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

Citation: *F. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 236

Tribunal File Number: AD-15-1176

BETWEEN:

F. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: June 6, 2017

DATE OF DECISION: June 19, 2017

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal.

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

[4] A teleconference hearing was held. The Appellant and the Commission each attended and made submissions.

THE LAW

[5] 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

[6] This appeal concerns whether or not the Appellant committed an act of misconduct within the meaning of the *Employment Insurance Act* (Act).

[7] In his oral submissions, the Appellant stated that a person is innocent until proven guilty, and as the criminal charge of refusing a breathalyzer test was stayed he did nothing wrong. He declined to provide any details regarding what happened the night he was charged because, in his view, this information is "confidential." Nonetheless, he asks that I allow his appeal.

[8] The Commission, for their part, supports the General Division decision. They submit that the Appellant knew or ought to have known that refusing a breathalyzer test could jeopardize his driver's licence which in turn could threaten his employment as a driver. They ask that the appeal be dismissed.

[9] In her decision, the General Division member set out the correct test for misconduct. She then determined that the Appellant had been dismissed because his driver's licence had been suspended for refusing a breathalyzer test. Finally, she determined that because of the Appellant's prior experience "he knew or ought to have known that there would be some consequences to his actions, whether he chose to or not to provide the requested breath sample," and dismissed his appeal.

[10] The Federal Court of Appeal has ruled on the issue of misconduct many times. In *Mishibinijima v. (Attorney General)*, 2007 FCA 36, at paragraph 14, the test was framed this way: "[…] there will be misconduct where the claimant 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."

[11] Contrary to the assertion of the Appellant, this means that it is largely irrelevant whether or not a claimant was convicted of any criminal charges that might have been brought against them for their behaviour. Of course, a criminal conviction or acquittal may offer additional evidence that a particular action was or was not an act of misconduct, but ultimately it is the underlying act which must be examined.

[12] To assist me in my deliberations, I listened to the recording of the General Division hearing. At approximately the 22:00 mark of that recording, the Appellant did state that he thought that he would lose his licence for a day or so, although he did not think that he would lose it for as long as he did. At approximately 32:30 of the recording, the Appellant agreed that he had had a few drinks and had gone to his truck when police approached and asked him to take a breathalyzer test. At approximately 34:30 of the recording, he admitted that his truck "was running" although it was not in motion.

[13] I also note the account of a conversation between a Commission employee and the Appellant (found at GD3-18) in which the Appellant is alleged to have said that "if he [the Appellant] had taken the test the consequences would have been the same."

[14] As previously observed, the Appellant in this case refused to tell me what happened on the night his licence was suspended. The General Division member noted (at paragraph 28 of her decision) that the Appellant was similarly unhelpful when he had appeared before her.

[15] Ultimately, the Appellant lost his employment because he no longer had a valid driver's licence. He no longer had a valid driver's licence because he had been charged with refusing a breathalyzer test. He was charged with refusing a breathalyzer test at the conclusion of an evening where (by his own admission) he had been drinking and was in care and control of a vehicle.

[16] I find that the member's conclusion that the Appellant's actions were misconduct within the meaning of the Act was within the range of possible outcomes given the law and the evidence she was bound to consider and apply. The Appellant has failed to persuade me otherwise, and in fact I have great difficulty seeing how the member could have reached any conclusion other than the one that she did.

[17] In my view, as evidenced by the decision and record, the member conducted a proper hearing, weighed the evidence, made findings of fact based upon the entirety of the evidence, established the correct law, properly applied that law to the facts, and came to a conclusion that was intelligible and understandable.

[18] There is no reason for the Appeal Division to intervene.

CONCLUSION

[19] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division