Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation : *S. W. v Canada Employment Insurance Commission*, 2015 SSTGDEI 228

Date: December 9, 2015

File number: GE-15-1023

GENERAL DIVISION - Employment Insurance Section

Between:

S. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Grant Smith, Member, General Division - Employment Insurance Section

Heard by Teleconference on December 7, 2015

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant – D. W.

INTRODUCTION

[1] The Appellant applied for employment insurance benefits (EI benefits) on October 30, 2014. The Respondent denied the application at the initial level and on February 17, 2015 denied the application at the reconsideration level. The Appellant appeal to the General Division of the Social Security Tribunal (Tribunal).

[2] The hearing was held by Teleconference for the following reasons: the complexity of the issue under appeal, the information in the file, including the need for additional information, 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] Was the conduct of the Appellant willful or deliberate or so reckless as to approach willfulness and did it constitute misconduct within the meaning of the *Employment Insurance Act*? (Act)

THE LAW

[4] 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;

[5] 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 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.

[6] 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

[7] The Appellant was employed by X until she was dismissed on October 10, 2014.

[8] The Appellant stated in her application that she was dismissed because the employer found that she had behaved in a manner irreconcilable with the nature of her position.

[9] In response to a request for information about IT security in the Appellant's workplace the employer provided "that all users of computers owned by X have unique credentials (passwords), which only the user knows, to access their workstation. Logging into the computer requires a user to input a password to log into the network, and this password is changed every 90 days. Once logged into the network, the email system requires an additional password, to gain access to email. Finally, all workstations are configured to lock when the accounts are inactive. It is the user's responsibility to protect the confidentiality of these credentials."

[10] The employer alleged that on June 30, 2014 at 7:13 P.M. the Appellant sent an email, from her office computer, to her union. The email stated in part: "One day soon I will snap, bring one of my guns in to work, and shoot the bastard."

[11] The union lawyer turned the email over to the police who informed the employer. The Appellant returned to work on July 2, 2014 and was immediately suspended by the employer and an investigation was begun. Following the conclusion of the investigation, on October 30, 2014, the Appellant was dismissed.

[12] After speaking with the employer and the Appellant the Commission determined the Appellant had lost her employment by reason of her own misconduct. the Commission imposed an indefinite disqualification to regular benefits effective October 12, 2014, pursuant to subsection 30(1) of the Act.

SUBMISSIONS

[13] The Appellant submitted at the hearing that she has never acknowledged sending the subject email. She further submits there is no proof that she did so. She noted the date and time of the email was June 30, 2014 at 7:13 P.M. She further noted that it was the day before a National holiday and she would not have been in the office at that time; nobody has come forward to say they saw her there. She submitted that she works 8:00 a.m. to 4:30 p.m. and leave the office promptly at 4:30. She submits the email was sent well beyond her hours of work. She also stated that she had to pick her child up from after school care. The Appellant has stated that the only evidence against her is a redacted email with nothing to show that it was sent by her. She submitted that the Commission's reliance on that piece of evidence fails the legal test.

[14] The Appellant also submitted that the employer has acknowledged, in the termination letter, that she has never acknowledged sending the email. The Tribunal pointed out that the termination stated that she gave no explanation on the advice of her lawyer. She was then asked directly, "Did you tell your employer at the disciplinary hearing that you had not written the email?" The Appellant responded, "I have never acknowledged that I sent the email." The Appellant kept repeating this phrase, refusing to state whether or not she had stated at the disciplinary hearing "I did not write and send the email".

[15] The Appellant submitted that the Commission accepted the employer's word over hers' and that she should have been given the benefit of doubt per section 49 of the Act.

[16] The Appellant referred to the Digest of Entitlement Principles and stated that in making its decision the Commission did not follow the rules as laid out in chapter 7. A decision to deny benefits was made after only a brief call to the employer and another brief call to the Appellant.

[17] Further the Appellant submitted that she had no reasonable certainly that an email sent to a union lawyer would be taken to the police or the employer. She submitted that in doing so the lawyer breached the client / lawyer relationship of confidentiality.

[18] The Appellant further submitted that the person who sent the email would have thought that if it was discovered it would only have resulted in a reprimand being issued, not a dismissal.

