[TRANSLATION]

Citation: *R. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 107

Appeal No: GE-14-2290

BETWEEN:

**R. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance

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| SOCIAL SECURITY TRIBUNAL MEMBER: | Aline Rouleau |
| DATE OF DECISION: | September 16, 2014 |
| TYPE OF HEARING: | Teleconference |
| DECISION: | Appeal dismissed |

## PERSONS IN ATTENDANCE

Neither the Appellant nor his representative participated in the hearing. Verification confirmed that the Appellant's representative received the notice of hearing, indicating the scheduled time and date of the hearing, by priority post on August 7, 2014. Since they did not participate in the hearing, the Tribunal rendered its decision on the basis of the appeal file, as provided in section 12 of the *Social Security Tribunal Regulations*.

## DECISION

[1] The Tribunal dismisses the appeal. The Tribunal finds that the circumstances invoked by the Appellant to justify his actions are not probative, that his actions were conscious and deliberate and made with the knowledge that they violated the safety rules, that the Appellant's actions constituted misconduct and that he should have known that these actions would result in his dismissal. The Tribunal also finds that the Commission's position to concede the issue violates the parameters established by the *Employment Insurance Act*, its Regulations and the case law interpreting them.

## TYPE OF HEARING

[2] The hearing was held by teleconference for the reasons set out in the notice of hearing dated August 5, 2014.

## ISSUE

[3] Did the Appellant lose his employment because of his own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (the Act)?

## INTRODUCTION – STATEMENT OF FACTS

[4] A renewal claim for benefits took effect on December 22, 2013 (GD3-3 to GD3-12) following the Appellant's dismissal (GD3-13).

[5] After investigating, the Commission found that the Appellant had lost his employment by reason of his misconduct and that the alleged act was the immediate cause for the dismissal and constituted misconduct. The Commission therefore imposed an indefinite disqualification effective December 15, 2013, in accordance with section 30 of the Act (GD3-23 and GD3-24).

[6] The Appellant requested a reconsideration of that decision (GD3-25 to GD-29). The Commission upheld its initial decision (GD3-31 and GD3-32), which gave rise to this appeal before the Tribunal (GD2-1 to GD2-10).

[7] The employer was invited to join the appeal before the Tribunal and had until July 24, 2014, to do so. There was no response to this invitation.

[8] In its submissions to the Tribunal (GD4-1 to GD4-8), the Commission asked that the appeal be allowed.

## APPLICABLE LAW

[9] Section 29 of the *Employment Insurance Act* defines "employment" for the purposes of sections 30 to 33, as any employment of the claimant within their qualifying period or their benefit period.

[10] Section 30 of the *Employment Insurance Act* provides for the imposition of an indefinite disqualification if is established that a claimant lost any employment because of their misconduct.

## EVIDENCE

[11] The evidence on file shows the following:

(a) The Appellant worked from March 3 to December 19, 2013, and the reason for the separation from employment given in the Record of Employment is dismissal (GD3-13).

(b) The Appellant stated (GD3-14 and GD3-15) that he was contacted by the employer on January 4, 2013, to inform him that he no longer wanted to see him on the site for safety reasons. The employer did not warn him orally or in writing to correct the situation.

(c) The employer explained (GD3-16) that the Appellant was dismissed because he did not comply with the safety procedures of his job as a railroad bridge operator. A bridge operator has to perform a number of tasks at different heights, and when the height exceeds eight feet, the bridge operator must use a harness according to regulations to this effect. The Appellant did not comply with this procedure. He was met with and orally notified on several occasions to comply with the safety rules. The employer stated that all employees had taken a safety course.

(d) The employer stated (GD3-16 and GD3-17) that the Appellant had received a final notice from foreman S. M. and his lead hand, H. P. In December 2013, the Appellant was laid off for the holiday season like all the others and, during this time, the employer decided to dismiss the Appellant following a discussion with foreman S. M. because none of the teams wanted to work with the Appellant any more when they returned to the site in January, as they found it too dangerous.

(e) The employer produced two foreman reports: One report, prepared by supervisor S. M. (GD3-19) and detailing the Appellant's on-site behaviour and the foreman's and assistant's reactions between December 10 and 18, 2013, finds that, despite oral warnings, the Appellant did not change his behaviour. They are discouraged, no longer know what to do and do not want the responsibility for this guy to rest with them. They are afraid of an accident and of being accused of negligence because they are responsible for the men working on their sites. They no longer want to have a guy around who does not comply with the safety procedures. The other report (GD3-20 and GD3-21), prepared by foreman R. G., describes the Appellant's breaches of the safety rules during September and October 2013, the warnings he received at that time and the final warning notifying him that, in the event of a further breach, the Appellant would have to leave his work team, senior management would be notified, and someone else would

have to resolve the problem. This report contains the names of witnesses to the events described.

