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

Citation: *Canada Employment Insurance Commission v. W. E.*, 2017 SSTADEI 257

Tribunal File Number: AD-16-814

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

W. E.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Mark Borer

HEARD ON: June 20, 2017

DATE OF DECISION: July 7, 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 The decision of the General Division is rescinded and the determination of the Commission is restored.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. Both 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* (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] The Commission submits that the General Division member erred in law and in fact when he found that the Respondent did not commit an act of misconduct. The Commission notes that the Respondent lost his job because his driving licence was suspended for after he had failed a breathalyzer test on June 19, 2015. They contend that, contrary to the views of the General Division member, it is not relevant whether the Respondent was aware of a

previous suspension of his licence or whether his employer had previously accommodated him instead of firing him. They ask that the appeal be allowed.

[7] The Respondent submits that he thought he would not be fired because he had been given another chance previously in similar circumstances. He maintains his position that he had no idea that he had lost his licence on June 15, 2015, and that, had he known, he never would have been driving on June 19, 2015.

[8] In his decision, the General Division member focused on the earlier of the two suspensions, which the Respondent received in June 2015. In doing so, he determined that the Respondent had not been aware of this earlier suspension and therefore did not commit an act of misconduct. Further, the member also determined that, since the Employer had indeed previously been lenient towards the Respondent and the Respondent had always been honest and upfront with his employer, it was not reasonable to think that he would lose his job on this occasion. He then allowed the appeal.

[9] Unfortunately, in doing so the member erred.

[10] The Federal Court of Appeal has ruled on the issue of misconduct many times. In *Mishibinijima v. Canada (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] Although on a previous occasion his employer had accommodated him, it is not disputed that the Respondent needed his driver's licence to perform his work duties. The Respondent said so in the hearing before me, and his employer (at GD3-18) identified as the reason for the Respondent's dismissal his inability to perform his duties because he was not legally permitted to drive.

[12] It is also not disputed that on June 19, 2015, the Respondent was issued a Notice of Driving Prohibition (found at GD3-36) which suspended his licence due to a failed roadside

breathalyzer test. In describing this incident, the Respondent stated at the hearing before me that he had consumed one beer before driving his truck to go get some dinner.

[13] Put another way, the uncontested evidence shows that the Respondent 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 failed a breathalyzer test. He failed a breathalyzer test at the conclusion of an afternoon/early evening where (by his own admission) he had consumed alcohol and was behind the wheel of a vehicle.

[14] By focusing on the actions of the Respondent's employer in dismissing him when they had previously tolerated his actions and, by failing to address the true reason for the Respondent's dismissal (the June 19, 2015, suspension rather than the June 15, 2015, suspension), the member failed to consider all the evidence before him and misapplied the law to the facts. These are errors which I am obligated to intervene to correct.

[15] Normally, having concluded the above I would return the file to the General Division for a new hearing. However, given the uncontested nature of the evidence, I do not believe that a new hearing would serve any useful purpose.

[16] Instead, I will give the conclusion that the General Division member should have given: that the Respondent lost his employment due to his own misconduct.

[17] This means that the initial Commission determination was correct, and must be restored.

CONCLUSION

[18] 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