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

Citation: *A. B. v. Canada Employment Insurance Commission*, 2018 SST 181

Tribunal File Number: AD-17-614

BETWEEN:

A. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 26, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is granted.

OVERVIEW

[2] The Applicant's (referred to below as the Claimant) workplace behaviour on February 22, 2016, caused his employer to suspect he was under the influence of drugs. The results of an employer-administered drug test were inconclusive, but the Claimant was still suspended for five days. He was informed that he would have to pass a second drug test on his return to work. The Claimant returned to work on March 1, 2016, and was again tested for drugs by an independent service. The results were positive for marijuana and cocaine, and the employer terminated the Claimant's employment.

[3] The Respondent (referred to as the Commission) found that the Claimant lost his job because of his own misconduct and the Claimant was therefore disqualified from receiving benefits. On appeal, the General Division agreed with the Commission. It concluded that the Claimant knew or ought to have known that termination was a real possibility as a result of his taking drugs and failing a drug test.

[4] The leave to appeal application was filed late but I have exercised my discretion to allow the application to proceed.

[5] I am concluding that the Claimant has a reasonable chance of success on appeal. The impugned conduct is that the Claimant had drugs in his system at the time of a drug test. The General Division found the Claimant to have violated the employer's zero tolerance policy by having drugs in his system and failing a test. The General Division's characterization of the employer's policy as "zero tolerance" appears to have factored significantly into the General Division's finding that the Claimant knew or ought to have known that, if he failed a drug test, he might be terminated. However, the General Division may have misunderstood or ignored that evidence which suggested that the policy may not have been zero tolerance as it related to drug testing results. This may have influenced the General Division's determination that the

Claimant's conduct was willful. I have found that the General Division may have based its finding on a misapprehension of the facts.

PRELIMINARY MATTER

Late application

[6] The application for leave to appeal is late. Subsection 57(1) of the *Department of Employment and Social Development Act* (DESD Act) requires the leave application to be filed within 30 days after the date on which it is communicated to the appellant. In this case, the General Division decision was issued on August 11, 2017, and the Claimant called the Tribunal on August 18, 2017, to say he would be appealing. While subsection 19(1) of the *Social Security Tribunal Regulations* deems the communication date to be 10 days after the day on which the decision is mailed to the party, this is a presumption that may be challenged by evidence to the contrary. From the record of the telephone call on August 18, 2017, I accept that the decision was communicated to him by August 18, 2017, at the latest.

[7] This means that the leave application would need to be filed by September 18, 2017 (September 17 is a Sunday). The application was considered complete on November 14, 2017. Therefore, I conclude that the application was filed late.

[8] I have discretion to allow an extension of time under subsection 57(1) of the DESD Act, but I am required to exercise that discretion in a principled manner. The factors relevant to the exercise of my discretion are as follows:

- That the Claimant demonstrates a continuing intention to pursue the application or appeal;
- That there is a reasonable explanation for the delay;
- That there is no prejudice to the Minister in allowing the extension; and
- That the matter discloses an arguable case.[1]

[9] I accept that the Claimant demonstrated a continuing intention to pursue the application. The Claimant called on September 7, 2017, to express his intention to seek leave to appeal, and he faxed a notice of appeal form to the Tribunal on the same day. Unfortunately, his application was incomplete and he was advised by the Tribunal that his application would not be

[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

considered late if he provided complete information by October 17, 2017. The Claimant filed additional information on October 17, 2017, but his application was still not considered complete. A second letter dated October 25 that was mailed to him by the Tribunal requested a declaration that the information in his application was true. The Claimant called to ask about this on November 14, and submitted the requested declaration the same day. This factor supports granting an extension.

[10] The Claimant has not provided an explanation for why his application was late, because he filed his original application on time and would not have known it was incomplete. When he was asked to send in additional materials, he was told his application would not be considered late if they were received by October 17, 2017. Given that he did send in additional materials by that date, he was entitled to rely on the information he received that it would not be considered late, so he did not provide an explanation. When he provided the final piece, the signed declaration, he was clearly late to complete his application, but he was not informed in either the letter of October 25 or the telephone conversation that he should explain why he filed late.

