Citation: ***Canada Employment Insurance Commission v. P. M.*****, 2015 SSTAD 1325**

Date: November 13, 2015

File number: AD-14-493

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

P. M.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Teleconference on November 3, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated August 25, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On August 25, 2014, the General Division of the Tribunal determined that:

> - The Respondent did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the "*Act*").

[3] The Appellant requested leave to appeal to the Appeal Division on September 11, 2014. Leave to appeal was granted on March 20, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was represented by Mrs. J. Davis. The Respondent was also present at the hearing.

THE LAW

[6] Subsection 58(1) of the *DESD Act* states that the only grounds of appeal are the following:

a. the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b. the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c. The General Division 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.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the Appellant did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Act*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- The General Division has ignored/disregarded fundamental evidence and has erroneously focused on what is considered customary for people who have a couple of drinks during a wake to support its position;

- The General Division decision is not well reasoned under section 114(3) of the *Act* as the evidence does not support a finding that the Respondent did not lose his job as a result of his own misconduct;

- The General Division erred when it relied on the terms of the settlement agreement without first determining whether the Respondent's loss of his driver's license triggered the loss of his employment;

- The case law is clear that a Tribunal's finding of misconduct may be reversed by the settlement of a grievance only where that settlement reveals evidence that contradicts a finding of misconduct;

- Misconduct has been defined by the Federal Court of Appeal as conduct of a claimant that is willful, i.e. conscious, deliberate or intentional; and where the claimant knew or ought to have known that his conduct was such that it would result in the loss of employment. The misconduct must also constitute a breach of an express or implied duty resulting from the contract of employment;

- The Federal Court of Appeal has re-affirmed that claimants, who put themselves in a position of losing their employment by committing infractions which cause the loss of driving privileges, when this is required for their employment, are subject to a disqualification pursuant to section 30 of the *Act*;

- The Federal Court of Appeal has also re-affirmed the principle that where a claimant is forced to leave his employment due to an act of misconduct, there can be no "just cause" for leaving or taking leave;

- In the context of this case, whether the issue was viewed as misconduct for losing employment or just cause for taking a voluntary leave of absence; the undisputed event triggering the loss of employment on November 11, 2013 was the voluntary act of the Respondent in deciding to drive his vehicle after consuming alcohol. The Respondent's decision to drive after consuming alcohol in excess of the legal limit was a willful act. This voluntary act led to the loss of his driver's license which in turn caused him to lose his job;

- The Federal Court of Appeal re-iterated that the consumption of alcohol by the Respondent was voluntary in the sense that his acts were conscious and that he was aware of the effects of that consumption and the consequences which could or would result;

- However, given the employer issued an amended record of employment modifying the dismissal for misconduct to a suspension from November 11,

2013 to January 22, 2014 followed by an authorized leave of absence, the Appellant is prepared to amend its decision to coincide with the amended record of employment;

- Nonetheless, as the suspension meets the test for misconduct, the Respondent would be disentitled for that period under sections 30 and 31 of the *Act* and during the period he was approved to take a leave of absence, he would be disentitled under sections 30 and 32 of the *Act* because he does not meet the test of "just cause";

- There is no prejudice to the Respondent in this case: whether the reason for separation is for misconduct, suspension, voluntary leaving or voluntary leave of absence, it does not change the underlying issue; section 30 of the *Act* still applies and no benefits are payable.

[9] The Respondent submits the following arguments against the appeal:

- He did not lose his job by reason of his own misconduct; He still works for the same employer;

- In fact, his employer issued an amended record of employment confirming he was suspended from work and not fired;

- The settlement agreement is dated and signed by the parties and the union representative;

- The settlement states that he is suspended for approximately two months and that he is to take a leave of absence of twelve months before returning to work with a valid driver's license.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for questions of law is correctness - *Canada (AG) v. Lemire*, 2010 FCA 314, and for mixed questions of fact and

law is reasonableness - *Smith v. Alliance Pipeline Ltd*, 2011 SCC 7, *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[11] The Respondent did not make any representations regarding the applicable standard of review.

[12] The Tribunal acknowledges that the Federal court of appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Canada (AG) v. Lemire*, 2010 FCA 314, *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Dunsmuir v. New Brunswick*, 2008 SCC 9,*Canada (AG) v. Hallée*, 2008 FCA 159,

ANALYSIS

[13] When it allowed the appeal of the Appellant, the General Division made the following findings:

> "[26] During the hearing, the Claimant stated that on November 20, 2012, he had attended a wake along with other relatives at a local restaurant for his deceased mother who had passed away in September 2012. He said that he had only two small pints of beer at the wake. When he was leaving the wake in his truck, a man sitting in a truck in the parking lot accused the Claimant of hitting his truck and called the police. The police took him to the police station and gave him the Breathalyzer test. He blew over the .08 limit and was given a temporary suspension of his driver's licence for ninety days. The Claimant stated that upon investigation there had been no damage to the trucks. The Claimant stated that he was not drunk at the time of the incident.
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> [27] At the court hearing on November 12, 2013, the Claimant was charged with impaired driving because he blew over .08 on the Breathalyzer test. He lost his licence for a year, which was later reduced to six months because he installed a Breathalyzer in his car. However, he could only legally drive his car with the installed Breathalyzer. He could still not legally drive a truck.
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> [28] On January 22, 2014, as the result of his filed grievance and help from his union, a settlement agreement was reached between the Claimant and the employer. The employer agreed to change the reason for ending his employment to leave of absence instead of dismissal. The Claimant was to return to work once his driver's licence was reinstated.

