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

Citation: *A. B. v. Canada Employment Insurance Commission*, 2018 SST 668

Tribunal File Number: AD-17-614

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 12, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. B. (Claimant), was dismissed from his employment for failing a drug test. The Respondent, the Canada Employment Insurance Commission (Commission), denied his application for Employment Insurance benefits on the basis that the Claimant had been dismissed for misconduct. It maintained its decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal.

[3] The General Division agreed with the Commission that the Claimant had been dismissed for misconduct and it dismissed his appeal. The Claimant appealed again and the matter is now before the Appeal Division.

[4] The appeal is allowed. The General Division erred by misapprehending the nature of the employer's policy and the Claimant's understanding of the policy, and this factored into its finding that the Claimant knew or ought to have known that his conduct breached a duty owed to his employer and that dismissal was a real possibility.

ISSUES

[5] Did the General Division base its decision on an erroneous finding of fact that the Claimant knew or ought to have known that his conduct in consuming marijuana would impair the performance of his duty to his employer, and that dismissal was a real possibility, by doing the following?

a) misapprehending the Claimant's admission that he knew about the employer's zero-tolerance policy; or
b) misapprehending the employer's drug and alcohol policy.

ANALYSIS

Standard of Review

[6] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are similar to the usual grounds for judicial review, suggesting that the same kind of standard-of-review analysis might also be applicable at the Appeal Division.

[7] I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. In *Canada (Citizenship and Immigration) v. Huruglica*,[1] the Federal Court of Appeal was of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guide the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[8] *Canada (Attorney General) v. Jean*[2] pertained to the judicial review of an Appeal Division decision. The Federal Court of Appeal was not required to rule on the applicability of the standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[9] Certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] but I am nonetheless persuaded by the reasoning of the Court in *Huruglica* and *Jean*. I will therefore consider this appeal by referring only to the grounds of appeal set out in the DESD Act.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] See, for example, *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; and *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167

General Principles

[10] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[11] By way of contrast, the Appeal Division cannot intervene in a decision of the General Division unless it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s. 58(1) of the DESD Act, and set out below:

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.

Introduction to the issues

[12] The General Division's finding of misconduct was based on the Claimant's failure of a drug test on March 1, 2016,[4] following a one-week suspension for suspicion of impairment on February 23, 2016, and his subsequent return to work.

[13] The General Division explicitly stated that whether the Claimant was or was not impaired on February 23, 2016 (the date that he was first tested) was not under consideration because the Claimant was not dismissed on that day.[5] As a result, the General Division did not consider whether the Claimant had given the employer reason to suspect he was impaired on February 22 or 23, or whether testing the Claimant for drugs on February 23, 2016, was in accordance with the employer's policy.

[4] General Division decision, para. 52
[5] *Ibid*., para. 40

[14] The General Division relied on the Claimant's admission to drug use to establish the conduct alleged to be misconduct. Although the General Division made no specific finding as to the type of drugs the Claimant consumed or when he consumed them, the Claimant admitted only to smoking marijuana a "couple of weeks" prior to his February 23 suspension. In his testimony, the Claimant specifically denied using any drugs other than marijuana, and he denied smoking drugs at any time from the time of this admitted drug use until his drug test on March 1. This evidence was not rejected by the General Division and I therefore presume that the General Division accepted the Claimant's testimony on his drug use.

[15] It is clear on the face of the General Division file that the Claimant did not know until February 23 that he would have to take a test on March 1. Accepting that the Claimant did not consume drugs between the time he knew about the March 1 test and when he took that test, the Claimant's ability to anticipate the March 1 test **as of February 23** is not relevant to the determination of misconduct.

[16] For the Claimant to know, or to be presumed to know, that his consumption of marijuana would impair the performance of his duties or breach an obligation to the employer, the Claimant would also have to know (or it must be reasonable to presume that he knew), at the time of the conduct, that such a duty or obligation existed. In other words, he would have to know, at the time he smoked marijuana, that he would be required to pass a drug test at a time when he could expect to still have drugs in his system.

[17] The General Division concluded that the Claimant ought to have known that his conduct (consciously smoking marijuana[6]) was such as to impair the performance of the duties owed to his employer (passing a drug test) and that, as a result, dismissal was a real possibility.