(f) After trying to reach the Appellant on two occasions to no avail, the Commission found (GD3-23 and GD3-24) that the alleged act was the immediate cause for the dismissal and constituted misconduct because the Appellant had been warned repeatedly, knew he had to comply with the procedures and did not change his behaviour.

(g) In his request for reconsideration of the Commission's decision (GD3-25 to GD3-29), the Appellant states that he notified his supervisor that he could not wear the harness and that the supervisor [translation] "did not want to hear about it." He provided a clinical note from a doctor, dated August 14, 2013, and an ultrasound examination report made on September 12, 2013 (GD3-28 and GD3-29).

(h) When the Commission communicated with the Appellant following his request for reconsideration, he maintained (GD3-30) that he knew he had to wear his harness but that he had submitted a medical note stating that he could not wear it. The Appellant stated that he did not ask the doctor for a certificate stating that he had to leave his job because the employer did not ask him for a medical certificate and because he was able to work.

(i) In his notice of appeal (GD2-1 to GD2-10), the Appellant states that, on December 16, 2013, he discussed his health problem with the employer, who agreed to let the Appellant work in a location where he would not have to wear the harness. He provided a medical examination report dated September 12, 2013 (GD2-6) and a letter from a doctor (GD2-8), dated May 8, 2014, confirming that the Appellant had not been able to wear a harness since August 2013.

[12] Since the Appellant did not participate in the hearing, no evidence additional to that on file was submitted.

**SUBMISSIONS OF THE PARTIES**

[13] The Appellant submitted the following:

(a) He notified his supervisor that he could not wear a harness, but the supervisor did not want to hear about it. The Appellant believes that the employer did not want to keep him because it was hiring young people at lower wages and found an excuse to dismiss him.

(b) The labour standards board informed him that the employer could not dismiss him before giving him three written warnings. He maintained that he should have received warnings.

[14] The Respondent Commission submitted the following:

(a) In its initial decision, the Commission maintains that the Appellant was warned repeatedly and knew that he had to comply with the safety procedures. He did not change his behaviour and was dismissed. The medical certificate submitted during the reconsideration process did not state that the Appellant could not wear a harness.

(b) In its submissions to the Tribunal, the Commission stated that it must cancel its position on the disqualification due to dismissal because of the facts submitted as part of the request for reconsideration.

(c) The Commission could not maintain that the alleged act was wilful or deliberate or so negligent as to approach wilfulness.

(d) The Commission assumed this position because the employer had no discipline policy, which is confirmed by the foremen's statement that they made the mistake of not sitting down with the Appellant to inform him of the seriousness of his actions.

(e) In the absence of a progressive discipline policy, the Appellant did not know where he stood because the oral warnings were all alike and did not escalate in a dismissal. There was no final written warning informing the Appellant that the next offence would result in dismissal. Even if he was repeatedly warned to wear his harness, he

did not know when one of these offences would result in dismissal. It cannot be concluded that the Appellant knew that his job was in jeopardy when he was dismissed. The employer did not dismiss him after the final offence. He was laid off for the 2013 holiday season and was dismissed on January 4, 2014, on which date no offence was committed.

(f) The information provided in the notice of appeal had no impact on the Commission's decision. One of the facts submitted by the Appellant contradicted the information already on file. He stated that, on December 16, 2013, he discussed his condition with his employer, who agreed to let him work on the ground from that point but, in the statement of February 17, 2014, the foremen maintain that, from December 16 to 18, 2013, the Appellant returned to work on the bridge and was continuously warned. This is a contradiction and undermines the credibility.

(g) The medical note stating that the Appellant has not been able wear a safety harness for medical reasons since August 2013 is not relevant to the reason for separation, because of the Appellant's readiness to return to work in January 2014.

(h) The Commission recognized that the Appellant breached the safety rules on the employer's site. However, due to the lack of a discipline policy, written warnings based on such policy or formal acknowledgements of receipt by the Appellant, the evidence on file does not support the finding that the Appellant committed misconduct.

(i) The Commission asked the Tribunal to allow the appeal.

**ANALYSIS**

[15] For the alleged act to constitute misconduct within the meaning of section 30 of the Act, it must be voluntary or deliberate or result from such carelessness or negligence that it borders on being deliberate. Also, there must be a cause and effect relationship between the act considered as misconduct and the dismissal.

[16] There is no definition of misconduct in the *Employment Insurance Act*. The Federal Court of Appeal has defined the notion of misconduct as wilful conduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Canada (AG) v. Lemire*, 2010 FCA 314). This definition of misconduct includes two components: deliberate misconduct and the causal link.

[17] The Tribunal must assess the facts based on the evidence before it in order to determine the issue of misconduct. The question as to whether such an act or omission by an employee falls within the notion of misconduct is a question of fact. Therefore, particular attention must be given to the established facts rather than to the opinions expressed by the various interested parties. For the Tribunal to conclude that there was misconduct by an employee, it must have sufficient evidence for it to be able to know how the employee behaved and then to decide whether such behaviour was reprehensible in the circumstances.

