Citation: *Canada Employment Insurance Commission v. M. O.*, 2015 SSTAD 1485

Appeal No. AD-14-190

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. O.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: December 31, 2015

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. The decision of the General Division is rescinded and the determination of the Commission is restored.

INTRODUCTION

[2] On March 17, 2014, a General Division member allowed the appeal of the Respondent against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On August 25, 2015, a teleconference hearing was held. The Commission and the Respondent attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (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.

[6] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (Attorney General),* 2012 FCA 190, and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for

questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[7] This case revolves around the application of the law and jurisprudence regarding misconduct.

[8] The Commission appeals against the decision of the General Division member on the basis that the member ignored the jurisprudence of the Federal Court of Appeal as well as the uncontested evidence in determining that the Respondent had not lost his employment for misconduct. The Commission submits that the Respondent was subject to a "last chance agreement" because he had accumulated many demerit points for safety violations, and that the Respondent violated that last chance agreement by making a further safety error. Although the Commission admits that the Respondent did not mean to make this error, they argue that it was still "willful" within the meaning of the jurisprudence because the Respondent knew or ought to have known that it was likely to result in his dismissal. The Commission asks that their appeal be allowed.

[9] The Respondent argues that, as found by the General Division, he simply made a mistake. He acknowledges that this was a violation of his last chance agreement and regrets making this mistake, but asserts that this does not constitute misconduct as it was not deliberate and could have happened to anyone. He asks that the General Division decision be upheld.

[10] In her decision, the General Division member correctly noted that simply because an employer was entitled to dismiss an employee does not mean that the employee automatically committed misconduct. After citing an umpire decision (CUB 30010) supporting the proposition that an inability to do the job or general incompetence does not constitute misconduct, the member concluded that the Respondent's "inability to work in that [stressful] environment renders him unqualified, incapable and perhaps even incompetent but not meeting the expectations of the employer does not constitute

misconduct". The member then concluded that as the Respondent had not committed misconduct, his appeal should be allowed.

[11] In argument before me, the parties agreed on the main evidentiary points. Their disagreement (and the issue that must be resolved) involves the application of the jurisprudence surrounding misconduct to the facts of the case.

[12] In *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, the Federal Court of Appeal set out at paragraph 14 the general principle that:

> Thus, there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, 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.

[13] The Court expanded upon this in *Canada (Attorney General) v. Maher*, 2014 FCA 22. In that case, the claimant missed work through inadvertence and was warned by his employer that if this happened again it would result in dismissal. After noting *Mishibinijima*, the Court stated at paragraph 6 that:

> In this case, the respondent had received very harsh sanctions for failing to report to work. He had already received two warnings that any failure to meet his obligations as an employee would result in his dismissal. The previous day had been a difficult one… Despite this, he failed to take specific steps to ensure that he would be able to report to work. How can it be reasonably argued that this conduct was not so careless or negligent that the claimant could not have expected to be dismissed? We are all of the view that the Board erred… It should have asked itself whether [the claimant], in light of his employment file as a whole, had conducted himself so carelessly that he could not have been aware that his absence could result in his dismissal.

[14] As noted above, the facts in this case are not in dispute. The Respondent had been employed as a rail traffic controller for a national railway company for approximately 10 years. A central element of that job is preventing train mishaps by following strict safety procedures. Previously, he had made several safety-related errors which resulted in him accumulating sufficient demerit points to warrant his dismissal. Instead, it was agreed that

he would sign a “last chance agreement” and that any further demerit points would result in his termination.

[15] In due course, the Respondent did indeed commit a further safety violation that resulted in additional demerit points. As a direct result, he was dismissed.

[16] Applying the above jurisprudence to the facts of this case results in the inevitable conclusion that the Respondent, in light of his employment file as a whole, must have been aware that a further safety violation would breach the “last chance agreement”, impair the performance of his duties, and result in his dismissal. As such, I find that his failure to exercise “ongoing attentiveness and vigilance” (as phrased by the Commission in their written submissions) does indeed constitute misconduct.

[17] By finding to the contrary, the General Division member failed to apply the jurisprudence of the Court and thereby rendered an unreasonable decision. The member’s decision cannot stand.

CONCLUSION

[18] 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