Federal Court of Appeal | Cour d'appel fédérale

Date: 20190815

Docket: A-377-18

Citation: 2019 FCA 222

CORAM: **WEBB J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

MARILYN NELSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on June 25, 2019.

Judgment delivered at Ottawa, Ontario, on August 15, 2019.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The Applicant, Ms. Marilyn Nelson, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal dated October 29, 2018 (AD-18-348). The Appeal Division allowed the Applicant's appeal from a decision of the General Division of the Social Security Tribunal dated April 23, 2018 (GE-17-3920), but nevertheless ultimately agreed with the General Division's conclusion that the Applicant lost her employment because of her

misconduct within the meaning of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 [*Employment Insurance Act*].

[2] The Applicant requests that this Court grant an order setting aside the decision under review and referring the matter back to the Appeal Division with directions to remit the matter to the General Division for redetermination. For the reasons that follow, I would dismiss her application without costs.

II. Background

[3] This matter arises as a result of the Applicant's termination from her employment as a receptionist for the Gitxaala Nation (the Employer). The Applicant worked at the Kitkatla health station on the Employer's reserve and lived on the reserve at the relevant time.

[4] The Applicant was dismissed from her position by letter dated June 8, 2017 after the Employer received a report from a community member that on June 3, 2017, contrary to the terms of her employment, she was seen publicly intoxicated on the reserve. In the Applicant's termination letter, the Employer referred to a prior complaint that the Applicant was seen intoxicated on the reserve on April 28, 2017. The Employer further referenced a meeting that it had held with the Applicant on May 9, 2017, during which it allegedly discussed its policies prohibiting alcohol and drug use on reserve and advised the Applicant that another complaint would be grounds for termination. The Applicant does not agree with the Employer's summary of what occurred during this meeting.

[5] The Gitxaala Nation is a dry reserve. The Gitxaala Liquor Control Bylaw No. 1 prohibits the manufacturing, sale, and possession of liquor and non-prescription drugs on Gitxaala land as well as intoxication (Bylaw No. 1). The Employer adopted Bylaw No. 1 as part of its policies governing employee conduct. In particular, section 34(f) of the Employer's Personnel Policy states: "[g]rounds for disciplinary action up to and including termination may include, but are not limited to, (among other things): (f) breaking or in breach of the Gitxaala By-law No. 1 (no alcohol or illegal drugs)." In addition, section 1 of the Employer's Orientation Document states: "As part of your orientation to Gitxaala we are outlining some of the expectations and standards required of all our employees." Employees must "[u]phold the Gitxaala By-law No 1 – No alcohol or illegal drug use within the community." It further advises that "[c]ertain acts will not be tolerated as a Gitxaala Nation Employee: a) Possession and/or consumption of alcoholic beverages and/or un-prescribed [*sic*] drugs, on/off the job within the community." It also states that the Employer would have "zero tolerance for impairment".

[6] On July 7, 2016, shortly after she commenced full-time work for the Employer, the Applicant signed the Orientation Document. She also signed a Declaration of Understanding indicating that she had read, understood and agreed to abide by the Personnel Policy, including section 34(f) which prohibits violation of Bylaw No. 1. The Declaration of Understanding states: "I also understand and acknowledge that if I breach the terms and conditions of the Gitxaala Nation Personal [*sic*] Policies, I will subject myself to disciplinary action, up to and including termination."

[7] On June 26, 2017, following her termination, the Applicant applied to the Canada Employment Insurance Commission (the Commission) for Employment Insurance (EI) benefits. In her application, she stated that she was terminated because her employer had accused her of using alcohol and/or drugs. She admitted that she had been drinking in her home but stated that she had only had a "social drink" and pointed out that other employees had not been terminated for similar behaviour. The Commission contacted the Employer, which confirmed that the Applicant had been dismissed for breaching Bylaw No. 1.

