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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. P. V.*, 2018 SST 71

Tribunal File Number: AD-17-557

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**P. V.**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: January 25, 2018

Canada

## DECISION AND REASONS

## DECISION

[1] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

## INTRODUCTION

[2] On July 13, 2017, the Tribunal's General Division found that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on August 2, 2017. Leave to appeal was granted on August 25, 2017.

## TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

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

[5] At the hearing, the Appellant was represented by Elena Kitova. The Respondent attended the hearing with her representative, Daniel Thimineur.

## THE LAW

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

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] The Tribunal must decide whether the General Division erred in finding that the Respondent had not lost her employment by reason of her own misconduct under sections 29 and 30 of the Act.

## STANDARDS OF REVIEW

[8] The Federal Court of Appeal has determined that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the DESDA. The Appeal Division cannot exercise the review and superintending powers reserved for higher courts—*Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[9] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

## ANALYSIS

### Facts

[10] The facts on file are relatively simple and undisputed.

[11] The Respondent's employment ended on June 30, 2016, because she had reported for work on June 5, 2016, under the influence of alcohol and had been unable to perform her duties. Before this incident, the employer had given the Respondent numerous warnings about her drinking-related absences.

[12] On October 15, 2016, the Respondent was suspended for five days because her supervisor had found her intoxicated on work premises, unable to perform her duties. On April 3, 2016, the Respondent came to work unable to perform her duties. Following this incident, the employer asked the Respondent to see a psychologist and undergo treatment during her leave period from April 7, 2016, to April 21, 2016. The employer asked the Respondent to prove that she had successfully completed her treatment as a condition to returning to work.

[13] The Respondent complied with the employer's request and began a treatment program. As agreed upon with the employer, the Respondent returned to work. In accordance with her agreement with the employer, the Respondent agreed in particular to do her assigned duties and follow her work schedule.

[14] On Sunday, June 5, 2016, the Respondent relapsed. She went to work after partying the previous night and, still under the influence of alcohol, she was unable to perform her duties. The Respondent reported for work on time but did not work that day.

[15] The employer met with the Respondent on June 7 and 8, 2016, to tell her that she had not performed her duties and followed her work schedule because she had come to work intoxicated on June 5, 2016, and that it had to terminate her employment. However, the employer allowed her to finish her work cycle by working until June 30, 2016, on which date her employment ended. The employer stated that it wanted to allow the Respondent to "make some money" so that she could return home.

## General Division Decision

[16] The General Division concluded that although the Respondent did not have a medical report demonstrating her illness, the facts in the record—specifically, the treatment she underwent in 2016, the medication she was prescribed for depression, her therapy with a Sodexo psychologist, and the admission of a drinking problem by the Respondent and the employer—were sufficient to allow the General Division to find that the Respondent had an alcohol dependence.

[17] The General Division found that, despite the fact that the Respondent had come to work on June 5, 2016, unable to perform her duties, she had not willfully disregarded the employer's interests. The Respondent was not in control of her state at the time of the facts that led to her dismissal, and this conduct did not constitute misconduct on the Respondent's part in the sense that her conduct was not premeditated or intentional.

[18] The General Division also found that the Respondent's conduct on June 5, 2016, was certainly reprehensible, but that since that day had been voluntarily added to her schedule, it was not part of the regular work schedule she had agreed to follow, and that the breach was not of such scope that the Respondent could normally foresee that it would be likely to result in her dismissal.

## Position of the Parties

[19] The Appellant argues that contrary to the General Division's findings, the Respondent's actions do constitute misconduct within the meaning of the Act and the jurisprudence.

[20] The Appellant argues that the General Division's decision goes against the teachings of the Federal Court of Appeal on alcoholism and misconduct. It submits that nothing in the record supports the General Division's conclusion that the Respondent's behaviour was not willful, or that her alcohol consumption was not deliberate or conscious.

[21] The Appellant is of the opinion that the General Division erred in its interpretation of the notion of "misconduct" within the meaning of subsection 30(1) of the Act and that it did not correctly apply the relevant case law principles.

[22] The Respondent submits that her testimony was heard and assessed by the General Division. It considered all the facts and came to the conclusion that the Respondent's employment did not end because of misconduct.

