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

Citation: *Canada Employment Insurance Commission v. H. M.,* 2017 SSTADEI 97

Tribunal File Number: AD-16-722

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

H. M.

Respondent

and

St. Mary's Hospital

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: January 13, 2017

Date of Decision: March 10, 2017

Canada

DECISION

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 The decision of the General Division is rescinded and the determination of the Commission is restored.

INTRODUCTION

[2] Previously, a General Division member allowed the Respondent's appeal.

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

[4] A teleconference hearing was held. The Commission and the Respondent attended and made submissions, but the Employer did not. The Commission and the Respondent were represented by counsel.

[5] Notice of the hearing was sent by courier to the address given to the Tribunal by the Employer, but the package went unclaimed. Upon learning this, Tribunal staff attempted to contact the Employer's representative by telephone. Unfortunately, the designated representative was no longer working for the Employer and no new contact person could be identified. Since that date, the Tribunal has had no contact with the Employer.

[6] Based on the above, although I am not satisfied that the Employer has received notice of the hearing, I find that the Tribunal has taken all appropriate steps to locate the Employer. I also find that the Employer is in breach of its regulatory obligation to update the Tribunal with its current contact information.

[7] With the agreement of the Commission and the Respondent, I proceeded in the Employer's absence.

THE LAW

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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

[9] In the decision under appeal, the General Division member found that due to alcoholism the Respondent's drinking was not "willful". This caused the member to conclude that the Respondent did not commit misconduct within the meaning of the *Employment Insurance Act* (Act).

[10] In their appeal, the Commission submits that the above finding was made in error. The Commission does not dispute that the Respondent suffers from alcoholism or that resisting the urge to drink alcohol when suffering from alcoholism is very difficult. Notwithstanding this, among other arguments, they argue (at paragraph 64 of their written submissions, found at AD3 – 17) that:

> The consumption of drugs and alcohol by the Respondent, even though attractive or irresistible, was voluntary in the sense that her acts were conscious and that she was aware of the effects that consumption and the consequences which could or would result. Her actions were sufficiently serious and of such scope that she could normally foresee that it would be likely to result in her dismissal.

[11] For her part, the Respondent agrees with the findings and reasoning of the General Division member. The Respondent submits that she proved, on the balance of probabilities, that her consumption of alcohol was not conscious or willful and that therefore the General Division member was correct in finding that misconduct had not been shown.

[12] In her extremely thorough decision, the General Division member canvassed the evidence, the law, the submissions, and the jurisprudence of the Federal Court of Appeal.

She concluded, based largely upon the Respondent's uncontested testimony at the General Division hearing, that (at paragraph 166 of her decision):

> [the Respondent] was psychologically affected and was not acting in a sufficiently voluntary manner when she consumed the substances in question and that she was unable to understand the nature and consequences of her actions at all material times when she consumed the prohibited substances.

[13] The member then found (at paragraph 154-155 and elsewhere in her decision) that although the Respondent had consumed alcohol and/or other substances in violation of a "last chance agreement", she did not do so consciously or willfully, and on this basis allowed the Respondent's appeal.

[14] The issues raised in this file are complex, and the member canvassed them in detail. It is with great reluctance that I find myself persuaded, for the reasons below, that the member erred.

[15] Although the Federal Court of Appeal has dealt with the issue of alcoholism and misconduct many times, it is sufficient to mention only a few of these cases. In *Canada (Attorney General) v. Wasylka*, 2004 FCA 219, the Court stated that:

> [4] […]The consumption of drugs by the respondent, even though attractive or irresistible, 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.[…]
>
> [5] It would be fundamentally altering the nature and principles of the employment insurance scheme and Act if employees, who lose their employment as a result of abusing impairing substances such as alcohol or drugs, could be entitled to receive regular unemployment benefits.[…]

[16] In *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, the Court noted *Wasylka* and a number of other alcoholism cases which raised the same issues. In discussing whether the consumption of alcohol by the claimant in that case was willful or not, the Court stated that:

> [35] The evidence before the Board [the General Division's predecessor Tribunal] with respect to the applicant's problem with alcohol is very weak and, in my view, insufficient to justify the conclusion sought by the applicant.

