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

Citation: *Z. T. v. Canada Employment Insurance Commission*, 2018 SST 1271

Tribunal File Number: AD-18-345

BETWEEN:

Z. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: December 6, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and I have made the decision that the General Division should have made.

OVERVIEW

[2] The Appellant, Z. T. (Claimant), was dismissed by his employer for becoming involved in an argument with another employee at the Claimant's staff accommodations. The Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant had been dismissed for misconduct, and the Claimant was disqualified from receiving Employment Insurance benefits as a result. The Commission maintained this decision when the Claimant asked it to reconsider. The Claimant appealed to the General Division of the Social Security Tribunal, but his appeal was dismissed. He now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division found the Claimant's participation in an argument to be misconduct without regard for the evidence.

[4] The Claimant is not disqualified from receiving benefits for having lost his employment due to misconduct because, based on the facts before me, arguing does not constitute misconduct.

ISSUE

[5] Did the General Division find as fact that the Claimant knew or should have known that his participation in an argument could lead to his dismissal, in a perverse or capricious manner or without regard for the evidence?

ANALYSIS

General Principles

[6] 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.

[7] 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 section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The grounds of appeal are stated 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.

Did the General Division find as fact that the Claimant knew or ought to have known that his participation in an argument could lead to his dismissal, in a perverse or capricious manner or without regard for the evidence?

[9] The General Division decision was not based on the actual conduct represented by the argument but simply on the fact that an argument was known to have occurred. There was little evidence before the General Division by which it could assess the Claimant's actual conduct.

[10] The General Division characterized the argument as an "act of violence and/or inappropriate behaviour",[1] but it did not explain on what evidence it reached this conclusion. The

[1] General Division decision, para 32.

conduct policy in the Employee Handbook, to which the General Division refers, does not define arguing as violence. It specifies the conduct that the employer considers unacceptable, identifying, "threats, physical violence, abusive language [and] harassment of another employee."

[11] The Claimant had provided the Commission with a statement that a co-worker came to the Claimant's residence and got into an argument with him,[2] which he also described as a "fight."[3] The employer also provided a statement to the Commission. He said that the Claimant got into an argument with the other employee, that he believed they were going to get into a physical fight, and that he intervened to prevent a physical fight. The employer stated that he could see "visible signs" that the Claimant was under the influence of alcohol.[4]

[12] The employer's statement did not supply any additional details that might have assisted the General Division to characterize the argument as violent or inappropriate. For example, there are no details by which it might be determined:

- whether the Claimant was the aggressor, a consenting participant, or seeking to avoid any escalation;
- what visible signs the employer observed that suggested the Claimant was under the influence of alcohol;
- how he knew these signs were alcohol-related;
- the degree to which the Claimant was "under the influence";
- whether a fight was about to happen; or
- whether the employer's intervention was either necessary or appropriate.

[13] The General Division did not rely on the employer's characterization of events, and it did not assess whether, in the course of the argument, the Claimant engaged in any of that conduct actually deemed unacceptable according to the employer's policy. It found that the Claimant breached the contract of employment on the basis of an argument, without any analysis of whether the Claimant's behaviour was threatening, violent, abusive, or harassing.

---

[2] GD3-19.
[3] GD3-29.
[4] GD3-20.

[14] Neither the Employee Handbook nor any other document or statement from the employer or any other party suggests that it is a term of employment that employees must not get into arguments with one another while living in employer-managed accommodations. Nor is this something that is intuitively obvious.

[15] The term "argument" spans a broad spectrum of behaviour: some acceptable and some not. The General Division is correct that misconduct must constitute a breach of a duty that is express or implied, but it did not explain on what basis it considered that the Claimant owed his employer an express or implied duty to avoid arguments.

[16] I note that the General Division also referred to three warnings the Claimant received[5]. The first concerned an accident in which the Claimant was involved while on a personal day. Although it is stated to be a warning, it was actually the employer's response to the Claimant's request for time off. The second warning, dated August 8, 2016, concerned a disturbance in which some furniture at the residence was broken. A number of people were warned, including the Claimant, because the employer could not establish what happened or who was responsible for what. In the third warning, dated December 10, 2016, the Claimant was warned for attending work under the influence of alcohol.

[17] It is not clear whether the General Division viewed these warnings as having increased the likelihood that the Claimant would have or ought to have known he would be dismissed for participating in an argument. In my view, only the final warning can be said to confirm previous misconduct on the Claimant's part, and that warning was for a different form of behaviour than the Claimant's involvement in an argument at the employer-provided residence on the Claimant's own time. These warnings do not suggest that the Claimant owed a duty to avoid arguing or that he should have known he could be dismissed for arguing.

[18] The General Division's finding that the Claimant breached the contract of employment simply does not follow from his participation in an argument and is therefore perverse or capricious. I find that the General Division erred under section 58(1)(c) of the DESD Act by finding that the claimant engaged in conduct that he knew or ought to have known could lead to his dismissal.

---

[5] General Division decision, para 31.

CONCLUSION

[19] The appeal is allowed.

REMEDY

[20] Section 59 of the DESD Act allows me to dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration; or confirm, rescind, or vary the General Division decision. In my view, the record is complete, and I may make the decision that the General Division should have made.

[21] Section 30 of the *Employment Insurance Act* (EI Act) states that a claimant who is dismissed for misconduct is disqualified from receiving benefits. The General Division correctly noted that misconduct must be a breach of a duty that is express or implied in the contract of employment.

[22] The Commission's telephone log shows that the employer was of the view that the Claimant had been drinking and that he also believed the argument was about to become physical when he intervened. In his February 7, 2017, application for benefits, the Claimant describes the reason for his termination as that he was arguing with a co-worker.[6] He said he "got in an argument with a colleague", and repeated that "he had an argument at work during work hours" in a discussion with the Commission on March 7, 2017.[7] He is later recorded as having said he got into a "fight with another worker", referring to the same incident.

[23] The Commission is responsible for establishing misconduct. The employer's statements do not reveal the basis for his beliefs and are uncorroborated. The General Division did not rely on the employer's evidence and did not explicitly find that the Claimant was physically aggressive, threatening, or intoxicated, finding instead that misconduct was established on the basis of the Claimant's involvement in an argument.

---

[6] GD3-9.
[7] GD3-19.

[24] I accept that the only conduct that is established on the evidence before the General Division is the Claimant's participation in a verbal argument with another person at his employer-managed residence—nothing more and nothing less.

[25] Neither the Employee Handbook nor any prior warnings received by the Claimant mention "arguing" as a prohibited behaviour or as conduct that could result in dismissal. I find that the Claimant did not owe an express or implied duty to the employer to never engage in an argument.

[26] If the Claimant did not owe a duty to the employer to avoid getting into an argument with another person in his residence, then it cannot be said that the Claimant knew or should have known his dismissal was a real possibility as a result of his arguing. Therefore, I find that the Claimant's arguing was not misconduct within the meaning of section 30 of the EI Act and that the Claimant's conduct was not such as to disqualify him from receiving benefits.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
SUBMISSIONS:	Z. T., Appellant C. Walker, Representative for the Respondent