

Citation: *A. C. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 44

Appeal #: GE-13-2258

BETWEEN:

A. C.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Eleni Palantzas

HEARING DATE: May 28, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal is allowed

PERSONS IN ATTENDANCE

The Claimant, Mr. A. C., attended the hearing by teleconference.

DECISION

[1] The Member finds that the Claimant did not lose his employment by reason of his own misconduct pursuant to section 29 and 30 of the *Employment Insurance Act* (EI Act).

INTRODUCTION

[2] The Claimant applied for regular benefits on October 10, 2008 however; on October 29, 2008 he started a 3 month contract and worked for 3 days as Construction Labourer with Apricot Solutions Inc.

[3] On February 28, 2013, the Canada Employment Insurance Commission (Commission) concluded that the Claimant lost his employment with Apricot Solutions Inc. due to his own misconduct and imposed an indefinite disqualification to benefits effective October 26, 2008 pursuant to sections 29 and 30 of the EI Act. An overpayment of \$17,185.00 resulted.

[4] On October 16, 2013, the Claimant requested that the Commission reconsider its decision and on the same day, the Commission maintained its decision.

[5] On January 24, 2014, the Claimant appealed late to the General Division of the Social Security Tribunal (Tribunal). On March 16, 2014, the Member reviewed the file and determined that the appeal is not late.

FORM OF HEARING

[6] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by teleconference for the reasons provided in the Notice of Hearing dated April 1, 2014.

ISSUE

[7] Whether the Claimant lost his employment by reason of his own misconduct and whether an indefinite disqualification should be imposed pursuant to sections 29 and 30 of the EI Act.

THE LAW

[8] Subsection 29(a) of the EI Act stipulates that for the purposes of sections 30 to 33, “employment” refers to any employment of the claimant within their qualifying period or their benefit period.

[9] Subsection 29(b) of the EI Act stipulates that for the purposes of sections 30 to 33, “loss of employment” includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers.

[10] Subsection 30(1) of the EI Act stipulates that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) The claimant is disentitled under sections 31 to 33 in relation to the employment.

[11] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

[12] On October 10, 2008 the Claimant made an initial claim for regular benefits.

[13] On November 4, 2008, Apricot Solutions Inc. (a placement agency) sent in a

record of employment indicating that the Claimant was employed with them for 3 days (18 hours) on October 29, 30 and 31, 2008 and that he was dismissed (GD3-12). The Claimant advised the Commission that he was laid off from this employment (GD3-14).

[14] On October 27, 2009, the Commission requested payroll information from the employer (GD3-15).

[15] On November 17, 2009, the employer responded and indicated that the Claimant did not show up at the client work site on November 3, 2008. The employer indicated that the Claimant did not provide a valid reason for not showing up to work and that his irresponsible behavior cost the employer the contract with the construction company. The Claimant was told not to return (GD3-17).

[16] On April 2, 2012, the Commission requested clarification from the Claimant regarding his employment (GD3-20).

[17] The Commission did not receive a response from the Claimant. On February 28, 2013, the Commission concluded that the Claimant lost his employment due to his own misconduct and imposed an indefinite disqualification to benefits effective October 26, 2008 resulting in an overpayment of \$17, 185.00 (GD3-22 and GD3-33).

[18] On October 4, 2013, the Claimant requested that the Commission reconsider its decision and noted that he has not received any of the Commission's correspondence. The Claimant indicated that he was not dismissed by this employer. The employer lost the contract and they did not have any other jobs suited for his skills (GD3-26 and GD3-27).

[19] On October 16, 2013, the Claimant advised the Commission that he was informed by the employer that they lost the contract and that he was no longer needed. He believed this meant that he was laid off not dismissed. The Claimant admitted to being late on the worksite that day but was never told that it was his fault that the contract was lost. He advised the Commission that 3 people were needed for the job and that one of the other guys did not show up that Monday. The Commission maintained its decision due to the lack of substantial proof of the Claimant's statements (GD3-34 and GD3-35).

[20] On October 30, 2013, the Claimant submitted a written statement indicating that he is unable to contact neither his former employer, the client (construction company) nor a coworker who could have substantiated his statements. The Claimant contends that his former employer is not being completely honest. He noted that the employer was contracted to supply 3 workers (he could only supply 2 workers) to start on the site on October 29, 2008. He noted that he was late on November 3, 2008 and was told to return home and contact his employer. He called the owner before leaving the site and was told by the employer that they had lost the contract. Since he did not have the skills to work in an office which was their primary business (construction was new to the employer), he would be let go and issued a record of employment indicating as such. The Claimant indicated that he reported the reason for separation and his earnings to the Commission promptly thereafter (GD3-37).

[21] At the hearing, the Claimant reiterated much of what he submitted in his written statement (GD3-37). He testified that he was unaware of the Commission's attempts to contact him and the notice of debt until he was informed by another government agency when he updated his contact information. He stated that he had just applied for employment insurance benefits when he was offered this opportunity. He testified that when he was told by his employer that he lost the contract and that he didn't have any other work for him; he immediately provided the Commission his pay stub as proof of earnings and indicated that he was laid off. The Claimant indicated that unfortunately he did not notice that the employer had indicated a code that meant that he had been dismissed on his record of employment when he submitted it to the Commission.

