Citation: *S. D. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 77

Appeal #: GE-13-1938

BETWEEN:

S. D.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Gerry McCarthy
HEARING DATE:	June 22, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

S. D. (the Claimant and Appellant) did not attend the hearing. The employer also did not attend the hearing.

DECISION

[1] The Tribunal finds the Claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

INTRODUCTION

[2] The Claimant established an initial claim for Employment Insurance benefits (EI benefits) on October 23, 2011. The Claimant worked for "McDonald's Restaurant" and was dismissed from his employment on August 26, 2011. The Canada Employment Insurance Commission (Commission) determined the Claimant lost his employment due to his own misconduct. The Claimant appealed to the Board of Referees and his appeal was dismissed on March 1, 2012. The Claimant subsequently appealed to the Umpire on March 9, 2012. The Claimant verbally advised the Commission on April 27, 2012, and May 2, 2012, that he was withdrawing his appeal to the Umpire. The Claimant did not submit (in writing) his request to withdraw his appeal to the Umpire. The Appeal Division of the Social Security Tribunal (Tribunal) became seized of any appeal filed with, but not heard by, the Office of the Umpire before April 1, 2013, in accordance with section 266 and subsection 267(1) of the *Jobs, Growth and Long-term Prosperity Act* of 2012. As of April, 2013, the Office of the Umpire had not heard the Claimant's appeal. On July 17, 2013, the Appeal Division of the Tribunal wrote that there must be a new hearing so that the Appellant could have the opportunity to be heard. The Appeal Division of the Tribunal subsequently referred the matter to the General Division of the Tribunal for a new hearing. The Claimant's scheduled hearing for March 5, 2014, and May 15, 2014, were both adjourned as the Claimant's Notice of Hearing was returned to the Tribunal.

FORM OF HEARING

[3] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated February 3, 2014.

ISSUE

[4] The issue is whether the Claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the EI Act.

THE LAW

[5] Subsections 29 (a) of the EI Act states that: For the purposes of sections 30 to 33,

> (a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period.

[6] Subsection 30(1) of the EI Act provides, in part, 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."

[7] The EI Act does not define misconduct. The Federal Court of Appeal (FCA) has explained the legal notion of misconduct for the purposes of this provision as acts that are wilful or deliberate, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85)

[8] The FCA has further explained that wilful 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 (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Secours v. Attorney General of Canada*, A-1342-92).

[9] Furthermore, the FCA has explained that to determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Nguyen v. Attorney General of Canada*, 2001 FCA 348; *Brissette v. Attorney General of Canada*, A-1342-92).

EVIDENCE

[10] The Claimant applied for EI benefits on October 25, 2011, and established an initial claim on October 23, 2011.

[11] The Claimant said he worked for "McDonald's Restaurant" until August 26, 2011, and was dismissed by the employer. He said he had overstocked by bringing too many buns out to the preparatory area of the restaurant. He said his supervisor asked him about the extra buns and he felt it better not to reply. He said during this time he was lacking sleep, because his friend had been hospitalized. He said on May 29, 2011, he had been suspended for one-week by the employer for allegedly swearing. He said he spoke to the employer about saving his job, but was told he was giving them "too much attitude."

[12] The Claimant's Record of Employment indicated he was dismissed by the employer.

[13] The employer (Mr. M. B./Franchise Owner) spoke to the Commission on December 20, 2011, and said the Claimant worked as a preparatory person in the restaurant. He said there were three incidents which involved the Claimant. First: He said the Claimant had refused a request from the manager and became involved in a fight with that manager. Second: He said he Claimant had told another manager to "Fuck off" and it was confirmed

by staff. Third: He said the Claimant threatened another manager and was given a one-week suspension. He said the Claimant came back to work three-weeks later and subsequently became involved in a fight with his manager. He said the Claimant had yelled and caused disruption. He said the Claimant was sent home and dismissed the next day. He said when the Claimant was suspended it was his final written notice. He said the Claimant had been through a process of disciplinary action up to and including the termination of his employment.