[8] The Applicant subsequently contacted the Commission to verify the status of her application. She confirmed that she knew Bylaw No. 1 was a condition of her employment, but stated that she did not think she would be summarily terminated because of the Employer's progressive discipline policy, which she understood as requiring the Employer to provide her with a warning or suspension prior to dismissal. In particular, the Applicant referenced Article 16 of the Personnel Policy, which states that progressive discipline "will be used" and provides for the various steps of discipline that the Employer may apply, including verbal warnings, written warnings, and suspensions and/or probations. When the Commission's delegate asked the Applicant about the May 9, 2017 meeting, the Applicant stated that she never got a warning about her drinking and said was never given a copy of her termination letter. The Applicant further stated that other employees had received warnings or suspensions for similar infractions, as opposed to being summarily dismissed for their behaviour.

[9] On July 28, 2017, the Commission denied the Applicant's request for benefits. It determined that the Applicant had lost her employment due to her own misconduct, and imposed

an indefinite disqualification for EI benefits under section 30 the *Employment Insurance Act*. The Commission maintained the disqualification on reconsideration.

[10] The Applicant then appealed to the General Division. The General Division confirmed the Commission's finding that the Applicant's behaviour amounted to misconduct and that she was therefore disqualified from receiving benefits under section 30 of the *Employment Insurance Act*. Specifically, it found that the reason the Applicant was dismissed was because she had consumed alcohol on the reserve in breach of Bylaw No. 1, which it found was a term of her employment contract. The General Division found that the Applicant had indeed engaged in the conduct of which she was accused and which led to her dismissal, and that this conduct met the test for misconduct because her actions were deliberate and she "knew or ought to have known that dismissal was a real possibility" (General Division's Reasons at para. 41). The General Division further concluded that while the Employer had a progressive discipline policy, it was not bound to follow it, and that in any event, the severity of the Employer's response was an employment law question not relevant to the issue of whether the Applicant had engaged in misconduct under section 30 of the *Employment Insurance Act*.

[11] The Applicant appealed this decision to the Appeal Division.

III. Decision of the Appeal Division

[12] The Appeal Division concluded that the Applicant had demonstrated allowable grounds of appeal under paragraphs 58(1)(b) and (c) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 [*DESDA*], which warranted intervention. It found that the

General Division had improperly rendered its decision without regard to the Employer's progressive discipline policy, how the Employer treated other employees who engaged in similar conduct, or the actual text of Bylaw No. 1. It further concluded that the General Division had erred in law by failing to make a necessary finding of fact concerning whether or not the Applicant had received a prior warning about her drinking on May 9, 2017 or otherwise (at paras. 15-38).

[13] Finding that the record before it was complete, the Appeal Division exercised its authority under section 59 of the *DESDA* to make the decision that the General Division should have made. The Appeal Division essentially agreed with the General Division's conclusion that the Applicant was dismissed because she had consumed alcohol on reserve contrary to her terms of employment. It determined that this constituted misconduct because, despite the lack of clarity in the record concerning the May 9, 2017 meeting, the evidence disclosed that the Applicant had at least been "put on notice that the [E]mployer was concerned about her conduct" (at para. 54). As a result, the Applicant ought to have known dismissal was a real possibility. The Appeal Division further concluded that it was not reasonable for the Applicant to rely on the existence of the Employer's progressive discipline policy or her knowledge that other employees were only suspended or warned for drinking, given her own prior warning and that she knew her husband had been fired without warning.

IV. Issues

[14] I would characterize the issues before this Court as follows:

(1) Was it reasonable for the Appeal Division to assess the evidence and make findings of fact as though at first instance?

(2) Was it reasonable for the Appeal Division to conclude that the Applicant engaged in misconduct for the purposes of section 30 of the *Employment Insurance Act*?

(a) Did the Appeal Division improperly adopt the Employer's subjective assessment of whether the Applicant engaged in misconduct without conducting its own objective analysis under section 30 of the *Employment Insurance Act*?

(b) Did the Appeal Division commit errors of fact or mixed fact and law concerning:

(i) Whether not consuming alcohol in her private time was a condition of the Applicant's employment rationally connected to her job?

(ii) Whether the Applicant ought to have known that she would be terminated for consuming alcohol on reserve during her private time?

V. Standard of Review

[15] On judicial review of a decision of the Appeal Division where it interprets and applies a statute closely connected to its function, this court is required to adopt a standard of reasonableness (*Mehra v. Canada* (*Attorney General*), 2018 FCA 93 at para. 5; *Atkinson v. Canada*, 2014 FCA 187 at paras. 24-32). It is well-established that when an administrative body interprets its home statute, with which it has particular familiarity, there is a presumption of deference on judicial review (*Edmonton* (*City*) *v. Edmonton East* (*Capilano*) *Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 22; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54).

