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

Citation : *M. N. v. Canada Employment Insurance Commission*, 2018 SST 1031

REVISED DECISION – corrections integrated into the main text of the original decision

Tribunal File Number: AD-18-348

BETWEEN:

M. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: ~~October 19, 2018~~ **October 29, 2018**

Canada

DECISION AND REASONS

DECISION

[1] The appeal of the General Division decision is allowed, but I confirm the decision of the Canada Employment Insurance Commission that the Appellant lost her employment because of her own misconduct.

OVERVIEW

[2] The Appellant, M. N. (Claimant), was dismissed from her employment with a First Nations band administration office as a result of a report that she had been seen intoxicated on the reserve. The Respondent, the Canada Employment Insurance Commission (Commission), denied the Claimant's application for Employment Insurance benefits because she had been dismissed for misconduct. The Claimant requested a reconsideration, but the Commission maintained its decision to deny her benefits.

[3] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division found that the Claimant had been dismissed because she consumed alcohol on the reserve, contrary to the terms of her employment, and that she knew or ought to have known dismissal was a real possibility. The Claimant's appeal was dismissed, and the Claimant has now appealed to the Appeal Division.

[4] The appeal is allowed. The General Division failed to consider evidence and failed to make a required finding of fact in relation to whether the Claimant knew or ought to have known that dismissal was a real possibility. Furthermore, the General Division's finding that the Claimant breached an express term of her employment relied on a misunderstanding of a local bylaw, By-law No. 1, that the employer required its employees to honour.

[5] I have given the decision that the General Division should have given. The Claimant lost her employment because of her own misconduct and is thereby disqualified from receiving any benefits under s. 30 of the *Employment Insurance Act* (EI Act).

ISSUES

[6] Did the General Division base its decision on an erroneous finding that the Claimant's conduct was misconduct in a perverse or capricious manner or without regard for any of the following?

a) the employer's policy of progressive discipline;

b) the evidence of how other employees were disciplined; or

c) the text of By-law No. 1.

[7] Did the General Division err in law by failing to determine whether the Claimant had received a prior warning?

ANALYSIS

Standard of Review

[8] 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 in the Courts, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division.

[9] However, 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. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*,[1] 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 guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[10] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of a decision of the

[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242

Appeal Division. The Federal Court of Appeal was not required to rule on the applicability of 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.

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

General Principles

[12] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[13] However, the Appeal Division may intervene in a decision of the General Division only if 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.

[14] The only grounds of appeal are described below:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (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

[3] See, for example, *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Thibodeau v. Canada (Attorney General*), 2015 FCA 167

a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division find that the Claimant's conduct was misconduct in a perverse or capricious manner or without regard for the material before it?

[15] The General Division concluded that the Claimant knew or ought to have known that dismissal was a real possibility (paragraph 41). However, the only evidence that the General Division apparently considered was that the Claimant had agreed to uphold By-law No. 1 and that the Claimant therefore understood that drinking on the reserve would "not be tolerated." The General Division's finding that the Claimant knew or ought to have known that she could be dismissed did not take into account Article 16 of the employer's discipline policy (the Progressive Discipline policy), or accept that the manner in which the employer treated other employees for the same behavior was relevant. In addition, the General Division found the Claimant to have breached an express duty by violating By-law No. 1 without regard for the actual text of the by-law.

Issue 1 (a) The Progressive Discipline Policy

[16] The General Division considered the Progressive Discipline policy, but only to say that the employer was not obligated to follow it (paragraph 51). The authorities that the General Division cited in paragraphs 51 and 52 of its decision all find that the severity of the disciplinary response is essentially irrelevant to a finding that the actions in question were misconduct. None of these authorities address the question of whether the claimants knew or ought to have known he or she would be dismissed—a question that is implicit in the finding of misconduct.

[17] The General Division stated that it disagreed that the employer was "obligated to follow the steps of the progressive discipline"(paragraph 51). In support of the General Division decision, the Commission cited paragraph 16.03, Article 16 of the Personal Policy Manual, which states that "[t]he steps of progressive discipline **may** consist of [certain steps that follow]." The Claimant also cited paragraph 16.03, which begins: "A system of progressive discipline **will** be used." The Claimant argued that the use of progressive discipline was itself mandatory, regardless of the particular steps the employer chose to apply.

