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

Citation: T. B. v Canada Employment Insurance Commission, 2019 SST 204

Tribunal File Number: AD-18-657

BETWEEN:

T. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: March 14, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, T. B. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant had lost his job because of his misconduct. The Commission found that the Claimant was dismissed because he took materials belonging to the employer for his personal use. The Claimant requested that the Commission reconsider its decision; however, it maintained its original decision. The Claimant appealed the Commission decision to the Tribunal's General Division.

[3] The General Division found that the Claimant had lost his job because he took two boxes of garbage bags that belonged to his employer for his personal use, contrary to the employer's policy against theft. It found that the Claimant knew he could lose his job for breaching the employer's policy against theft. For these reasons, the General Division concluded that the Claimant's conduct was misconduct within the meaning of section 30 of the *Employment Insurance Act* (EI Act).

[4] The Claimant was granted leave to appeal to the Appeal Division. The Claimant submits that the General Division erred in law in its interpretation of the legal test, set out by the Federal Court of Appeal, for whether a settlement can be used as evidence that a claimant's termination of employment was rescinded by a settlement.

[5] The Tribunal must decide whether the General Division erred in law in its interpretation of the legal test for whether a settlement can be used as evidence that a claimant's termination of employment was rescinded by a settlement.

[6] The Tribunal dismisses the appeal.

ISSUE

[7] Did the General Division err in law in its interpretation of the legal test for whether a settlement can be used as evidence that a claimant's termination of employment was rescinded by a settlement?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals following section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that act.[1]

[9] 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]

[10] 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.

Did the General Division err in law in its interpretation of the legal test for whether a settlement can be used as evidence that a claimant's termination of employment was rescinded by a settlement?

[11] The General Division decided the Claimant's case on an individual basis and on its own merit to determine whether there was misconduct under the EI Act. The General Division correctly found that it was not up to the General Division to decide cases that were not before it.

[12] The General Division found that the Claimant lost his job because he took two boxes of garbage bags that belonged to his employer for his personal use, contrary to the employer's policy against theft. It found that the Claimant knew he could lose his job for breaching the

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

employer's policy against theft. For these reasons, the General Division concluded that the Claimant's conduct was misconduct within the meaning of section 30 of the EI Act.

[13] The Claimant submits that the General Division erred in law by not following the case law on settlements that he had presented to the General Division. The case law sets out the legal test for whether a settlement can be used as evidence that a claimant's termination of employment was rescinded by a settlement. The Claimant puts forward that the test is outlined in the Federal Court of Appeal case of *Canada (Attorney General) v Boulton* and that the test was adopted in cases following that case.[3]

[14] The Claimant further submits that the General Division ignored critical phrases in the settlement and, therefore, made erroneous findings of fact, without regard for the material before it. He submits that the General Division also ignored relevant facts.

[15] The Claimant relies on the settlement reached in the grievance of his termination and the settlement of his Ontario Labour Relations Board (OLRB) complaint. He argues that the two settlements clearly state that he was terminated for cause and that this termination was rescinded by the settlements.

[16] It is relevant to reproduce the essential terms of the settlement reached in the grievance of his termination below:

> "Whereas the Grievor was dismissed for cause and filed a grievance in respect of that dismissal;
>
> The parties agrees as follows in full settlement of that grievance:
>
> 1- The Employer rescinds the termination for cause but the parties agree that the employment relationship is no longer viable and the Grievor will not be able to return to work and the employment relationship remains severed."
>
> 2-

[3] *Canada (Attorney General) v Boulton*, 1996 CanLII 11574 (FCA).

[17] And the essential terms of the settlement reached for his OLRB complaint are as follows:

> "1. These Minutes of Settlement do not constitute an admission by either the Respondent or Intervener of liability or wrongdoing or that there was any breach of the Labour Relations Act nor do they represent a withdrawal of the allegations of the Applicant.
>
> 2. The Respondent will provide the Applicant with correspondence […] confirming that it rescinded the Applicant's termination for cause but that the Applicant and Respondent agreed that the employment relationship was no longer viable and therefore remained severed. The Respondent will further confirm in the aforementioned correspondence that it does not object to the Applicant's request for reconsideration of the decision of the Social Security Tribunal, General Division – Employment Insurance Section, dated April 3, 2016 (Hereinafter the "Appealed Decision)."

[18] The General Division found that nothing in either of the two sets of minutes of settlement altered the essential facts that led to the Claimant's dismissal on September 3, 2015. It found that there was no evidence that the employer later backtracked, reconsidered, or otherwise changed its view of the Claimant's conduct in taking the employer's property for his personal use.

[19] The Claimant argues that the General Division should have read the phrase "remains severed" in the context of the settlement as a whole, which specifically stated at the beginning of the sentence that "[t]he Employer rescinds the termination for cause …."

[20] Furthermore, the phrase "the employment relationship remains severed" is also preceded by the phrase "the parties agree that…". This phrase specifically imports a mutuality into the statement that the employment relationship remains severed and an agreement by the parties, which again, does not denote a termination for cause, which is carried out by the employer alone.

[21] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence regarding the misconduct that contradicts the position the employer took during the Commission's investigation or at the General Division hearing. The Tribunal finds that the settlement agreements in the present case do not have this effect.

[22] There is nothing in the settlement agreements that expressly or implicitly includes admissions that the facts on file regarding the Claimant were erroneous or did not accurately reflect the events as they occurred. The settlement agreements do not contain any retraction from

the employer regarding the events that initially led to the dismissal of the Claimant.

[23] As the General Division stated , the settlement agreements seem to be more of an attempt by the employer to assist the Claimant in securing Employment Insurance benefits by simply stating that it rescinds the termination for cause. The agreements do not provide for reinstatement or contain any consideration or meaningful compensation for the Claimant after nearly 18 years of service, which would allow the Tribunal to conclude that the settlement agreements contradict the earlier finding of misconduct.

[24] The preponderant evidence before the General Division shows that the Claimant was initially dismissed because he took two boxes of garbage bags that belonged to his employer for his personal use, contrary to the employer's policy against theft.

[25] The Federal Court of Appeal has stated on many occasions that a deliberate violation of the employer's code of conduct is considered misconduct within the meaning of the EI Act.[4]

[26] For the reasons mentioned above, the appeal is dismissed.

[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

CONCLUSION

[27] The Tribunal dismisses the appeal.

Pierre Lafontaine

Member, Appeal Division

HEARD ON:	February 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. B., Appellant Saranjit Singh Chiima, Representative for the Appellant Isabelle Thiffault, Representative for the Respondent