Citation: ***C. B. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 206**

Date: November 27, 2015

File number: GE-15-1964

GENERAL DIVISION - Employment Insurance Section

Between:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Richard Sterne, Member, General Division - Employment Insurance Section

Heard In person on November 27, 2015, in Kitchener, Ontario

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, C. B., and her Representative, Rachael Lake from the Waterloo Region Community Services, attended the in-person hearing.

The employer did not attend the in-person hearing.

INTRODUCTION

[1] The Appellant was employed by X Ontario Limited (employer) until February 13, 2015.

[2] On February 13, 2015, the employer advised the Appellant that her employment had been terminated effective immediately, because of her gross misconduct and theft on February 9, 2015.

[3] On April 1, 2015, the Canada Employment Insurance Commission (Respondent) advised the Appellant that they were unable to pay her any EI benefits because she had lost her employment on February 13, 2015, as a result of her misconduct.

[4] On April 22, 2015, the Appellant filed a request for reconsideration of the Respondent's April 1, 2015 decision, which was denied on May 29, 2015.

[5] The hearing was held in-person for the following reasons:

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

b) The fact that the credibility is not anticipated to be a prevailing issue.

c) The fact that more than one party would be in attendance.

d) At the request of the Appellant.

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

f) 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

[6] Did the Appellant lose her employment due to her misconduct, pursuant to subsection 30(1) of the *Employment Insurance Act* (Act)?

THE LAW

[7] 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;

[8] 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."

[9] 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

[10] The Appellant was employed by the employer from March 31, 2014 to February 13, 2015.

[11] On February 13, 2015, the employer advised the Appellant that her employment had been terminated effective immediately because of her gross misconduct and theft on February 9, 2015.

[12] On February 18, 2015, the employer issued the Appellant's record of employment (ROE) and indicated the reason for issuing the ROE was code M, Dismissal.

[13] On February 24, 2015, the Appellant applied for EI benefits.

[14] On March 9, 2015, the employer told the Respondent that the Appellant was a cashier in his store, and they had reason to believe that the Appellant had stolen approximately $200.00 at the point of sale. The employer stated that the float was approximately $200.00 short and they were sure it was the Appellant because the security camera had recorded the theft occurring. The employer stated that his loss prevention offer had spoken to the Appellant to see if she would admit to the theft, but she denied it, and was unable to explain the situation recorded on the camera.

[15] On March 27, 2015, the Appellant told the Respondent that she had been accused of stealing $200.00 during her shift, as her till was $188.00 short. The Appellant said that she had worked at her till from 1:30pm to 7:30pm. She had taken over from the person who had worked the same till from 8:30am to 1:30pm. The Appellant stated that she did not steal the money.

[16] On April 1, 2015, the Respondent advised the Appellant that they were unable to pay her any EI benefits because she had lost her employment on February 13, 2015, as a result of her misconduct.

[17] On April 22, 2015, the Appellant filed a request for reconsideration of the Respondent's April 1, 2015 decision.

[18] On May 29, 2015, the Appellant told the Respondent that she was not sure that the person in the security video was her. She said that she had taken the till over from someone who had worked the same till earlier in the day. She said that she could not have put the missing money up her sleeve because she was not able to move her hands quickly due to her fibromyalgia. She stated that she did not steal the money.

[19] On May 29, 2015, the Respondent advised the Appellant that they had not changed their April 1, 2015 decision.

SUBMISSIONS

[20] The Appellant submitted that:

a. she did not lose her job due to her misconduct.

b. she did not steal anything.

[21] The Respondent submitted that:

a. the Appellant had lost her employment by reason of her own misconduct, and therefore they imposed an indefinite disqualification effective February 8, 2015 pursuant to subsection 30(1) of the Act.

ANALYSIS

[22] 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.

[23] 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

[24] During the hearing, the Appellant stated that prior to working for her current employer; she had worked for an employer for seven and a half years where she was recognized as cashier of the month for stopping a theft. The Appellant stated that at the time of the incident recorded by the security video camera that she had rung up a sale for a customer. The customer proceeded to give her some twenty dollar bills to pay for his purchase. She said that she did not open the till at that moment because the customer had not given her enough money to cover the total amount owed. She said that she held on to the twenty dollar bills until the customer had given her an additional amount to cover the cost of his purchase. She then opened the cash drawer and put the monies into the drawer and gave the customer his change. The Appellant stated that this was her standard procedure. She stated that she didn’t put any money up her sleeve, not only because she would not steal but also because her fibromyalgia inhibited her ability to move quickly.

[25] The Appellant stated that she had taken over the till from the cashier who had worked the day shift before her, without the till being counted. She said that normally at the end of her shift, she would take the money out her till and send it via pneumatic tube, directly to the accounting office. She stated that on the day of the incident, someone from accounting had taken the till from her and delivered it to the accounting office. The Appellant stated that she did not steal any money.

[26] The Tribunal found the Appellant was credible during the hearing in that she was open and consistent in her comments and answers to questions, while under oath.

[27] The Tribunal finds that the pictures from the security camera video show the Appellant holding on to the twenty dollar bills, but do not show her putting the money up her

sleeve. The Tribunal accepts the Appellant's explanation that holding on to the cash presented until the customer had given her enough cash to pay for his bill before opening the till, was the standard procedure.

[28] The Tribunal finds that there was no accounting for the cash in the drawer realized from the Appellant's sales, because the cash in the drawer was not counted at the beginning of her shift. The Tribunal finds that the cash in the drawer was not in the Appellant's control while the accounting person took the cash from her to deliver it to the accounting office at the end of her shift.

[29] The Tribunal finds that there is no evidence or proof that the Appellant stole the money.

[30] The Tribunal finds that there is no evidence that the Appellant knew or should have known that her actions would result in her dismissal.

[31] 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.

Mishibinijima v. Canada (AG), 2007 FCA 36

[32] 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

[33] The Tribunal finds that the Appellant's actions were not willful, deliberate, or conscious to the extent that she knew that they could result in her dismissal and do not constitute misconduct, pursuant to sections 29 and 30 of the Act.

CONCLUSION

[34] The appeal is allowed.

Richard Sterne
Member, General Division - Employment Insurance Section