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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. B. Y.*, 2018 SST 283

Tribunal File Number: AD-18-37

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

B. Y.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: March 27, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal the decision rendered by the General Division of the Social Security Tribunal of Canada on December 22, 2017, is granted.

OVERVIEW

[2] The Applicant, the Canada Employment Insurance Commission, determined that the Respondent, B. Y., lost his job as a result of his own misconduct. As a result, the Respondent's claim for Employment Insurance benefits was refused.

[3] The Respondent argues that his acts were not willful, that he was ill (alcoholism), that his relapse was not intentional, and that his relapse cannot be characterized as misconduct.

[4] The Applicant appealed the Commission's decision. The General Division found that the Respondent did not lose his employment as a result of his own misconduct. It found that the Respondent did not deliberately come to work intoxicated and that this event cannot be considered "voluntary" or "intentional."

[5] The Applicant argues in its application for leave to appeal that the General Division erred in law, as well as in fact and law, specifically by erring in its interpretation of case law regarding the issue of misconduct resulting from alcoholism and by failing to consider the evidence adequately.

[6] The appeal has a reasonable chance of success because there is an arguable case that the General Division erred in its interpretation and application of case law.

ISSUE

[7] Is there an arguable case that the General Division erred in its interpretation and application of case law?

ANALYSIS

[8] An applicant must be granted leave to appeal a decision rendered by the General Division. An appeal may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.[1]

[9] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there a ground of appeal on which the appeal could succeed?[2]

[10] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error. The only reviewable errors are the following:[4] the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[11] Though the Applicant has presented more than one ground of appeal, the Appeal Division does not need to respond to all of the grounds presented. Different grounds of appeal may be interdependent, so it may be impracticable to analyze each ground separately. One ground of appeal may be sufficient to justify granting leave to appeal.[5] As a result, I will address one possible error that warrants further review and not every possible error.

Is there an arguable case that the General Division erred in its interpretation and application of case law?

[12] According to the Applicant, the Respondent lost his job because he reported to work inebriated, which constitutes misconduct. However, the General Division erred in its

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[1] *Department of Employment and Social Development* Act (DESD Act), at paras. 56(1) and 58(3).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115 at para. 12; *Murphy v. Canada (Attorney General)*, 2016 FC 1208 at para. 36; *Glover v. Canada (Attorney General)*, 2017 FC 363 at para. 22.
[3] DESD Act at para. 58(2).
[4] DESD Act at para. 58(1).
[5] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

interpretation of the legal concept of misconduct and did not correctly apply the case law principles regarding misconduct resulting from alcoholism.

[13] In *Mishibinijima*[6] and *Bigler*,[7] the Federal Court of Appeal set out principles regarding misconduct resulting from alcoholism. The General Division cited these two cases, but it did not explain their application, or non-application, regarding the Respondent's situation.

[14] In *Mishibinijima*, the Federal Court of Appeal noted that it must have evidence before it that confirms a claimant's claim that there was no misconduct on his part due to his alcoholism; examples of required evidence includes a medical report, participation in an Alcoholics Anonymous program, or other evidence that might confirm that the behaviour was not deliberate. The claimant testified that his behaviour was not deliberate, but the Court found that the evidence was "very thin" and "insufficient to confirm [...]"[8]

[15] In *Bigler*, the Federal Court of Appeal determined that "[m]isconduct, under section 30 of the Act, has been defined as conduct that is wilful, meaning conscious, deliberate or intentional. 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." The Umpire allowed the observation that the claimant had a serious problem with alcohol without a medical report; the Umpire relied on deduction and the evidence. This conclusion is erroneous and the Court declared the following:

> "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 and to make the exclusion contained in subsection 30(1) of the Act inapplicable to the respondent. There was no medical evidence relating to the respondent's alcoholism or to whether the circumstances in which Mr. Bigler started to drink following his mother's death effectively made his consumption of alcohol at that time involuntary."[9]

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[6] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[7] *Canada (Attorney General) v. Bigler*, 2009 FCA 91.
[8] *Mishibinijima* at paras. 33 to 36.
[9] *Bigler* at paras. 6 to 8.

[16] The General Division noted that the Respondent came to work on December 30, 2016, after consuming alcohol, but it also noted that the evidence did not show that the Respondent was inebriated.[10] It found that it was the Respondent's medical condition and not the alcohol consumed that [translation] "took precedence in this case."[11]

[17] The General Division seems to not have addressed case law principles regarding misconduct resulting from alcoholism in view of this conclusion, but it is not entirely clear. The General Division relied on proof stating that the Respondent had a problem with alcohol and that he had undergone treatment for this problem. Did the General Division err by not analyzing the situation while it applied this case law?

[18] It would be premature for the Appeal Division to decide whether the General Division erred in its interpretation and application of case law, but there is a ground upon which the appeal might succeed.

[19] For these reasons, I find that there is an arguable case that the General Division erred in law.

CONCLUSION

[20] **Leave to appeal is granted.**

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

[22] I invite the parties to make submissions on the following questions: whether a hearing is appropriate; if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division

[10] General Division decision at paras. 29 and 30.
[11] *Ibid.* at para. 37.

REPRESENTATIVE(S):	A. C., Canada Employment Insurance Commission