[TRANSLATION]

Citation: *H. C. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 110

Appeal No: GE-14-941

BETWEEN:

H. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Claude Durand
HEARING DATE:	June 2, 2014
TYPE OF HEARING:	Videoconference
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE AND TYPE OF HEARING

The Appellant, H. C., participated in the videoconference held on June 2, 2014, for the reasons set out in the notice of hearing dated May 26, 2014.

DECISION

[1] The Tribunal allows the appeal.

INTRODUCTION

[2] The Appellant lost his employment because he was dismissed on September 6, 2013.

[3] On January 2, 2014, the Canada Employment Insurance Commission (the Commission) notified the Appellant that he was disqualified from receiving benefits effective November 24, 2013, since he lost his employment because of his misconduct within the meaning of Canada's *Employment Insurance Act* (the Act) (page GD3-29).

[4] The Appellant filed a request for reconsideration of this decision, which the Commission upheld on February 12, 2014 (page GD3-38).

[5] The Appellant appealed to the Social Security Tribunal (pages GD2-1 to GD2-4).

ISSUE

[6] The Tribunal must determine whether the Appellant lost his employment because of his misconduct pursuant to sections 29 and 30 of the Act.

APPLICABLE LAW

[7] Paragraphs 29(*a*) and (*b*) of the Act stipulate the following:

> 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;

[8] Subsection 30(1) of the Act stipulates the following:

> 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.

EVIDENCE

Evidence in the Commission's file

[9] The employer, Value Village Stores, ended the Appellant's employment on September 6, 2013 (GD3-20) because it determined that he violated a safety rule (GD3-21).

[10] The alleged incident occurred on September 4, 2013. The Appellant was the assistant production supervisor.

[11] According to the employer's version, the Appellant asked an employee to change a neon light by climbing on a garbage container instead of asking the employee to use a ladder.

[12] The employer stated that it obtained written statements from witnesses and that A., the employee involved in the incident, stated that the Appellant was the one who told him to climb on the container (pages GD3-23, 24, 25, 26, 27, 28 and 35).

[13] The employer has no written policy on safety measures, but employees are given health and safety training as soon as they are hired.

[14] In addition, each month employees receive additional training on safety considerations in the company (GD3-21).

[15] This was the first time that the Appellant was involved in a workplace safety incident (GD3-21).

Appellant's evidence

[16] He had returned from 10 months of sick leave from the CSST when he was dismissed.

[17] The Appellant stated that he did not ask the employee to change the neon light. It was only when he passed by that he noticed the employee on the container preparing to change the neon light. He asked the employee to get down, while advising him on how to avoid hurting himself.

[18] The employee told the Appellant that the manager asked him to change the neon light.

[19] The Appellant stipulated that the sequence of events can be clearly seen on the surveillance camera. He also stated that the employee, A., could testify (page GD3-31).

[20] The Appellant submitted as evidence the CSST report on his workplace accident and his return to work with limitations (Exhibit GD-5).

SUBMISSIONS OF THE PARTIES

[21] The Appellant stated the following:

> (a) He had a serious workplace accident that damaged his left knee. He was struck by a merchandise cart and he was absent from work for 10 months;
>
> (b) Since returning to work, he had had to be mindful of the physical limitations resulting from his condition;
>
> (c) He had a difficult relationship with the new supervisor, Ms. A. S., who had been on the job for three weeks. The Appellant stated that his physical limitations may have been viewed negatively by the supervisor, who wanted higher productivity;
>
> (d) He felt that his employer had been looking for a way to dismiss him since his return from sick leave;
>
> (e) When he noticed that an employee had climbed on a container to change a neon light, he asked the employee to get down. The employee refused;
>
> (f) It was the electrician’s job to change the light. He would not have asked an employee to do it;

(g) Since his workplace accident, he had been even more aware of dangers in the workplace. He never would have put a co-worker's safety at risk;

(h) He was a member of the company's health and safety committee and he was aware of the rules to follow. Workplace safety is important to him;

(i) Ms. M. told the employee that the neon light needed to be changed;

(j) The surveillance cameras were working and the recordings were of good quality in order to prevent theft;

(k) He had never faced any disciplinary action and he certainly did not expect to lose his job.

[22] The Commission Respondent stated the following:

(a) Ms. A. S., the supervisor, stated that Ms. M. did not give the instruction to change the neon light. Ms. M. had stated that the neon lights might need to be changed, but did not give any timeframe to do so (GD3-32);

(b) The employer no longer had the video evidence and specified that it was of poor quality;

(c) The supervisor arrived when the Appellant was giving instructions to A. on how to install the neon light. She stated that after he realized that she was there, the Appellant claimed that he was telling A. to get down;

(d) The employer stated that the employee, A., was questioned. A. stated that he never indicated that Ms. M. gave the instruction to change the neon light. On the contrary, A. even stated that the Appellant told him not to move the container because there was no time;

(e) In this case, the Commission found the employer's version much more credible because it is based on the written testimonies of employees;