VI. Analysis

1. *Was it reasonable for the Appeal Division to assess the evidence and make findings of fact as though at first instance?*

[16] The Applicant alleges that when the Appeal Division exercised its authority under section 59 of the *DESDA* to "make the decision that the General Division should have made," the Appeal Division improperly reweighed the evidence and made *de novo* factual findings. The Applicant submits that the Appeal Division was not permitted to make novel findings of fact, assess credibility or otherwise reweigh the evidence on appeal from a decision of the General Division, and that in this instance, it "performed a complete reconsideration of the matter from the General Division record before giving the decision the General Division should have given" (Applicant's Memorandum of Fact and Law at para. 27).

[17] I respectfully disagree. It is true that the Appeal Division cannot intervene for the sole reason that it would have weighed the evidence on record differently than the General Division (*Garvey v Canada (Attorney General)*, 2018 FCA 118, at para 5). Once the Appeal Division finds that there is a legitimate reason to intervene with the General Division's decision based on the grounds of appeal listed under subsection 58(1) of the *DESDA*, it may proceed to decide factual questions necessary to the disposition of any application. Subsection 64(1) of the *DESDA* plainly states that the "Tribunal", which includes the General Division and the Appeal Division as stated under section 44 of the *DESDA*, "may decide any question of law or fact that is necessary for the disposition of any application […]". Accordingly, it would seem the legislation grants the Appeal Division the authority to make findings of fact, including those which the

Applicant contests. Based on those findings, the Appeal Division was further entitled under section 59 of the *DESDA* to make the decision the General Division should have made, without referring the decision back to the General Division for reassessment. The exercise of this power accords with paragraph 3(1)(*a*) of the *Social Security Tribunal Regulations*, SOR/2013-60, which requires that the Tribunal "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit [...]."

[18] The Appeal Division in this case found that the Applicant had established grounds of appeal which warranted its intervention under subsection 58(1) of the *DESDA*. These included, among other things, that the General Division erred (1) in fact by not considering the Employer's treatment of other employees, and (2) in law by not making a finding of fact concerning whether the Applicant had received a prior warning about her conduct. It then legitimately proceeded under section 59 of the *DESDA* to correct these errors and make the decision the General Division should have made, which required it to assess the record and make findings of fact in accordance with section 64 of the *DESDA*. In my view, this approach was reasonable and discloses no error. In short, there is a difference between what constitutes a reviewable error under subsection 58(1) of the *DESDA*, and what the Appeal Division can do when it finds such an error. There is, therefore, no basis for this Court to intervene.

[19] The Applicant relies on this Court's decision in *Simpson v. Canada* (*Attorney General*), 2012 FCA 82 for her proposition that the Appeal Division lacks authority to reweigh evidence or substitute its own conclusions for those of the General Division. However, this case concerned the role of courts on judicial review of administrative action, not the statutory powers of

administrative actors in general or the particular powers of the Appeal Division when reviewing a decision of the General Division. Again, I would not intervene with the Appeal Division's decision on this ground of review.

2. *Was it reasonable for the Appeal Division to conclude that the Applicant engaged in misconduct for the purposes of section 30 of the Employment Insurance Act?*

(a) Did the Appeal Division improperly adopt the Employer's subjective assessment of whether the Applicant engaged in misconduct under section 30 of the *Employment Insurance Act*, without engaging in its own objective analysis?

[20] The Applicant submits that the Appeal Division erred in law by adopting the Employer's subjective definition of misconduct, rather than undertaking an objective assessment as required under section 30 of the *Employment Insurance Act*. In essence, the Applicant argues that the Appeal Division improperly assessed what constitutes misconduct by relying solely on the Employer's policies rather than taking into account other relevant considerations, such as whether the Applicant's consumption of alcohol negatively impacted her work performance.