[18] In finding that the Claimant knew, or ought to have known, that his conduct impeded the carrying out of his obligations to his employer, the General Division relied on the Claimant's admission that he knew of the employer's zero-tolerance policy and that he knew he must pass a drug test.[7]

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[6] *Supra*, note 4, para. 5
[7] *Supra*, note 4, para. 47

The existence of a duty to the Employer

[19] The Claimant's expectation of the March 1 test is not relevant to the extent that it arose out of his February 23 suspension, as noted above. If he had a job duty or an obligation to his employer to pass a test, that duty or obligation would have had to have arisen from the terms of his employment contract, from the policies or practices communicated to employees including the Claimant, or from some other specific communication by the employer or an agent of the employer. Some of the evidence that was before the General Division is reviewed below.

Formally described obligations

[20] A written employment contract was not in evidence; however, the employer policy considered by the General Division (GD3-25) describes employee duties and obligations. The policy speaks to "drug testing," but only in the context of drug impairment. The policy notes that a drug test will be administered in the event of suspicion of impairment, following a period of suspension, with the apparent purpose of preventing employees from returning to work impaired.

[21] The policy does not authorize random drug testing, or testing under any circumstance except for the purpose of permitting an employee to return to work after a suspension for suspicion of impairment. It includes a provision, to which the General Division did not refer, which states that the employer "reserves the right to implement a drug and alcohol testing program after issuing a 60 day written and posted notice to its employees outlining the intent to do so." There was no evidence that the employer had issued notice of intent to implement a drug-testing program.

Employer practices

[22] There was no evidence before the General Division of a general practice of random or periodic drug testing by the employer or at the employer's workplace.

Other communications

[23] Other evidence of communications between the employer or its agents and its employees is in the form of notes from safety meetings, or disciplinary communications directed to the Claimant specifically. In some cases, the safety meetings are stated to be in relation to the zero-

tolerance policy on drugs and alcohol. The disciplinary communications involving the Claimant are unrelated to drug use or testing. None of the notes from safety meetings or the individual communications with the Claimant reference a practice or policy of random or periodic drug testing for employees.

[24] The only mention in the General Division file of any communication related to the employer having a concern with employees having drugs "in their system" is a statement from the Human Resource Manager (L. H.) to the Commission that the employees are informed at their orientation that the employer has a zero-tolerance policy for drugs in the system.[8] L. H. also informed the Claimant specifically that he would be tested for drugs at the time when he returned to work from his workers' compensation claim/injury in October 2015.

[25] L. H. told the Commission that the Claimant had to go through "random drug testing" after his return from his workers' compensation claim.[9] However, the General Division did not refer to evidence of random testing in its analysis, or rely on it to find that the Claimant knew or ought to have known that his conduct would impede the carrying out of his obligations to his employer.[10] The principal justification for the General Division decision was the existence of a "zero tolerance" policy.

[26] While the General Division does not state that the employer's policy was in fact "zero tolerance", the General Division notes that "the employees were also repeatedly reminded about the importance of the zero tolerance drug/alcohol policy" and the decision refers repeatedly to the Claimant's awareness of the zero-tolerance policy. The General Division also relies on the Claimant's knowledge of the zero-tolerance policy to find that he "willfully disregarded the effects his actions would have on his job performance."[11] Specifically, the General Division found that "the Claimant had drugs in his system and therefore did not pass a drug test, which in turn, violated the employer's policy and he was dismissed for this reason."[12]

[27] Therefore, it is implicit that the General Division found the policy to be zero-tolerance, and that this "zero tolerance" extends to drugs in the system. The zero-tolerance policy is the

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[8] GD3-18
[9] GD3-18
[10] *Supra*, note 4, para. 47
[11] *Supra*, note 4, para. 52
[12] *Supra*, note 4, para. 42

reason that the General Division found that the Claimant knew or should have known that his action was misconduct, and the zero-tolerance policy is also the reason the General Division found that he knew or should have known that he would be dismissed.

Issue 1: Misapprehension of the Claimant's Admissions

[28] The General Division relied on what the Claimant *admitted* to knowing about the employer's drug policy. It stated that the Claimant admitted to knowing of the employer's "zero tolerance" policy.[13] However, while the Claimant did admit to the existence of an employer "drug and alcohol policy," as recorded in the decision,[14] there is no record in the file documentation or the audio recording of the hearing showing that the Claimant characterized the employer's policy as a "zero-tolerance" policy or acknowledged that it was "zero-tolerance" for positive drug tests, or drugs in his system.

