



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *D. P. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 225

Date: December 1, 2015

File number: GE-15-2393

GENERAL DIVISION - Employment Insurance Section

Between:

D. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: John Noonan, Member, General Division - Employment Insurance Section

Heard by Teleconference on October 15, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. P., Appellant

INTRODUCTION

[1] The A claim for employment insurance benefits was established by the Appellant effective April 19, 2015. (GD3- 3-13) This claim was, on May 18, 2015, denied as the Canada Employment Insurance Commission (Commission) determined that the Appellant was disqualified from receiving benefits because he had lost his employment due to his own misconduct on April 4, 2015. (GD 3-20) The Appellant sought and was granted a reconsideration of this decision resulting in the Commission maintaining its original decision. (GD3 – 42). He then appealed to the Social Security Tribunal on July 29, 2015.

[2] The hearing was held by Teleconference 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 the appellant will be the only party in attendance.
- d) The information in the file, including the need for additional information.
- e) 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

[3] Whether a disqualification should be imposed pursuant to sections 29 and 30 the *Employment Insurance Act* (Act) because the Claimant lost his employment by reason of his own misconduct.

THE LAW

[4] Subsections 29(a) and (b) of the Act state that:

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;

[5] Subsection 30(1) of the Act states that:

30(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

- i) 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
- ii) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[6] Subsection 30(2) of the Act states that:

(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

[7] According to the evidence in the docket, the Appellant worked for Forbes Bros. in AB from May 26, 2014 until April 4, 2015 at which time he was dismissed from his job. (GD 3-14)

[8] The Appellant was dismissed from his employment effective April 4, 2015 for having breached the employer's drug and alcohol policy.

[9] The Appellant, on his application for benefits, indicated that he was dismissed from his employment.

[10] He further indicated that he was told by the employer the reason for his dismissal. GD3-7

[11] The Appellant's employer asserts that the Appellant:

1. Was dismissed for failing a drug test.
2. This test had been administered after the Appellant fainted on the jobsite.
3. Appellant was a crane operator.

[12] The Appellant asserts that:

1. He was dismissed for failing the drug test.
2. He was found to have 33 nanograms of marijuana in his system when the cut-off point was 29 nanograms. GD3-18
3. When on shift, he had been overcome by exhaust fumes which caused the fainting episode resulting in .

[13] The Appellant fainted on the job therefore was sent to hospital as a precaution to check for possible cause. Tests were negative.

[14] Because the Appellant had been operating a crane, as per policy (GD3-33), a post incident drug test was administered which the Appellant failed resulting in his immediate termination from his employment.

[15] The Appellant states that he smokes 1 or 2 “joints” each and every evening to assist with sleep.

[16] The Commission concluded that the claimant lost his employment by reason of his own misconduct. As a result the Commission imposed an indefinite disqualification effective April 5, 2015 pursuant to subsection 30(1) of the Act (Page GD3-20).

SUBMISSIONS

[17] The Appellant submitted that he should be eligible to receive benefits because:

- a) He needed the marijuana daily as a sleep aid.
- b) He doesn't have faith in sleeping pills.
- c) He never had an accident.
- d) He only smoked the drug at home, never at work.

[18] The Respondent submitted that the Appellant is not eligible to receive benefits because:

- a) He was dismissed from his job on April 4, 2015 for misconduct.
- b) The Appellant had failed a drug test which, as per the employer's stated and written policy, led to his dismissal.
- c) The actions of the Appellant had severed the relationship between him and his employer.
- d) These actions were willful and the Appellant should have known that they would / could lead to his dismissal.

ANALYSIS

[19] Section 30 of the Act states that “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”.

[20] The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. (**Tucker** A-381-85)

[21] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (McNamara 2007 FCA 107; Fleming 2006 FCA 16).

[22] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities LARIVÉE A-473-06, FALARDEAU A-396- 85.

[23] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).

[24] In acting as he did, the claimant ought to have known that his conduct was such that it might lead to his dismissal (Kaba 2013 FCA 208; Hastings 2007 FCA 372).

[25] It was the issue with the Appellant failing a drug test that led to his dismissal.

[26] This immediately severed the trust relationship between the Appellant and the employer.

[27] The Appellant's assertion that this was a wrongful dismissal is not relevant here as the conduct of the employer is not in question.

[28] The Appellant has, on at least 2 occasions, admitted to smoking marijuana daily as a sleep aid and therefore he should / could expect residual amounts to be retained in his system contrary to his employer's drug and alcohol policy.

[29] Whether or not the issue of his "drug dependency" was properly assessed by the employer is not an issue for the Tribunal. GD3-31

[30] I find that the Commission and the employer have shown, as the onus is on them to do so, that the Appellant's actions were willful to the point that he would / could assume they would lead to his dismissal.

[31] I find that the Appellant lost his employment as a direct result of his own misconduct and is therefore disqualified from receiving benefits

[32] The Tribunal "Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment" (Meunier A-130-96).

CONCLUSION

[33] In having done so, the Member finds that, having given due consideration to all of the circumstances, the Appellant's actions in this case amounted to misconduct under the Act therefore the appeal is dismissed.

John Noonan
Member, General Division - Employment Insurance Section