

[TRANSLATION]

Citation: *R. B. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 137

Appeal #: GE-14-438

BETWEEN:

R. B.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Richard Sterne

HEARING DATE: October 1, 2014

TYPE OF HEARING: In person

DECISION: Appeal is allowed.

PERSONS IN ATTENDANCE

The following persons attended the in person hearing:

R. B. - Claimant

Nicole Silva – the Claimant’s representative (representative)

F. B. – the Claimant’s husband (husband)

Jose Dores - Interpreter

DECISION

[1] The Tribunal finds that the Claimant did not lose her employment because her conduct was willful or so reckless to approach willfulness to constitute misconduct pursuant to subsection 30(1) of the *Employment Insurance Act* (Act).

[2] The appeal is allowed.

INTRODUCTION

[3] The Claimant was employed by 1000210 Ontario Inc., o/a Pinherios Janitorial (employer) until September 28, 2013.

[4] On October 3, 2013, the Claimant applied for employment insurance benefits (EI benefits).

[5] On December 5, 2013, the Canada Employment Insurance Commission (Commission) advised the Claimant that they were unable to pay her EI benefits because she had lost her employment with the employer on September 28, 2013 as a result of her own misconduct.

[6] On December 14, 2013, the Claimant filed a request for reconsideration of the Commission’s December 5, 2013 decision, which was denied on January 21, 2014.

FORM OF HEARING

[7] The hearing was by personal appearance for the reasons provided in the Notice of Hearing dated April 28, 2014.

[8] On March 24, 2014, 1000210 Ontario Inc., o/a Pinherios Janitorial (employer) was added as a party in the appeal.

[9] The hearing was scheduled and adjourned several times at the request of the representative and the employer in the Interest of Natural Justice.

[10] On September 29, 2014 the employer withdrew as an added party to the appeal.

ISSUE

[11] Did the Claimant lose her employment due to her misconduct pursuant to subsection 30(1) of the Act?

THE LAW

[12] Subsections 29(a) and (b) of the Act:

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;

[13] Subsection 30(1) of the Act:

(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."

[14] Subsection 30(2) of the Act:

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

EVIDENCE

[15] The Claimant was employed by 1000210 Ontario Inc., o/a Pinherios Janitorial (employer) from March 3, 2002 to September 28, 2013.

[16] On October 1, 2013, the employer issued the Claimant's record of employment (ROE) and indicated that the reason for issuing the ROE was code D for illness or injury.

[17] On October 3, 2013, the Claimant applied for EI benefits. In her application, the Claimant indicated that she was no longer working because she had been laid off.

[18] On October 31, 2013, the Claimant's husband told the Commission that the employer said that he had laid off the Claimant because she was sick. The husband said however that the Claimant was not sick.

[19] On October 31, 2013, the employer told the Commission that the Claimant was not showing up for work and when he questioned her about it; she would say she wasn't feeling well. The Claimant's husband would be doing the cleaning instead of the Claimant, but he was not doing things correctly. The employer said that he was getting complaints from his clients. The employer said that he gave the Claimant two written notices advising the Claimant that if she was not able to come to work, that she had to notify him. The employer said that the Claimant did not do this; whenever she was not able to work her husband would do the work instead. The employer stated that the reason for separation was dismissal due to attendance issues.

[20] On October 31, 2013, the Claimant's husband told the Commission that he helped his wife at work and his wife was working there with him. The husband said that his wife had never missed a shift at work. He said that he didn't know where the employer was getting his information, as the employer never came to the work site to observe for himself. The husband denied the Claimant had received any written notices from the employer.

[21] On November 4, 2013, the Claimant filed a request for an amended ROE with the Commission because the employer had refused to provide an amended ROE indicating that the Claimant had been laid off.

[22] On December 5, 2013, the employer told the Commission that his clients were complaining that the husband was not doing the job properly. He said that the Claimant kept not showing up for work and not telling him and he had heard from his clients that the Claimant had been sick. The employer said that he had told the Claimant many times that this had to stop. He told her that if she was sick to call and tell him she was sick and couldn't work. He said that he would find another employee to fill in for her. He said that he told her that if she was sick to get a doctor's note saying she was too ill to work. He said that he was very concerned because her husband was not an employee and his insurance would not cover him if something happened.

[23] The employer said that he was fully prepared to rehire the Claimant after she recovered from her illness if she provided a doctor's note, but that she had told him that she wasn't ill. The employer said that since the Claimant stated that she was not ill, then he fired her for attendance issues of not calling in when she couldn't make a shift. She had her husband, who was not his employee, work her hours for her so she would still get paid. The employer said that he had warned her in writing that if she continued with these actions she would be fired.

[24] On December 5, 2013, the employer faxed the Commission copies of two warning letters dated January 18, 2013, May 24, 2013, and the termination letter dated September 27, 2013. The employer said that these letters were given to the Claimant in the presence of her husband. The warning letters advised the Claimant that her husband had to cease doing her

work because the employer's liability insurance did not cover him as he wasn't an employee.

[25] On December 5, 2013, the Claimant's husband told the Commission that the Claimant had not missed a day of work in over 11 years. He said that the employer was lying and that he had never worked in place of the Claimant. He said the employer had never talked about this to his wife and that they never got anything in writing. He said his wife doesn't drive and so he would drive her to work. Instead of wasting time driving back home and then coming back to pick her up later, that he would give her a hand. He said that the employer never came to the work site to see for himself if she was working or if he was working, so he is lying.

[26] On December 5, 2013, the Commission advised the Claimant that they were unable to pay her EI benefits because she had lost her employment with the employer on September 28, 2013 as a result of her own misconduct.