[29] The Claimant testified that he knew he could be fired if he tested positive, but this was in relation to the testing in October 2015 that L. H. had warned him to expect. The Claimant also testified more generally that he thought he could be suspended but that he did not expect to be terminated if he were found to have drugs in his system at work. This evidence does not imply an admission of a zero-tolerance policy. To the contrary, it suggests that he did not understand the policy to be zero-tolerance, at least in regard to whether he could be dismissed.

[30] The General Division also stated that the Claimant "admittedly knew he was under the employer's scrutiny and that he could be tested for drugs at any time."[15] I have not found any such admission on the file or in the audio recording of the hearing. The Claimant did not dispute that he knew on February 23, when he was suspended, that he would be tested on March 1, and he testified that he consciously refrained from consuming drugs in anticipation of that test. However, the Claimant did not admit to being under any specific scrutiny related to his drug use or to a belief that he could be tested for drugs "at any time."

[31] The Claimant testified only that he had been told by some co-workers to be careful because he was being set up to be fired. This testimony followed from a discussion of the series

[13] *Supra*, note 4, paras. 47 and 52 (see also para. 46, where it is said that he "does not dispute" that he knew of the zero-tolerance policy)
[14] *Supra*, note 4, para. 28
[15] *Supra*, note 4, para. 49

of complaints that had been made against him by what he describes as a group of L. H.'s hired friends. These complaints concerned the Claimant's interactions with other employees, but were not related to drug use.

[32] I find that the General Division misapprehended the nature of the Claimant's admissions. This misunderstanding factored into the General Division's finding that when he consumed drugs, the Claimant knew or ought to have known that he was breaching an obligation to his employer to pass a test.

[33] Therefore, the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner, under s. 58(1)(*c*) of the DESD Act.

Issue 2: Misapprehension of the employer's drug and alcohol policy

[34] The General Division also relied on the existence of the employer's drug and alcohol policy, which it termed a "zero-tolerance" policy, to determine the Claimant's duty or obligation to the employer, and what the Claimant knew or ought to have known about how his conduct would impair his performance of that duty and about the possibility of termination. However, the General Division did not examine the evidence to determine whether the policy was zero-tolerance in theory or in application.

The formal drug and alcohol policy

[35] The General Division twice quoted the employer's policy to the effect that employees suspected to be under the influence or suffering the after-effects of use of alcohol or drugs "will not be allowed to return until the symptoms of impairment are deemed to be dissipated and he/she must pass a drug and alcohol test"[16] (underlining in original). While it is clear that the Claimant did not pass the March 1 test, the General Division did not articulate what it considered *the policy* to say about the circumstances in which an employee could be expected to take a drug test, or the consequence of a failed test.

[36] The employer describes its drug and alcohol policy as "zero-tolerance," at least in the safety meeting notes and in its discussions with the Commission. But this is not the end of the

[16] *Supra*, note 4, paras. 39 and 41

matter. The employer policy documents were entered into evidence and speak for themselves. In addition, the safety meeting notes in evidence describe the manner in which the employer interpreted its policy for, and to, its employees.

[37] So far as the policy itself, there are actually two—possibly three—versions of the employer's policy relevant to drug testing. The version at GD3-25 is the only version referred to by the General Division (in its section titled "Evidence from the Employer"[17]). It is undated and there is nothing on the file that would indicate whether it is the policy in effect at the relevant time, except that it appears, from its placement within the file, to have been supplied in response to the Commission's request for "the policy." The policy reads as follows:

> 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.

[38] On its face, the provision does not specify zero tolerance for having drugs in the system, or even zero tolerance for impairment, so far as dismissal from employment goes. It may suggest "zero tolerance" for impairment in the sense that suspension is a stipulated consequence of suspected impairment, but it does not suggest that dismissal is an inevitable or even a possible consequence of suspicion of impairment or of a positive drug test.

[39] The policy requires the employee to pass a drug test after a suspension, but it seems plain that the consequence of a failed test is the prevention of an employee's return to work until such time as they can pass the test. A good deal must be read in to interpret the policy as requiring or even threatening dismissal from employment for not passing the test.

