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

Citation: *S. C. v. Canada Employment Insurance Commission,* 2016 SSTADEI 159

Tribunal File Number: AD-15-941

BETWEEN:

S. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON March 17, 2016

DATE OF DECISION: March 22, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On July 29, 2015, the General Division of the Tribunal determined that:

> - The Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the "*Act*").

[3] The Applicant requested leave to appeal to the Appeal Division on August 25, 2015. Leave to appeal was granted on September 18, 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] At the hearing, the Appellant was present and represented by Kevin Fox. The Respondent was represented by Carol Robillard.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (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 lost 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 erred in fact and law;
- The General Division failed to appreciate that the misconduct that was relied upon to deny the Appellant's benefits resulted from his disability, namely alcoholism;
- Alcohol addiction is recognized as a disability under the *Human Rights Code*, R.S.O. Chapter 1-1.19. Employers cannot discriminate against employees with addictions. Employers are expected to accommodate the disease to the extent possible;

- The Appellant has brought a claim against his former employer, for wrongful dismissal and breach of the *Ontario Human Rights Code*, R.S.O. Chapter H. 19. The claim was settled in favor of the Appellant;
- Throughout the entire period of his employment, the Appellant performed the responsibilities of his position in a professional and conscientious manner. He was an extremely hardworking dependable employee who maintained an excellent employment record;

- The Appellant pleads that he is an alcoholic and that his co-workers were well aware that he was an alcoholic given, amongst other things, his erratic behavior;

- The Appellant pleads that his employer terminated his employment due to his disability, and further, the behavior said disability was causing him to exhibit. Rather than terminating his employment, the employer should have placed him on a leave of absence while he sought treatment for his condition. His employer breached the *Human Rights Code* by undertaking the course of action it did;

- The conduct of the Appellant was not voluntary but was the consequence of his disability;

- He disputes the conclusion of the General Division on the issue of misconduct. He did not, consciously or deliberately engaged in the behavior of consuming alcohol.

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

- Misconduct occurs when the claimant knew or ought to have known that his or her 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. However, the notion of willful misconduct does not imply wrongful intent, it is sufficient that the misconduct be conscious, deliberate or intentional. Finally, there must be a causal link between the misconduct and the employment;

- The Appellant's actions constitute misconduct and the General Division decision is reasonable given the facts of this case;
- The Federal Court of Appeal supports alcoholism is not justification for misconduct and showing up for work under the influence is misconduct. The Appellant was aware of his alcohol addiction and based on the employer's zero tolerance policy and final warning, should have known that his drinking may result in a possible dismissal;
- The General Division considered the evidence submitted and despite the employer's efforts to counsel the Appellant and suggest he seek treatment, the Appellant did not take their advice and continued to come to work inebriated;
- Whether the dismissal was justified or appropriate is not the issue under review;
- In his appeal to the Appeal Division, the Appellant argues his alcoholism is a disability. He submits letters attesting to his exceptional service and evidence that he did attend treatment in 2010 and after he was dismissed. This does not negate the actions which led to his dismissal, namely attending work under the influence;
- Finally, a doctor's note submitted on May 26, 2015 after the Appellant's dismissal, does confirm a history of alcoholism and that the Appellant attended treatment since February 2015; it however provides no medical evidence to the effect that the Appellant was not responsible for his actions;
- The General Division decision is one of the reasonable outcomes given all the facts. There is no evidence that the General Division acted impartially, erred in law or made an erroneous finding of fact in a perverse or capricious manner.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the applicable standard of review for a mixed question of fact and law is reasonableness – *Masic v. Canada (AG)*, 2011 FCA 212.

[12] The Tribunal notes that the grounds of appeal in section 58 of the *DESDA Act* are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in subsection 115(2) of the *Act*. Therefore, the Federal Court of Appeal jurisprudence on the nature of the appeal regarding former EI Umpires is relevant and persuasive.

[13] The Tribunal is of the opinion that the degree of deference the Appeal Division accords to the General Division decisions should be consistent with the deference accorded to the decisions of former board of referees by the Employment Insurance Umpires. An appeal before the Appeal Division is not a *de novo* hearing. It is not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) c. Merrigan*, 2004 CAF 253.