> [29] The Tribunal found the Claimant to be credible based on his comments and his answers to the questions which were asked during the hearing.
>
> (…)
>
> [32] The Tribunal finds that the Claimant's behavior at the wake was not willful or so reckless where the Claimant knew or ought to have known that his conduct was such that it would result in dismissal. The wake was held outside of working hours in a restaurant. The Claimant stated he only had two pints of beer at the wake and was not drunk.
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> [33] The Tribunal finds that it is customary for people to have a couple of drinks during a wake. The Tribunal finds that the Claimant's behavior at the wake and afterwards did not constitute willful misconduct.
>
> [34] The Commission ignored the terms of the settlement agreement between the employer and the Claimant because it was not dated, was not on official letterhead and was hand written. The Tribunal accepts the terms of the settlement agreement because it was signed by both parties, written in official language, and made sense.
>
> [35] The Tribunal finds the fact that the employer reinstated the Claimant to his job once he got his driver's licence reinstated and changed the reason for issuing his record of employment to leave of absence, further supports that the Claimant did not lose his job as the result of his misconduct.
>
> [36] The Tribunal finds that the Claimant did not lose his employment because his conduct was willful or so reckless to approach willfulness to constitute misconduct, pursuant to subsection 30(1) of the *Act*."

[14] With great respect, the decision of the General Division cannot be maintained by the Tribunal.

[15] It is relevant to reproduce the essential terms of the signed agreement dated January 22, 2014, that intervened between the employer, the Respondent and his union representative:

> "Whereas the Grievor was discharged from his employment on November 11, 2013;
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> Whereas the Grievor has filed grievance on 2013-13-04;
>
> And Whereas the parties wish to resolve this matter;
>
> Now therefore the parties agree as follows:

1. The Grievor's discharge shall be converted to a suspension without pay from November 11, 2013 to January 22, 2014 (the "suspension") for failure to maintain the qualifications for his job as required under policies OPS-002 and OPS-005;

2. The suspension shall remain on the Grievor's record permanently;

3. Provided the Grievor fulfills the conditions outlined in paragraph 4 below, the Grievor shall be placed on unpaid leave of absence from January 23, 2014 to May 31, 2015, for certainty, it is expressly agreed that, during this time, the Grievor shall not be entitled to vacation pay, holiday pay or any other compensation of any kind;

4. Reinstatement from the unpaid leave of absence is conditional upon the Grievor being able to report to work on June 2, 2015 with a valid driver's license with no restrictions, including any restrictions relating to ignition interlock. If the Grievor fails to meet these conditions, he shall be discharged immediately and for cause.

5. It is agreed that subject to the *Ontario Human Rights Code*, any future drivers licence suspension or loss of drivers licence will result in immediate discharge for cause."

[16] The Tribunal finds it necessary to reaffirm that the mere existence of a concluded settlement agreement is not of itself determinative of the issue of whether an employee was dismissed for misconduct. It is for the General Division to assess the evidence and come to a decision. It is not bound by how the employer and employee or a third party might characterize the grounds on which an employment has been terminated.

[17] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct which would contradict the position taken by the employer during the investigation by the Commission or at the time of the hearing before the General Division. The Tribunal finds that the settlement agreement in the present case does not have this effect.

[18] The agreement specifically mentions the failure of the Respondent to maintain the qualifications for his job as required under the employer's policies OPS-002 and OPS-005. Reinstatement from the unpaid leave of absence is conditional upon the Respondent being able to report to work on June 2, 2015 with a valid driver's license with no restrictions. Furthermore, the agreement clearly mentions that the suspension is to remain on the

Respondent's record permanently. The Respondent is also placed on an unpaid leave of absence from January 23, 3014 to May 31, 2015 without any form of compensation whatsoever by the employer.

[19] There is nothing in the settlement agreement in question which would permit one to infer that the employer withdrew his allegation of misconduct against the Respondent. It neither expressly nor implicitly includes admissions that the facts on file with the Appellant were erroneous or did not accurately reflect the events as they occurred. The agreement simply does not contain any retraction from the employer regarding the events that initially led to the dismissal of the Respondent.

[20] The evidence before the General Division is undisputed. The Respondent was initially dismissed because he lost his driving license for one year following an impaired driving conviction. He required his license to perform his work duties as a truck driver.

[21] The Federal Court of Appeal has firmly maintained that claimants, who put themselves in a position of losing their employment by committing infractions which cause the loss of driving privileges, when this is required for their employment, are subject to a disqualification pursuant to section 30 of the *Act* - *Canada (AG) v. Brissette*, A-1342-92; *Smith v. Canada (AG)*, A-875-96.

[22] The Tribunal finds that the General Division erred when it concluded that the Respondent's behavior at the wake was not willful or so reckless where he knew or ought to have known that his conduct was such that it would result in dismissal because "it is customary for people to have a couple of drinks during a wake". The Respondent's decision to drive after consuming alcohol in excess of the legal limit was clearly a wilful act. This voluntary act led to the loss of his driver's license, a requirement of his position as a truck driver, which in turn caused him to lose his job.

[23] While it is true that the dismissal of the Respondent was later changed to a suspension by the involved parties, this fact does not change the nature of the misconduct that initially led to the Respondent's dismissal - *Canada (AG) c. Boulton*, 1996 CAF 1682, *Canada(AG) c. Morrow*, 1999 CAF 193,

[24] For the above mentioned reasons, the Tribunal is justified to intervene and rescind the decision of the General Division.

CONCLUSION

[25] The appeal is allowed, the decision of the General Division dated August 25, 2014, is rescinded and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division