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

Citation: *H. E. v Canada Employment Insurance Commission*, 2019 SST 439

Tribunal File Number: AD-19-85

BETWEEN:

H. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 8, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, H. E. (Claimant), applied for regular Employment Insurance benefits and established a claim effective April 20, 2014. Although the Claimant's Record of Employment (ROE) indicated that he had been dismissed, the Commission nonetheless approved the Claimant's claim because his employer, XX, did not provide enough information to prove that the Claimant had lost his job because of his own misconduct.

[3] The Employer asked the Commission to reconsider its decision. It put forward that the Claimant was terminated from his position as manager after a forensic investigation revealed he was involved in contract splitting with a company owned by his brother and had participated in a hiring board that hired his brother-in-law. The Claimant argued he was not properly trained regarding the employer's policies and that he did not consider his brother-in-law to be a relative. The Employer argued the Claimant was well aware of its policies and chose not to disclose his actions to anyone. The Commission overturned its original decision and imposed a retroactive disqualification on the Claimant's claim because it concluded that he had lost his employment due to his own misconduct.

[4] The General Division found that the Claimant's conduct of contracting with two non-arm's length companies and engaging in contract splitting on the Freezer Project, and in failing to disclose the family relationship when he hired his brother-in-law, contrary to the various policies governing the Claimant's employment, was deliberate and so reckless as to be willful. The General Division further found that the Claimant ought to have known he could lose his job for these acts and that such conduct would irreparably harm his relationship with his employer. It concluded that the Claimant's conduct to be misconduct within the meaning of section 30 of the *Employment Insurance Act* (EI Act).

[5] The Claimant was granted leave to appeal to the Appeal Division. The Claimant puts forward that the General Division Member made several comments during the hearing that demonstrated she was not impartial in assessing his testimony and by not being so, influenced the outcome of her decision. The Claimant also puts forward examples that the General Division 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.

[6] The Tribunal must decide whether the General Division Member's comments during the hearing give rise to an apprehension of bias by a reasonable and fully informed person. It must also decide if the General Division 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.

[7] The Tribunal dismisses the appeal.

ISSUES

Issue no 1: Did the General Division render its decision based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it?

Issue no 2: Did the General Division Member's comments during the hearing give rise to an apprehension of bias by a reasonable and fully informed person?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 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, 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.

Issue no 1: Did the General Division render its decision based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it?

[11] The Tribunal reiterates that the role of the General Division was not to judge the severity of the penalty imposed on the Claimant, but rather, whether he's conduct amounted to misconduct within the meaning of the EI Act

[12] The General Division found that the Claimant's conduct of contracting with two non-arm's length companies and engaging in contract splitting on the Freezer Project, and in failing to disclose the family relationship when he hired his brother-in-law, contrary to the various policies governing the Claimant's employment, was deliberate and so reckless as to be willful.

[13] The General Division further found that the Claimant ought to have known he could lose his job for these acts and that such conduct would irreparably harm his relationship with his employer. It concluded that the Claimant's conduct to be misconduct within the meaning of sections 29 and 30 of the EI Act.

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

[14] The employer's main allegation with respect to misconduct of the Claimant surrounds a fridge conversion/freezer installation project that occurred in October 2013, at the employer's lab.

[15] X received the mandate to proceed with an independent investigation and presented the employer with a report of the investigation and findings in May 2015. The Claimant chose not cooperate in the investigation on the legal advice of his attorneys. In June 2015, after suspending the Claimant, the employer rendered the final decision to terminate the Claimant's employment based on the results of the third party investigation. The employer explained that the results of the investigation determined that the Claimant was involved in contract splitting and that the vendors were in relation to the Claimant.