[18] The conduct that the General Division accepted as having occurred, and that it found to

be misconduct, was that the Claimant had consumed alcohol on the reserve, contrary to By-law #1 and the terms of her employment. The Claimant had argued that the actual consumption of alcohol occurred outside the workplace and outside of work hours. There was no suggestion that the Claimant failed to report for work or reported late as a result of having consumed alcohol, that she reported for work intoxicated or hung over, or that she was otherwise physically or mentally impaired at work as a consequence of drinking. If the employer's policies had not prohibited the consumption of alcohol on the reserve, it is unlikely that the Claimant's conduct, as found, could be considered misconduct.

[19] The Claimant argued that the General Division misconstrued the legal definition of misconduct and that it erred by considering the Claimant's actions to be misconduct based solely on the employer's characterization. The Claimant points to the General Division's statement that "the violation of a community bylaw [prohibiting alcohol consumption on reserve] may not be grounds for dismissal 'off reserve,'" (paragraph 47) and she argues that this shows that the General Division did not objectively assess whether the conduct was misconduct. The Claimant argued that the General Division effectively adopted the employer's "subjective" definition of misconduct without regard to whether the Claimant's conduct could objectively be considered to be misconduct. The Claimant cites *Choiniere v. Canada (Employment and Immigration Commission)*[4] in support of her position.

[20] In my view, *Choiniere* does not support this position. The Federal Court of Appeal held that the employer's opinion that the conduct in question was misconduct was insufficient, but that "opinion" had not been formalized into the terms of employment by which all employees had agreed to abide. *Choiniere* refers to the requirement for an "objective assessment" but this is stated to be an objective assessment of whether the misconduct was the reason for the dismissal.

[21] The other jurisprudence that the Claimant has cited[5] supports the proposition that conduct cannot be found to be misconduct based solely on the employer's subjective appreciation of the conduct. However, like *Choiniere*, those cases do not involve misconduct that was based on the

[4] *Choiniere v. Canada (Employment and Immigration Commission*), A-471-95
[5] AD7-11

breach of an express term of the employment contract.

[22] Following the test for misconduct developed in the case law, the General Division needed only to find that the Claimant's conduct breached an express or implied duty or obligation to the employer[6] and that she knew or should have known that dismissal was a real possibility.[7]

[23] I am not satisfied that the General Division simply accepted the employer's opinion that the Claimant's alcohol consumption was misconduct. The General Division found misconduct on the basis that the Claimant violated an express term of her employment that required her to comply with a by-law applicable to the reserve in general.

[24] If not for the orientation agreement and the employer policies, the Claimant would not have understood that drinking on reserve would put her in breach of By-law No. 1 or of her duty or obligation to her employer. If she cannot be presumed to know that consumption of alcohol would be considered misconduct at any time or any place on the reserve without reference to these documents, then she likewise cannot be presumed to know the consequences of consuming alcohol on her employment without consulting these documents. Consideration of all the documents establishing the terms of the Claimant's relationship to her employer is critical to any finding of misconduct.

[25] The Claimant argued that the Progressive Discipline policy was one of the reasons that she did not believe she would be dismissed for having consumed alcohol. Article 16 of the Personal Policy Manual[8] clearly stipulates the mandatory use of progressive discipline. The employer has some discretion as to which steps to use and in what order, noted by the Commission, but "progressive discipline" is not generally understood to allow an employee to be immediately terminated for a **first** offence, in the absence of egregious behavior.

[26] The General Division erroneously found that the Claimant knew or ought to have known that dismissal was a real possibility without regard for the Progressive Discipline policy and the Claimant's testimony as to its effect on her understanding of the consequences for consuming

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[6] *Canada (Attorney General) v. Lemire*, 2010 FCA 314
[7] *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36
[8] GD3-29

alcohol on reserve. This is an error under s. 58(1)(*c*) of the DESD Act.

Issue 1 (b) The evidence of how other employees were disciplined

[27] The Claimant had told the General Division that other employees who had committed similar infractions were not dismissed, but the General Division dismissed the treatment of other employees' conduct as irrelevant (paragraph 55).

[28] The General Division cited *Canada (Attorney General) v. Namaro,*[9] but *Namaro* found only that the fact that other employees had not been dismissed for similar misconduct was not relevant to whether the claimant had been **dismissed for misconduct**. *Namaro* did not address whether the treatment of other employees for similar misconduct was relevant to whether the Claimant knew or ought to have known that dismissal was a real possibility for her own misconduct. As noted in the leave to appeal decision, *Locke v. Canada (Attorney General)*[10] allows that the employer's response to the conduct of other employees is relevant to the question of what a claimant knew or may be presumed to have known.

