

Citation: *Canada Employment Insurance Commission v. B. K.*, 2014 SSTAD 27

Appeal No. 2013-0568

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**B. K.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal**

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SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 10, 2014

DECISION: Appeal allowed

## **DECISION**

[1] The appeal is allowed. The decision of the Board of Referees (“the Board”) is rescinded and the determination of the Commission is restored.

## **INTRODUCTION**

[2] On February 28, 2013, a panel of the Board of Referees determined that the appeal of the Respondent from the previous determination of the Commission should be allowed. The Commission appealed that decision to the Office of the Umpire.

[3] On April 1, 2013 the Appeal Division of the Social Security Tribunal became seized of any appeal not heard by an Umpire by that date.

[4] On February 20, 2014 a teleconference hearing was held. Although the parties were properly notified, only the Commission attended. As I was satisfied that the Respondent had received notice of the hearing, I proceeded in their absence.

## **THE LAW**

[5] To ensure fairness, this matter will be examined based upon the Appellant’s legitimate expectations at the time of the appeal to the Office of the Umpire. For this reason, the present appeal will be decided in accordance with the legislation in effect immediately prior to April 1, 2013.

[6] According to subsection 115(2) of the Employment Insurance Act (“the Act”) which was in effect before April 1, 2013, the only grounds of appeal are that:

- (a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) the board of referees 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.

[7] The standard of review for questions of law and jurisdiction is correctness.

[8] The standard of review for questions of fact and mixed fact and law is reasonableness.

### **ANALYSIS**

[9] The Appellant submits that the Board erred by finding that due to alcoholism the actions of the Respondent were not wilful misconduct within the meaning of the Act. In particular, they object to the fact that no medical evidence was presented to prove alcoholism or that his actions were involuntary, as required by the Act and the jurisprudence.

[10] In their decision, the Board found that the cause of the Respondent's dismissal was "driving the car [sic] under the influence of alcohol". They further found that this was not done wilfully because the Respondent "has a long existence [sic] of alcoholism and this cost the claimant his job. The Board finds that his alcoholism caused him to lose his position."

[11] Unfortunately, the Board does not appear to have considered the jurisprudence of the Federal Court of Appeal. In particular, *Canada (Attorney General) v. Bigler* (2009 FCA 91) addresses a situation very similar to this case.

[12] In their decision, the Court held in part that:

"There was no medical evidence relating to the respondent's alcoholism or to whether the circumstances in which Mr. Bigler started to drink following his mother's death effectively made his consumption of alcohol at that time involuntary... I agree with the applicant that in the case at bar, there was no

evidence to support the Board's conclusion that the claimant's actions were not wilful."

[13] Giving the Board (and the Respondent) the benefit of the doubt it may be that it was possible to conclude based upon the Respondent's testimony alone, as the Board did in the case before me, that the Respondent suffered from alcoholism. Even if that is so, however, I cannot find any evidence in the record to support the Board's conclusion that the conduct in question was involuntary and therefore not wilful.

[14] Ultimately, the Respondent lost his employment because he no longer had a valid driver's license. He no longer had a valid driver's license because he had been convicted of impaired driving. He had been convicted of impaired driving because, by his own admission, he drank and then got behind the wheel of his car.

[15] Although alcoholism may have contributed to this chain of events, *Bigler* stands for the proposition that misconduct must be found if the evidence does not establish both alcoholism and the involuntariness of the conduct in question. As no such evidence was present in this case, the appeal of the Commission must be allowed.

## **CONCLUSION**

[16] For the above reasons, the appeal is allowed. The decision of the Board is rescinded and the determination of the Commission is restored.

*Mark Borer*

Member, Appeal Division