[14] 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 - *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 (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] When it dismissed the appeal of the Appellant, the General Division concluded that:

> "[34] The Appellant was warned about his behaviour at work that is coming to work inebriated. He was sent home and/or suspended from work for committing this

> breach of the company's policy on several occasions. He was given official warning letters regarding his inebriation at work. The Appellant was encouraged by management to use the company's medical plan to seek assistance. The Appellant was also advised in the letter delineating his suspension that he should seek help from the company's medical benefit plan.
>
> [35] The Appellant did not seek assistance for his alcohol dependency while he was working at BBB. The letter from Trillium Health Partners delineating the treatment the Appellant had indicated that he went for treatment in February 2015.
>
> [36] The Appellant was aware of the company's policy about coming to work while inebriated.
>
> [37] The Appellant 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. That the disciplinary sanction that of being terminated after several previous warnings about his behaviour at work, was harsher than the one the Appellant may have expected, does not mean that his conduct was not misconduct.
>
> [38] The employer had a system of progressive discipline which was used. They tried to counsel and suggest that the Appellant seek treatment for what they considered a problem with alcohol, based upon their observations while he was at work. The Appellant did not take their advice and continued to come to work inebriated.
>
> [39] The Member finds that the Appellant committed misconduct while at work, according to the *Act*."

[16] In appeal, the Appellant argues that the General Division failed to appreciate that the misconduct that was relied upon to deny him benefits resulted from his disability, namely alcoholism. The Appellant pleads that he did not consciously or deliberately engaged in the behaviour of consuming alcohol.

[17] He submits that alcohol addiction is recognized as a disability under the *Human Rights Code*, R.S.O. Chapter 1-1.19 and that employers cannot discriminate against employees with addictions.

[18] The Appellant disputes the conclusion of the General Division on the issue of misconduct since his conduct was not voluntary but was the consequence of his disability.

[19] The Federal Court of Appeal in *Canada (AG) v. Wasylka*, 2004 FCA 219, upheld the principle that the consumption of drugs or alcohol by a claimant was voluntary in the sense that his actions were conscious and that he was aware of the effects of what that consumption and the consequences which could or would result.

[20] In the Federal Court of Appeal case *Mishibinijima v. Canada (AG)*, 2007 FCA 36, another alcohol dependency case, the Court mentioned that a different conclusion could be reached as to the element of wilfulness assuming that sufficient evidence was adduced regarding a claimant's inability to make a conscious or deliberate decision, which evidence would likely include medical evidence.

[21] The Tribunal finds that the General Division's did not err when it concluded that the alcoholism of the Appellant was not in itself sufficient to displace the voluntariness of his consumption of alcohol and to make the exclusion contained in subsection 30(1) of the *Act* inapplicable to him – *Canada (PG) c. Bigler*, 2009 CAF 91, *Canada (AG) v. Turgeon*, [1999] F.C.J. No. 1861.

[22] The evidence before the General Division with respect to the Appellant's problem with alcohol is weak and, in the view of the Tribunal, insufficient to justify the conclusion sought by the Appellant. All that is known about his problem comes from the Appellant's testimony before the General Division and a copy of a letter dated April 24, 2015, from Trillium Health Partners which advised that he successfully participated in a recovery program in February 2015 with follow up sessions in March 2015 and April 2015 (GD6-9-10). In Appeal, the Appellant filed a summary discharge report dated March 5, 2010 (AD1- 18-19) and a medical note from Dr. Neel Bector dated May 26, 2015 (AD1-24). Without deciding on the admissibility of such evidence in appeal, the Tribunal is not convinced that this supplementary evidence supports a conclusion that the Appellant's conduct was not wilful.

[23] The Tribunal is also of the view that whether or not that problem constituted a "disability" pursuant to the *Human Rights Code* was an irrelevant consideration with respect to the question at issue before the General Division. The same goes with respect to

the employer's duty of accommodation pursuant to the provisions of the *Human Rights Code* - *Mishibinijima v. Canada (AG)*, 2007 FCA 36.

[24] The role of the General Division was to determine if the employee's conduct amounted to misconduct within the meaning of the *Act* and 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, - *Canada (Attorney General) v. Lemire*, 2010 FCA 314,

[25] In the present case, the General Division arrived at the conclusion that the Appellant was aware of his alcohol addiction and based on the employer's zero tolerance policy and final warning, should have known that his drinking may result in possible dismissal. The General Division found that despite the employer's efforts to counsel the Appellant and suggest he seek treatment, the Appellant did not take their advice and continued to come to work inebriated which finally led to his dismissal due to intoxication on the job.

[26] The Tribunal is sympathetic to the situation of the Appellant but his problem with alcohol and the evidence submitted cannot allow him to escape the conclusion of the General Division that misconduct was the cause of his dismissal.

CONCLUSION

[27] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division