[14] The employer (Mr. M. B.) spoke to the Commission on December 20, 2011, and said that the three incidents he referred to were discussed with the Claimant on May 30, 2011, and occurred prior to that date. Mr. M. B. then provided more information on the final incident. He said on August 26, 2011, the Claimant was working in the preparatory area of the restaurant and had brought out to many buns. He said the Claimant's manager advised him that he needed to pull the charts to review the number of buns required. He said the Claimant replied that he did not need the charts. He said the Claimant's manager then asked him to drop the attitude. He said the Claimant replied back that she (the manager) could pull the charts. He said the Claimant was sent home and his employment was terminated the next day. He clarified that the Claimant's final written warning did not state he would be terminated for any further incidents. He said at that time he told the Claimant verbally that it was his final warning.

[15] The Claimant spoke to the Commission on December 20, 2011, and said he agreed with his suspension but not his termination of employment. He then spoke about the final incident. He said he did not know where the charts were for the buns. He said the manager was supposed to give the buns to him, and he didn't know where they were.

[16] On December 20, 2011, the Commission notified the Claimant that he lost his employment on August 26, 2011, due to his own misconduct.

[17] In his appeal to the Board of Referees (dated January 10, 2012) the Claimant said he did not agree that his behavior on August 26 (2011) constituted misconduct as he was going through personal issues at that time.

[18] The employer (Mr. M. B.) spoke to the Commission on January 30, 2012, and said there was no written policy regarding "progressive discipline." He said the employer's policy was a three-step discipline which involved a warning, suspension, and termination of employment. He said there was nothing about a one-week suspension followed by a two-week suspension. He said the Claimant was given a written warning on the first occasion. He stated at that time the Claimant was told that if there were further incidents his employment would be terminated. He explained that at the time he should have dismissed the Claimant rather than just giving him a warning, because he had threatened a manager and called another manager a "fucking bitch." He said a termination of employment letter was not issued to the Claimant.

[19] The employer (Mr. M. B.) submitted a letter (dated February 24, 2012) that reviewed and clarified the incidents leading up to the Claimant's termination of employment by his manager. He said there were three previous incidents of concern that involved the Claimant. First: He said the Claimant had a "run in" with a manager over the quantity of muffins he should be preparing. He said this incident involved loud confrontation, yelling, and a disruption to the business occurred. Second: He said the Claimant called one of the managers a "fucking bitch." Third: He said the Claimant threatened a Manager. He explained that the manager was pregnant and she was considering stepping down to make it easier on herself. He said the Claimant threatened this manager and said: "If you don't step down I will make it my business to see that you do." Mr. M. B. further wrote that these incidents were confirmed by the people involved. He said he reviewed these incidents with the Claimant and suspended him for one-week. He then wrote that the Claimant came back to the workplace and when a new manager came on board she questioned the Claimant about the quantity of buns he had pulled. He explained that there was a two-day expiry on buns and the Claimant pulled "way too many buns." He wrote that the Claimant argued repeatedly with the manager. He said the manager sent the Claimant home and the next day terminated his employment.

[20] The Board of Referees dismissed the Claimant's appeal on March 1, 2012.

[21] The Claimant appealed to the Umpire on March 9, 2012, and said he had not received any sort of notice on what was going on with his claim.

[22] On April 27 (2012) and May 2 (2012) the Claimant indicated to the Commission that he wished to withdraw his appeal to the Umpire. The Claimant was asked to submit his withdrawal in writing. No written withdrawal was received and the matter proceeded.

[23] On September 4, 2012, the Commission requested the Umpire allow an additional period of time for written representations.

[24] On July 10, 2013, the Appeal Division of the Tribunal referred the matter back to the General Division and wrote that there must be a new hearing so that the Appellant (Claimant) could have the opportunity to be heard.

