Citation: *K. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 62

Appeal #: GE-14-1693

BETWEEN:

K. G.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Teresa Jaenen
HEARING DATE:	June 17, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal is allowed

PERSONS IN ATTENDANCE

Mr. K. G., the Claimant attended the hearing.
Mr. Mark Crawford, the Representative attended the hearing.
Ms. Sarah Mottershead, an Observer attended the hearing

DECISION

[1] The Tribunal finds that an indefinite disqualification should not be imposed because the Claimant did not lose his employment due to his own misconduct.

INTRODUCTION

[2] On November 4, 2012 the Claimant made an initial claim for employment insurance benefits. On December 17, 2012 the Canada Employment Insurance Commission (Commission) denied benefits because the Claimant lost his employment due to his own misconduct. The Claimant appealed to the Board of Referees, who on January 31, 2 013 dismissed the appeal. On April 30, 2104 the Social Security Tribunal (SST) Appeals Division allowed the Claimant's appeal and issued a new hearing to be held by the General Division, Employment Insurance Section of the SST.

FORM OF HEARING

[3] After reviewing the evidence and submissions made by the parties to the appeal the Tribunal decided on an in person hearing for the reasons provided in the Notice of Hearing dated May 23, 2014.

ISSUE

[4] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification pursuant to sections 30 of the *Employment Insurance Act* (the Act) because he lost his job due to his own misconduct as per paragraph 29(1)(b) of the Act.

THE LAW

[5] Paragraphs 29(a) and (b) states for the purposes of paragraph 30(a) "employment" refers to any employment of the Claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[6] Subsection 30(1) of the Act states a Claimant is disqualified from receiving any benefits if the Claimant lost any employment because of their misconduct.

EVIDENCE

[7] A record of employment indicates the Claimant was employed with Turnbull Excavating from April 2, 2012 to July 13, 2013 when he was dismissed.

[8] The record of employment indicates the Claimant had insurable earnings in pay period one of $1950.91 and $762.27 for period two.

[9] The employer stated the Claimant was dismissed for not showing up for work and when he was at work he left early.

[10] The employer's comptroller stated they spoke to the Claimant about being late several times and they just couldn't put up with it anymore and dismissed him for absenteeism.

[11] She stated there were no written warnings on file.

[12] She stated the employer hired the Claimant and let him stay in a room at the job site.

[13] She stated the Claimant was really good from April to May.

[14] She stated she mentioned to the employer that they should be giving the Claimant written notices but the employer said as long as they got the Claimant to the work site he was a good worker.

[15] She stated that the Claimant was absent from June 25, 2012 to July 4, 2012 and he missed almost a week. The Claimant did work again after that until he was dismissed on July 13, 2012.

[16] A medical document signed by Dr. Akinsete was faxed from the employer stating the Claimant was unfit to work from June 20, 2012 to June 27, 2012 due to a left hand injury.

[17] A letter from the employer states the Claimant was not let go due to a shortage of work and that he Claimant did not show up for work during the period of June 25, 2012 to July 13, 2012. The Claimant was clearly told he was being let go due to his absences and being unreliable.

SUBMISSIONS

[18] The Claimant submitted that:

a) He wasn't sure why he was dismissed but thought it was a shortage of work;

b) He doesn't know why his employer said he didn't get along with others, it was news to him;

c) He doesn't know why the employer would say he was late or absent because he lived right behind the work site;

d) He had been dismissed in the past for being late and absent but that was not the case this time;

e) He disputes the employer allegations that he was absent from June 25, 2012 to July 4, 2012;

f) He was not at work from June 20, 2012 to June 27, 2012 due to a work place injury and he had supplied the employer with a doctor's note for the same period;

g) He returned to work on June 28th and worked until he was dismissed on July 13, 2012;

h) He does not have a driver's license and depends on transportation supplied by the employer;

i) On occasions when he did leave early he had permission from his foreman, who also was the one who would give him a ride back to where he resided;

j) He injured his hand at work and needed to be taken to the emergency room and his employer was aware of the accident;

k) He never received any written warnings from his employer; and

l) He believes the employer wanted an excuse to let him go because of the work place injury he sustained.

[19] The Respondent submitted that:

a) The Claimant was dismissed for repeatedly reporting to work late or being absent;

b) Given the Claimant's history of tardiness and absenteeism finds the employer's statements to be more credible;

c) This resulted in a breach of trust in the employer-employee relationship; and

d) The Claimant's actions meet the legal test of misconduct.

ANALYSIS

[20] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

[21] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct, where the Claimant knew or ought to have known that his misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the Claimant's misconduct and the Claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment. *Canada (AG) v. Lemire*, **2012 FCA 314**.

