



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v. R. K.*, 2017 SSTADEI 227

Tribunal File Number: AD-16-1256

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**R. K.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Mark Borer

HEARD ON: June 8, 2017

DATE OF DECISION: June 12, 2017

## **DECISION**

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

## **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 each 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 is a case where the Respondent was fired for alleged misconduct.

[7] The Commission submits that the General Division member erred in law and fact by finding that the Respondent had not committed an act of misconduct. Among other arguments, they submit that the member incorrectly applied the law of misconduct by attaching importance to the steps that the Employer had taken to terminate the Respondent

instead of only assessing the Respondent's actions. The Commission also submits that if the law had been properly applied to the facts, the General Division member could only have reached one conclusion: that the Respondent had indeed committed an act of misconduct.

[8] The Respondent supports the General Division member's decision, and made submissions regarding some of the circumstances surrounding his dismissal. He asks that the appeal be dismissed.

[9] In his decision, the General Division member summarized the facts and established the correct law. He then concluded that he preferred the Respondent's version of events rather than the opposing evidence. Finally, he found (at paragraph 36) that:

The Tribunal finds that the Appellant's actions in the final incident lacked a mental of wilfulness for a number of reasons. First: [the Respondent] was not provided any written warnings from the employer that his actions could lead to his dismissal [*sic*].

[10] On this basis, he then concluded that the Respondent's actions were not willful and did not constitute misconduct.

[11] The Federal Court of Appeal has held many times (such as in *Canada (Attorney General) v. Lemire*, 2010 FCA 314) that in determining whether or not a given situation constitutes misconduct, it is not appropriate to consider whether or not the actions taken by an employer in dismissing a claimant were justified. Unfortunately, the above-quoted paragraph (as well as paragraph 39 of the General Division member's decision) indicates that the member did just that.

[12] I therefore have no alternative but to find that, at least in part, the General Division member failed to properly apply the jurisprudence of the Court. This is an error which I am obligated to intervene to correct.

[13] Notwithstanding the Commission's request that I give the decision the General Division member should have given, I find that the correct remedy for this error is a new General Division hearing. It is in the interests of justice that the parties be able to make their respective cases in full and present whatever testimony or documents they feel might

be necessary to support their submissions, which they will be able to do before the General Division.

## **CONCLUSION**

[14] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

*Mark Borer*

Member, Appeal Division