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

Citation: *Canada Employment Insurance Commission v. R. G.*, 2018 SST 38

Tribunal File Number: AD-17-49

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

R. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: December 4, 2017

DATE OF DECISION: January 12, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative: E. Kitova
Respondent's representative: C. Braker

OVERVIEW

[1] The Respondent made an initial claim for Employment Insurance regular benefits and, on December 10, 2015, the Canada Employment Insurance Commission (Commission) determined that benefits could not be paid because the Respondent had lost her employment as a result of her misconduct. Documentation provided to the Commission indicated that the Respondent, a personal support worker, had a disciplinary record including warnings for poor attendance, and a warning and two suspensions for making unwelcome, offensive calls to co-workers to discuss work-related matters while off duty and appearing to be intoxicated. The Respondent had been offered a leave of absence to pursue substance abuse treatment in May and October 2015, and she was given a final warning on October 1, 2015, that further instances of inappropriate behaviour related to substance abuse would result in her dismissal. She had subsequently been dismissed from employment following an incident on November 3, 2015, in which she contacted a co-worker after hours to discuss a patient, sounding intoxicated.

[2] The Commission's decision to deny benefits was upheld on reconsideration, and the Respondent appealed that decision to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated December 18, 2016, the General Division allowed the appeal on the basis that the Respondent's actions that caused her dismissal were not wilful and, as such, the disqualification from benefits ought not to have been imposed. The General Division's analysis is contained in the following paragraphs:

> [29] The Tribunal is aware that the Federal Court of Appeal in *Canada (AG) v. Wasylka*, 2004 FCA 219, upheld the principle that the consumption of drugs or alcohol by a claimant was voluntary in the sense that his actions were conscious and that he was aware of the effects of what that consumption and the consequences which could or would result.

> [30] But in the Federal Court of Appeal case *Mishibinijima v. Canada (AG)*, 2007 FCA 36, another alcohol dependency case, the Court mentioned that a different conclusion could be reached as to the element of wilfulness 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.
>
> [31] In a report by Doctor Vijay Nishka, MD, FRCPC, on January 27, 2016, the Doctor wrote that: "Diagnostically, this is a 56-year-old lady who presents with recurrent major depressive disorder and underlying generalized anxiety disorder, as well as ethanol dependence disorder. I believe that many of her difficulties do stem from a recurrent pattern of abuse and she continues to struggle with these issues now. It is entirely possible that she was dealing with significant issues related to depression and anxiety as well as ethanol dependence when she was working at Caressant Care" (GD6-13).
>
> [32] The Tribunal accepts and assigns considerable weight to the above medical report. The report clearly states that the Appellant's recurrent major depressive disorder, underlying generalized anxiety disorder and the ethanol dependence disorder were present and at issue when she was working at Caressant Care. The Appellant's own evidence is that when she drinks she is a different person and when she becomes sober she does not remember what events took place while intoxicated.
>
> [33] The Tribunal finds that this is not a case where an Appellant uses the excuse of alcoholism without any supporting medical evidence to justify actions that caused a dismissal to occur.
>
> […]
>
> [35] For all the above reasons, the Tribunal finds that that the Appellant's actions that caused her dismissal were not wilful and she was not dismissed from her employment because of misconduct […]

[3] The Commission's application for leave to appeal this decision was granted by the Tribunal's Appeal Division on January 31, 2017.

[4] This appeal proceeded by teleconference, for the purpose of hearing oral submissions, in light of the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ANALYSIS

[5] Subject to exceptions not relevant to this appeal, s. 30(1) of the *Employment Insurance Act* (Act) stipulates that a claimant is disqualified from receiving benefits if he or she "lost any employment because of their misconduct." It is settled law that this disqualification arises only if there was wilful misconduct. The concept of wilful misconduct requires the action or omission to be made "consciously, deliberately or intentionally," but "wrongful intent" is not required: *Canada (Attorney General) v. Tucker*, [1986] 2 F.C. 329 (F.C.A.); *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 (F.C.A.).

[6] The parties to this appeal are in agreement that the jurisprudence contemplates that alcohol-related misconduct may not be wilful, in limited circumstances. The Commission's representative submits that the General Division misapplied the jurisprudence to the facts of this appeal, whereas the Respondent's representative submits that the General Division's decision on wilfulness was consistent with the jurisprudence and supported by Dr. Nishka's medical report and the Respondent's testimony.

[7] The grounds of appeal raised in this matter are those found in s. 58(1)(*b*) and (*c*) of the *Department of Employment and Social Development Act* (DESDA):

> (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.

[8] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is

owed to the General Division on errors of law. However, the language of s. 58(1)(*c*) requires the Appeal Division to show some deference on factual errors: for the appeal to succeed, the impugned finding of fact must not only be material ("based its decision on") and incorrect ("erroneous"), but also made in a perverse or capricious manner or without regard for the evidence.