[22] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[23] The Tribunal must first identify if the alleged act constituted misconduct and if the Claimant's conduct complained of was the cause of the dismissal and not merely an excuse for dismissal.

[24] In this case, the Tribunal finds the alleged act of absenteeism constituted misconduct however the Tribunal cannot find the alleged act occurred and that absenteeism was the cause for the Claimant's dismissal.

[25] The Respondent presents the argument the Claimant was dismissed due to absenteeism. In this case the employer alleges the Claimant did not show up for work from June 25, 2012 to July 4, 2012 and did not provide any reasons for being absent. The employers evidence in the file indicate the Claimant did return to the workplace following being absent and worked until July 13, 2012 when at that time the employer felt he could no longer rely on the Claimant and dismissed him. The Claimant however provided documentary and oral evidence that disputes the employer's allegations. The Claimant stated that he was away from June 20, 2012 to June 27, 2012 following an injury he sustained at the workplace. The Claimant supplied a medical document to substantiate the leave of absence. The Claimant provided oral evidence that he returned to work on June 28th

and worked until he was dismissed on July 13, 2012. The Claimant also referenced these facts are substantiated on the record of employment. The record of employment which was prepared by the employer indicate the Claimant was paid $1950.91 in pay period that covered the two weeks immediately preceding the dismissal and was paid $762.27 for two week period that would have included the week of medical leave.

[26] The Tribunal finds from the medical evidence and the information on the record of employment, the Claimant was in fact absent from his employment however not on the days the employer alleges. The evidence supports the employer would have been aware of the Claimants absence because the Claimant provided his employer with a medical note. This is substantiated that the employer was in receipt of the medical document as it was the employer who faxed the medical note to the Claimant's representative upon request (GD2-70). The Tribunal finds the amounts recorded on the record of employment would indicate the Claimant worked more than 40 hours per week in the two weeks preceding the dismissal and over 40 hours in the pay period preceding. The Tribunals finds the later period would encompass the one week the Claimant was off on a medical leave. As the employer did not attend the hearing the Tribunal does not know why the employer failed to make any mention of the Claimant's absenteeism due to his medical condition or to reply to the earnings recorded on the record of employment.

[27] The Tribunal finds the facts in the file supplied by the employer are not consistent with the Claimant, and from the medical evidence and the information on the record of employment the Tribunal finds the evidence supports the Claimant did not commit the alleged misconduct based on absenteeism. The Claimant's representative stated they believed the employer just wanted to get rid of the Claimant because of the work place injury. The Tribunal finds there is no evidence to support the representative's statements the dismissal was in regards to a workplace injury. The only reason actually given by the employer for the termination is absenteeism and as the evidence presented does not support the Claimant was absent without permission it does not support misconduct.

[28] The Respondent presents the argument that given the Claimant's history of tardiness and absenteeism finds the employer's statements to be more credible. The evidence in the file show the Claimant agreed in the past there had been issues of being late and absent from work, and that he had in fact been dismissed for those reasons. However this was not the case this time because he had not been absent, contrary to the employers statements. The Claimant's provided oral evidence that he lived in a room on the job site that was provided by the employer so they could always get a hold of him. He did not have a valid driver's license or he owned his own means of transportation and relied on transportation from his employer to and from the job sites, and that there were a couple of times he left early, but his foreman knew because he has to drive him.

[29] The Tribunal does not have the benefit of oral evidence from the employer, however the facts in the file indicate the employer was lenient with the Claimant despite his work habits. The evidence in the file support a history the employer would dismiss the Claimant and hire him back and from the employer evidence, and the Claimant did not receive any written warnings or progressive discipline actions during any time during his employment, past or present. The employer provided the Claimant with a place to live and transportation to the job sites and from the employer's statements the Claimant was a good worker once they got him to the work site. The Tribunal finds the evidence on the file; the Respondents argument does support the credibility of the employer statements.

[30] As Justice Nadon wrote in *Mishibinijima v. Canada* **2007 FCA 36**, there will be misconduct 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.

[31] In this case, the Tribunal cannot find evidence that the alleged action of misconduct due to absenteeism exits and therefore, the Claimant could not have known his absent due to a medical reason, to which he provided his employer a medical note would have caused his dismissal two weeks after he returned to work.

[32] The Respondent argues the Claimant's behavior resulted in a breach of trust in the employer-employee relationship. As the Tribunal has determined misconduct has not occurred, the Tribunal cannot find a breach of trust in the employer-employee relationship occurred.

CONCLUSION

[33] The appeal is allowed.

Teresa Jaenen
Member, General Division

DATED: June 23, 2014