



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *S. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 271

Tribunal File Number: AD-16-1381

BETWEEN:

**S. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Pierre Lafontaine

HEARD ON: July 4, 2017

DATE OF DECISION: July 17, 2017

## **REASONS AND DECISION**

### **DECISION**

[1] The appeal is dismissed.

### **INTRODUCTION**

[2] On November 16, 2016, the General Division of the Social Security of Tribunal of Canada (Tribunal) determined that the Appellant had lost his employment due to his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant is deemed to have filed an application for leave to appeal to the Appeal Division on December 20, 2016. Leave to appeal was granted on February 7, 2017.

### **FORM OF HEARING**

[4] The Tribunal determined that the hearing of this appeal would be conducted by teleconference for the following reasons:

- the complexity of the issue or issues
- the fact that the parties' credibility was not a prevailing issue
- the cost-effectiveness and expediency of the hearing choice
- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice

[5] The Appellant attended the hearing and was represented by Yvan Bousquet. The Respondent was represented by Manon Richardson.

## **THE LAW**

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

- 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.

## **ISSUE**

[7] Did the Tribunal's General Division err in finding that the Appellant had lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act?

## **SUBMISSIONS**

[8] The Appellant submits the following arguments in support of his appeal:

- It is both an error of fact and of law to group together with the same case law a case where the employee [translation] "forgot to make a payment on his driver's licence before the deadline and is prevented from working for a short period of time" and a case where the employee [translation] "commits a criminal act that sees him lose his driver's licence making him incapable of working for a 12-month period."
- It is also an error of fact and law to claim that "forgetting to renew his driver's licence before the deadline" has the same impact on the capacity of the employee

to accomplish his regular tasks as “committing a criminal act by driving under the influence.”

- The Appellant was able to rectify the situation within 24 hours, more or less, and he was available to resume work the next day.
- The Respondent’s burden of proof is not synonymous with the employer’s opinion.
- Forgetting to renew his driver’s licence cannot be characterized as misconduct under the Act, even the employer cited it to proceed with the dismissal of its employee.
- An objective assessment is needed to say that misconduct was in fact the cause of the loss of employment.

[9] The Respondent submitted the following arguments to refute the Appellant’s appeal:

- As an essential condition of his employment, the Appellant had to hold a valid driver’s licence. By failing to renew it in time, he was no longer authorized to drive a company truck and he breached an express duty of the contract of employment. This breach stems directly from his misconduct.
- The General Division’s role is not to determine whether the employer’s decision to dismiss the Appellant was justified, but rather to determine whether the action constituted misconduct and whether it led to the loss of his employment.
- The General Division did not commit an error of fact or of law in unanimously upholding the Respondent’s decisions. The Appellant knew or ought to have known that failing to renew his driver’s licence in time could impair the performance of his duties to his employer and, therefore, it was very possible that he would be dismissed.

## STANDARDS OF REVIEW

[10] The parties maintain that the appropriate standard of review for questions of law is correctness, and that the appropriate standard of review for questions of mixed fact and law is reasonableness—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that “[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.”

[12] The Federal Court of Appeal further indicated that:

Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of “federal boards”, for the Federal Court and the Federal Court of Appeal.

[13] The Federal Court of Appeal concludes by emphasizing that “[w]here it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.”

[14] The mandate of the Tribunal’s Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[15] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

## ANALYSIS

[16] The facts on file are relatively simple. The Appellant is a truck driver and his date of birth is November 17, 1965. He forgot to renew his driver's licence by paying the necessary fees before the expiry date of his licence. He was then intercepted by police officers with his employer's vehicle on the night of November 18–19, 2015. Another truck driver was summoned to the premises to take over for the Appellant. The next day, he went to renew his driver's licence and prepared to go to work in the evening, as usual. His employer then called him during the course of the day to tell him that what had happened was unacceptable for them and that he was dismissed.

[17] Furthermore, the General Division's role is to determine whether the employee's conduct amounted to misconduct within the meaning of the Act and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal—*Canada (Attorney General) v. Lemire*, FCA 314.

[18] On the other hand, the notion of misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. In other words, the test for misconduct is whether the act complained must have been willful or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his or her actions would have on job performance—*Canada (Attorney General)*, 2007 FCA 372, *Tucker* (A-381-85), *Mishibinijima*, A-85-06.

[19] The Tribunal is of the opinion that the General Division committed no error when it found, from the material brought before it, that the non-renewal of the driver's licence constituted a breach of an express or implied duty of the Appellant's contract of employment. Since the Appellant could no longer drive due to his own negligence, he breached an essential condition of his employment.

[20] As emphasized by the General Division, failing to ensure that one has valid driver's licence at all times, an essential condition of one's employment, reflects a recklessness and negligence that approaches wilfulness under the Act.

[21] During his submissions before the General Division and on appeal, the Appellant greatly emphasized the decision by the Umpire in CUB 65900, Ronald C. Stevenson, since the facts, according to him, are practically identical in the present case.

[22] However, the Tribunal is of the humble opinion that said decision does not respect the insights of the Federal Court of Appeal, because it implies that the breach of conduct must stem from wrongful intent.

[23] The Tribunal therefore finds that the General Division considered the Appellant's arguments, that its decision rests on the evidence submitted before it, and that this decision complies with the legislation provisions and with the jurisprudence.

[24] For the above-mentioned reasons, it is appropriate to dismiss the appeal.

## **CONCLUSION**

[25] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division