[9] On the subject of the wilfulness of alcohol-or drug-related misconduct, the Federal Court of Appeal has provided substantial guidance. In *Canada (Attorney General) v. Turgeon*, [1999] F.C.J. No. 1861, the Court held that alcoholism alone could not justify misconduct:

> [2] […] Even admitting purely for the sake of argument that alcoholism could be relied on to justify misconduct within the meaning of s. 28(1), there was no evidence before the board of referees in the case at bar allowing it to conclude that the alcohol problem alleged by the claimant was such as to allow him to argue this justification. The mere fact of having an alcohol problem is not in itself sufficient to make the exclusion contained in s. 28(1) inapplicable to a claimant.

[10] *Casey v. Canada (Employment Insurance Commission)*, 2001 FCA 375 provides an example of an expert report inadequate to vitiate wilfulness:

> [3] The Board in this case had before it additional evidence in the form of an expert report which was submitted as evidence that Mr. Casey's misconduct was not wilful. However, as a matter of ordinary logic, that report was not capable of supporting the conclusion that his conduct was not wilful. The report provided general information about the effect of alcohol addiction but expressed no firm opinion about Mr. Casey himself. In these circumstances the Umpire was correct to conclude that the Board based its decision on an erroneous finding of fact that it made in a perverse or capricious manner and without regard to the material before it.

[11] In *Canada (Attorney General) v. Wasylka*, 2004 FCA 219, the consumption of drugs was considered voluntary even though irresistible to the individual:

> [4] It was an error of law for the Umpire to conclude that the respondent's absence from work was not wilful because of his drug addiction. 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. He did declare that he could "not focus on anything that matters" when he was taking the drug […]
>
> [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. Section 21 of the Employment Insurance Act and 40 of the Employment Insurance Regulations already provide for sickness benefits and the respondent has been a recipient of such benefits.

[12] *Canada (Attorney General) v. Pearson*, 2006 FCA 199 provides another example of medical evidence insufficient to justify misconduct:

> [12] I should add that Dr. Ghanem's opinion cannot support the Umpire. Although Dr. Ghanem stated that the respondent's problems at work were linked to his alcoholism, a point which no one disputes, that is not an answer to the question of whether the respondent lost his job by reason of his misconduct.

[13] In *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, the evidence relied upon was solely the claimant's testimony that he had, and was unable to control, an alcohol problem. The Court reviewed the jurisprudence, and concluded as follows:

> [36] That is the extent of the evidence adduced by the applicant regarding his alcohol problem. I cannot see how that evidence could possibly support an argument that his conduct was not wilful. **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 which I need not address.** Clearly, in the present matter, the evidence adduced is incapable of supporting a conclusion that the applicant's conduct was not wilful. [emphasis added]

[14] Most recently, in *Canada (Attorney General) v. Bigler*, 2009 FCA 91, the Court reiterated that a finding of alcoholism alone is insufficient, while acknowledging that disqualification may be avoided on evidence of involuntariness:

> [3] […] 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**.
>
> […]
>
> [7] The Board's finding that the claimant was an alcoholic was not dispositive of the issue as it was not in itself sufficient to displace the voluntariness of his consumption of alcohol […] [emphasis added]

[15] There are no examples of evidence sufficient to displace voluntariness in the context of alcoholism, from the Federal Court of Appeal. The Respondent submitted two Umpire decisions, both pre-dating the above-cited jurisprudence, which found for the claimant. In CUB 38274 (June 30, 1997), the Umpire approved of a Board of Referees finding that the claimant's absences were unplanned and the result of an illness, being alcoholism. There is no indication of the underlying evidence supporting this finding. In CUB 41470 (June 1, 1998), the Umpire found that a report from an expert in alcoholism and drug addiction, which showed that the claimant's acts were not voluntary, was sufficient to find that she had not lost her position due to her own misconduct. Umpire decisions are not binding upon the Tribunal, but may be persuasive. I do not find these two decisions to add to the Federal Court of Appeal jurisprudence in any substantive way; CUB 41470 does demonstrate the kind of claimant-specific, medical evidence that could, under a *Mishibinijima* or *Bigler* analysis, support a finding that misconduct was not voluntary.

[16] Collectively, the Federal Court of Appeal jurisprudence indicates that, in order to reach a finding that alcohol-related misconduct is not wilful, the decision-maker must rely upon evidence, likely including medical evidence, that addresses a claimant's inability to make a conscious or deliberate decision and/or the involuntariness of the conduct in question. Evidence of alcoholism in and of itself, medical evidence of a link between the misconduct and the alcoholism, and generic evidence about the effects of alcoholism, are insufficient.