(f) Even without the surveillance video or the testimony from the employee involved (A.), who is no longer employed at Value Village Stores, the Commission found that the four testimonies of the employees were sincere and trustworthy;

(g) These testimonies showed that the Claimant asked an employee to climb on a container to change a neon light and that this move was dangerous and did not comply with the employer's instructions or the safety practices required for this task;

(h) None of the witnesses' testimonies indicated that the Appellant tried to prevent the employee from climbing on the container to change the neon light. The Appellant was near A. before he climbed on the container and probably could have prevented him from doing so;

(i) On the contrary, the testimonies were unanimous and showed that the Appellant encouraged the employee and guided him through the installation of the neon light, while giving him safety warnings. The Appellant was aware that the move was dangerous;

(j) The Appellant did more than make a judgment error. He failed to follow the workplace safety instructions;

(k) The Commission found that the Appellant's actions amounted to misconduct within the meaning of the Act because he made a serious error by encouraging an employee to change a neon light in an unsafe and dangerous manner.

ANALYSIS

[23] In terms of misconduct, the courts have emphasized on numerous occasions that alleged behavioural breaches must be serious. Reprehensible conduct is not necessarily misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98*; Meunier*, A-130-96).

[24] Although the Act does not define misconduct, the case law defines it as follows: In order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance (*Tucker*, A-381-85).

[25] For a behaviour to amount to misconduct under the *Employment Insurance Act*, it is not necessary for there to be wrongful intent. 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).

[26] The onus is on the Commission and/or the employer (only if the employer is the appellant) to prove (based on a balance of probabilities) that the claimant lost his employment by reason of his own misconduct. To do this, 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).

[27] The proof of a mental element is necessary. The claimant's behaviour must be 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).

[28] In *Mishibinijima v. Canada (A.G.)*, 2007 FCA 36, the Federal Court of Appeal wrote the following: 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.

[29] It is in the light of these guiding case law principles that I will analyze this case.

[30] Clearly there are conflicting accounts in this case. The employer stated that it dismissed the Appellant because he violated the safety rules in the workplace. The Appellant denied that he ever violated the safety rules.

[31] I listened to the testimony of the Appellant, who described in detail his work environment and the incidents that took place on September 4, 2013.

[32] I give credibility to his version of the facts, namely, that he did not ask an employee to climb on a container to install a neon light and therefore violate the company's safety rules.

[33] First, I do not accept the Commission's submissions on the existence of video evidence showing that the Appellant made this request.

[34] The employer stated that the recording was of poor quality and that it no longer had the video evidence. Since this evidence is not verifiable, I will not take it into account.

[35] I also note that the employer did not have the written complaint of the other employee directly involved in the incident, a man named A. who no longer works for the employer.

[36] I note that when the supervisor, Ms. A. S., arrived on site, the Appellant was giving instructions to the employee, A., and told him to get down (pages GD3-28 and 43).

[37] I also note that the employer admitted that the manager had stated that the neon lights needed to be changed (page GD3-32).

[38] I reviewed the four written testimonies of employees who witnessed the incident.

[39] I note that Ms. B. (page GD3-25) stated that she heard the Appellant tell A. to [translation] "climb on the garbage container and that she turned around."

[40] I note that this lady heard only part of the conversation. It is not known where she was when she heard this sentence and whether these were the Appellant's exact words. She also did not witness the scene because by her own admission she turned around. I do not give any probative value to this testimony.

[41] The other witnesses also did not hear the Appellant ask the employee to change a neon light by climbing on the container. The witnesses arrived on site when the employee was already on the container. They cannot testify with regard to the start of the discussion between the Appellant and the man named A.

[42] The evidence shows that the witnesses observed that an employee was trying to change a neon light while perched on a container and that the Appellant was telling him that he was doing it wrong, to pay attention and that the move was dangerous (pages GD3-25, 26 and 28).

[43] I reject the submissions of the Commission, which found that the Appellant was near the employee before the employee climbed on the container and that he probably could have prevented the employee from doing so.

[44] On the contrary, the evidence shows that no one witnessed the start of the incident. There is no evidence that the Appellant was there when the employee climbed on the container, or that he asked the employee to do so.

[45] I also accept the Appellant's submissions on the fact that since he himself was the victim of a workplace accident, he was particularly informed about health and safety in the workplace, and that he would never have asked a co-worker to take these types of risks.

[46] In this case, the Commission made a decision after assessing the conflicting statements of the Appellant and the employer and determined that the employer's version was more credible because it was based on the written testimonies of employees.

[47] In view of the foregoing, I do not agree with this finding. The employer chose to dismiss the Appellant. The Tribunal does not need to review this decision. However, this does not necessarily mean that the dismissal resulted from the misconduct.

[48] The case law holds that 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).

[49] I find that the facts do not show that misconduct is the reason for the dismissal.

[50] The Tribunal finds that the Appellant did not lose his employment because of his misconduct pursuant to sections 29 and 30 of the Act. Therefore, no disqualification applies.

CONCLUSION

[51] The appeal is allowed.

Claude Durand

Member, General Division

DATE OF REASONS: September 22, 2014