[16] The evidence shows that the compliance with the X's Conflict of Interest and Post-Employment Code[3] and the Code of Conduct[4] is a condition of employment for all X employees. The Claimant's offer of employment outlined this requirement, which he acknowledged upon signing.[5] In addition, acceptance and adherence to the expected behaviours contained in the Values and Ethics Code for the Public Sector is a condition of employment for every public servant in the federal public sector.[6]

[17] The X report mentions that the Claimant attended numerous training programs including the "Managing for Success program", which specifically covers procurement and contracting.[7]

[18] The preponderant evidence shows that the Claimant was solely responsible for the contracting of good and services with respect to the Freezer Project and that both suppliers contracted where related to the Claimant and not at arms-length. Furthermore, the allocation of the Freezer Project in three separates phases was clearly done to keep

[3] GD3-139 to GD3-171.
[4] GD3-131 to GD3-138.
[5] GD3-172 to GD3-176
[6] GD3-143.
[7] GD3-78, paragraphs 72 and 73.

each of the contractor costs below $10,000.00, which is defined in the X's Procurement and Contracting Policy as contract splitting.[8]

[19] The Claimant argues that he relied in good faith on his Resource Manager's advice with regard to the procurement rules in attempting to secure the purchase and installation of the freezer that totalled over $10,000. He argues that the Resource Manager was of the view that proceeding in this fashion was not contract splitting. He also argues that many people were aware that he had contacted his brother's company to secure a freezer considering the lab's urgent need and that no one had then raised the issue of a potential conflict of interest.

[20] However, the evidence shows that the Claimant was well aware that any contract over $10,000.00 was above his authority and that he needed to follow X'S procurement procedures.[9] The Resource Manager, Mrs. W. and another colleague, Mr. H., had advised the Claimant that the acquisition of the freezer should go through National Procurement as the estimated cost was expected to exceed $10,000.[10] The Claimant had other resource people who he could have spoken to about this matter if he had really wanted clarification.[11] Furthermore, the Claimant was aware that he could not deal with a vendor that was not at arms-length without violating the Conflict of Interest Code since it was a condition of his employment, which he acknowledged upon signing.

[21] In the present case, there was sufficient evidence available to the General Division to justify a finding of misconduct. It is clear that the Claimant's actions breached the employer's trust. In acting as he did, the Claimant knew or ought to have known that the 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.

[22] The Tribunal finds that the Claimant showed, at the very least, carelessness or was negligent to the point that one could say that he wilfully disregarded the affects actions would have on the duty owed to the Employer when he proceeded to split the

[8] GD3-94, par. 170.
[9] GD3-80, par.87.
[10] GD3-82, par 105.
[11] GD3-125.

contracts awarded to two non-arm's length companies to achieve the Freezer Project knowing fully well that the total cost of the project exceeded his spending authority.

[23] The Tribunal finds that the General Division decision is supported by the facts and complies with the law and the decided cases.

[24] In view of the above, the Tribunal finds that this ground of appeal has no merits.

Issue no 2: Did the General Division Member's comments during the hearing give rise to an apprehension of bias by a reasonable and fully informed person?

[25] The Claimant puts forward that the General Division Member made several comments during the hearing that demonstrated she was partial in assessing his testimony and by not being so, influenced the outcome of her decision.

[26] An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.[12]

[27] The Claimant bases his allegation of bias on the words used by the Member during his hearing. In view of the seriousness of such allegation, the Tribunal proceeded to listen at length to the hearing before the General Division.

[28] The Tribunal finds that the allegation of the Claimant is not supported by the words used by the General Division.

[29] The Claimant put forward in his testimony that the employer initially suspended him and afterwards terminated him after he did not attend scheduled meetings. The Member did awkwardly comment that "when you decide not to attend meetings" "things

[12] *Arthur v Canada (Attorney General)*, 2001 FCA 223.

like that do happen" clearly referring to his suspension being changed to a termination. However, she immediately invited the Claimant to continue his testimony on relevant facts.

[30] The Tribunal finds that the General Division exercised its role as the trier of facts. The General Division proceeded to listen in full to the testimony and presentation of the Claimant and necessarily tested his credibility. She clarified certain points and arguments raised by the Claimant during the hearing. She clearly explained to the Claimant what facts she had to review in order to determine if he had lost his employment because of his misconduct.

[31] The Tribunal finds that there is no material evidence demonstrating conduct from the General Division member that derogates from the standard. The Tribunal reiterates that such an allegation cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of a claimant.

[32] In view of the above, the Tribunal finds that this ground of appeal has no merits.

CONCLUSION

[33] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	April 25, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	H. E., Appellant