[21] Again, I would respectfully disagree with the Applicant's proposition. When it found that the Applicant's consumption of alcohol constituted misconduct (at para. 57), the Appeal Division properly adopted the objective definition of misconduct articulated by this Court in *Mishibinijima v. Canada* (*Attorney General*), 2007 FCA 36 (at para. 14): "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

[22] Using this definition as a framework, the Appeal Division undertook a full assessment of the record that was before the General Division, including the Applicant's testimony and the standards of employee conduct provided under the Employer's policies. In particular, the Appeal Division considered the fact that the Employer had put the Applicant on notice that it was aware of prior instances of her drinking and was concerned about her conduct, and that the Applicant understood that the Employer expected her to abstain from alcohol use on reserve. Having completed this process, the Appeal Division determined (at para. 57) that the Applicant knew or ought to have known that termination was a real possibility if she continued to consume alcohol on reserve, and that as a result, her behaviour amounted to misconduct. In my view, this approach was properly objective and discloses no legal error.

(b) Did the Appeal Division commit errors of fact or mixed fact and law concerning:

(i) Whether not consuming alcohol in her private time was a condition of the Applicant's employment rationally connected to her job?

[23] The Applicant says that the Appeal Division erred in finding that the Employer's alcohol prohibition was a condition of employment causally linked to her job. The Applicant submits that because she consumed alcohol off-duty and during her private time, and because there was no evidence to suggest that she arrived to work intoxicated or otherwise impaired, there was no rational connection between her consumption of alcohol and her job performance. The Applicant further submits that the Appeal Division erred in finding that the Employer's policies prohibiting alcohol on the reserve constituted an express or implied term of her employment contract, noting

that a written copy of her employment contract had not been adduced as evidence before the General Division.

[24] In my view, the Applicant's submissions lack merit. While she correctly asserts that there must be a causal link between her off-duty behaviour and her employment in order to ground a finding of misconduct under the *Employment Insurance Act* (*Canada* (*Attorney General*) *v. Brissette*, [1994] 1 F.C. 684 (C.A.), at para. 14 [*Brissette*]; *Canada* (*Attorney General*) *v. Cartier*, 2001 FCA 274 at para. 12), the Appeal Division expressly found that such a link existed. In particular, the Appeal Division stated that "the Band has an interest in maintaining its credibility and respect for its authority, and it has a legitimate interest in ensuring that its direct employees are not seen breaking the Band's by-laws" (at para. 45). In my view, this conclusion was reasonable considering the nature of the Employer as a dry reserve. It understandably had an interest in enacting policies to prevent employees from engaging in behaviour that would threaten the integrity of its by-laws, and showed little tolerance for employees, like the Applicant, who knowingly breached these policies.

[25] Moreover, in my view, it is irrelevant that the Employer's alcohol prohibition existed only as a term of employment under its policies, and not in any written employment contract between the Applicant and the Employer. As noted in *Brissette*, a term of employment "may be express or implied" and it may relate "to a concrete or more abstract requirement" (at para. 10). While the Applicant relies on *Locke v. Canada* (*Attorney General*), 2003 FCA 262 [*Locke*] (at paras. 4-7) for the principle that employer policies alone cannot dictate whether actions constitute misconduct, the facts in that case differ from those at hand: the employer had no

written policy prohibiting the behaviour at issue (smoking marijuana after a shift on the employer's premises). It was therefore necessary to assess other contextual factors to determine whether the employee knew or ought to have known that this behaviour could amount to a terminable offence. This lies in contrast to the present matter, where the Employer's policies clearly establish the standards of conduct expected of the Applicant and all other employees, including that employees may not drink alcohol on the reserve. Further, it is precisely on the basis of written policies that this Court found, in *Canada* (*Attorney General*) *v. Lemire*, 2010 FCA 314 (at paras. 17, 19-20), that the claimant had breached a term of his employment.

[26] Accordingly, in my view, it was reasonable for the Appeal Division to conclude on the basis of the Employer's policies that not drinking alcohol on reserve was an express or implied term of the Applicant's employment, regardless of whether it was stated in a written contract.

(ii) Whether the Applicant ought to have known that she would be terminated for consuming alcohol on reserve during her private time?

