

[TRANSLATION]

Citation: *B. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 100

Appeal No: GE-13-1405

BETWEEN:

B. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Claude Durand

HEARING DATE: July 2, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE AND TYPE OF HEARING

B. G., the Appellant, accompanied by his representative, Yvan Bousquet from Mouvement Action Chômage (MAC St-Hyacinthe), participated in the teleconference held on July 2 for the reasons given in the notice of hearing dated April 24, 2014.

DECISION

[1] The Tribunal does not allow the appeal.

INTRODUCTION

[2] In this case, the Appellant was dismissed because he went on leave without the employer's authorization. The Employment Insurance Commission (the Commission) determined that the Appellant had lost his employment by reason of his own misconduct.

[3] Consequently, the Commission imposed an indefinite disqualification effective July 14, 2013, in accordance with subsection 30(1) of the *Employment Insurance Act* (the Act).

[4] The Appellant applied for an administrative review and the Commission upheld its initial decision.

[5] The Appellant appealed to the Social Security Tribunal (the Tribunal) on July 10, 2014.

ISSUE

[6] The Tribunal must decide whether the appellant lost his employment by reason of his own misconduct within the meaning of sections 29 and 30 of the Act.

APPLICABLE LAW

[7] 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;

(b) 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;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

- [8] **30.** (1) 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.

EVIDENCE

Evidence in the file: Commission's investigation

- [9] An initial claim for Employment Insurance benefits was established effective July 14, 2013 (pages GD3-2 to 15).
- [10] The Appellant worked intermittently for Garage Gaston Chartier & Fils for 18 years as a tire installer and distributor at the counter.
- [11] The Appellant had requested a week off from July 15 to 19, to go on a motorcycle trip with his girlfriend (page GD3-17).
- [12] First, the employer allegedly refused to allow the week off on the dates requested by the Appellant because that period was very busy.
- [13] During the same period, the employer also had to prepare bids for tire changes done in the fall for a major client, the City of Montreal.
- [14] According to the employer, at the Appellant's insistence, he agreed to time off from July 15 to 17, but insisted that the Appellant come to work on Thursday, July 18, and Friday, July 19.
- [15] G. C., the boss, stated that, when the Appellant was leaving on Friday, July 12, he told the employer, in front of the other employees, that he intended to take the full week off and not return on July 18 and 19, regardless of the consequences (page GD3-23).
- [16] G. C. told him again at this time to come to work on those days because he was needed.

[17] The Appellant did not show up on those two days; he did not contact the employer to report his absence (page GD3-26).

[18] The employer dismissed him on the spot for a serious breach (pages GD3-24 and 25).

[19] The Appellant confirmed most of the employer's version (page GD3- 25).

Evidence at the hearing: Appellant's testimony

[20] The Appellant explained how important this week of vacation was to him by stating that it was the only week he could take off with his girlfriend because of their schedules.

[21] He also said that the week in question was not as busy as the boss claimed.

[22] The Appellant's version differs on the circumstances of his leave and his decision to take the full week off.

[23] The Appellant confirmed that, at the end of his work day on July 12, the Friday before his leave, he told the boss, G. C., that he would not be coming in to work on the following Thursday and Friday and that he intended to take the full week off.

[24] G. C., the boss, allegedly did not reply. The Appellant stated that he took the boss's silence as agreement.

[25] When he received his dismissal letter, he was surprised. He reiterated that he had taken the boss's silence as acquiescence.

[26] The Appellant stated that he had never had disciplinary action taken against him.

[27] The Appellant added that there is no written policy about leave requests. He explained that a policy of logic applied. Employees had to give notice if they wanted to take time off.

SUBMISSIONS OF THE PARTIES

[28] In summary, the Appellant's representative submitted the following:

(a) On July 12, the employer did not tell the Appellant that he was not permitted to take leave for the full week of July 15 to 19, 2013.

(b) The Appellant did not remember having a conversation in front of the other employees on July 12 when he allegedly told the boss that he intended to take his full week of vacation.

(c) There are contradictory versions of these facts, and in such cases the Appellant must be given the benefit of the doubt.

(d) The Appellant has 18 years of experience, and was therefore in a position to know if the workload was so busy that he needed to be at work on July 18 and 19.

(e) The Appellant worked for the employer for 18 years. He could not have expected that he would be dismissed when he thought the boss, G. C., had finally approved his full week of vacation.

(f) This was a misunderstanding between the employer and the Appellant. The evidence is ambiguous and does not prove that, by not coming into work on July 18 and 19, the Appellant could have expected to be dismissed.