[23] The Respondent argues that the General Division took into account the actions of the employer, which did not dismiss the Respondent immediately when she did not perform her work duties the day after her birthday. The employer allowed her to finish her work period (from June 5 to June 30, 2016) before ending her employment. In addition, on the Respondent's Record of Employment, the employer indicated code "K –Other" and not code "M – Dismissal," as the reason for termination of employment.

[24] The General Division also considered the illness of the Respondent, who underwent two rounds of treatment and was monitored by a treating physician who prescribed her medication for her illness.

[25] The Respondent is of the opinion that it is a question of assessing the evidence, and that the General Division does not commit an error of law when it assesses all the facts before the Tribunal.

**Did the General Division err by finding that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the Act*?***

[26] Based on the evidence before it, the General Division found that the Respondent was not in control of her state at the time of the facts that led to her dismissal, and that this conduct did not constitute misconduct on the Respondent's part in the sense that her conduct was not premeditated or intentional.

[27] It also found that the Respondent's conduct on June 5, 2016, was certainly reprehensible, but that since that day had been voluntarily added to her schedule, it was not part of the regular work schedule she had agreed to follow, and that the breach was not of such scope that the Respondent could normally foresee that it would be likely to result in her dismissal. Even the employer had not considered misconduct as the reason for termination on the Record of Employment.

[28] With all due deference, the General Division's decision cannot stand. The Tribunal finds that the General Division erred in law in making its decision and that it did not consider the evidence before it. Therefore, the Tribunal is justified to intervene and render the decision that should have been rendered.

[29] Misconduct, under section 30 of the Act, has been defined as conduct that is willful, meaning that it is conscious, deliberate, or intentional. Furthermore, the notion of misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent or be premeditated [*Canada (Attorney General) v. Secours*, [1995] F.C.J. No. 210 (QL)].

[30] In this case, the Respondent's employment ended on June 30, 2016, because she had reported for work on June 5, 2016, under the influence of alcohol and unable to perform her duties, despite several previous warnings from the employer and agreements signed by her. Since the Respondent could not perform her duties, she breached an essential condition of her work contract and was dismissed.

[31] On more than one occasion, the Federal Court of Appeal has established that an employee who impairs the performance of the duties owed to their employer fails to meet an explicit employment contract condition [*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Canada (Attorney General) v. Wasylka*, 2004 FCA 219; *Canada (Attorney General) v. Cooper*, 2003 FCA 389; *Casey v. Canada (Employment Insurance Commission)*, 2001 FCA 375; *Canada (Attorney General) v. Cartier*, 2001 FCA 274; *Canada (Attorney General) v. Turgeon*, A-582-98].

[32] The Tribunal finds that even though the Respondent voluntarily agreed to go to work on June 5, 2016, and this was not her regular work schedule, that is irrelevant to the Respondent's agreement to go to work to perform the tasks and duties assigned by the employer.

[33] In addition, even though the employer did not dismiss the Respondent at the time of the last incident and indicated a reason other than dismissal on the Record of Employment, the evidence before the General Division clearly shows that the employer dismissed her because she had failed to meet the specific conditions of her employment contract.

[34] However, 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 [*Canada (Attorney General) v. Bigler*, 2009 FCA 91].

[35] It is true that the Respondent established before the General Division that she had an alcohol addiction. However, the General Division's finding that the Respondent had an alcohol addiction does not in itself override the voluntary nature of the consumption of alcohol and render the exclusion set out in subsection 30(1) of the Act inapplicable to the Respondent (*Bigler*).

[36] The evidence before the General Division does not support the conclusion that the Respondent's behaviour was involuntary, or that her alcohol consumption was not deliberate or conscious.

[37] There is no medical opinion or evidence from the treatment centres that could possibly confirm that the Respondent's conduct was not deliberate.

[38] Rather, the evidence demonstrates that the Respondent was conscious of her actions, the effects of her alcohol consumption, and the consequences that could or would result.

[39] The Respondent volunteered to work on Sunday, June 5, 2016, knowing that she would be celebrating her birthday the night before and that she might have difficulty working on Sunday morning, but "she thought that since it was her birthday, the employer would overlook it and would not take it into account." Nevertheless, she knew that her job was in jeopardy. In light of this statement, the General Division could not conclude that the Respondent's actions were involuntary.

[40] The Tribunal sympathizes with the Respondent's situation, but it must allow the appeal in order to conform to the teachings of the Federal Court of Appeal.

**CONCLUSION**

[41] The appeal is allowed, the General Division's decision is rescinded, and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division