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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. M. D.,* 2016 SSTADEI 64

Tribunal File Number: AD-15-243

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF HEARING: January 26, 2016

DATE OF DECISION: February 4, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision is rescinded, and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On April 20, 2015, the Tribunal's General Division found that:

> - The Respondent had not lost his employment as a result of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On May 7, 2015, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on June 9, 2015.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- The fact that the parties' credibility was not one of the main issues;
- The cost-effectiveness and expediency of the hearing choice;
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] At the hearing, the Appellant was represented by Julie Meilleur. The Respondent was present and chose to represent himself.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(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 or order, whether or not the error appears on the face of the record; or

(c) The General Division based its decision or order 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 whether the General Division erred in fact and in law in finding that the Respondent did not lose his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act.

SUBMISSIONS

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

- The General Division erred in law in its interpretation of misconduct, as established by subsection 30(1) of the Act.

- There is misconduct where the claimant knew or ought to have known that his conduct would result in dismissal. The notion of misconduct does not imply a wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. There must also be a causal relationship between the misconduct and the employment. In other words, the misconduct must consist of a violation of an explicit or implicit employment contract requirement.

- In this case, the General Division accepted that the Respondent had been dismissed because he no longer met the requirements of his position after losing his driver's licence as a result of impaired driving.

- The Federal Court of Appeal has confirmed that alcoholism does not excuse misconduct. It maintains that a drinking problem in no way negates the voluntary nature of the acts committed. The consumption of alcohol is voluntary; the Respondent had to be conscious of his acts and aware of the effects of such consumption and the consequences that could result.

- In *Bigler [Canada (A.G.) v. Bigler*, 2009 CAF 91], the Federal Court of Appeal found that there was no medical evidence in the file showing that drinking alcohol was an involuntary act for the Claimant.

- The Respondent did not present any medical evidence in this appeal file to show that his actions were involuntary. As a result, the General Division could not conclude that the Respondent's conduct was not wilful.

- According to the facts on file, the General Division erred in fact and in law when it rendered an unreasonable decision that did not take into account the relevant case law principles.

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

- He had been sober for 26 months and he had regained his pride, his social life, and employment. Now, he has lost everything.

- He has never willfully done anything to lose his job.

- It is well-known that those with alcohol addiction relapse 95% of the time for long or short periods.

- A relapse is involuntary and uncontrollable.

- Alcohol addiction is an illness not unlike cancer.

- He provided documents from the treatment centre proving that he suffers from an alcohol addiction.

- He does not understand the Appellant's relentlessness whereas the General Division had rendered a decision in his favour.

STANDARDS OF REVIEW

[10] The Appellant submits that the interpretation of the term "misconduct" involves a question of law and the applicable standard of review is correctness [*Canada (A.G.) v. Coulombe*, 2008 FCA 292] and determining whether the Respondent lost his employment due to his own misconduct is a question of mixed fact and law. The standard of review is reasonableness - *Hickey v. Canada (A.G.)*, 2008 FCA 330.

[11] The Respondent did not submit any applicable standards of review.

[12] Although the term “appeal” is used in section 113 of the Act (formerly section 115 of the Act) to describe the procedure introduced before the Appeal Division, the Appeal Division’s authority is essentially identical to that previously granted to the Umpires and that which is granted to the Federal Court of Appeal by section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of the word, but rather a circumscribed review - *Canada (A.G.) v. Merrigan*, 2004 FCA 253.

[13] The Tribunal is of the opinion that the Appeal Division should provide a degree of deference to the General Division’s decisions that is consistent with the degree of deference provided to the decisions of the former Board of Referees being appealed before the Employment Insurance Umpire.

[14] The Federal Court of Appeal determined that that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on questions of law is correctness and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Hickey v. Canada (A.G.)*, 2008 FCA 330, *Canada (A.G.) v. Coulombe*, 2008 FCA 292, *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] The facts on file are relatively simple and undisputed.

[16] The Respondent filed an initial claim for benefits that began on August 10, 2014. He worked as a driver for Maison Carignan until August 8, 2014, when he was dismissed. The Respondent was dismissed because his driver's licence was revoked for driving under the influence and a valid licence was an essential job requirement.

[17] During the hearing before the General Division, the Respondent stated that he has been an alcoholic for years. He further stated that he was consulting and that since 2000, he had been admitted for treatment twice for his alcohol addiction. He added that he had been sober since his last treatment in 2012; however, he had a relapse in July 2014. In August 2014, he had a car accident while under the influence.

[18] The Respondent stated that he had never willfully done anything to lose his job, that it is a known fact that alcoholics relapse for a short or an extended period at a rate of 95%, that a relapse is unintentional and beyond one's control and that alcohol addiction is an illness not unlike cancer.

