Citation: ***A. C. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 118**

Date: June 29, 2015

File number: GE-14-4668

GENERAL DIVISION – Employment Insurance Section

Between:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Maple Leaf Foods

Added Party

Decision by: Teresa Jaenen, Member, General Division - Employment Insurance Section

Heard by Teleconference on June 16, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. A. C., the Appellant (Claimant) attended the hearing.

Maple Leaf Foods, the employer **did not** attend the hearing.

INTRODUCTION

[1] On the Claimant made established a claim for employment insurance benefits. On November 25, 2014 the Canada Employment Insurance Commission (Commission) denied the Claimant benefits because he lost his employment due to his own misconduct. On January 9, 2015 the Claimant made a request for reconsideration. On February 14, 2015 the Commission maintained their original decision and the Claimant appealed to the *Social Security Tribunal of Canada* (Tribunal).

[2] In accordance with subsection 10(1) of *Social Security Tribunal Regulations* (Regulations) the Tribunal may, on its own initiative or if a request is filed, add any person as a party to the proceeding if the person had a direct interest in the decision. In this case on May 11, 2014 the Tribunal determined the employer had a direct interest and added them as a party to the appeal.

[3] In accordance with subsection 12(1) of the Regulations if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of hearing. In this case, Canada Post verified the employer received and signed his Notice of Hearing on May 14, 2015. Thus the Tribunal is satisfied the party received notice and therefore proceeded under the authority of the above-noted subsection.

[4] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The information in the file, including the need for additional information.

c) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification under sections 29 and 30 of the *Employment Insurance Act* (the Act) because he lost his employment due to his own misconduct.

THE LAW

[6] Paragraphs 29(a) and (b) of the Act states for the purposes of paragraph 30(a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[7] Subsection 30(1) of the Act states a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.

EVIDENCE

[8] In the Notice of Appeal the Claimant stated that the accusations of breaching the harassment policy was based on coworkers lies. He stated he stopped signing the written warnings issued to him by his employer because he found their investigation conclusions to be nonsense. He stated that without witnesses it is his word against that of his employer. He stated the union agrees with him that the employer overreacted. The Claimant stated the tribunal procedure is irrelevant since he has made employment insurance contributions (EI) and they are his earnings. He would like to see Canada dismantled (GD2-2).

[9] In the request for reconsideration the Claimant stated that there is a grievance in effect with Maple Leaf and the union agrees that they employer over-reacted. It appears the grievance may go to arbitration. He believes Maple Leaf to be incompetent and the EI system is biased towards employers and he would like to see Canada cease to exist as a nation (GD2A-3).

[10] In his application for benefits the Claimant stated he was dismissed for committing an act of violence and/or inappropriate behavior. He stated that a coworker tried to intimate him. He stated his employer had indicated on numerous times that he should complain to a supervisor or the human resource department (HR) instead of taking matters into his own hands. He stated he denied threatening a coworker and that his actions and comments to the coworker were reflexive and emotional. He stated he only mimicked his behavior such as staring or gestures. The Claimant stated there was no violence on his part but the coworker's behavior is known to management and he has not been discouraged from doing so. He stated there have been verbal insults exchanged (GD3-16).

[11] The Claimant stated that there was a zero tolerance for violation and inappropriate behavior would be dealt with via a number of written warnings and then suspension and then finally termination. He stated he had been given a written statement of the policy (GD3-6).

[12] In his application the Claimant stated the he disagreed that his behavior violated company policy and that the incidents were minor and not worthy of being reported to management. He stated he had a previous warning on June 20 when a coworker was staring at him and made comments when the two passed. He stated he responded with benign comments but considered them minor in nature (GD3-7).

[13] The Claimant stated he contacted his union representative regarding the dismissal and they would file a grievance (GD3-7 to GD3-8).

[14] A record of employment indicates the Claimant was employed with Maple Leaf Foods from December 17. 2012 to October 15, 2014 when he was dismissed from his employment (GD3-15).

[15] On November 24, 2014 the employer stated to the Commission that the Claimant had been terminated for a violation of workplace policy. She stated she was not able to provide details but that the Claimant had received previous warnings (GD3-16).

[16] On November 24, 2014 the employer provided a summary file from April 24, 2014 to October 15, 2014 regarding verbal and written warnings and a suspension (GD3-17).

[17] On November 25, 2014 the Claimant stated to the Commission that the employer didn't like how he deals with coworkers who bother him. For example, if a coworker stares at him, he stares back and that he would rather deal with it himself instead of complaining. He stated who ever complains wins. He stated that he had received previous warnings. The Claimant stated that it his bill of rights if he wants to stare at someone (GD3-19).