[29] The General Division's finding that the Claimant's actions amounted to misconduct failed to consider how the employer's treatment of other employees for similar conduct might have impacted the Claimant's expectation of consequences for her own conduct. This factor is relevant to the determination of what she ought to have known about the consequences of her conduct, and the General Division's failure to consider it is an error under s. 58(1)(*c*) of the DESD Act.

Issue 1(c) Interpretation of By-law No. 1

[30] The General Division found that that the Claimant had consumed alcohol on reserve, that she had willfully violated By-law No. 1 (paragraph 45), and that the violation of the by-law was also a violation of her employment contract and therefore misconduct under the EI Act.

[9] *Canada (Attorney General) v. Namaro)*, A-834-82
[10] *Locke v. Canada (Attorney General),* 2003 FCA 262

However, By-law No. 1 does not prohibit the consumption of alcohol on reserve.

[31] By-law No. 1[11] includes three prohibitions: a prohibition on the sale, barter, supply, or manufacture of intoxicants on the reserve; a prohibition against intoxication on the reserve, and; a prohibition on being found in possession of intoxicants.

[32] While the General Division had accepted that the Claimant consumed alcohol on reserve based on her own evidence, there was no evidence that she ever sold, bartered, supplied, or manufactured alcohol. The General Division did not find this to be the case. There was some evidence as to intoxication, but the Claimant disputed that she had been intoxicated on reserve, and the General Division made no finding as to whether this had occurred. Possession of alcohol, might perhaps be presumed to have occurred, based on the finding that the Claimant consumed alcohol, but a person is only in contravention of By-law No. 1 if that person is *found* in possession. There was no evidence that the Claimant was ever found in possession of alcohol, and the General Division did not find that the Claimant had been found in possession.

[33] The General Division understood that consumption of alcohol on reserve is prohibited by By-law No. 1. However, unless a person is also found in possession of alcohol, that person has not breached By-law No.1 through consumption alone. The General Division's decision that the Claimant's actions amounted to misconduct was therefore based on an erroneous finding that she had breached an express duty to uphold By-law No. 1,which was made in a perverse or capricious manner or without regard for By-law No. 1 itself. This is an error under s. 58(1)(*c*) of the DESD Act.

Issue 2: Did the General Division err in law by failing to determine whether the Claimant had received a prior warning?

[34] According to the Federal Court of Appeal in *Mishibinijima v. Canada (Attorney General*),[12] "there will be misconduct where the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the claimant's employer and that, as a result, dismissal was a real possibility." The Claimant had argued that she did not know that dismissal was a real possibility because of the Progressive Discipline policy. In her

[11] GD3-24
[12] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36

mind, progressive discipline would minimally require some sort of warning, and she was of the view that she had not received one.

[35] The employer supplied the Commission with a copy of a June 8, 2017, letter to the Claimant[13] in which the employer referred to a prior discussion on May 9, 2017. According to the letter, the employer warned the Claimant after an incident involving drinking, and told her that she would be terminated if it happened again. The Claimant agreed that she had met with the employer about a prior incident, but she stated that the employer had spoken only of "rumours" and had not told her that she was being warned or disciplined.

[36] The General Division failed to resolve the conflict between the letter and the Claimant's testimony, and it made no finding as to whether she had received a prior warning. Because the Claimant relies on the existence of the Progressive Discipline policy to support her reasonable expectation of a warning or some other discipline short of dismissal, the question whether the Claimant had been warned is highly relevant to the reasonableness of her belief that the Progressive Discipline policy would operate to prevent her termination. It was also relevant to whether she should have known dismissal was a real possibility, regardless of the Progressive Discipline policy.

[37] The failure to make a necessary finding of fact relevant to an issue in the appeal is an error of law under s. 58(1)(*b*) of the DESD Act.

CONCLUSION

[38] The appeal is allowed.

REMEDY

[39] The Commission has requested that I refer the matter back to the General Division for reconsideration, in the event that I should allow the appeal. However, I consider the record to be complete and accordingly, I will exercise my authority under s. 59 of the DESD Act to make the decision that the General Division should have made.

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[13] GD3-27

[40] ~~The Commission has the burden of proof to establish that the Claimant's actions amounted to misconduct within the meaning of the EI Act. In this case, the Commission has not met that burden~~.

[41] The General Division decision is based on its finding that the Claimant violated By-law No. 1, contrary to an express term of the employment contract. As noted above, the Claimant's admission that she consumed alcohol on reserve does not mean that she necessarily violated the by-law, and the Commission has not established that she did so.

[42] The employer's Orientation document sets out the employer's expectations and standards[14]. Item 1 of the Orientation document also requires that the Claimant uphold By-law No. 1. Item 1 continues as follows: "- No alcohol or illegal drug use within the community."

