Citation: *R. A. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 27

Appeal #: GE-14-4189

BETWEEN:

R. A.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Richard Sterne
HEARING DATE:	February 10, 2015
TYPE OF HEARING:	In person
DECISION:	Appeal is allowed

PERSONS IN ATTENDANCE

The Claimant, R. A., and his representative, Tony Ciampa, attended the hearing in person.

DECISION

[1] The Tribunal finds that the Claimant's actions were not such that he should have known that he could be terminated, and therefore do not constitute misconduct, pursuant to section 30 of the *Employment Insurance Act* (Act).

[2] The appeal is allowed.

INTRODUCTION

[3] The Claimant was employed by Titan Tool and Die Limited (employer) until July 2, 2014.

[4] On July 14, 2014, the employer issued the Claimant's record of employment (ROE) and indicated that the reason for issuing the ROE was code M, Dismissal.

[5] On August 4, 2014, the Claimant applied for employment insurance benefits (EI benefits).

[6] On September 3, 2014, the Canada Employment Insurance Commission (Commission) advised the employer that they had approved the Claimant's claim for EI benefits because they believed that the reason that the Claimant lost his employment did not constitute misconduct.

[7] On September 9, 2014, the employer filed a request for reconsideration of the Commission's September 3, 2014 decision.

[8] On October 30, 2014, the Commission advised the Claimant that as a result of the request for reconsideration, that they had changed their September 3, 2014 decision and determined that the Claimant had lost his employment as the result of his misconduct.

FORM OF HEARING

[9] On November 26, 2014, the employer requested that they be added as a party to the appeal.

[10] The hearing was in person for the reasons provided in the Notice of Hearing dated January 21, 2014.

[11] The employer did not attend the hearing.

ISSUE

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

THE LAW

[13] 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;

[14] 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."

[15] 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

[16] The Claimant was employed by Titan Tool and Die Limited (employer) from January 26, 2009 to July 2, 2014.

[17] On July 14, 2014, the employer issued the Claimant's record of employment (ROE) and indicated that the reason for issuing the ROE was code M, Dismissal.

[18] On August 4, 2014, the Claimant applied for EI benefits.

[19] On September 3, 2014, the Claimant told the Commission that for the past ten years he had been using his union time to leave early. He stated he knew it was not allowed in the collective agreement; however the employer had been allowing it to happen. The Claimant stated that the employer would tell him to leave early on some days and tell him to claim it as union time. The Claimant maintained that he never thought he would be fired for what he was doing as he had been given permission.

[20] On September 3, 2014, the employer told the Commission that the Claimant was dismissed with cause, because he had stated that he had gone to the local union office to do

union activities, when in fact he had gone home. The employer denied giving the Claimant permission to leave early on union time.

[21] On September 3, 2014, the Commission advised the employer that they had approved the Claimant's claim for EI benefits because they believed that the reason that the Claimant lost his employment did not constitute misconduct.

[22] On September 9, 2014, the employer filed a request for reconsideration of the Commission's September 3, 2014 decision.

[23] On September 15, 2014, the employer sent the Commission a copy of the Claimant's July 8, 2014 termination letter which stated that the Claimant had been terminated for just cause by misrepresenting his out of plant union time. The letter stated that the employer's investigation had revealed that the Claimant had breached the trust with the employer by engaging in theft of time from the employer, by taking union time without conducting union business.

[24] On October 30, 2014, the Commission advised the Claimant that they had received a request for reconsideration from the employer. The Commission stated that they had changed their September 3, 2014 decision and determined that the Claimant had lost his employment as the result of his misconduct.

[25] On November 1, 2014, a Notice of Debt was sent to the Claimant showing his disqualification had resulted in an $4,626.00 overpayment in EI benefits.

SUBMISSIONS

[26] The Claimant submitted that:

a) he disputed the alleged misconduct.

b) his termination was unjust.

c) he was the elected union representative.

d) he was performing his duties as union representative when the employer terminated him.

[27] The Respondent submitted that:

a) they initially concluded that the Claimant had not lost his employment by reason of his own misconduct, and allowed the claim free from disqualification pursuant to section 29 and subsection 30(1) of the Act and notified the employer of their right to request a reconsideration.

b) the initial decision was replaced by a new decision.

c) they determined that the Claimant had lost his employment due to his own misconduct, pursuant to sections 29 and 30 of the Act.

d) an overpayment of EI benefits in the amount of $4,626.00 resulted from the decision.

e) the Claimant's time theft constituted misconduct within the meaning of the Act because the claimant took paid time off work to conduct union business, but did not in fact conduct union business;

f) the Claimant should have known he could be dismissed for his actions given that he was in breach of the union-employer agreement and because the employer had earlier raised concerns about the use of union time; and there is a causal relationship between the misconduct and the termination.

ANALYSIS

[28] 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.

[29] 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

[30] During the hearing, the Claimant stated that as union chair, he often went to the union office or his home to conduct union business on his laptop because it was quieter. He said that for the past ten years his supervisor had turned a blind eye to his leaving early to conduct union business on union time. He said that the union-employer agreement allowed him 2 hours of paid union time per week outside the plant. He said that he had been working on a major restructuring of the employer's pension plan and a dismissal that was being grieved. He admitted that he erred when he told the employer that he had gone to the union office before going home.

[31] The Tribunal finds that the union-employer agreement states that "the Plant Committee will be allowed to leave work during union time herein provided up to two (2) hours per week with pay to conduct Union business; provided the affected Committeeperson notifies the Company in writing that they are leaving the plant."

[32] The Tribunal finds that the evidence shows that on June 30, 2014, the Claimant did notify the employer in writing that " I will be gone during my union time on union business."

[33] The Tribunal finds that the Claimant was credible during the hearing in that he was open and consistent in his comments and answers to questions, while under oath.

[34] The Tribunal accepts the Claimant's statement that he had gone home to work on union business pertaining to the pension plan restructuring and a dismissal grievance. The pension issue was confirmed in the evidence presented by the employer.

[35] The Tribunal finds that the Claimant did properly notify the employer that he was leaving the plant as per the union-employer agreement. The Tribunal finds that since the

Claimant stated that he was doing union business on union time, he was not breaching his responsibility to the employer.

[36] The Tribunal finds that what is union business and where it was being conducted remains the concern of the union and not the employer.

[37] The Tribunal notes that the Claimant's July 8, 2014 termination letter refers to an incident on June 30, 2014 where the Claimant went home on union time to conduct union business. The letter does not make reference to any other prior incidents, warnings, or notice that his actions could lead to his dismissal.

[38] The Tribunal accepts the Claimant's statement that he was not aware that his actions could lead to his dismissal as the employer had condoned his actions for a number of years and leaving the plant on union time was a term of the union-employer agreement.

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

Mishibinijima v. Canada (AG), 2007 FCA 36

[40] 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

[41] The Tribunal finds that the Claimant's actions were not wilful, deliberate, or conscious to the extent that he knew that they could result in his dismissal and do not constitute misconduct, pursuant to sections 29 and 30 of the Act.

CONCLUSION

[42] The appeal is allowed.

Richard Sterne
Member, General Division

DATED: February 11, 2015