[40] A different undated version of the same policy was also submitted by the employer.[18] This one states only that,

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[17] *Supra*, note 4, para. 16
[18] GD3-72

> "employees suspected of being under the influence of drugs or who are suffering the after effects will be asked to leave the job site and will not be allowed to return until the symptoms are deemed to be dissipated."

This version does not even suggest that a drug test is required to return. The General Division did not refer to this policy or explain how it found the policy at GD3-25 to be the policy in effect at the time the Claimant admitted to last consuming drugs.

[41] A safety meeting of July 30, 2014, produced what appears to be a third statement or an interpretation of policy.[19] This statement emphasizes "zero tolerance" for drug use at work, discusses how employees cannot be impaired, and threatens immediate dismissal for openly consuming drugs. It does not specifically prohibit "having drugs in the system," but it does note the following:

> Employees/contractors refusing to provide a drug or alcohol sample when requested will face disciplinary action and/or termination. Should a test prove positive, [the employer] reserves the right to exercise their responsibility to request prosecution."

The General Division did not reference this policy in its analysis or decision.

[42] The 2014 interpretation or formulation seems more severe than the other undated formal policies in that it does not restrict the circumstances in which a test might be requested. It is the only directive that identifies termination as a possible consequence, although the consequence is for refusing to be tested. The actual *employment* consequence of a failed test is not specified even here. However, neither the employer nor the Commission argued that it represented the employer's policies generally, or the policy in effect in February 2016. The General Division did not refer to it.

Employer's interpretation of the policy and its application in the workplace

[43] The drug policy in the workplace, as it is interpreted by the employer and communicated, and as it is actually practised, is also relevant. The Claimant testified that he had been present at the safety meeting from which the notes at GD3-71 were prepared (and which appears to have

[19] GD3-81

taken place on November 2, 2015). He described the subject of the meeting as being the issue of people smoking marijuana in the parking lot. The Claimant confirmed that L. H. told the employees at that meeting that what they did on their own time was their own business and that they should stop what they are doing on Sunday, and the General Division accepted this evidence.[20] This policy interpretation was confirmed again in notes of the safety meeting that took place the day before the Claimant was first tested on February 23, 2016. Those notes say, "Stay clean and sober on Sunday so it doesn't affect your work or your job."

[44] The Claimant also testified that he had told L. H. that people (by which he meant other employees) were smoking pot in the parking lot (of the employer) and that L. H. (i.e. the employer) did not test them or do anything else.[21]

[45] The General Division stated that the employee's conduct is the conduct that is relevant, not the employer's conduct, although this was with reference to its finding that the employer's three-strike policy had not been followed in the Claimant's case.[22] While the General Division is correct that the focus of misconduct is on the employee's action, this does not mean that the employer's conduct, or the conduct of other employees, is not relevant for the purpose of determining what duty was owed by the Claimant to the employer and whether the Claimant *knew or ought to have known* that his actions would impair that duty.[23] There is no indication that the General Division considered the employer's conduct or the Claimant's testimony regarding other employees' behaviour for the purpose of determining the Claimant's actual obligation to his employer.

[46] Except to say that, "… being told that [the employees] can do what they want on their own time does not mean that the employer is condoning their behaviour or that their zero tolerance policy does not apply at work.", the General Division did not analyze the policy or determine whether the policy is truly a "zero-tolerance" policy as written or in practice.

[47] The General Division made no effort to reconcile the illogic or apparent conflict between a supposed "zero-tolerance" policy that would require employees to have no detectable drugs in

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[20] *Supra*, note 4, para. 50
[21] Audio recording of General Division hearing at 0:21:15
[22] *Supra*, note 4, para. 51
[23] See *Locke v. Canada (Attorney General)*, 2003 FCA 262, para. 8, where evidence of other employees smoking marijuana was considered relevant to determination

their system on Monday (assuming that they are coming to work Monday), and the employer's communication to the employees (in a safety meeting concerning drug use and impairment) that they could do what they wanted on their own time so long as they stopped on Sunday (or before Sunday, depending on whether the source is the notes from the November 2 meeting or from the meeting on February 22).

[48] That particular difficulty aside, it is simply not sufficient to say that a particular piece of evidence does not establish that the policy was not a zero-tolerance policy. The onus was on the Commission to establish misconduct, and therefore also to establish that the Claimant knew or ought to have known that his conduct would impair his performance and that dismissal was a real possibility. The Claimant was not obligated to establish that the policy was not "zero-tolerance." The Commission was obligated to prove that it was zero-tolerance (or to establish some other basis on which the Claimant could be said or presumed to have known that he was impairing the performance of a duty and that dismissal was a real possibility).