[43] The Claimant also signed a declaration that she would abide by the Personal Policy and that she would be subject to disciplinary action up to and including termination if she breached the terms of the Personal Policy[15]. The only applicable policy is the one found at 34(f), which refers to "breaking or in breach of the [local] By-law No. 1". This is followed by the statement "(no alcohol or drugs)."[16]

[44] Despite the manner in which By-law No. 1 is drafted, it is apparent from the parenthetic comments in both the Personal Policy and the Orientation that the employer understood its own By-law No. 1 to prohibit alcohol use within the community—or reserve, in this case. This is consistent with the preamble to the by-law, which states that the by-law "is a special measure for the protection of the inhabitants of the reserve […] from the presence of intoxicants." It is also apparent that the employer communicated to its employees its expectation that they should completely abstain from alcohol use on reserve.

[45] The Claimant signed the declaration, indicating that she understood the Personal Policy, and signed the Orientation document, indicating that she read and understood the Orientation. She also testified at the General Division that she understood she should not drink alcohol on reserve (00:51:00). Therefore, I accept that she was aware that the employer expected her to

[14] GD3-26
[15] GD3-25
[16] GD6-4

abstain from alcohol use on reserve. Regardless of whether the Claimant was technically in breach of By-law No. 1, the Claimant still breached a term of her employment by consuming alcohol on reserve. Not only is the requirement that Band employees abstain from alcohol an express term of employment, but it is one whose objective is rationally related to the nature of the employment. In my view, the Band has an interest in maintaining its credibility and respect for its authority, and it has a legitimate interest in ensuring that its direct employees are not seen breaking the Band's by-laws.

[46] The Claimant did not admit to being intoxicated or intoxicated in public, but she did admit to having consumed alcohol on reserve in relation to the most recent incident, for which she was dismissed. The only evidence to suggest that she may have been intoxicated is the anonymized third-party complaint letter dated May 4, 2017, and a reference by the employer to another complaint in the termination letter. Given that the Claimant has had no real opportunity to answer or test those allegations, I give little weight to the evidence that the Claimant was intoxicated, in public or otherwise.

[47] At the same time, I do not accept all of the Claimant's testimony at face value. The Claimant's testimony contradicted her earlier statement to the Commission that she had a social drink in her home[17], as well as her husband's corroboration that she had been at home[18]. She testified that the day she was seen, she was walking home from having been drinking the night before (00:55:35), at a friend's house (00:56:00). The General Division member offered her the opportunity to explain the contradiction between her testimony and prior inconsistent statements, but she did not do so.

[48] At any rate, I accept that the Claimant did consume alcohol in respect of the recent incident, based on her own admissions. I find that her consumption of alcohol on reserve, regardless of the circumstances, is a breach of her duty to her employer. The question then becomes: "Did the Claimant know, or should she have known, that termination was a real possibility as a result of her consuming alcohol on reserve?"

[17] GD3-9
[18] GD3-31

[49] The Claimant testified that on one prior occasion in which the employer had questioned her about rumours—related to drinking—and that she was not warned or disciplined at that time. She also testified that she was aware the employer had a progressive discipline policy and that other employees who had consumed alcohol on reserve had received warnings or suspensions. The discipline policy, Article 16 of the Personnel Policy Manual, was in evidence[19] before the General Division. Paragraph 16.03 of this document states that the employer will use a system of progressive discipline and that the penalty will generally be more serious as the number of infractions increases. The Claimant testified that she had never received a warning for anything while working for the employer (00:45:00) and that the drinking incident for which she was dismissed was her first infraction. She therefore submits that she had good reason to believe that she would not be dismissed under a progressive discipline process, particularly when other employees with drinking infractions were warned or suspended for the same conduct.

[50] The anonymized complaint letter dated May 4, 2017, was from a person who claimed to have witnessed the Claimant drunk in public on April 28, 2017. This would have been just prior to May 9, when the employer said it met with the Claimant. The employer also provided a copy of a termination letter to the Claimant dated June 8, 2017, regarding the most recent incident—a complaint alleging the Claimant's drunkenness on June 3. That letter references the earlier report of the April 28, 2017, incident, and states that the Claimant had been warned at the meeting that another complaint would be grounds for termination. The Claimant claimed that she did not receive this termination letter.

