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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v B. Y.*, 2018 SST 1293

Tribunal File Number: AD-18-37

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. Y.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: December 13, 2018

CORRIGENDUM DATE: December 19, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and this decision replaces the General Division decision.

OVERVIEW

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

[3] The Respondent submits that his acts were not wilful, that he was ill, that his relapse was not intentional, and that his relapse cannot be characterized as misconduct.

[4] The Respondent appealed the Commission's decision. The General Division found that the Respondent did not lose his employment because of his misconduct. It found that the Respondent did not deliberately show up for work intoxicated and that this event cannot be considered [translation] "wilful" or "intentional."

[5] The Appellant submits that the General Division erred in law and made an error of mixed law and fact, specifically in its interpretation of the case law regarding the issue of misconduct resulting from alcoholism and by failing to consider the evidence on file adequately. Leave to appeal was granted because of the arguments that the General Division erred in its interpretation and application of the case law.

[6] The General Division erred in law and made an error of mixed law and fact; the appeal is allowed. The Claimant lost his employment because of his misconduct.

ISSUE

[7] Did the General err in its interpretation and application of the case law?

[8] If the General Division erred, should the Appeal Division give the decision that the General Division should have given or refer the matter back to the General Division?

ANALYSIS

[9] The only grounds of appeal are that the General Division erred in law, failed to observe a principle of natural justice, or 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. Given that the General Division may have erred in law in making its decision, the Appeal Division granted leave to appeal.[1]

[10] The Appeal Division does not owe any deference to the General Division on issues of natural justice, jurisdiction, or law.[2] In addition, the Appeal Division may find an error of law whether or not it appears on the face of the record.[3]

[11] The appeal before the General Division turned on the question of whether the Respondent lost his employment because of his misconduct, which is an issue of mixed fact and law.

[12] Where an error of mixed fact and law committed by the General Division concerns an issue of law, the Appeal Division may intervene under section 58(1) of the *Department of Employment and Social Development Act* (DESDA).[4]

[13] The appeal before the Appeal Division rests on errors of law and serious errors in the findings of fact about an issue of law.

Did the General err in its interpretation and application of the case law?

[14] According to the Appellant, the Respondent lost his employment because he showed up for work intoxicated, which constitutes an act of misconduct. However, the General Division erred in its interpretation of the legal concept of misconduct and did not correctly apply the case law principles regarding misconduct resulting from alcoholism.

[15] The act complained of occurred on December 30, 2016. Before showing up for work, the Respondent consumed four or five beers [translation] “in order to ease his suffering” caused by

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[1] *Department of Employment and Social Development Act* (DESDA), s 58(1).
[2] *Canada (Attorney General) v Paradis* and *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.
[3] DESDA, s 58(1)(b).
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118.

an ear infection and physical aches and pains.[5] The General Division accepted that the Appellant [*sic*] has schizophrenia, that he has problems related to alcohol, and that he started consuming alcohol again. It found that [translation] "the Appellant did not deliberately show up for work intoxicated."[6]

[16] The Respondent referred to his problems with alcohol and to the act that occurred during a relapse period. The Respondent's alcoholism was relevant to the issue of misconduct in this case.

[17] In *Mishibinijima*[7] and *Bigler*,[8] 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 how they applied, or did not apply, to the Respondent's situation.[9]

[18] In this respect, the General Division erred in law. Even though the General Division found that it was the Respondent's medical condition (his schizophrenia and ear infection) and not the alcohol consumed [translation] "that takes precedence in this case,"[10] the Respondent's alcoholism was relevant to the conduct complained of. The Respondent was experiencing a relapse; he had consumed alcohol before going to work; he smelled of alcohol; and he could not safely perform his duties at work. The General Division should have explained how this case law applied, or did not apply, to the Respondent's situation.

[19] For these reasons, the appeal is allowed.

Should the Appeal Division give the decision that the General Division should have given or refer the matter back to the General Division?

