728

Tribunal File Number: AD-16-1320

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

H. E.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 13, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, H. E. , applied for Employment Insurance benefits after he was suspended and then terminated from his employment. He maintains that he was unfairly terminated.

[3] The Appellant, the Canada Employment Insurance Commission, initially allowed the Respondent's claim. However, after reconsideration at the employer's request, the Appellant denied the Respondent's request and disqualified him from benefits because it found that he had lost his employment as a result of his own misconduct.

[4] The General Division found that while the employer dismissed the Respondent on the grounds that he had breached conflict of interest policies (contract splitting and hiring of a family member), the Respondent's conduct was not wilful or deliberate because: he relied on information provided by another employee, he disclosed dealings with his brother, he did not influence the hiring process, and he had not been adequately trained on conflicts of interest.

[5] The Appellant is appealing the General Division decision on the grounds of errors of law and serious errors in the findings of fact. The Tribunal's Appeal Division granted leave to appeal on the basis that the appeal had a reasonable chance of success.[1]

[6] The appeal hearing was held by teleconference. Both parties participated.

[7] The Appeal Division finds that the General Division committed reviewable errors. The General Division erred in law in making its decision, and it based its decision on serious errors in the findings of facts. The matter is referred back to the General Division for reconsideration.

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[1] Leave to appeal decision dated December 21, 2016.

ISSUES

[8] The Appellant raises many grounds of appeal. After addressing the standards of review that the Appeal Division must apply when it reviews a General Division decision, I will address the specific issues raised by the Appellant as follows:

Issue 1: Did the General Division err in law by misapplying binding jurisprudence?

Issue 2: Did the General Division base its decision on a serious error in its findings of fact, specifically as follows?

a) By its lack of clarity on whether the Respondent committed the actions for which he was dismissed;
b) By concluding that the Respondent's actions "lacked a mental element of wilfulness" when the evidence did not support such a finding.

Issue 3: If the General Division did err in such a way, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[9] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, 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.[2]

Standards of Review (or Deference to the General Division)

[10] When the Appeal Division reviews a General Division decision, must it apply the standards of review as adopted in *Dunsmuir v. New Brunswick*[3] or the statutory tests that the *Department of Employment and Social Development Act* (DESD Act) associates with issues of

[2] *Department of Employment and Social Development Act* at s. 58(1).
[3] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.

natural justice, issues of law, and issues of fact? The applicable approach also determines whether the Appeal Division owes deference to the General Division on these issues.

[11] The Appellant submits that the language of the Tribunal's governing statute, the DESD Act, is binding on the Appeal Division. Furthermore, the Appellant argues that the Appeal Division is not required to show deference to the General Division's decisions on questions of natural justice, jurisdiction, and law. The Appeal Division's role in reviewing these types of questions is to ensure that the decision is correct. As for erroneous findings of fact, the Appeal Division may intervene in a General Division decision if the Appellant establishes that the decision was based on an erroneous finding of fact that the General Division made in a perverse or capricious manner or without regard for the material before it. The Appellant submits that the General Division based its decision on findings of fact and on questions of mixed fact and law that were "unreasonable," thereby using the language in *Dunsmuir*.

[12] The Respondent made no submissions on the standard of review for a decision made by the General Division.

[13] There appears to be a discrepancy in relation to the approach that the Appeal Division should take when reviewing appeals of decisions rendered by the General Division[4] and, if the standards of review must be applied, whether the standard of review for questions of law and natural justice differs from the standard of review for questions of fact and questions of mixed fact and law.

[14] Given that the courts have yet to resolve or provide clarity on this apparent discrepancy, I will consider this appeal by first applying the language of the DESD Act and then applying the standard of reasonableness to questions of fact. In conducting a review of the reasonableness of the General Division's findings of fact, I will determine whether there was some basis in the evidence for the General Division's findings, rather than whether, on the evidence, alternative findings are available or are more reasonable.[5]

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[4] *Canada (Attorney General) v. Paradis* and *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274; *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Canada (Attorney General) v. Peppard*, 2017 FCA 110; *Quadir v. Canada (Attorney General)*, 2018 FCA 21.
[5] *Dr. Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 SCR 226, at para. 41.

[15] The Appeal Division does not owe any deference to the General Division's conclusions on questions of law and natural justice.[6] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[7]

[16] The appeal before the General Division turned on the question of whether the Respondent lost his employment by reason of his own misconduct, a question of mixed fact and law.

[17] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under s. 58(1) of the DESD Act.[8]

[18] The appeal before the Appeal Division rests on distinct questions of errors of law and serious errors in the findings of fact, each of which discloses an extricable legal issue.

Issue 1: Did the General Division err in law by misapplying binding jurisprudence?

[19] I find that the General Division erred in law by not applying binding Federal Court of Appeal jurisprudence.

[20] The General Division referred to the Federal Court of Appeal decisions *Lemire v. Attorney General of Canada*, *Mishibinijima v. Attorney General of Canada*, and *Tucker v. Attorney General of Canada*.[9] It adopted the legal test to be extracted from these cases as "the legal notion of misconduct for the purposes of this provision as acts that are wilful or deliberate, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal."[10]

[21] The General Division interpreted "wilful or deliberate" as requiring the Respondent to have had actual knowledge of the proper procedures for contracts and purchase orders, to have failed to disclose dealings with his brother, to have influenced the selection process in order to hire a family member, and to have been adequately trained on conflicts of interest.[11]

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[6] *Paradis*, *supra* note 4 at para. 19.
[7] DESD Act at s. 58(1)(*b*).
[8] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[9] General Division decision, at para. 41: *Lemire v. Attorney General of Canada*, 2010 FCA 314; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, [1986] 2 F.C. 329 (C.A.)
[10] General Division decision, at para. 41.
[11] Ibid. at para. 47.