[49] In submissions to the Appeal Division, the Commission conceded that the General Division had erred in that it did not reconcile the inconsistency of the employer's evidence as to what constitutes a zero-tolerance policy.[24] I agree that there is inconsistency between how the employer characterized its policy and the substance and implementation of the policy. In identifying the policy as zero-tolerance, the General Division failed to consider or misapprehended evidence that suggested otherwise, such as the other version or versions of the policy in evidence, safety meeting interpretations of the policy, and the conduct of the employer and the other employees. If considered, this evidence might have supported a finding that the policy was not one of "zero tolerance" as it relates to positive drug test results.

[50] The General Division substantially relied on the existence of a "zero-tolerance" policy to support its decision that the Claimant's actions constituted misconduct, i.e. that the Claimant had a duty to have no drugs in his system so that he could pass the drug test, and that he knew or ought to have known when he smoked marijuana that it would impair his ability to perform his duty to pass that test and that dismissal was a real possibility as a result of a failed test.

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[24] AD2-4

[51] I therefore find that 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 under s. 58(1)(*c*) of the DESD Act.

Remedy

[52] The Commission has asked that the matter be returned to the General Division for reconsideration, but I consider the record to be complete. Therefore, in accordance with my authority under s. 59 of the DESD Act, I will make the decision that the General Division should have made.

[53] Subsection 30(1) states that a claimant is disqualified from receiving benefits if the claimant lost any employment because of their misconduct. The meaning of "misconduct" has been established by judicial interpretation in cases such as *Mishibinijima v. Canada (Attorney General* where the Federal Court of Appeal said, "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."[25]

[54] I accept the Claimant's testimony that he consumed marijuana about two weeks prior to his suspension, and that this caused him to fail the drug test on March 1, so I accept that the conduct occurred.

[55] I also accept that the conduct resulted in his dismissal. The employer's response to complaints that the Claimant had behaved in an offensive manner on February 22 was not to dismiss him but to suspend him. However, the Claimant was dismissed immediately following confirmation of a positive drug test on March 1.

[56] The Claimant testified that he had not consumed any drugs since smoking marijuana a couple of weeks earlier. The drug test is evidence of residual levels at a point in time, but there was no evidence on which the time of consumption could be assessed from the drug test, and there was no evidence to contradict the Claimant's assertion. Therefore, I am satisfied that the failed drug test and dismissal resulted from the earlier consumption of marijuana. I recognize

[25] *Mishibinijima v. Canada (Attorney General*), 2007 FCA 36

that the drug test was also positive for cocaine, which the Claimant denied using at any time, but the evidence does not establish when or how cocaine was introduced to the Claimant's system.

[57] However, I find that the Commission has not met its onus of establishing, on a balance of probabilities, that the Claimant knew or ought to have known either that 1) consuming marijuana when he was not at his workplace or on work time was a breach of an obligation to his employer, or that 2) it would impair the performance of a duty and that dismissal would be a real possibility as a result of that consumption.

[58] I have considered the various versions of the policy, and the manner in which that policy was interpreted to employees at safety meetings, as well as evidence that other employees were using drugs and that the employer was well aware of this. While I acknowledge L. H.'s statement to the Commission that employees are told at their orientation that the employer has a zero-tolerance policy for drugs in their system, this is not reflected in the employer's actual policy documents or in the evidence of the manner in which the employer communicates or interprets its policy to employees in the workplace.

[59] I accept that the employer's formal drug and alcohol policy that is applicable to the Claimant's circumstances is that which is described in the HS & E Policies & Guidelines (GD3-25) at section 1.5, entitled "Alcohol & Drugs in the Workplace Policy." However, regardless of which of the two versions of policy reflects the policy that would have been in effect in February 2016, I find that neither document is a zero-tolerance policy as it is written, at least so far as it relates to positive drug tests and/or the consequences that might result from a positive drug test. I also find that the drug and alcohol policy is not understood or practised as a zero-tolerance policy in the workplace in relation to positive drug test results.