> All that is known about his problem comes from his testimony before the Board […].
>
> [36] […] I cannot see how that evidence could possibly support an argument that his conduct was not willful. Whether or not, in a given case, a different conclusion could be reached, 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, is an issue I need not address.[…]

[17] Finally, in *Canada (Attorney General) v. Bigler*, 2009 FCA 91, the Court found (at paragraph 3) that:

> Misconduct, under section 30 of the Act, has been defined as conduct that is willful, meaning conscious, deliberate or intentional. When an employee has been dismissed for alcoholism-related misconduct, he or she will not be disqualified from receiving unemployment benefits pursuant to subsection 30(1), if both the fact of the alcoholism and the involuntariness of the conduct in question are established.

[18] The Court then went on to find (at paragraph 8) that:

> There was no medical evidence relating to the respondent's alcoholism or to whether the circumstances in which [the Respondent] started to drink following his mother's death effectively made his consumption of alcohol at that time involuntary.

[19] From the above three cases I conclude that proving on the balance of probabilities that the consumption of alcohol or drugs was not willful, even if alcoholism has already been shown, is difficult and must rest on a firm evidentiary foundation. This foundation may not necessarily include medical evidence but, taking into account *Mishibinijima*, without medical evidence the task becomes even more difficult.

[20] In this case, the General Division member concluded (at paragraph 174 and elsewhere in her decision) that the Respondent had committed acts which, if willful, would constitute misconduct, and that the Respondent had been dismissed for these acts. Neither the Commission nor the Respondent has challenged these findings. There is no basis to disturb them, and indeed I agree with them.

[21] Unfortunately, I do not feel the same way regarding the member's conclusion (in paragraph 175) that the acts in question were not willful.

[22] In coming to the conclusion that these acts were not willful, the member relied heavily upon the testimony offered by the Respondent at the General Division hearing. As correctly pointed out by the Respondent, the Commission chose not to attend that hearing. Because of this, the Respondent's evidence was unchallenged, leading the member to accept that evidence as credible.

[23] Although the Commission takes issue with this, I do not. The member was perfectly entitled to accept the uncontested evidence from the Respondent about the irresistible nature of her addiction.

[24] Rather, my objection to the member's conclusion is that although she discussed at length the jurisprudence of the Court (including the above cases) in her decision she did not properly apply that jurisprudence.

[25] To me, the issues in this case are exactly the same as those faced in the three cases cited above. Ultimately, given the findings in *Wasylka*, *Mishibinijima*, and *Bigler*, there was simply insufficient evidence before the General Division member to ground a finding that the Respondent's actions were not willful. As found by the Court, it is insufficient for the claimant to simply assert that the consumption of alcohol was irresistible.

[26] I note as well that (at paragraph 34 of her decision) the member found (based upon an admission by the Respondent) that the Respondent "decided to consume only 1 glass of champagne". I fail to see how, the Respondent having "decided" to have one alcoholic beverage, it was open to the member to find that the consumption of alcohol (at least on that occasion) had not been willful, given the jurisprudence of the Court.

[27] By finding to the contrary, the member failed to properly apply the jurisprudence of the Court and I am obligated to intervene to correct that error.

[28] For the above reasons, I do not believe that returning this file to the General Division for a new hearing would serve a useful purpose, and I will therefore give the decision the member should have given.

[29] There is no dispute that the Respondent suffered from alcoholism, and that she also knew that drinking alcohol or otherwise violating the “last chance agreement” would mean that dismissal was a real possibility. Further, there is no doubt that the Respondent took actions that violated the agreement and that those actions were the cause of her dismissal. The only question to answer is whether her actions were willful and/or conscious within the meaning of the Act and the jurisprudence, given her alcoholism.

[30] Having reviewed the record and the submissions of the parties I find that, especially given the Respondent’s admission noted above, her actions at least on that occasion were indeed willful and conscious. There is no basis for me to conclude otherwise.

[31] I am sympathetic to the Respondent, and I have no doubt that her alcoholism influenced her actions. But the jurisprudence of the Federal Court of Appeal stands for the proposition that misconduct must be found if the evidence does not establish both alcoholism and the involuntariness of the conduct in question.

[32] I am unable to conclude that the Respondent’s conduct was involuntary. Therefore, given the jurisprudence of the Court, this appeal must be allowed.

CONCLUSION

[33] For the above reasons, the appeal is allowed. The decision of the General Division is rescinded and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division