[22] The Claimant testified that he was not the reason that the employer lost the contract. The Claimant stated that the employer was supposed to provide 3 employees on the work site of the construction company (client) however; there were only two of them; he never met a third employee. On Monday, November 3, 2008 the other employee did not show up and he admittedly showed up late. He was told by the client that his company/employer was no longer working on that site. The Claimant remembers that he asked to go inside the FedEx building to charge his phone in order to call his employer. He was told by his employer that he had lost the contract and that he does not have any other work to give him at that time. The Claimant stated that his employer was a new placement agency that employed mostly office workers but wanted to hire

employees in the construction trades (like him) so that they were available for future jobs. The Claimant stated that “it is not at all true” that the employer lost the contract because he was late. The Claimant also stated that he did not call in sick on Friday, October 31, 2008. Prior to accepting the offer, the Claimant stated that he had told the employer that he was going to be off on that day.

[23] The Claimant testified that he attempted obtain proof of his version of the events from people who can attest to the fact that he was on the work site and confirm the reason his employer lost the contract. He tried to call his former employer by phone and email but there was no response. He called Maple Reiner’s union (from the sticker on his hard hat) but was told that they could not provide information about any of their files. The Claimant stated that he even tried to recall all the other parties on the job site including a drywall company (recognized their truck) but didn’t know their name. The other coworker’s name was “David” or “Dave” but knows nothing more about him.

SUBMISSIONS

[24] The Claimant submitted that:

a) he was not dismissed by Apricot Solutions Inc. but laid off after the employer lost the contract with a construction company where he was placed. The employer did not have any other suitable work for him.

[25] The Respondent submitted that:

a) given the new information provided by the Claimant (GD3-37), the Claimant should have been given benefit of the doubt in this case;

b) the Claimant does not sway from the facts throughout the discussions and documentation;

c) that it finds it difficult to comprehend how a company could lose a contract within an hour or two of an employee being late and expects that that contract should and would have more security attached to it;

d) it concedes on the issue before the Tribunal and recommends that it allow the appeal.

ANALYSIS

[26] Section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by reason of his/her own misconduct.

[27] The Member recognizes that the legal test to be applied in cases of misconduct is whether the act under complaint was wilful, or at least of such careless or negligent nature that one could determine that the employee wilfully disregarded the effects his actions would have on job performance (McKay-Eden A-402-96, Tucker A-381-85). That is, the act that led to the dismissal was conscious, deliberate or intentional, 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 (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[28] Further, the Member recognizes that the onus is on the employer and the Commission to show that the Claimant, on a balance of probabilities, lost his employment due to his own misconduct (Larivee A-473-06), Falardeau A-396-85).

[29] The Member notes that it must first be established that the Claimant's actions were the cause of his dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). In other words, did the Claimant lose his job because of his own actions, which in this case, was for not showing up at a work site? Further, did the Claimant commit the alleged offence?

[30] In this case, it is undisputed evidence that the employer, a placement agency, lost a contract with a construction company. The employer and Claimant however, disagree on the reason for the separation of employment and the Claimant's alleged actions. On the one hand, the employer indicated in a written submission that the Claimant was dismissed because he did not show up on the worksite costing him the contract with the construction company. On the other hand, the Claimant contends that he was not dismissed but was laid off, that he did show up at the work site and he was not the reason that the employer lost the contract.

[31] The Member first considered the submissions of the employer and the Commission since the onus is on the employer and the Commission to show that the Claimant lost his employment due to his own misconduct. The Member noted that the employer's reasons are

provided in a written submission to the Commission in November 2009 and that no other contact with the employer was made. The Member also considered that the Commission initially determined that the Claimant lost his employment due to his own misconduct based only on the employer's written submission since they were unable to contact the Claimant. The Commission has since reviewed the Claimant's statements and additional information (GD3-37) and submitted that the Claimant should have been given benefit of the doubt. It submitted that the Claimant was very vocal about the events that lead to his leaving his employer and did not sway from the facts throughout his submissions. Further the Commission submitted that it finds it difficult to comprehend how a company could lose a contract within an hour or two of an employee being late and expected that the contract would have been more secure. The Commission therefore, concedes on the issue before the Tribunal.

[32] The Member next considered the Claimant's statements to the Commission, his written submission and direct testimony. The Member agrees with the Commission in that the Claimant was consistent with his version of the facts throughout his submissions. The Member also considered that the Claimant provided details of the work site, other coworkers, the union and other contracted companies. The Claimant was forthcoming about being late on the last day of work and made a concerted effort to obtain proof to substantiate his actions (presence on the work site) on the last day of work and the reason for the employer losing the contract. The Member further considered that the Claimant provided an alternative, plausible explanation for the employer losing the contract and why he believes he was laid off and not dismissed. The Member therefore, placed more weight on the consistent and direct evidence of the Claimant than the one written submission from the employer.

[33] The Member considered that in order for misconduct to exist, the initial onus is on both the Commission and the employer to demonstrate that the Claimant committed the alleged offence for which he was dismissed. In this case, the employer and the Commission (by concession) did not discharge that onus and the Member finds that, on a balance of probabilities, the Claimant did not commit the alleged offence of not showing up on the work site which caused the employer to lose the contract. That is, by preferring the Claimant's evidence over that of the employer, the Member finds that the Claimant did show up on the work site, albeit late, on November 3, 2008.

[34] The Member finds therefore, that on a balance of probabilities, the Claimant did not lose his employment as result of his own misconduct and an indefinite disqualification should not be imposed pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[35] The appeal is allowed.

Eleni Palantzas
Member, General Division

DATED: May 29, 2014