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

Citation: *R. Y. v. Canada Employment Insurance Commission,* 2018 SST 188

Tribunal File Number: AD-17-906

BETWEEN:

**R. Y.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 27, 2018

Canada

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant (Claimant) was terminated from his employment in March 2016 as a result of repeated unexcused absences, a failure to inform the employer that he would be absent, and a failure to explain his absences. The Claimant acknowledges that he is an alcoholic and that he had suffered a relapse in early 2016. This was the reason for his several absences in February and March 2016.

[3] When the Claimant applied for Employment Insurance benefits, the Canada Employment Insurance Commission (Commission) denied his claim for benefits on the basis that he had lost his employment as a result of his own misconduct. The Claimant appealed to the General Division of the Social Security Tribunal, arguing that the actions that resulted in his dismissal were not wilful. The General Division accepted that the Claimant suffered from alcoholism but found that his consumption of alcohol was not involuntary, and that he was aware that taking a drink might result in a relapse and the consequential loss of his employment. The Claimant now seeks leave to appeal the General Division decision.

[4] I do not find that the Claimant has a reasonable chance of success on appeal. In arguing that the General Division misunderstood the nature of alcoholism, the Claimant has only restated his position before the General Division that he did not consciously or voluntarily take a drink. He has not identified how the General Division's finding was perverse or capricious or made without regard to the material before it.

[5] In addition, the General Division is required to apply the law and this includes the judicial interpretations of "misconduct" and of the meaning of actions that are "conscious" and "voluntary." The court cases cited by the General Division member have interpreted these terms in the context of alcoholism and other addictive behaviour. The courts have not accepted that

the fact of alcoholism is sufficient to displace the voluntariness of the consumption of alcohol. Nothing in the circumstances of this case suggests that those interpretations should not apply.

## ISSUES

[6] Is there an arguable case that the General Division's determination that the conduct was not involuntary was made in a perverse or capricious manner or without regard to the material before it?

[7] Is there an arguable case that the General Division erred in law in interpreting the Claimant's conduct as voluntary or conscious?

## ANALYSIS

### General principles

[8] 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 apply the law. The law would include the statutory provisions of the *Employment Insurance Act* (Act) and the *Employment Insurance Regulations* that are relevant to the issues under consideration, as well as 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 are before it.

[9] 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 General Division decision only if the General Division has made certain types of errors, which are called "grounds of appeal."

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that 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; and

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.

[11] Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division would otherwise disagree with the General Division's conclusion and the result.

[12] At this stage, I must find that there is a reasonable chance of success on one or more grounds of appeal in order to grant leave to appeal and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1]

[13] The Claimant brought his application for leave to appeal on the basis that the General Division made an "important error regarding the facts": which is intended as a reference to s.58(1)(c) of the DESD Act above. His explanation for asserting this ground of appeal reveals his basic disagreement with the General Division's conclusion. However, it does not disclose any specific error.

[14] As a result, I caused a letter to be sent to the Claimant dated December 19, 2017, that asked the Claimant to explain in more detail on what grounds he is appealing and why he believes the General Division to have been in error. The Claimant did not respond. Following direction from the Federal Court,[2] I have nonetheless gone beyond the application to review the record for possible errors.

[15] To find that the Claimant was dismissed due to his own misconduct, the General Division would need to find that the Claimant engaged in certain conduct, that he lost his employment due to that conduct, and that the conduct can be considered misconduct under the Act. Misconduct is defined as conduct that is conscious, deliberate or intentional,[3] that constitutes a breach of an express or implied duty resulting from the contract of employment,[4] and that is such that the claimant knew or ought to have known it could result in his dismissal.[5]

---

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41
[2] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615; *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[3] *Canada (Attorney General) v. Lemire*, 2010 FCA 314.
[4] Ibid.
[5] Supra, note 3.

The General Division properly considered each of these elements and found that the Claimant was dismissed for his misconduct.

[16] There is no dispute as to the essential fact of the Claimant's alcoholism or that he suffered a relapse in January 2016. Nor is there a dispute that he repeatedly missed work without being excused, that he gave no notice or explanation for many of his absences, and that he was ultimately terminated as a result. The Claimant has not argued that the General Division ignored or misunderstood the evidence in finding these facts, and I do not find any error. The Claimant disputes only the conclusion that his conduct was conscious or voluntary.

