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

Citation: *DA v Canada Employment Insurance Commission*, 2020 SST 939

Tribunal File Number: AD-20-672

BETWEEN:

D. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 30, 2020

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant (Claimant) worked as a subway operator. His employer dismissed him after he tested over the acceptable limits on a random drug test. The Canada Employment Insurance Commission (Commission) accepted that the employer dismissed the Claimant for contravening its Fitness for Duty Policy because he failed a random drug test when reporting for work. The Commission decided that he lost his job because of misconduct, and disqualified him from being paid employment insurance benefits. The Claimant requested reconsideration but the Commission maintained its original decision. The Claimant appealed to the General Division.

[3] The General Division found that the Claimant lost his job after he tested over the acceptable limits on a random drug test. It found that the Claimant should have known that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant lost his job because of his misconduct.

[4] The Appeal Division granted leave to appeal to the Claimant. He puts forward that the General Division ignored evidence and erred in law in its interpretation of sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[5] I must decide whether the General Division erred in fact or in law in its interpretation of the legal test for misconduct.

[6] I dismiss the appeal.

ISSUE

[7] Did the General Division make an error in fact or in law in its interpretation of the legal test for misconduct?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

PRELIMINARY MATTERS

[11] The Claimant filed evidence in appeal not produced before the General Division regarding the employer's drug-testing policy. I informed the Claimant during the appeal hearing that the powers of the Appeal Division are limited by section 58(1) of the DESD Act and that I could not accept new evidence.

[12] The Claimant filed an application to rescind or amend the General Division decision pursuant to section 66 of the DESD Act. The Claimant's application was dismissed. The Claimant informed the Appeal Division that he would not appeal the General Division's rescind or amend decision. He requested that the Appeal Division render a decision based on the evidence initially presented to the General Division.

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.

[13] Therefore, I will render the present decision based on the evidence initially presented to the General Division.

Did the General Division make an error in fact or in law in its interpretation of the legal test for misconduct?

[14] The Claimant puts forward that the General Division ignored evidence and erred in law in its interpretation of sections 29 and 30 of the EI Act.

[15] The Claimant submits that the General Division ignored the employer's own policy in rendering its decision. The employer never proceeded to confirm the result of the first test. The Claimant further submits that he could not have known he would be dismissed since he stopped consuming marijuana twelve hours before reporting for work.

[16] The General Division had to decide whether the Claimant had lost his employment because of his own misconduct in accordance with sections 29 and 30 of the EI Act.

[17] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. The test for misconduct is whether the alleged act was willful or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his or her actions would have on job performance.[3]

[18] Jurisprudence has also constantly held that the reasonableness of the sanction imposed by an employer on an employee is not a deciding factor in determining whether a claimant's behaviour amounts to misconduct within the meaning of the EI Act.[4]

[19] The General Division found that the Claimant lost his job after he tested over the acceptable limits on a random drug test. It found that the Claimant should have known

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[3] *Canada (Attorney General) v Hastings*, 2007 FCA 372; *Mishibinijima v Canada* (Attorney General), 2007 FCA 36; *Tucker* (A-381-85).
[4] *Canada (Attorney general) v Marion*, 2002 FCA 185.

that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant lost his job because of his misconduct.

[20] The General Division found that the material submitted by the Claimant after the hearing on the employer's drug-testing policy did not indicate that a second sample had to be tested for drug levels as well as drug component. It found that the material also did not mention the requirement for an impairment test. The General Division found that the need for confirmation testing was irrelevant since the initial drug test was clearly positive.

[21] The Claimant recognized that he made a conscious decision to use marijuana the day before he was due to operate a subway train. He stated that 12 hours was all the time he needed to clear the drug from his system. He reported for work the next morning because, in his mind, he suffered no lingering after-effects. He relied on his own assessment of his fitness for duty.

[22] The Claimant was aware of the employer's policies on drug usage. He knew that his employer performed random drug tests. He had previously went through a random test. He also knew that the employer was following him closely since he had disclosed that he was a recreational user.

[23] The Claimant did not dispute before the General Division that he lost his employment because he failed his random drug test on October 8, 2019. The acceptable level for the employer was 10 ng/ml and his test result showed that he had 12 ng/ml in his system.

[24] Unfortunately, for the Claimant, his actions constitute misconduct within the meaning of the EI Act. In acting as he did, the Claimant knew or ought to have known that the conduct was such as to impair the performance of his duties owed to the employer and that, as a result, dismissal was a real possibility.

[25] I am of the view that the Claimant showed, at the very least, carelessness or was negligent to the point that one could say that he wilfully disregarded the affects his actions would have on the duty owed to the employer when he used marijuana the day before he was due to operate a subway train.

[26] I find that there is no evidence to support the grounds of appeal invoked by the Claimant or any other possible ground of appeal. The decision of the General Division is supported by the facts and complies with the law and the decided cases.

[27] I have no choice but to dismiss the appeal.

CONCLUSION

[28] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	August 25, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. A., Appellant