[11] I could ask the Claimant for submissions as to why the application was late, but I see no need. The circumstances suggest to me that the Claimant had attempted to comply with the various technical requirements of a complete application, but that he had difficulty understanding what was required. I accept that this difficulty negotiating the process is the explanation for the late application and I further find it reasonable. The Claimant acted in a reasonably diligent manner in attempting to comply with the application requirements. This factor supports granting an extension.

[12] In all, the Claimant is less than a month late in providing a complete application. I find the prejudice to the Claimant in refusing the extension to be significantly greater than any prejudice to the Commission. The length of the delay is not so significant as to interfere with the Commission's ability to investigate or answer the Claimant's application.

[13] The final factor is whether the matter discloses an arguable case. The arguable case test has been held to be roughly equivalent to the reasonable chance of success on appeal, which is the question I must determine in the leave to appeal application. If I find there is an arguable

case I will allow the extension of time to file the leave to appeal application and I will also grant leave to appeal.

ANALYSIS

General principles

[14] The General Division is required to consider and weigh the evidence that was before it and to make findings of fact. It is also required to consider the law. The law would include the statutory provisions of the *Employment Insurance Act* (Act) and the *Employment Insurance Regulations* (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must apply the law to the facts to reach its conclusions on the issues that it must decide.

[15] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a decision of the General Division only if the General Division has made certain types of errors, which are called "grounds of appeal." According to subsection 58(1) of the DESD Act, 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
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> (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.

[16] In order to grant the application for leave to appeal, I must be satisfied that the appeal has a reasonable chance of success on one or more grounds of appeal.

[17] The General Division considered whether the Claimant was disqualified from receiving benefits because he was terminated for misconduct, as required by section 30 of the Act. According to the courts, conduct can be found to be "misconduct" only if it is

- willful, i.e. in the sense that the acts that led to the dismissal were conscious, deliberate or intentional;
- conduct that the claimant knew or ought to have known would impair the performance of his duties owed to his employer and that, as a result of the conduct, dismissal was a real possibility.[2]

Issue: Is there an arguable case that the General Division erred in basing its decision on a finding that the Claimant ought to have known that he could be terminated if he failed a drug test?

[18] The Claimant has argued that the General Division erred in that it did not give sufficient consideration to the memo from one of the employer's human resources representatives. This memo stated that what employees do on their own time is their own business. Because there is no suggestion that the Claimant consumed drugs at work or was impaired at work, I understand the Claimant's application to be a challenge to the General Division's finding that he knew or ought to have known he could be terminated for failing the test. The Claimant appears to be suggesting, as a ground of appeal, that the General Division may have based its decision on an erroneous finding of fact.

[19] The General Division is not perfectly clear on the manner in which the Claimant's conduct "impaired his performance" such that he knew he could be terminated. The General Division acknowledges that the Claimant was not impaired and was not dismissed because of impairment (paragraph 50). Rather, he was dismissed because of his positive test. The General Division found at paragraph 47 that the Claimant's "consequential failing of a drug test impeded the carrying out of his obligations". My understanding, therefore, is that the General Division considers that the Claimant had a duty to submit to and pass the drug test, and that this is the duty that was impaired.

[20] The law would require the Claimant to have understood that there was a real possibility that he could be terminated as a consequence of failing the drug test. The General Division's conclusion on this matter appears to be largely based on its understanding that the Claimant knew that the employer had a "zero-tolerance policy". At paragraph 50, the General Division reviews some of the Claimant's testimony and the corroborative employer memos to the effect that the employer was unconcerned with what employees do at home so long as it does not

[2] *Canada (Attorney General) v. Lassonde*, 2009 FCA 333.

affect their work: “What you do on your own time is your business”(GD3-71). However, the General Division finds that this does not mean that the zero-tolerance policy does not still apply at work.

