[TRANSLATION]

Citation: *Y. C. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 54

Date: March 25, 2015

File number: GE-14-3057

GENERAL DIVISION – Employment Insurance Section

Between:

Y. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Claude Durand, Member, General Division – Employment Insurance Section

In-person hearing herd on November 27, 2014, Montreal, Province of Quebec

REASONS AND DECISION

INTRODUCTION

[1] The Appellant, Y. C., was present with her representative, Dany Pascazio of the CSN.

[2] The hearing of this appeal was conducted in person for the reasons stated in the notice of hearing dated September 2, 2014.

[3] The Employment Insurance Commission (the Commission) determined that the Appellant had lost her employment because of her own misconduct and imposed a disqualification starting on March 9, 2014.

[4] The Appellant made a request for reconsideration and, on July 23, 2014, the Commission upheld the initial decision.

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

ISSUE

[6] The Tribunal must determine whether the Appellant lost her employment because of her misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the Act).

THE LAW

[7] Paragraphs 29(a) and (b) of the Act provide as follows:

> *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 provides as follows:

> *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

Commission's evidence in the file

[9] An initial claim for employment insurance benefits was established effective March 9, 2014.

[10] The Appellant was an orderly. Her employer, Résidences N., terminated her employment as a result of an altercation with a coworker (pages GD3-3 to GD3-20, GD3-21 and GD3-22).

[11] The employer provided three documents describing the Appellant's alleged conduct in the course of her work.

i. August 27, 2013: written warning, aggressive behaviour toward a coworker; reference made to the employer's code of ethics (GD3-25);

ii. December 17, 2013: violent behaviour (hit a resident on December 2, 2013); three-day suspension for failure to comply with the employer's policies and rules; if repeated, termination of employment without further notice (GD3-24);

iii. March 5, 2014: violent behaviour toward a coworker in front of a resident; the residence's code of ethics did not tolerate violence in the workplace under any circumstances; the relationship of trust was permanently severed (GD3-23).

[12] The Appellant denied the facts alleged against her and stated that it was her coworker, with whom she did not get along, who had initiated the dispute by elbowing her (pages GD3-26 and GD3-37).

Appellant's evidence at the hearing

[13] On the morning of the incident, the Appellant was preparing to give a resident a bath. An employee, Ms. M. J., was already in the bathroom with a resident. The Appellant tried to help her and the other employee pushed her.

[14] The Appellant tried to call for help using her cell phone, but Ms. M. J. grabbed it from her. She never hit her coworker with the swinging door.

[15] The Appellant also denied the other two incidents in her file, namely the incidents on August 27 and December 17, 2013.

[16] She stated that she had been named favourite employee in 2013, as shown by the certificate presented by the employer (page GD8-2).

[17] She stated that she was a victim of persecution, abuse and false reports by her coworkers.

[18] The Appellant stated that the employer had opened her locker by cutting the lock and that $500 had been taken from her. That money was allegedly returned to her through a cheque from the employer in January 2014.

[19] She completed an accidental event report on the day of the incident.

[20] She also called the police for a report and had the residence's nursing assistant, N. M., complete an examination report to prove that she had bruises (page GD3-34).

PARTIES' ARGUMENTS

[21] The Appellant's representative made the following arguments:

(a) There was an unhealthy work atmosphere at the employer;

(b) in the past, the Appellant had reported inappropriate behaviour by her coworkers, and since then she had been a victim of retaliation;

(c) the Appellant's coworkers lied by claiming that she had previously hit a resident and threatened a coworker;

(d) the employer never witnessed the alleged acts but gave credence to the other employees' version rather than the Appellant's;

(e) the Appellant was in a situation where she was abused by a coworker, M. J., with whom she had the altercation that led to her dismissal; this was the same person who had accused her of threats and violent behaviour in 2013;

(f) the Appellant did not speak to her employer about the situation described by her; she thought that everything would get back to normal and that it was childishness, and she did nothing;

(g) the employer claims to have a video of the incident, but it never provided the video as evidence; the Appellant and her union representative also deny having watched the said videotape;

(h) the accidental event report shows that there were bruises on the Appellant's body, so she could not have been the assailant, but rather the person subjected to violence.