[18] The Claimant stated to the Commission that the file summary the employer provided is all lies and that Maple Leaf is full of liars. He stated regarding the August 12, 2014 incident he had kept his gestures close to his body after the coworker had walked by and called him a derogatory name. He stated he didn't report the incident as names don't hurt. He stated he retaliated and the coworker made a complaint against him. He stated that he only received one, one day suspension and was terminated when he should have received a three day suspension instead of termination. He stated that EI money belongs to him and that Canada is holding his money hostage and he will be suing Service Canada (GD3-10).

[19] On February 6, 2015 the Claimant stated to the Commission that a coworker had been bullying him since June and he continuously stared at him. He stated that he was told by HR that staring was not allowed and considered harassment but HR didn't correct the coworker. He stated on September 25, 2014 the coworker made gestures of putting his hand under his chin. He stated he called the coworker a fag and the coworker complained to HR. He stated he previously had asked the coworker to fight but not on that day. He stated he told the HR during the investigation that if the coworker wanted to fight off premise he would and they could fight to death if he wanted (GD3-24).

[20] On February 12, 2014 the employer who conducted the final interview with the Claimant over the telephone stated to the Commission that the Claimant stated he would fight his colleague to the death if he needed to. She stated they refused the Claimant back on the premises because of this and similar statements. She stated the union grieved his termination and wants him re-instated on a last chance agreement but so far they have refused (GD3-25).

[21] The employer provided the Commission with employer's policy regarding Workplace Harassment and Workplace Violence Prevention (GD3-27 to GD3-35).

[22] On February 14, 2015 the Claimant stated to the Commission that he would appeal their decision and that the judges would fear his anger. He stated he was told that staring was not allowed and that he was given a warning. He stated that the Commission was taking the side of the employer. The Commission stated that the Claimant's statement that he would fight to the death was considered a serious threat and one manager has to take seriously. It clearly breached the employer's harassment policy (GD3-37).

[23] He stated that death was in the dictionary and that if he can't use the word death then he can't use the work life either. He stated it wasn't he who wanted to fight but his colleague and if they had of fought it would have been off premises and have nothing to do with the employer. He stated that fights sometimes end in death (GD3-37).

SUBMISSIONS

[24] The Claimant submitted that:

a) The decision Commission made on misconduct is irrelevant because the Commission is bias to the employer in that they believe their statements;

b) There were never any witnesses to the complaints against him;

c) All the incidents were lies and that the union also didn't agree with them;

d) On April 24, 2014 incident he didn't make the comment to the worker but to the lady who was in charge of quality assurance, and that the coworker was sabotaging the equipment because he didn't know what he was doing;

e) On June 5, 2014 is a lie, he did sit behind him but he didn't pin him on the table. He was not causing any conflict, but rather he could sit wherever he wanted;

f) On July 25, 2014 he couldn't recall the details because it was so long ago, but he did recall getting a one day suspension;

g) On August 12, 2014 he had kept his hand close to is body and that he gestures were insignificant and it also his right to make gestures if he wanted to;

h) On September 25, 2014 the facts on (GD3-17) are not true that he did not ask the coworker to fight on that day, however he had asked for a fight on previous occasions. He stated that is what he had told the HR person during the investigation;

i) There were many incidents at work were his coworkers were making gestures and mimicking him but they were never disciplined and it was him that got fired;

j) The comment that he said in (GD3-25) that he would fight until death was a lie. He stated it was in previous conversations that it was a suggestion that a fight could lead to death;

k) He would be prepared to fight to death if the situation presented itself. He would never back down and if it meant someone would have to die then that's what he would do;

l) He didn't go to HR and complain because he is not someone who complains but he did go to his union;

m) His supervisor knew about other incidents but he never heard both sides;

n) He doesn't believe he was at fault and the investigation results were not right, he was only reacting to the coworker's intimation. He stated the coworker just popped up out of nowhere and began harassing him;

o) He believes upper management wanted him out because he was at the top of his salary and they just let the complaints pile up against him;

p) He believes there is an underlay agenda but his union will now be going to arbitration but he doesn't know when;

q) He is working now part time where no immigrants work and he not having any problems; and

r) In closing, he would destroy Canada if he could because Canada needs to be destroyed and how did the Tribunal like that.

[25] The Respondent submitted that:

a) The Commission concluded that the Claimant's actions constituted misconduct within the meaning of the Act because he received multiple warnings prior to his dismissal (GD3- 17);

b) The Claimant admitted to taking matters in to his own hands in dealing with other employees and that his actions including staring at other employees who offended him (GD3-19). Furthermore, the Claimant admitted to calling a co-worker a fag and exchanging other insults (GD3-24); and

c) The Claimant's admission to HR that he had previously challenged his coworker to a fight and that they could fight to death if the coworker was willing to meet off site (GD3- 24 to GD3-25) along with statements made by witnesses to the final incident (GD3-17) shows a clear pattern of behavior that violated company policy and warranted dismissal.

ANALYSIS

[26] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

[27] 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 misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment. *Canada (AG) v. Lemier*, 2012 FCA 314.