[60] I have also considered whether the Claimant may have understood his obligation to pass a drug test without regard to the drug policy. There is no evidence that the employer had a generally applicable practice of random or periodic drug testing or that the employer gave its employees reason to expect that they could be tested, except in accordance with the drug policy. As to the Claimant's particular duty or obligation to the employer, I accept that the employer required the Claimant to be drug-tested before resuming his duties in October 2015 after a significant absence for a work-related injury, and that the Claimant considered the possibility he

would be fired if he failed that test. However, this is a qualitatively different circumstance from the circumstances in which he was dismissed. The Claimant was given ample warning that he could expect the particular test in October 2015 and, in anticipation of his return, he was encouraged to modify his behaviour in such a way as to ensure that any drugs he had consumed had cleared his system. In my view, the requirement that he take and pass a drug test on that occasion was in the nature of a specific or exceptional obligation, with which the Claimant complied.

[61] I acknowledge that L. H.'s statement to the Commission that the Claimant had to go through "random drug testing" after his return from his injury is some evidence that the Claimant could expect to be tested at any time.[26] This statement finds some support from the employer's notes related to the February 22, 2016, incident (signed by L. H. and another person), which describe the Claimant's February 23 test as "post-incident random testing."[27]

[62] I have considered this evidence, but I am not satisfied that a program of testing of any kind had been applied to the Claimant such that he was obligated to submit on demand to drug testing, and be in a position to prove that he had no drugs in his system. While the Claimant testified to having passed all his drug tests at some point in the past, there was no specific evidence that the Claimant was subjected to any testing after his return to work in October 2015, until February 23, 2016.

[63] In addition, I am not convinced that L. H.'s description of the Claimant's drug testing as "random" is accurate. L. H. also told the Commission that the employer has "the right to administer random testing *if they are suspicious* of 'it'," [28] and that the employer's decision to administer the inconclusive test of February 23 was justified on the basis of suspicion of impairment.[29] Testing that is dependent on suspicion would, by definition, not be "random" testing and, in my view, this calls into question the accuracy of L. H.'s other references to the Claimant's testing as "random."

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[26] GD3-18
[27] GD3-28
[28] GD3-57
[29] *Ibid.*

[64] Finally, I note that such testing would not be consistent with any of the employer's policy documents, and is not contemplated in any of the statements broadly communicated to the employees. One would expect that the employer would have documentation, including notice to the concerned employee, if that employee were to be subjected to random or periodic testing targeted to the employee discriminatively. There is no such documentation.

[65] The only applicable employer policy is that policy by which the employer may require an employee who is suspected of impairment to leave and not return until they pass a test. The trigger for the application of the policy is suspicion of impairment. The Claimant explicitly denied ever coming to work impaired[30] and there is no evidence that his behaviour on February 22 was a consequence of drug impairment, or evidence that he had ever come to work impaired. The drug test on February 23 was inconclusive for drugs in his system, and there is no evidence, expert or otherwise, on which it might be inferred, from either the test results or from his having smoked marijuana a couple of weeks earlier, that he would be impaired on February 22 as a result. Thus, and assuming the employer to be applying its policy in good faith, the Claimant had no reasonable basis for believing that any part of the impairment policy would apply to him.

[66] I find that the Claimant, at the time he consumed marijuana, could not reasonably be expected to have known that he would be required to take a drug test when he still had drugs in his system. The policy that allows for suspension based on suspicion of impairment would not support such an expectation.

[67] I further accept the Claimant's testimony that he did not expect to be dismissed for smoking marijuana away from work and on his own time (although he did think he could be suspended if he were found to have drugs in his system). I find that this expectation is reasonable in view of the actual employer policy that provides for testing only to allow a return to work; the Claimant's unchallenged evidence of the manner in which the employer treated drug consumption by others in the workplace; and the employer's clear message to employees that what they do on their own time is their business so long as they do not come to work impaired.

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[30] Audio recording of General Division hearing at 0:22:15

[68] I therefore find that the Claimant did not know and could not reasonably be expected to have known, at the time he consciously consumed marijuana approximately two weeks before his February 23 suspension, that he was breaching an obligation to his employer or impairing his ability to perform his duties for his employer, or that termination was a real possibility as a result. The Claimant's conduct does not constitute misconduct within the meaning of the *Employment Insurance Act* and therefore, the Claimant is not disqualified from benefits by reason of misconduct.

CONCLUSION

[69] The appeal is allowed.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
Parties and Representatives	A. B., Appellant Susan Prud'Homme, Representative for the Respondent