[29] In support of the Appellant's claims, his representative submitted a variety of case law. In particular, CUB 60702, according to which the employer's opinion does not equal proof of misconduct, and CUB 65750 *Keegan Rose*, which addressed a burden of ambiguous or equivalent proof, according to which the claimant must be given the benefit of the doubt.

[30] The Respondent submitted the following:

(a) The employer refused to allow a full week off because it was a busy period. However, he showed flexibility by giving three out of five days off. The Appellant was dismissed because he was away on July 18 and 19, 2013 without permission.

(b) The Appellant put himself in a situation that left his employer no choice. He knew that his leave request had been refused for July 18 and 19, 2013, but he decided not to come to work anyway.

(c) His actions constitute misconduct within the meaning of the Act by their wilful or deliberate nature and the fact that they resulted from such carelessness or negligence as to approach wilfulness.

ANALYSIS

[31] First of all, it is worth recalling the principles set out in the Act and highlighted by the case law.

[32] The purpose of the Act is to compensate people whose employment has terminated involuntarily and who are without work. The loss of employment against which the person is insured must be involuntary (*Gagnon* [1988] 2 S.C.R. 29).

[33] The purpose of these sections is to impose a disqualification as a kind of punishment for undesirable conduct that falls short of the true unemployment the Act intends to benefit (*Tucker* A-381-85).

[34] It is the responsibility of insured persons, in exchange for their participation in the scheme, not to transform what was only a risk of unemployment into a certainty (*Langlois* 2008 FCA 18; *Tanguay* 1458-84).

[35] The performance of services is an essential condition of the employment contract. Where a claimant, through their own actions, can no longer perform the services required from them under the employment contract and as a result loses their employment, that claimant “cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily” (*Wasyłka* 2004 FCA 219; *Lavallée* 2003 FCA 255; *Brissette* A-1342-92).

Case law principles regarding misconduct:

[36] The construction of misconduct is a question of law, but whether a particular act or omission is misconduct is a question of fact (*Tucker* A-381-85; *Bedell* A-1716-83).

[37] Determining what constitutes misconduct is largely a question of circumstances (*Gauthier* A-6-98; *Bedell* A-1716-83).

[38] It is not necessary that there be wrongful intent for behaviour to amount to misconduct under the *Employment Insurance Act*. It is sufficient that the reprehensible act or omission complained of be made wilfully, that is, consciously, deliberately or intentionally (*Caul* 2006 FCA 251; *Pearson* 2006 FCA 199; *Bellavance* 2005 FCA 87; *Johnson* 2004 FCA 100; *Secours* A-352-94; *Tucker* A-381-85).

[39] The onus is on the Commission to prove (on a balance of probabilities) that the claimant lost their employment by reason of their own misconduct. To discharge this onus, the Tribunal must be satisfied that the misconduct was the reason for the dismissal, not the excuse for it. This requirement necessitates a factual determination after weighing all the evidence (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A. 398).

[40] Proof of a mental element is necessary. The claimant's behaviour must have been deliberate or so reckless as to approach wilfulness (*McKay-Eden* A-402-96; *Jewell* A-236-94; *Brissette* A-1342-92; *Tucker* A-381-85; *Bedell* A-1716-83).

[41] For the Tribunal to conclude that there was misconduct, it must have the relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and then, to decide whether this behaviour was reprehensible (*Meunier* A-130-96; *Joseph* A-636-85).

[42] What is the situation here?

[43] In reflecting on the Appellant's claims, the Tribunal came to understand that he wanted to highlight a situation that he claimed was ambiguous, which he could use to his advantage when he had not reported for work.

[44] In addition, if the employer's refusal to allow the full week of leave requested by the Appellant must be examined, the Tribunal has to accept that the employee was in a better position than the employer to decide this.

[45] The Tribunal rejects the Appellant's arguments concerning a misunderstanding. The employer's position was always clear; he refused to give the Appellant a full week off.

[46] The Appellant's position is untenable.

[47] The Appellant could hardly claim he was surprised at being dismissed; he demonstrated wilful blindness.

[48] He chose his personal well-being over the requirements of his employment, which were obviously up to his employer to define.

[49] He must bear the consequences of his indifference.

[50] The Appellant wilfully disregarded his employer's instructions; he knew the consequences, namely, that he could lose his job.

[51] For these reasons, the Tribunal concludes that the Appellant lost his employment by reason of his own misconduct and that the Commission's decision to impose a disqualification on him in accordance with subsection 30(1) of the Act was well-founded.

CONCLUSION

[52] The appeal is dismissed.

Claude Durand

A handwritten signature in black ink that reads "Claude Durand". The signature is written in a cursive, flowing style.

Member, General Division

DATE OF REASONS: September 9, 2014