[21] However, the General Division does not define what it means by “zero tolerance” and neither do the employer policies. According to Merriam-Webster’s online dictionary[3] the term “zero tolerance” means giving *the most severe* punishment possible to *every* person who commits a crime or breaks a rule. The Free Dictionary defines “zero tolerance” as “A law, policy, or practice that provides for the imposition of severe penalties for a proscribed offence or behaviour *without making exceptions* for extenuating circumstances.”[4]

[22] Only one part of the employer’s drug and alcohol policy in evidence strictly meets such a definition: “[A]n employee will be dismissed if the employee is witnessed to be *openly engaging in the consumption of alcohol or drugs in a public place, employer properties or work sites* and/or *during work hours*.” (emphasis added)

[23] The policy also includes provisions such as the following: “Any employee reporting for work *in the possession* of illegal drugs, or alcohol will be refused work and is liable to be terminated”; “The use, sale, unlawful possession, manufacture or distribution of [drugs or alcohol} *during work hours* […] is strictly prohibited.” (emphasis added)

[24] None of the above policies apply to the Claimant’s circumstances. The only policy that applies is the impairment policy: Employees who are suspected of either being under the influence of alcohol or drugs or who are suffering the after effects of these items will be asked to leave the job site immediately and will not be allowed to return until the symptoms of impairment are deemed to be dissipated and they must pass a drug and alcohol test.

[25] Something like this happened to the Claimant. He is said to have made some sort of lewd gesture and comment that caused the employer to suspect impairment. After administering an inconclusive drug test, the employer suspended the Claimant for a week.

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[3] www.merrium-webster.com/dictionary/zero%20tolerance?src=search-dict-box, accessed February 9, 2018, at 6:22 pm MST.
[4] www.freedictionary.com/zero+tolerance, accessed February 9, 2018, at 6:01 pm MST.

[26] Reading the impairment policy, it would appear that the imposition of a *suspension* based on suspicion of impairment is non-discretionary, or what might be described as "zero tolerance." However, the policy does not stipulate the consequences if an employee should fail to pass a drug test when he or she returns to work after the suspension. The policy could easily be read to delay the employee's return until the employee *can* pass the test. So far as employees submitting to drug testing and the discovery of drugs in their systems, the drug policy does not read as a "zero tolerance" policy.

[27] Furthermore, the Claimant's evidence at paragraph 50 does not support the application of the policy as "zero tolerance" *as it is applied to the results of drug tests*. I appreciate that there is some evidence in the form of a telephone log entry of a conversation with an employer representative that states that all employees are told they have a zero-tolerance policy for having drugs in their system (GD3-18). However, the General Division does not appear to have analyzed the actual written policy supplied, or the Claimant's evidence, to determine what the employer's expectations were, or to have attempted to reconcile the conflict between the statement at GD3-18 and the other evidence. In fact, the General Division made no explicit finding that the employer's policy was a "zero-tolerance policy", either as it was written, communicated, or practised.

[28] If the General Division misapprehended the employer policy as being a "zero-tolerance" policy for the purpose of drug test results, this could well have affected its decision. The existence of such a policy would seem to have been important to the determination that drug consumption amounts to misconduct, when the consumption is not shown to have taken place on the employer's premises or during work hours, or to have impacted work performance otherwise. I therefore conclude that the General Division may have made based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it as set out in paragraph 58(1)(*c*) of the DESD Act.

[29] I am satisfied that there is an arguable case. Having considered all of the relevant factors, I will exercise my discretion and allow an extension of time. The application for leave to appeal may proceed.

[30] Having found an arguable case, I also find that the application has a reasonable chance on appeal.

CONCLUSION

[31] The application for leave to appeal is granted.

[32] At the appeal hearing on the merits, the Claimant is free to argue that the appeal should be allowed on alternative or additional arguments or grounds.

[33] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division