[22] The respondent Commission made the following arguments:

(a) The Federal Court of Appeal has affirmed the principle that there is misconduct where the claimant's behaviour was wilful in the sense that the acts that led to dismissal were conscious, deliberate or intentional;

(b) the employer is prepared to provide evidence of the recording of the incident and has given the Commission the warnings placed in the Appellant's file;

(c) according to the employer's statement, the Appellant and the union representative were invited to watch the videotape (page GD3-39);

(d) the Appellant was dismissed as a result of a physical altercation with a resident and a coworker on March 5, 2014; the incident followed previous warnings by the employer

on August 27, 2013, a written warning in the file and, on December 17, 2013, a three-day suspension (December 11, 12 and 13, 2013) for failure to comply with the employer's policies and rules;

(e) the Appellant had been informed on December 17, 2013 that another such incident would result in her dismissal without further notice, but she disregarded this;

(f) in this case, the Commission is of the opinion that the employer has discharged its burden of proof; the Appellant's wrongdoing created a conflict of interest with the employer's activities and damaged the relationship of trust between the parties.

ANALYSIS

[23] There is no definition of misconduct in the Act. However, the case law has defined 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).

[24] In cases involving misconduct, the courts have repeatedly emphasized that the breach of conduct complained of 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 dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96).

[25] For behaviour to amount to misconduct under the *Employment Insurance Act*, it is not necessary that there be wrongful intent. It is sufficient that the reprehensible act or omission complained of be "wilful", that is, conscious, deliberate or intentional (*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 lies on the Commission and/or the employer (only where the employer is the appellant) to establish (on a balance of probabilities) that the loss of employment by the claimant was because of the claimant's own misconduct. For that onus to be discharged, 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 of the evidence (*Bartone*, A-369-88; *Davlut*, A-241-82, [1983] S.C.C.A. No. 398).

[27] Proof of a mental element is necessary. The claimant's conduct must be wilful 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 that there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.

[29] My analysis in this case will be based on these broad principles developed in the case law.

[30] First, I have both parties' arguments on the existence of a video in the employer's possession allegedly proving that the Appellant was guilty of the wrongdoing complained of.

[31] Since that video is not in evidence in the file, I will not consider it.

[32] I am also rejecting the argument made by the Appellant's representative that the bruises on the Appellant's body mean that she did not assault a coworker but was instead the person assaulted.

[33] The fact that the Appellant filed an accidental event report and asked the nursing assistant to note down that she had bruises does not prove that the Appellant did not commit the acts complained of. It can simply be inferred that she gave that version of the facts to the nursing assistant on duty, who noted the presence the bruises.

[34] I have examined Exhibit GD8-1 filed in evidence by the Appellant at the hearing. It is a copy of an incident report from the City of Montréal police force, but it is undated and has no other information.

[35] On the same document, there is a copy of what seems to be a $300 payment to the Appellant, without any further details. I am attaching no probative value to this document.

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

[37] What is the situation in this case?

[38] In considering the Appellant's arguments, the Tribunal has come to understand that she claims to have repeatedly been a victim of her coworkers.

[39] If the Appellant is to be believed, those coworkers, particularly one named Ms. M. J., convinced the employer three times that the Appellant had committed violent acts in her workplace.

[40] However, the evidence shows that the Appellant apparently did not discuss the situation with her employer. Therefore, she did not challenge the previous warnings issued on August 27 and December 17, 2013 either with her employer or with her union, even though she had been suspended from her job for the breaches in question.

[41] It was not until June 2014, after she was dismissed, that the Appellant apparently asked her union to represent her.

[42] I am not convinced by the Appellant's explanations. The situation she described to me is highly unlikely and not supported by any evidence. I also note that no witness can corroborate her version of the facts.

[43] I note that the employer presented detailed evidence covering the period of August 2013 to March 2014 and showing unacceptable violent behaviour by the Appellant in her work setting.

[44] In my view, the Appellant knew she was risking dismissal if such acts were repeated. The employer had formally informed her of this.

[45] The mental element has been proved here, and the evidence as a whole shows that the acts committed by the Appellant were wilful, deliberate or of such a careless nature that she

was wilfully disregarding the effects of her actions on job performance. All of this clearly constitutes misconduct within the meaning of the Act.

[46] The Tribunal concludes that the Appellant lost her employment because of her misconduct within the meaning of sections 29 and 30 of the Act. The imposed disqualification therefore applies.

CONCLUSION

[47] The appeal is dismissed.

Claude Durand
Member, General Division - Employment Insurance Section