[51] As noted above, the General Division failed to make a finding as to whether the Claimant had been warned in relation to an earlier incident. The only first-hand evidence on this point is that of the Claimant, who testified that the employer discussed with her a "rumour" that she had been drinking (00:13:10). She said she was not warned, and she was not told she would be terminated if "it happens again." While the employer's June 8 termination letter refers back to the conversation a month earlier and states that it discussed the specific complaint with the Claimant and warned her, the Claimant stated that the employer never sent the letter to her and that she did not know about this letter until the Commission brought it up.

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[19] (GD3-29)

[52] In investigating the claim, the Commission did not speak to any representative of the employer who had first-hand knowledge of the first complaint or the discussion. Although the Commission specifically asked for other documentation related to the May 9, 2017, meeting discussed in the termination letter, the only document received in response was the redacted copy of the May 4 complaint.

[53] In my view, there is insufficient evidence to find that the Claimant received a formal warning or that she was disciplined. Nonetheless, the Claimant agreed that a meeting took place to discuss the Claimant's drinking, so she understood she was under scrutiny for drinking. Furthermore, she did not dispute that the meeting occurred on May 9, as indicated in the June 8 letter, which was within days of the date of the written complaint. The June 8 letter also refers back to the May 9 meeting and to a discussion of facts consistent with the May 4 complaint.

[54] Whatever the truth of the May 4 complaint, I accept that the Claimant was aware that the employer had received a complaint that she had been drinking and that it was concerned about it. In my view, it is implausible that such a meeting took place so soon after a specific complaint but that the employer did not raise the complaint or question the Claimant as to its truthfulness. I also find that it is implausible that such a discussion would have ended without leaving the Claimant with the impression that the next complaint would be treated more seriously. While the Claimant may not have been formally warned in the sense that she knew herself to have entered into the steps of progressive discipline, I find that she had been put on notice that the employer was concerned about her conduct.

[55] I accept the Claimant's evidence that other employees were warned or suspended for drinking infractions (00:52:08) as there is no evidence to the contrary. Furthermore, it is plausible: the terms of employment prohibited consumption of alcohol on reserve. This means that everything from a single drink in the privacy of one's home to a display of public drunkenness could be considered an infraction and subject to discipline. Given the wide range of behaviour captured and the existence of the employer's Progressive Discipline policy, I find it entirely plausible that some other employees were warned or suspended rather than being dismissed, particularly for a first offence of a minor nature.

[56] However, the Claimant also testified that her own husband had been dismissed from the Band for some sort of first offence and that the Band had not followed any system of progressive discipline in his case (00:53:25). Given her own prior warning, however informal, and her knowledge of her husband's circumstances, I do not accept that it would be reasonable for the Claimant to have relied on her observation that some other employees were only suspended or warned for drinking, or on the existence of the Progressive Discipline policy.

[57] I accept that the Claimant did not expect to be fired, but I find that she ought to have known that it was at least a real possibility if she continued to consume alcohol on reserve. I find the claimant's consumption of alcohol, contrary to the express terms of her employment, to be misconduct under the EI Act.

[58] In order for the Claimant to be disqualified from receiving benefits for misconduct, the Commission must also show that she was dismissed for her misconduct and not for some other reason. The General Division member asked the Claimant why she thought she was targeted by the employer and she answered that it was because she did not receive a warning or suspension while others did. However, the fact that other employees may have been disciplined less severely for drinking does not mean that the Claimant's dismissal is not related to her drinking.

[59] I have considered that the employer received at least two complaints about the Claimant for drinking, that it had a prior discussion with the Claimant about her drinking, that she admitted to drinking on the reserve just prior to her dismissal, and that her dismissal letter—whenever the Claimant received it—states that she was dismissed for drinking. I have also considered that the Claimant could offer no other explanation for her dismissal or any reason why she would have been targeted. On balance, I find that the Claimant was dismissed for drinking on reserve in contravention of the terms of her employment.

[60] I understand that the Claimant may believe that the employer has treated her unfairly in relation to other employees. However, it is the Claimant's conduct that is relevant to this decision; the employer's conduct is not under review.

[61] I acknowledge that the Commission has the burden of proof to establish misconduct. I am satisfied, on a balance of probabilities, that the Claimant was drinking on reserve, that this

conduct was in breach of a duty or obligation the Claimant owed to her employer under the terms of her employment, that she knew or ought to have known that dismissal was a real possibility as a result of her conduct, and that the conduct was the reason for her dismissal. I confirm that the Claimant was dismissed by reason of her own misconduct and is therefore disqualified for benefits under s. 30 of the EI Act.

Stephen Bergen

Member, Appeal Division

HEARD ON:	October 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. N., Appellant Holly Popenia, Representative for the Appellant Claudia Richard, Representative for the Respondent