[22] However, the jurisprudence does not require wilfulness in the sense that a claimant must have intended to breach employment codes of conduct, rules, procedures, or the like. The Federal Court of Appeal has confirmed that there is misconduct where the reprehensible act or omission complained was made "consciously, deliberately or intentionally."[12]

[23] In *Canada (Attorney General) v. Secours*, the Federal Court of Appeal held that the Board of Referees had erred in law by limiting misconduct to actions for which there was a wrongful intent.[13]

[24] Likewise, the General Division in this matter erred in law by requiring wrongful intent in its interpretation of the applicable legal test.

[25] I find that the General Division erred in law by misinterpreting binding jurisprudence.

Issue 2: Did the General Division base its decision on a serious error in its findings of fact?

a) By its lack of clarity on whether the Respondent committed the actions for which he was dismissed

[26] I find that the General Division based its decision on serious errors in the findings of facts by failing to make a clear finding of fact on whether the Respondent committed the actions for which he was dismissed.

[27] The General Division found that the Respondent was dismissed by his employer and that the employer's reason for dismissal was that the Respondent failed to demonstrate high ethical and professional standards.[14] The General Division found that the primary reasons for his dismissal were that "he was allegedly involved in contract splitting and hired his brother without telling anyone."[15]

[28] The General Division did not make a finding on whether the Respondent was involved in contract splitting. It found that he did not receive any training on contract splitting, that he relied

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[12] *Tucker, supra* note 9; *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 (FCA); *Canada (Attorney General) v. Johnson*, 2004 FCA 100.
[13] *Secours, supra* note 12 at paras. 9–10.
[14] General Division decision at para. 37.
[15] Ibid. at para. 47.

on advice of another employee in entering into the contracts with his brother, and that he disclosed to the employer that they were dealing with his brother.[16]

[29] On the hiring of his brother, the parties agreed that the General Division erred when it categorized the relation as "his brother," because the person hired was actually his brother-in-law. The contract splitting issue was found to involve the Respondent's brother. Therefore, it is unclear from the decision whether the General Division's findings about hiring of a family member involved a brother or a brother-in-law or both.

[30] Part of the analysis on misconduct that is necessary on the part of the General Division is the finding that the claimant committed acts which he or she was dismissed for having committed. Here, the General Division failed to make clear findings of fact on both of the primary reasons for the Respondent's dismissal.

[31] These errors in the findings of facts are reviewable pursuant to s. 58(1)(*c*) of the DESD Act. They are also unreasonable, in the language of *Dunsmuir*, because there was no basis in the evidence for the General Division's failure to make essential findings of fact.

b) By concluding that the Respondent's actions "lacked a mental element of wilfulness" when the evidence did not support such a finding

[32] The finding that the Respondent's actions lacked a mental element of wilfulness was capricious in that it was based on a misinterpretation of the legal test and on the General Division having assigned little or no weight to the employer's evidence (which contradicted the Respondent's) without adequately explaining its reasons.

[33] The General Division preferred the testimonial evidence to the documentary evidence in the Appellant's reconsideration file, but it did not adequately explain its reasons for affording more weight to this evidence than to the documentary evidence. If the General Division decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must

[16] Ibid. at paras. 42–45.

explain the reasons for this decision.[17] A failure to do so presents a risk that its decision will be marred by an error of law or that it will be qualified as capricious.

[34] The documentary evidence included a forensic investigation report showing the Respondent's management position and his responsibility to sign off on contracts and hiring. It included written policies and codes of conduct applicable to the Respondent. It also included evidence that the Respondent had split a contract with his brother into three contracts and had executed a false statement with regard to the hiring process. However, the General Division's only explanation on assigning little or no weight to this evidence was that it "prefers the [Respondent's] testimony … as his statements remained consistent, detailed and plausible."[18]

[35] With respect, I find that the General Division did not adequately explain its reasons for affording more weight to this evidence than to the documentary evidence and, as a result, the finding of fact that the Respondent's actions "lacked a mental element of wilfulness" is capricious. This is a reviewable error under s. 58(1)(*c*) of the DESD Act. It is also unreasonable, in the language of *Dunsmuir*, given the evidence in the documentary record of the specific actions of the Respondent.

Issue 3: If the General Division did err in such a way, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

[36] I have found that the General Division erred in law and based its decision on serious errors in the findings of facts.

[37] The Appellant submits that while the Appeal Division has the legislative authority to substitute its own decision, it should not do so in the present case because the Appeal Division member was not present to observe the Appellant's testimony, which was given "live" at the General Division videoconference hearing. The Appellant submits that credibility is at issue, in addition to contradictory evidence in the record. Only an audio recording is available, which is insufficient for the Appeal Division to assess the Appellant's testimony. Further, at the Appeal

[17] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13.

[18] General Division decision at paras. 42 and 43.

Division hearing, the Respondent attempted to provide new information and reargue his case based on that information.

[38] The Respondent made no submissions on this issue. He maintains that the General Division properly considered his appeal from disqualification and correctly decided the matter.

[39] I find that in misapplying and misinterpreting binding jurisprudence, the General Division's approach to the fact finding was not sufficiently complete for me to render the decision that the General Division should have rendered.

[40] In addition, in order to render a decision on whether the Respondent lost his employment because of his own misconduct, it will be necessary to consider the evidence and credibility, find the facts, and weigh the evidence. These tasks are better suited to the General Division than to the Appeal Division.

CONCLUSION

[41] The appeal is allowed. The matter is referred back to the General Division for reconsideration in accordance with these reasons and decision.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	January 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Louise Laviolette, Representative for the Appellant H. E. , Respondent, self-represented