[19] The Appellant submitted that, absent proof that she sent the email, there is nothing to suggest she did anything that would show willfulness or conduct that was so reckless as to approach willfulness; ergo there was no misconduct. She also submitted that the time delay between the suspension and the dismissal was so inordinately long that it does not show a causal link between the alleged misconduct and the dismissal.

[20] When asked about her statement in GD3-18 where the Commission agent J. H. recorded she had stated, “The claimant then advised that she made reference to a gun and going postal on the employee”. The Appellant stated “the agent must have misinterpreted what I said. That is not what I said; I have never acknowledged sending the email”.

[21] During the hearing the Appellant was asked, “So you were venting your frustration rather than making a legitimate threat?” The Appellant relied, “Yup”.

[22] The Respondent submitted that the Appellant’s action, sending the threatening email, was willful or deliberate or so reckless as to approach willfulness and constituted misconduct within the meaning of the Act.

ANALYSIS

[23] Subsection 30(2) of the Act provides for an indefinite disqualification when the Claimant loses her employment by reason of her own misconduct. For the conduct in question to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or so

reckless as to approach willfulness. There must also be a causal relationship between the misconduct and the dismissal.

[24] In *Canada (AG) v. Lemire, 2010 FCA 314* the Federal Court of Appeal defined the legal notion of misconduct for the purposes of section 30 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.

[25] In cases such as misconduct, the Tribunal must determine whether or not the Appellant lost her employment because of the alleged offence, whether the Appellant actually committed the alleged offence, and does the alleged offence constitute misconduct under the Act. The burden is on the employer and the Commission to prove misconduct.

[26] In *CUB 34832*, the Umpire stated that, in determining misconduct, the Tribunal must first identify the conduct, which is alleged to constitute misconduct, next find as a fact that the complained of behaviour was indeed misconduct and finally, determine that the loss of employment resulted from the misconduct.

[27] In the instant case the Tribunal finds the Appellant was dismissed for allegedly sending an email to her union threatening the life of a co-worker.

[28] The Appellant insists she has never acknowledged that she wrote or sent the email and noted that the time the email was sent (7:13 P.M.) was after her regular hours of work (08:00 A.M. to 4:30 P.M.) She also stated that if she had returned to the office to send this email she would have had her child with her as she had to pick up the child from day care. She also noted that nobody has come forward to give evidence that she was seen in the office at the time the email was sent. The Appellant stated that the workplace is an open space and everyone would have access to her work station.

[29] The Tribunal finds in GD3-18 that the Appellant did admit to a Commission agent that she had made reference to a gun and going postal on an employee. While the Appellant stated at the hearing that the Commission agent "must have misinterpreted what I said. That is not what I said; I have never acknowledged sending the email" the Tribunal finds it very unlikely, that a trained Commission agent, dealing with a serious matter of misconduct, would have misinterpreted the

Appellant's statement. The Commission accepts, on a balance of probabilities, that the conversation between the agent and the Appellant occurred per the agent's notes and that the Appellant did make reference to a gun and going postal on an employee.

[30] The Appellant has been very clear throughout this file stating repeatedly that she has never acknowledged sending the email however; the Tribunal finds that she has not denied sending the email.

[31] The Appellant was asked clearly in the hearing whether or not she told her employer that she had not written the email and she responded by stating "I have never acknowledged sending the email".

[32] The Appellant provided an explanation as to how the email was sent from her computer. She stated that her workplace is open and almost anyone working there would have access to her work site. While the Appellant would like the Tribunal to believe that anyone working at her work place then could have access to her computer it is clear and obvious to the Tribunal that the IT security in place at her workplace prevents just this sort of happenstance. The Appellant has presented no evidence that she gave her password credentials to anyone thereby allowing them access to her computer. Therefore the only conclusion the Tribunal can come to is the Appellant and only the Appellant had access to her office computer, ergo only she could have sent the email from her computer.

[33] The Appellant has also indicated that if she was in the office at 7:13 P.M. on June 30, 2014 she would have to have her child with her. While that might well be true, the Tribunal finds this statement and the statement that nobody has come forward to say that they saw her in the office at that time does not provide her with a credible alibi. A reasonable finding is that the Appellant took her child into the office with her and that she did so at 7:13 P.M. so she would not be seen by other employees.