[28] The Tribunal must first identify if the alleged act constituted misconduct and if the Claimant's conduct complained of was the cause of the dismissal.

[29] In this case the employer alleges the Claimant lost his employment when he breached the company policies regarding harassment and workplace violence prevention which the Tribunal finds constitutes misconduct within the meaning of the Act and therefore the cause of the dismissal.

[30] As cited in *Canada (A.G.) v. Tucker* A-381-85, misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Willful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere "carelessness" does not meet the standard of willfulness required to support a finding of misconduct.

[31] The Tribunal is entitled to accept hearsay evidence, as we are not bound by the same strict rules of evidence as are the Courts (*Canada v. Mills*, A-1873-83 FCA). In this case the Tribunal finds the evidence of the employer to be credible and the employer provided documentary evidence to support that the Claimant was willful in his actions as he had been disciplined on several occasions with verbal and written warnings, as well as receiving a suspension for his behavior.

[32] The Tribunal finds from the evidence on the file and from the Claimant's oral evidence that although he disputes the incidents occurred as they were written, the Claimant did confirm that he had received the disciplinary actions as stated in (GD3-17).

[33] Rude or aggressive behavior has been held to be misconduct and in particular if it is detrimental to the employer's interest. In this case the Tribunal finds that although the Claimant argues that the incidents did not occur as written, he does admit that he was involved in conflict with the coworker and that he did make gestures and verbal attacks took place. The Claimant provided oral evidence that there several instances of verbal abuse and he did confirm he called the coworker names and in particular called him a fag.

[34] The employer provided documentary evidence that the Claimant knowingly contravened the company policy when he made the threatening gestures towards the coworker. The evidence

supports the Claimant had conflicts with several coworkers and received verbal, written and a suspension because of his behavior.

[35] The Tribunal finds from the Claimant's oral evidence that he was fully aware of the company policies and that he had been warned by his employer about staring and making gestures was not acceptable. The Claimant provided oral testimony that he did make gestures to his coworker and even if he kept his hands close to his body and was only reacting to the alleged harassment from the coworkers demonstrates the Claimant knew or ought to have known his behavior could lead to dismissal because he had been warned by his employer on previous occasions.

[36] As Justice Nadon wrote in *Mishibinijima v. Canada* 2007 FCA 36, 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.

[37] The Claimant presented the argument that the employer over reacted to the incident and that he should not have been terminated. He argues that the union also agrees with him and they have filed a grievance to the matter and it will be going to arbitration.

[38] The employer presents evidence that the final decision to terminate the Claimant came about after a telephone interview following the incident on September 25, 2014 when the Claimant stated that he would fight the coworker to his death. At that point the employer banned the Claimant from the premises and terminated him. The employer provided evidence that confirmed the union had grieved the termination and requested the Claimant be reinstated on a last chance agreement; however they have refused to do so.

[39] The Tribunal finds from the Claimant's oral evidence that he believed the union would be going to arbitration but he did not have any details or confirmation when this would occur.

[40] The Tribunal find from the Claimant's oral evidence that although he believed to have only made a suggestion to his employer that he would fight to death, he did testify that he had challenged the coworker to a fight previously and that he would not back down and if he had to he would fight the coworker and if that meant until someone dies then that is what he will do.

[41] The Tribunal finds that that the statements made by the Claimant that he would fight the coworker to his death must be taken very seriously regardless if the threat was to be taken outside the workplace. An employer cannot tolerate physical or verbal aggressive behavior in the workplace as it threatens everyone's safety, the effectiveness of the work performed and the atmosphere. It also creates conflict between coworkers and the employee-employer relationship and thus the employer can no longer trust an employee who behaves in such a manner. The Tribunal finds the serious actions of the Claimant's behavior constitute misconduct and that it was his own actions that caused his dismissal.

[42] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[43] Determining whether dismissing the Claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the Claimant's dismissal from employment (*Macdonald* A-152-96).

[44] The Claimant presents the argument that Service Canada was bias and that they supported the employer.

[45] The Tribunal finds there is no evidence to support the Claimant was treated unfairly and that he was provided with the opportunity to provide the Commission with the necessary evidence through the initial statements and the request for reconsideration.

[46] The Claimant presents the argument that Canada needs to be dismantled and that he would destroy Canada if he could. He stated that he has paid into the employment insurance and that it is his right to collect benefits.

[47] The Tribunal must make its decision based on the facts presented in relation to the issue before it and has determined that regardless of how the Claimant feels about Canada, the Claimant is not entitled to benefits because he lost his employment when he breached the employers policy on harassment and violence in the workplace.

CONCLUSION

[48] The Tribunal finds that an indefinite disqualification should be imposed because the Claimant's actions were willful and deliberate which constitutes misconduct within the meaning of the Act.

[49] The appeal is dismissed.

Teresa Jaenen
Member, General Division - Employment Insurance Section