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

Citation: *C. W. v. Canada Employment Insurance Commission,* 2016 SSTADEI 154

Appeal No. AD-14-116

BETWEEN:

C. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Amended - Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 6, 2016

DECISION: Appeal dismissed

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 30, 2013, a General Division member dismissed the appeal of the Appellant against the previous determination of the Commission.

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

[4] On December 1, 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.

ANALYSIS

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

[7] The Appellant appeals against the decision of the General Division member on the basis that his conduct was not "willful" within the meaning of the jurisprudence, and that therefore his actions do not constitute misconduct. The Appellant argues that just because an employee is dismissed "because their services are not satisfactory to the employer" does not mean that the employee has committed misconduct. In this case, he submits that he was unable to complete the required courses because of personal issues he was dealing with at the time.

[8] The Commission, noting that the Appellant was fired for failing to complete a number of mandatory courses contrary to his contract of employment, supports the decision of the General Division member and asks that the appeal be dismissed.

[9] In her decision, the General Division member correctly stated the law and jurisprudence. She then examined that factual situation before her, and found that the Appellant had failed to complete required courses. Further, the member found that although the Appellant's contract had been amended a number of times to reduce the number of courses to be completed and extending the timeframe for doing so, the Appellant was well aware that a number of these courses must still be completed.

[10] The member then found that the Appellant had failed to complete the minimum number of courses per year, and that the Appellant (by his own admission) did not prioritize completing the courses. On this basis, the member found that the Appellant had willfully "neglected to fulfill his obligations" and was eventually fired for that reason. She then concluded that the Appellant had committed misconduct, upheld the initial determination of the Commission, and dismissed the Appellant's appeal.

[11] 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 orought 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."

[12] 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 th*a*t:

> "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."

[13] The member was aware of (and correctly cited) the jurisprudence of the Court and I find that, as evidenced by her decision, she understood and applied it to the facts at hand. The Appellant has failed to convince me that the member made any errors in doing so. The factual findings made by the member were entirely open to her based upon the evidence, and were perfectly reasonable.

[14] I have found no evidence to support the grounds of appeal invoked or any other possible ground of appeal. In my view, as evidenced by the decision and record, the member conducted a proper hearing, weighed the evidence, made reasonable findings of fact, established the correct law, and came to a conclusion that was intelligible and understandable.

CONCLUSION

[15] For the above reasons, the appeal is ~~allowed~~ dismissed. ~~The decision of the Board is rescinded and the determination of the Commission is resolved~~.

Mark Borer

Member, Appeal Division