**Issue 1: Is there an arguable case that the General Division's determination that the conduct was conscious or voluntary was made in a perverse or capricious manner or without regard to the material before it?**

[17] There is no arguable case that the General Division's finding that the Claimant's conduct in taking a drink was conscious or voluntary was made in a perverse or capricious manner or without regard to the material before it.

[18] The Claimant argues that he is an alcoholic and therefore that his drinking cannot be considered voluntary. In his application for leave to appeal, he states that he did not consciously and voluntarily decide to drink, and that he cannot explain why he took the first drink. He also seems to be saying that he used the term "bad decision" loosely in his testimony, and that he did not mean to imply that he had made a deliberate decision.

[19] I understand that the Claimant's purpose is to show that the General Division misunderstood his evidence, but I may consider only whether the General Division made an error on the basis of the evidence that was before it. An appeal before the Appeal Division is not an opportunity for the Claimant to revise or recast his testimony on the basis that it had been held to his prejudice at the General Division.

[20] The General Division was entitled to attach some significance to the actual words used by the Claimant in his testimony. This does not amount to an error. Furthermore, there is case law that would have supported the General Division's decision even if the General Division had not interpreted the Claimant's testimony as an admission of consciously deciding to take a drink

[21] For example, in *Mishibinijima v. Canada (Attorney General)*[6] the only evidence was the claimant's testimony that he had an alcohol problem and that he was unable to control this problem. The Court concluded as follows:

> 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.

[22] As in *Mishibinijima*, the Claimant's testimony that his consumption of alcohol was not conscious or voluntary is the only evidence on this point. It is insufficient, at least in part, because it is an inexpert opinion. He is not in a position to say whether the disease of alcoholism may negate conscious or voluntary action and, in particular, whether his own alcoholism was such that he was not "conscious" of taking the drink from which his January 2016 relapse followed. This is a medical question requiring a medical opinion. While there was some medical evidence before the General Division, it served only to confirm the Claimant's diagnosis of alcoholism. There was no medical evidence to the effect that taking that drink was an unconscious or involuntary action.

[23] I find no arguable case that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence before it (paragraph 58(1)(*c*) of the DESD Act).

**Issue 2: Is there an arguable case that the General Division erred in law in interpreting the Claimant's conduct as conscious or voluntary?**

[24] The General Division did not err in law in its understanding of the legal definition of "conscious" or "voluntary" for the purpose of assessing misconduct.

[6] *Mishibinijima v. Canada (Attorney General)*, 2017 FCA 36.

[25] The Claimant has argued that such terms are inapplicable to his action in taking "that first drink" (presumably the drink that precipitated his relapse in January 2016) and his submissions could be taken to imply that he believes that the General Division misunderstood the legal meaning that may be ascribed to "conscious" or "voluntary." However, the General Division applied the law as set out in *Canada (Attorney General) v. Bigler*[7] and *Canada (Attorney General) v. Wasylka.*[8] These decisions and others[9] reject the notion that evidence of alcoholism or drug addiction is sufficient to establish that a claimant's actions are not conscious, voluntary or intentional.

[26] The General Division is required to apply the law, including decisions of higher courts that have determined similar matters. The General Division decision is in line with those decisions. Therefore, I am not satisfied that there is an arguable case that the General Division erred in law under paragraph 58(1)(*b*) in its interpretation of misconduct, or in following jurisprudence that rejects proof of alcoholism as sufficient to establish that conduct is involuntary, for the purpose of assessing misconduct.

## CONCLUSION

[27] I find no reasonable chance of success on appeal on any grounds.

[28] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

| REPRESENTATIVES: | R. Y.,<br>Self-represented |
|---|---|

[7] *Canada (Attorney General) v. Bigler*, 2009 FCA 91.
[8] *Canada (Attorney General) v. Wasylka*, 2004 FCA 219.
[9] Supra, note 6; *Canada (Attorney General) v. Turgeon*, [1999] F.C.J. No. 1861: *Casey v. Canada (Employment Insurance Commission)*, 2001 FCA 375.