[34] Further, during the hearing this statement was put to the Appellant "So you were venting your frustration rather than making a legitimate threat?" The Appellant relied, "Yup".

[35] Additionally, during the hearing the Appellant stated that she had "no reasonable certainty that an email sent to a union lawyer would be taken to the police" or the employer and therefore

there was no reason to believe that she knew the email would lead to dismissal. She believed a warning or suspension would be the employer's response.

[36] The Tribunal finds these statements to be inculpatory in nature; she thought the union lawyer would keep the email confidential, she was venting versus making a legitimate threat, and she did not think such an email would lead to dismissal. In situations such as threat to a person's life the Tribunal finds a union lawyer in all likelihood would be required to report the email containing a death threat and would be well within the rules of ethical conduct in doing so.

[37] The Tribunal finds, on a balance of probabilities, from the Appellant's statements and evidence on file, that the Appellant did write and send the email as noted in GD3-32 and she was dismissed for that action. Further the Tribunal finds the email must be considered to be a serious and viable threat. Although the Appellant indicated during the hearing that the email was not a legitimate threat and she was venting her frustrations over her employer and union not taking action on her allegations of workplace harassment. The Tribunal finds that while the Appellant did not see this email as a real threat, the person receiving it came to a different conclusion and took it to the police.

[38] The Appellant has stated that the event occurred on June 30, 2014 and she was not terminated until October 10, 2014 and therefore there is no causal relationship between the misconduct and the dismissal. The Tribunal disagrees and while the Appellant might think she was the victim, clearly she initiated the action for which she was dismissed.

[39] The test for misconduct is whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the affects her actions would have on job performance (*Tucker A-381-85*).

[40] The Tribunal has found the Appellant wrote and sent the email in question. To send an email threatening the life of a co-worker cannot be seen by the Tribunal to be a joke, prank or simple venting. She clearly knew what she was doing and, in her statement that she had "no reasonable certainly that an email sent to a union lawyer would be taken to the police" demonstrates to the Tribunal that she knew that what she was doing was wrong and she erroneously relied on lawyer/client privilege to protect her.

[41] The Tribunal finds the Appellant's actions were willful and reckless and she willfully disregarded the affects her actions would have on job performance.

[42] The Appellant stated at the hearing that she didn't think something like this email would lead to dismissal but rather, the employer would reprimand the offender. The Tribunal finds that an email of this magnitude, where another person's life is threatened cannot be considered to be a minor incident. Violence in the workplace is not a negotiable subject in the Federal workplace and brings about termination of employment. The Appellant has provided no evidence that she is naïve, uneducated or didn't understand what she was doing. Rather, to the contrary her presentations during the hearing were thorough and articulate.

[43] Therefore, in accordance with the Federal Court of Appeal in *Canada (AG) v. Lemire*, 2010 FCA 314 the Tribunal finds the Appellant **ought** to have known that her action, in sending a threatening email, was misconduct of such a serious nature that it would lead to termination of employment.

[44] The Tribunal is aware of the Appellant's allegations of work place harassment and that it appears neither the union nor the employer have taken the road of expediency. The Tribunal finds itself compelled to state that workplace harassment is unacceptable and the employer has an obligation to deal with allegations with immediacy. If the Appellants' allegations are found to be true, then the union and the employer might be found culpable in causing the Appellant to take the action that led to her termination.

[45] Although the Appellant feels the dismissal was too harsh a punishment the Tribunal is guided by the Federal Court of Appeal, in *Marion (A-135-01), Fakhari (A-732-95), Namaro (A-834-82) and Secours (A-352-94)* which held that the question before the Tribunal does not require determining whether the severity of the sanction imposed by the employer was justified under the circumstances of the case, but whether the employee's conduct constituted misconduct under the Act and whether that misconduct resulted in the dismissal.

[46] The Tribunal finds the Appellant's conduct constitutes misconduct within the meaning of the Act.

[47] The Appellant stated repeatedly at the hearing that she should have been given the benefit of doubt per subsection 49(2) of the Act as the evidence was equally balanced. The Tribunal finds the evidence is not evenly balanced and weighs heavily against the Appellant.

CONCLUSION

[48] The appeal is dismissed.

Grant Smith
Member, General Division - Employment Insurance Section