[25] The Claimant's Notice of Hearing (dated February 3, 2014) and scheduled for March 5, 2014, was returned to the Tribunal. The Tribunal made attempts made to contact the Claimant by telephone on February 27, 2014.

[26] The Claimant's hearing for March 5, 2014, was adjourned. The Claimant's Notice of Hearing (dated March 10, 2014) and scheduled for May 15, 2014, was then sent by Purolator again.

[27] The Claimant's Notice of Hearing for May 15, 2014, was returned to the Tribunal on March 17, 2014.

[28] There were several attempts made to contact the Claimant by telephone from March 24, 2014, to April 4, 2014.

[29] The Claimant's hearing for May 15, 2014, was adjourned. The Claimant was sent (by regular mail) a new Notice of Hearing (dated May 27, 2014) which was scheduled for July 22, 2014.

[30] The Claimant's Notice of Hearing for July 22, 2014, was returned to the Tribunal on June 19, 2014.

SUBMISSIONS

[31] The Claimant submitted that:

> a) His behavior on August 26 (2011) did not constitute misconduct as he was going through personal issues at that time.
>
> b) In the final incident, his manager was supposed to give the buns to him as he didn't know where they were located in the restaurant.

[32] The Respondent submitted that:

> a) The Claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the EI Act.
>
> b) The Claimant's misconduct occurred on the day of his termination and was the cause of his dismissal.
>
> c) The Claimant had recent previous incidents of arguing with his manager involving disrespectful and threatening behaviour.
>
> d) The Claimant had been given a "second chance" in May 2011 following a one- week suspension and from this should have known that any further acts of a similar nature would result in the termination of his employment.
>
> e) The personal stress the Claimant indicated he was undergoing did not ameliorate the requirement to act in a respectful manner to his employer.

ANALYSIS

[33] The Claimant (who is the Appellant) and the employer did not join the teleconference hearing at the scheduled time on July 22, 2014. The Tribunal waited 15- miuntes for the parties to join the teleconference, but neither party joined the teleconference. The Tribunal is satisfied that the employer received the Notice of Hearing and will proceed in their absence.

[34] On February 3, 2014, the Notice of Hearing was sent to the Claimant by Priority Post to the address provided on his Notice of Appeal. On February 25, 2014, the Claimant's Notice of Hearing was returned to the Tribunal and marked "unclaimed." On March 10, 2014, the Notice of Hearing was sent to the Claimant again by Priority Post to the address provided on his Notice of Appeal. On March 17, 2014, the Claimant's Notice of Hearing was returned to the Tribunal and marked "does not live here anymore." On May 27, 2014, the Notice of Hearing was sent to the Claimant by regular mail to the address provided on his Notice of Appeal. On June 19, 2014, this Notice of Hearing was returned to the Tribunal. The Tribunal tried to contact the Claimant by telephone on February 27, 2014, and March 24, 2014, but there were "unidentified voice messages." The Tribunal tried to contact the Claimant again on April 4, 2014, and left a voice message. The Claimant did not return the message.

[35] The Tribunal recognizes that the Claimant's Notice of Hearing has been returned to the Tribunal on three occasions and there have been numerous attempts made to contact the Claimant by telephone (as cited above). The Tribunal wishes to emphasize that section 6 of the *Social Security Tribunal Regulations* states that: "A party must file with the Tribunal a notice of any change in their contact information without delay." Further, paragraph 3(1) (a) of the *Social Security Tribunal Regulations* states that: "The Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."

[36] The Tribunal is satisfied that all attempts have been made to locate the Claimant. Therefore, under the authority of subsection 3(2) of the *Social Security Tribunal Regulations*

to proceed by way of analogy, the Tribunal is dispensing with the requirement to give notice of a hearing to a party and will proceed in the Claimant's absence.

[37] The Tribunal must decide whether the Claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the EI Act.