[27] Finally, the Applicant submits that the Appeal Division erred in finding that she knew or ought to have known that dismissal was a real possibility as a result of having consumed alcohol on the reserve. In particular, the Applicant relies on Article 16 of the Employer's Personnel Policy to argue that the Employer was required to give her a warning or suspension prior to termination, and that she could not have known that she would be terminated without first being subject to incremental disciplinary steps. Her belief that she would not be terminated was, she says, bolstered by the fact that the Employer had given warnings and suspensions to other employees who were caught drinking on the reserve.

[28] For the purposes of finding misconduct, this Court has held that it is relevant to consider an employer's disciplinary treatment of other employees for similar conduct when determining whether an employee should have known there was a "real possibility" that she could be terminated (*Locke* at paras. 7-8). Nevertheless, in *Canada* (*Attorney General*) *v. Marion*, 2002 FCA 185, this Court unequivocally stated that the role of decision-makers is not to assess whether the level of discipline imposed by an employer was justified, but whether the employee's actions constituted misconduct under the *Employment Insurance Act* (at paras. 2-3):

> […] the Board of Referees found that the actions of the claimant in taking drugs, specifically smoking a joint on the job, did not disqualify him from receiving benefits under section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act). The ground for the Board's decision was that the dismissal without notice of an employee with 14 years of service in these circumstances, when it was his first offence of that nature, was an excessive and unfair penalty given that there were other workers who had been suspended as a warning for similar behaviour (consuming alcohol).
>
> The role of the Board of Referees was to determine 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, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act: *Fakhari and Attorney General of Canada* (1996), 197 N.R. 300 (F.C.A.); *A.G.C. v. Namaro* (1983), 46 N.R. 541 (F.C.A.); *Canada v. Jewell* (1994), 175 N.R. 350 (F.C.A.); *A.G.C. v. Secours* (1995), 179 N.R. 132 (F.C.A.); *Attorney General of Canada v. Langlois*, A-94-95, February 21, 1996 (F.C.A.).
>
> [Emphasis added]

[29] Similarly, in *Canada* (*Attorney General*) *v. Jolin*, 2009 FCA 303, this Court found that the fact "[t]hat the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct" (at para. 11). Accordingly, the sole question before this Court is whether it was reasonable for the Appeal Division to conclude that the Applicant

should have known there was a "real possibility" that she could be terminated for her conduct, taking into account the employer's treatment of other employees for similar infractions.

[30] In my view, the answer to that question must be affirmative. Despite the Applicant's claim that she did not expect to be terminated without first receiving a warning or a suspension, the Applicant admitted that a meeting with the Employer took place on May 9, 2017 to discuss her drinking. While the Employer did not formally record the details of this meeting in the Applicant's personnel file as stipulated for "Verbal Warnings" under Article 16 of the Personnel Policy, in my view the Appeal Division reasonably inferred from the facts that the claimant would have been aware that the Employer knew of and had expressed concern about her conduct. This is particularly so given that the Employer's policies consistently state that discipline "up to and including termination" may result if an employee violates By-law No. 1 or otherwise breaches the Employer's alcohol prohibition.

[31] Nevertheless, in my view, the Appeal Division erred when it considered the fact that the Applicant knew of the Employer's decision to summarily terminate her husband as a basis for finding that the Applicant was not entitled to rely on the Employer's progressive discipline policy or the fact that other employees had received warnings or suspensions prior to termination for drinking on reserve. There is no evidence of the nature of the husband's offence on the record, and accordingly, it was unreasonable for the Appeal Division to rely on this evidence as being relevant to what the Applicant knew or ought to have foreseen as the Employer's likely response to her alcohol-related infraction. However, as I have already determined that it was reasonable for the Appeal Division to conclude that the Applicant knew or ought to have known

that she could be terminated for drinking on reserve, this error is not, in itself, determinative of the matter. I would therefore not return the application to the Appeal Division for reconsideration on this point.

VII. Conclusion

[32] I would dismiss the application without costs.

"D. G. Near"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE APPEAL DIVISION OF THE SOCIAL SECURITY TRIBUNAL DATED OCTOBER 29, 2018, CITATION NUMBER 2018 SST 1031, TRIBUNAL FILE NUMBER AD-18-348

DOCKET:	A-377-18
STYLE OF CAUSE:	MARILYN NELSON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 25, 2019
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	WEBB J.A. DE MONTIGNY J.A.
DATED:	AUGUST 15, 2019

APPEARANCES:

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