[17] I agree with the Commission that the General Division misapplied the jurisprudence to the facts of this appeal. Neither the medical evidence nor the testimony can support an argument

that the Respondent's conduct was not wilful. Psychiatrist Dr. Nishka wrote the following, some two and a half months after the final event that led to the Respondent's termination:

> Over the years, [the Respondent] has struggled with recurrent major depressive disorder, chronic anxiety (probable GAD) and ethanol dependence disorder. She has consumed alcohol as a way of avoiding some of her emotional pain and dealing with loneliness and this has become more of an issue recently.
>
> She is originally trained as a nurse, but has worked as a PSW at Caressant Care for some time. She tells me that her employment was terminated over an issue related to confidentiality/conduct, though the exact details are somewhat unclear. [The Respondent] has struggled with depression and anxiety for many years, as is well documented in this note and previous notes, and it is entirely possible that she was dealing with significant issues related to depression and anxiety as well as ethanol dependence when she was working at Caressant Care.

[18] I cannot agree with the Respondent's representative's submission that this report, including the reference to "dealing with significant issues," supports a finding that the Respondent's termination-related conduct was not wilful. Dr. Nishka provides supportive evidence for a finding that the Respondent suffered from depression, anxiety and alcoholism in the period leading up to her termination. He provides no opinion whatsoever with respect to the Respondent's ability or inability to make conscious or deliberate decisions, or the voluntariness or involuntariness of the Respondent's conduct in drinking and/or in contacting her co-workers outside of work hours. As a matter of ordinary logic, and contrary to the Respondent's representative's submission, Dr. Nishka's report was not capable of supporting the conclusion that the Respondent's conduct was not wilful. The medical evidence is weaker than that which was found to be inadequate in *Pearson*, and not analogous to the expert report accepted in CUB 41470.

[19] The Respondent's testimony is in and of itself insufficient to support a finding that her misconduct was not wilful. The Respondent's testimony that "when she drinks she is a different person and when she becomes sober she does not remember what events took place while intoxicated" does not adequately address the question of whether the Respondent consciously, deliberately or intentionally began drinking after work and/or consciously, deliberately or

intentionally contacted her co-workers on November 3, 2015 or otherwise. The Respondent provided no further details in her testimony.

[20] As outlined above, *Wasylka* instructs us that the consumption of drugs or alcohol is generally voluntary in the sense that the acts (here, of drinking and making phone calls) were conscious. Given the lengthy disciplinary record and final warning in this appeal, it is also clear that the Respondent was aware of the effects of her alcohol consumption and the consequences that could result. Moreover, while there is some indication in the file documentation that the Respondent sometimes forgot having made calls to her co-workers, the employer's fact-finding report of November 4, 2015 and a Service Canada agent's memorandum of February 8, 2016 contain the Respondent's explanations for making the call on November 3, 2015 (and others previously). The Respondent's representative submits that this evidence is irrelevant, since it doesn't "speak to her judgment" and she was attempting to minimize her behaviour, yet, regardless of motivation, this evidence clearly establishes a certain degree of awareness on the Respondent's part. Most contemporaneously with her dismissal, the Respondent acknowledged making such calls, and did not suggest that her actions in doing so were in any way unintentional, unconscious, or beyond her control. The Respondent's testimony that she did not drink when working (an assertion supported by a lack of associated disciplinary action) further refutes any notion that her drinking after work on November 3, 2015 was itself entirely involuntary or out of her control.

[21] The General Division decision referenced *Mishibinijima* in paragraph 30 and, consistent with this decision, the member considered supportive medical evidence to be necessary (see paragraph 33). However, the member did not apply the lesson from *Mishibinijima* that such evidence must address "a claimant's inability to make a conscious or deliberate decision." He did not apply the corresponding lesson from *Bigler* that evidence of the "involuntariness of the conduct" would be required. The member thus misapprehended the jurisprudence and misapplied the law to the facts of this case. The member ultimately based his decision on an erroneous finding of fact (i.e. that the Respondent's conduct was not wilful), without regard for the evidence; the evidence before the General Division simply could not support such a finding. The General Division has thus made reviewable errors of fact and law, in reaching its conclusion that the Respondent's misconduct was not wilful.

[22] Pursuant to s. 59 of the DESDA, I am authorized to substitute my decision for that of the General Division, and I find this to be appropriate in this case. I am cognizant of the fact that the onus of proving misconduct, on a balance of probabilities, was on the Commission. Given the undisputed disciplinary history, the written record of the call made on November 3, 2015, and the Respondent's admissions to the employer and the Commission with respect to the conduct in question, together with the absence of persuasive evidence that the Respondent's conduct was not conscious, deliberate or voluntary, the only conclusion the General Division could have reached on the evidence and consistent with the jurisprudence was that the Respondent had lost her employment because of wilful misconduct.

[20] I sympathize with the Respondent, who has struggled with mental illness and addiction, yet the evidence before the General Division clearly established that the conduct leading to her loss of employment in November 2015 was misconduct, as that term has been interpreted in the jurisprudence. In the result, the Commission's appeal must be allowed, and the disqualification restored.

DISPOSITION

[21] The appeal is allowed. The Commission's original decision of December 10, 2015, is restored. The Respondent was disqualified from receiving regular benefits pursuant to s. 30(1) of the Act, by reason of losing her employment in November 2015 due to misconduct.

Shirley Netten
Member, Appeal Division