[27] On December 14, 2013, the Claimant filed a request for reconsideration of the Commission's December 5, 2013 decision. In her request, the Claimant stated on or about September 27, 2013 the employer had called her to tell her that he would be laying her off. She said that she never received any notification or letter or verbal notification that she would be laid off until September 27, 2013. The Claimant noted that her ROE indicated that the reason for issuing the ROE was code D for illness or injury and not M for dismissal or even code A for layoff as the employer had advised her.

[28] On January 21, 2014, the Claimant's husband told the Commission that the employer was trying to put somebody else in to do the job that the Claimant had been doing. He said that the Claimant and her husband worked together. The Claimant was the one who got paid, however the job was split between both of them. The Claimant doesn't drive or speak English so her husband was with her every day. He said that it was true that he was not an employee of the company and was not covered by their insurance. The husband said that the Claimant had never received any warning letters from the employer. The Claimant was always there with her husband and her husband was never there by himself. He said the

employer's statement that he warned the Claimant verbally and that she screamed and swore at him, was another lie.

[29] On January 21, 2014, the Commission advised the Claimant that they had not changed their December 5, 2013 decision.

SUBMISSIONS

[30] The Claimant submitted that:

- a) on September 27, 2013, the employer called her to say that he was going to lay her off after her shift on Sunday September 29, 2013.
- b) she did not receive any notification or letter or verbal notification that she would be laid off until September 27, 2013.
- c) the employer had found someone else to do her job.
- d) the employer had issued her ROE which indicated that the reason for issuing the ROE was code D for illness or injury, and not code M for dismissal, or even code A for layoff, as he had advised her.
- e) at no time did she receive any letters or even verbal notifications of misconduct.

[31] The Respondent submitted that:

- a) the Claimant lost her employment by reason of her own misconduct and therefore imposed an indefinite disqualification effective September 29, 2013, pursuant to subsection 30(1) of the Act.

ANALYSIS

[32] Subsection 30(1) of the Act states that a claimant is disqualified from receiving any benefits if they lost their employment as a result of their own misconduct.

[33] While the Act does not define the term "misconduct", the Federal Court of Appeal has stated that there will be misconduct where the conduct of the claimant was willful, in the

sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known the conduct was such as to impair the duties to the employment such that dismissal was a real possibility.

Tucker A-381-85; Locke 2003 FCA 262

[34] The Tribunal finds that the main issue of this appeal is the credibility of the employer and the Claimant. In reviewing the evidence, several conflicts exist in the facts presented and the verbal testimony.

[35] The employer said that he had only recently become aware that the Claimant's husband was helping in her job. The employer said that he was concerned because the husband was not an employee, and therefore wasn't covered by the employer's liability insurance. - The Claimant said that she had worked for the employer for over eleven years and it was the employer who had suggested that the husband help the Claimant in her work because she doesn't drive and English is her second language. She said that her husband helped her by taking out the garbage and doing the vacuuming.

[36] The employer accused the Claimant of being ill and having her husband fill in for her. The employer said that he had asked the Claimant to notify him when she was ill and provide a doctor's note. The employer indicated on the Claimant's ROE that the reason for issuing the ROE was illness. - The Claimant said that she was not ill and had never missed a day of work. The Claimant said that the employer had never asked her for a doctor's note.

[37] The employer said that he had received complaints from his clients about the job the Claimant was doing. - The Claimant said that the employer had never complained about her work performance prior to her termination. The Claimant said that several of the clients were upset that she was no longer cleaning their office.

[38] The employer provided copies of three letters, (warning letters dated January 18, 2013 and May 24, 2013, and a termination letter dated September 27, 2013) that he said he had presented to the Claimant personally with the husband present. – Both the Claimant and

her husband denied seeing the letters before, until they received copies from her Labour Board appeal, which was filed on December 10, 2013.

[39] During the hearing, the Claimant said that the employer had telephoned her husband on September 23, 2013, to get his help installing a paper dispenser. The Claimant's husband helped install the dispenser as he had helped the employer many times in the past. The Claimant said that they had considered the employer a friend, and had given him fruits and cheese to take home after they had finished the paper dispenser installation. Four days later, on September 27, 2013, the employer called the Claimant's husband to advise him that he was going to lay off the Claimant.

[40] The Tribunal finds the Claimant to be a credible witness. She was honest and forthright in delivering her testimony and answering questions under oath. The Claimant's husband substantiated the Claimant's testimony under oath.

[41] The Tribunal finds that the employer knew that the Claimant's husband was helping her in her work, since they had been working together for the employer for over eleven years. In fact, the Claimant said that the employer had suggested the arrangement since the Claimant doesn't drive or speak English.

[42] The Tribunal finds that there was no evidence that supports the employer's claim that the Claimant was sick and that the employer should have indicated the reason for issuing her ROE as illness.

[43] The Tribunal accepts the Claimant's testimony that she had not seen the warning letters or termination letter prior to being dismissed, as there was no evidence to the contrary, other than the employer's statement. The employer did not get the Claimant to sign acknowledgement that she had received the letters when they were supposedly presented to her.

[44] The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional.

[45] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as willful misconduct, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal. 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.

Canada (AG) v. Lemire, 2010 FCA 314

[46] The Tribunal finds that evidence does not support that the Claimant's acts which led to her dismissal were wilful, conscious, deliberate or intentional, or such that she ought to have known that her conduct was such that it would result in dismissal. The fact that the Claimant's husband had helped her do her job for the past eleven years does not constitute misconduct.

[47] The Tribunal finds that the Claimant did not lose her employment because her conduct was willful or so reckless to approach willfulness to constitute misconduct, pursuant to subsection 30(1) of the Act.

CONCLUSION

[48] The appeal is allowed.

Richard Sterne
Member, General Division

DATED: December 3, 2014