[38] The Tribunal finds the Claimant established an initial claim for EI benefits on October 23, 2011.

[39] The Tribunal recognizes the Claimant worked for "McDonald's Restaurant" until August 26, 2011, and was dismissed by the employer (his manager). The Tribunal finds the Claimant had previously received a one-week suspension from the employer (Mr. M. B.) on May 30, 2011, for three specific incidents where he argued with managers, threatened a manager, and used profanity in the workplace. The Tribunal finds that when the Claimant eventually returned to work he was involved in an argument with his manager and was dismissed by that manager the following day. The Tribunal finds the employer did not provide the Claimant with a written letter of termination.

[40] The Tribunal recognizes that on December 20, 2011, the Commission notified the Claimant that he lost his employment on August 26, 2011, due to his own misconduct.

[41] The Tribunal realizes the Claimant has submitted that his behavior on August 26, 2011, did not constitute misconduct as he was going through personal issues at that time. The Tribunal further recognizes the Claimant has argued that in the final incident (August 26, 2011) his manager was supposed to give the buns to him, because he did not know where they were located in the restaurant.

[42] The Tribunal will address the Claimant's arguments in a moment. However, the Tribunal would first like to emphasize the legal test for misconduct. In short: Were the Claimant's action wilful or deliberate? In other words: Should the Claimant have known (or ought to have known) that his conduct was such that it would result in dismissal (*Lemire v. Attorney General of Canada*, 2010 FCA 314*; Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85).

[43] The Tribunal realizes the Claimant has submitted that in the final incident he was going through some personal issues. However, it is not up to the Tribunal to decide whether the Claimant's dismissal was too severe, unfair, unwarranted, or the appropriate disciplinary action in view of the alleged misconduct (*Auclair v. Attorney General of Canada*, 2007 FCA 19; *Caul v. Attorney General of Canada*, 2006 FCA 251; *Marion v. Attorney General of Canada,* 2002 FCA 185). Instead, the Tribunal must apply the legal test to the facts. In this case, the Claimant received a one-week suspension from the employer (Mr. M. B.) on May 30, 2011, and was advised verbally (at the time) that it was his final warning. The Tribunal finds the Claimant was suspended by the employer, because he threatened a manager and directed profane language at his managers. The Tribunal recognizes the Claimant has not disputed that he behaved in this manner prior to his suspension. In fact, the Tribunal finds the Claimant told the Commission (in Exhibit GD2-31) that he agreed with his suspension (but not the termination of his employment).

[44] The Tribunal recognizes the Claimant has further argued that in the final incident his manager was supposed to give the buns to him, because he didn't know where they were located in the restaurant. The Tribunal accepts the Claimant was confused about where a certain product was located in the restaurant. Nevertheless, the employer has reported that (in the final incident) the Claimant repeatedly argued with his manager and even yelled at this manager. The Tribunal finds the Claimant has not disputed these reports from the employer, but only indicated he disagreed with his dismissal. On this point, the Tribunal finds Mr. M. B.'s statement on what occurred in the final incident to be credible as the information provided was coherent and detailed and not disputed by the Claimant.

[45] The Tribunal wishes to emphasize the Claimant was given a final warning about his behavior by Mr. M. B. (the employer) at the time he was suspended for one-week. The Tribunal finds the Claimant's suspension was the result of his inappropriate behavior toward his managers and his use of profanity in the workplace. In short, the Claimant should have known (or ought to have known) that yelling at his manager in the final incident would result in his dismissal since his previous suspension was imposed for this same sort of

behaviour. The Tribunal therefore finds the Claimant's actions in the final incident had a mental element of willfulness and meet the legal test for misconduct.

[46] In the last analysis, the Claimant's actions in the final incident were the cause of his dismissal and meet the legal test for misconduct (as cited above) pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[47] The appeal is dismissed.

Gerry McCarthy
Member, General Division

DATED: July 25, 2014.