[20] The Appeal Division may give the decision that the General Division should have given or refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate.[11]

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[5] General Division decision at paras 26–29.
[6] *Ibid.* at para 38.
[7] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] *Canada (Attorney General) v Bigler*, 2009 FCA 91.
[9] General Division decision at paras 10 k), 10 m), and 14.
[10] *Ibid.* at para 37.
[11] DESDA, s 59(1).

[21] The evidence on file is complete, and the Appeal Division may give the decision that the General Division should have given.

[22] In *Mishibinijima*, the Federal Court of Appeal noted that there must be evidence on file that supports a claimant's contention that there was no misconduct by reason of their alcoholism. Examples of required evidence include a medical report, participation in an Alcoholics Anonymous program, or other evidence that could support that the conduct was not wilful. The claimant testified that his behaviour was not wilful, but the Court found that the evidence was "very weak" and "insufficient to justify […]."[12]

[23] In *Bigler*, the Federal Court of Appeal determined that:

> Misconduct, under [the *Employment Insurance 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 submission that the claimant had a serious problem with alcohol without receiving a medical report; the umpire relied on what he inferred from the evidence. This finding was 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.[13]

[24] The parties agree that the case law requires that the evidence on file support a claimant's contention that there was no misconduct by reason of their alcoholism. In other words, the evidence must confirm that the conduct was not deliberate.

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[12] *Mishibinijima* at paras 33–37.
[13] *Bigler* at paras 6–8 [*sic*].

[25] The Appellant submits that the evidence is insufficient. The Respondent submits that the evidence is more than sufficient.

[26] *Mishibinijima* and *Bigler* established that the evidence must support both the existence of the alcoholism **and** the involuntariness of the conduct in question.

[27] The evidence on file includes:

a) A doctor's note dated April 18, 2017, from Dr. Alex Laevski, psychiatrist, who wrote that the Respondent had been seen since 2001 for problems related to schizophrenia and that his condition is characterized by periods of stability and instability in relation to alcohol and substance abuse;[14]

b) A doctor's note dated December 31, 2016, from Dr. Henri confirming that the Respondent had gone to the hospital emergency room for medical reasons;[15]

c) The statements from the Respondent and the employer written at the time of the Appellant's assessment of the Respondent's benefits claim;

d) The Respondent's testimony at the General Division hearing.

[28] All of the evidence indicates that, at the time of the act complained of, the Respondent was experiencing a relapse of his schizophrenia and alcoholism. Furthermore, he was suffering from an ear infection. The evidence supported the existence of the alcoholism.

[29] Did the evidence establish the second component, that of the involuntariness of the conduct in question?

[30] Does the evidence support that the Respondent's conduct, namely having consumed alcohol before going to work, was not deliberate? Based on my review of the record, the evidence is insufficient; it does not support that, at the time of the act complained of, the Respondent's conduct was not deliberate and involuntary.

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[14] GD8-2.
[15] GD3-15.

[31] The evidence shows that there was a long-term problem with alcoholism and an ear infection during the period the act complained of occurred, but it does not show that the Respondent's consumption of alcohol on December 30, 2016, was involuntary or that his decision to show up for work in the state he was in was involuntary.

[32] In fact, the Respondent made the deliberate decision to go to work after consuming alcohol. He drank four beers to ease the pain the ear infection caused, then he went to work. [Translation] "He thought that it would be okay." He knew that he could not be absent from work without a doctor's note, and he chose to show up for work, even though he had consumed alcohol, thinking that "it would be okay."[16]

[33] As a result, the Respondent is disqualified from receiving Employment Insurance benefits because he lost his employment due to his misconduct.

CONCLUSION

[34] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference
REPRESENTATIVES:	~~Anne-Claude Gagnon~~ Claudia Richard, Employment Insurance Commission ~~Claudia Richard~~ Anne-Claude Gagnon, for the Respondent

[16] GD3-39.