[19] Upon allowing the Respondent’s appeal, the General Division found the following:

> [*Translation*]
> [45] Did the Appellant make a deliberate and voluntary choice to consume alcohol and drive while under the influence?
>
> [46] In light of the Appellant's testimony, it is obvious that he has had an alcohol addiction that has caused him several setbacks over many years.
>
> [47] It is a well-established fact that alcohol addiction is a form of illness.
>
> [48] Alcohol addiction or alcoholism is the addiction to the ethyl alcohol (ethanol) present in alcoholic beverages. The World Health Organization1 (WHO) recognizes alcoholism as an illness and defines it as "mental and behavioural disorders" related to the consumption of alcohol1.

[49] Alcohol is the psychoactive substance at the source of this addiction, but it is also a toxic substance with adverse health effect. Alcohol addiction is the source of physical, psychological, and social damage.

[50] Numerous studies, publications, and books describe the symptoms of alcoholism as the compulsive urge to drink alcohol, the inability to limit consumption, physical dependence (withdrawal symptoms when not drinking), as well as tolerance, meaning the need to increase the dose to experience the desired effect. These symptoms are often accompanied by physical and psychological problems.

[51] To name only one, the Alcoholics Anonymous movement presents alcoholism as a progressive and irreversible disease that can nonetheless be stopped from advancing. This disease involves a physical dependence in addition to a mental obsession. Alcoholics Anonymous describes the need to consume alcohol as an undeniable urge to drink alcohol that is beyond control and defies the limits of common sense.

[52] These descriptions mirror the symptoms described by the Appellant to explain the behaviour his alcohol addiction induced.

[53] The document submitted by the Appellant during the hearing shows that he underwent therapy for this problem in 2012 (Exhibit GD6).

[54] I find that the impugned conduct is directly related to his problem.

[55] I appreciated the Appellant's testimony when he explained that his urge to drink had become uncontrollable and that he had become obsessed with this urge to drink.

[56] In my view, there is a clear distinction between a person, a social, occasional, or even excessive drinker, who deliberately chooses to ignore the effects of alcohol and a person who is aware that they have a drinking problem but who is unable to control themselves.

[57] It seems to me that a person with complete mental capacity could not voluntarily decide to continue drinking as had the Appellant. He did this by deliberately choosing to ignore the disastrous consequences that this would have on his personal and professional life.

[58] I find that the situation falls outside of the Appellant’s control. Based on this, there is no proof of a mental element. I do not find any elements that demonstrate that the Appellant's behaviour was deliberate or so reckless as to approach wilfulness.

[59] As a result, I find that the Appellant could not have reasonably believed that he could be dismissed as his illness clearly affected his judgement. In his case, I believe that his obsessive urge to drink trumped any other consideration—the very definition of alcoholism.

> [60] The Tribunal finds that the Appellant, Mr. Mario Drolet, did not lose his employment as a result of his own misconduct within the meaning of sections 20 and 30 of the Act. Therefore, no disqualification applies.

[20] With due consideration, the General Division's decision cannot be maintained for the above-stated reasons and the Tribunal is justified in intervening in order to issue the decision that should have been issued.

[21] The Federal Court of Appeal has on several occasions established that employees who must hold a valid driver's licence as an essential occupational requirement and lose their licence through their own fault would therefore fail to meet an explicit employment contract condition: *Canada (A.G.) v. Wasylka*, 2004 FCA 219, *Canada (A.G.) v. Cooper*, 2003 FCA 389; *Casey v. Canada (A.G.)*, 2001 FCA 375, *Canada (A.G.) v. Cartier*, 2001 FCA 274, *Canada (A.G.) v. Turgeon*, A-582-98.

[22] In this case, the Respondent was charged with impaired driving while he worked as a driver for Maison Carignan, a treatment centre. He was dismissed because his driver's licence was revoked for driving under the influence and a valid licence was an essential job requirement.

[23] The General Division's finding to the effect that the Respondent had an alcohol addiction does not in itself override the voluntary nature of consuming alcohol and render the exclusion set out in subsection 30(1) of the Act inapplicable to the Respondent - *Canada (A.G.) v. Bigler*, 2009 FCA 91.

[24] The evidence submitted to the General Division regarding the Respondent's alcoholism is rather thin. Everything we know about his problem comes mostly from his testimony before the General Division, in addition to a 2012 graduation certificate and a 2012-2013 honour's certificate, two certificates issued by the treatment centre. The Respondent nonetheless lost his job on August 8, 2014. This is the fundamental evidence submitted by the Respondent regarding his alcohol addiction. The Tribunal cannot see how that evidence could possibly support an argument that his conduct was not willful.

[25] In this case, there is no medical opinion, no evidence from the treatment centre or other evidence that could lead to the conclusion that the Respondent's behaviour was not deliberate.

[26] The Tribunal sympathises with the Respondent's situation, but it must allow the appeal in order to conform to the teachings of the Federal Court of Appeal.

CONCLUSION

[27] The appeal is allowed, the General Division's decision is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division