[18] The notion of wilful misconduct does not imply that it is necessary that the breach be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged misconduct and the loss of the claimant's employment.

[19] The Appellant stated that he knew the required safety rules and that he knew he had to wear a harness to perform his work. If he decided not to wear the safety harness, knowing that this violated the established rules, this effectively amounts to conscious and deliberate conduct.

[20] The Appellant invoked circumstances to justify not wearing the harness: a medical condition and the fact that he notified his supervisor that he could not wear it. With respect to the medical condition, the doctor's report and the examination reports dating back to August 2013 describe a painless clinical condition and do not refer to any restriction concerning the use of a safety harness. Only a letter from a doctor, dated May 8, 2014, refers to the condition retroactively, that is, well after the events and after the Appellant received a negative decision from the Commission. With respect to notifying his supervisor, the

Tribunal notes some contradictions. The Appellant first stated in his request for reconsideration that the "boss" did not want to know anything about it and subsequently stated in his notice of appeal to the Tribunal that he had agreed to let him work on the ground, where he did not need a harness. The Tribunal notes that this notification to the employer apparently occurred on December 16, 2013, which raises a number of questions. First, why December 16, 2013, when the medical condition to which he referred existed since August 2013? If wearing a harness bothered him, why did he not discuss the matter with his employer earlier? Why did he continue to perform the same tasks from August to December 2013, knowing that he was breaching the safety rules by not wearing the harness? Why is it that, between December 16 and December 19, 2013 (the date of the lay-off), after a discussion with the employer, the Appellant continued to perform the same tasks, when the employer had agreed to let him work on the ground? Is it possible that this discussion with the employer was provoked by complaints from the foremen regarding the Appellant's behaviour and that he knew that tolerance for his behaviour was coming to an end? The Tribunal finds that the circumstances invoked by the Appellant are not probative and that his actions were conscious and deliberate and made with the full knowledge that he was breaching the safety rules.

[21] I now turn my attention to the second component of the definition of misconduct within the meaning of the Act: the causal link between the act and the dismissal. Did the Appellant know or should he have known that his behaviour would result in his dismissal?

[22] The Tribunal cannot ignore that three people—the employer and two foremen—stated that they told the claimant on several occasions to wear his safety harness. The Appellant claimed that he was not notified in writing and, consequently, concluded that he had received no warning. The fact that these warnings were issued orally instead of in writing is but a comparison of one form with another, and the oral form does not mean that such warnings did not occur. Moreover, the Tribunal knows that an employer who does not comply with or does not enforce compliance with the safety rules of his industry can face serious problems in the event of a workplace accident. Regardless of how they are called in different Canadian provinces, workers' compensation boards are very strict and have the power to impose sanctions that no one may ignore. It is very difficult to see how the

Appellant, in failing to comply with the safety rules, could not suspect that there would be consequences to his actions and that one of these consequences could be his loss of employment. If one action is not a cause for immediate dismissal, the accumulation of such actions can result in a loss of the employer's trust in its employee. This is what the employer and his foremen have stated. This loss of trust can lead to dismissal.

[23] The decision in *Canada (Attorney General) v. Marion*, 2002 FCA 185, establishes that the Tribunal's role is not to determine whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*. According to the definition of misconduct for the purpose of the Act, as established by the Federal Court of Appeal above, the Tribunal finds that the Appellant's actions constituted intentional and deliberate misconduct and that he should have known that these actions would result in his dismissal.

[24] Subsection 54(1) of the *Department of Employment and Social Development Act* states that the General Division of the Tribunal may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given. To this end, the Tribunal's General Division must clearly apply the parameters provided by the *Employment Insurance Act*, its Regulations and the interpretations made by higher decision-making levels.

[25] When the Commission asked the Tribunal to allow the appeal, it relied on the fact that the employer had no discipline policy and that, in the absence of such a policy with progressive sanctions, the Appellant could not know that his employment was in jeopardy when he was dismissed. This type of policy arises from the application of labour law provisions.

[26] The Tribunal does not have to determine whether the dismissal is justified within the meaning of labour law, but rather whether, based on an objective assessment of the evidence, the misconduct was such that its author could normally foresee that it would likely result in his dismissal: *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377.

[27] The Tribunal reviewed the case in light of the above-mentioned parameters and finds that the Commission's position to concede the issue, with respect to the appeal before the Tribunal, violates these parameters. Therefore, the Tribunal confirms the Commission's initial decision, namely, that the Appellant lost his employment because of his own misconduct and that a disqualification from receiving benefits should be imposed on him.

**CONCLUSION**

[28] The appeal is dismissed.

Member, General Division

DATE OF HEARING: August 21, 2014