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

Citation: *C. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 4

Date: January 13, 2016

File number: GE-15-2539

GENERAL DIVISION - Employment Insurance Section

Between:

C. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

9080899 Canada Inc

Added Party

Decision by: Joseph Wamback, Member, General Division - Employment Insurance Section

Heard by Videoconference on January 13, 2016, Toronto, Ontario.

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. M., the Appellant attended the hearing

P. L., representing 9080899 Canada Inc. attended the hearing

INTRODUCTION

[1] The Appellant filed for benefits and the employer requested reconsideration. The Respondent notified the Appellant that they could not pay benefits as they determined that she lost her employment through her own fault. The Appellant filed an appeal with the Tribunal and a hearing was scheduled.

[2] The hearing was held by Videoconference for the following reasons:

a) The fact that the credibility may be a prevailing issue.

b) The fact that more than one party will be in attendance.

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

[3] The Appellant is appealing the Respondent's decision resulting from her request for reconsideration under Section 112 of the Employment Insurance Act (Act) regarding a disqualification imposed pursuant to sections 29 and 30 of the Act because she lost her employment by reason of her own misconduct.

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 appellant 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:

An appellant is disqualified from receiving any benefits if the appellant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

> (a) the appellant 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 appellant is disentitled under sections 31 to 33 in relation to the employment."

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

The disqualification is for each week of the appellant'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 appellant during the benefit period.

[7] Section 112 of the Act:

(1) An appellant or other person who is the subject of a decision of the Respondent, or the employer of the appellant, may make a request to the Respondent in the prescribed form and manner for a reconsideration of that decision at any time within (a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Respondent may allow.

(2) The Respondent must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Respondent may allow a longer period to make a request under subsection (1).

EVIDENCE

[8] The Appellant filed for regular benefits on May 5, 2015. She stated she was dismissed from her employment for misconduct for entering an inappropriate comment in a log book. She stated she was not aware of any policy prohibiting such conduct and was not cautioned or disciplined in the previous 6 months. (GD3-3 to 15)

[9] The Appellant was employed by 9080899 Canada Inc. O/A Comfort, from January 19, 2015 to April 24, 2015 when she was dismissed from her job. (GD3-16)

[10] The employer advised the Respondent on June 9, 2015 that the Appellant was dismissed for writing inappropriate comments in the client care binder. The Appellant wrote "what the fuck" as a comment in the binder. Employer states this is not acceptable when it comes to charting and that the Appellant had breached company policy in regards to appropriate conduct. (GD3-17)

[11] The Appellant advised the Respondent on June 9, 2015 that she was dismissed after she wrote a comment in the log book that her employer deemed inappropriate. She stated that she wrote "WTF" not the actual words in the log book because a client's pills kept disappearing and they would not put the pills in a blister pack. The Appellant stated she tried for many months to get a blister pack because this client's pills kept disappearing. She was dismissed and states she was never advised of any specific policy in regards to what she wrote. She stated that she is aware that she is to act appropriately but there was never any discussion about the comments in the log book. (GD3-18)

[12] The Respondent notified the employer on June 9, 2015 that the hours worked by the Appellant C. M., from January 19, 2015 to April 27, 2015 are being used to establish their claim for Employment Insurance benefits. (GD3-19)

[13] The employer requested reconsideration of the Respondent decision on June 30, 2015. They attached a copy of the log book with the inappropriate comment and a copy of the policy and expectations. The guidelines specifically state “The Communication Book is also available for the client, their family and any other agencies engaged in their care to review what has happened during the shift and any progress notes that our caregivers have left for family members. Since the Communication Book may be read by the client and family, it is necessary to be extremely careful about what is put in writing. Keep it professional and write ONLY factual comments necessary to provide continuity of care. (GD3-20 – 26)

[14] The employer advised the Respondent on July 20, 2015 that because the company offers Personal Support Workers for in home care for very ill patients it is crucial that they have very strict and rigid policies regarding behaviour and that all employees are well aware of the policies and procedures. The employer quoted the communication book guidelines that stated "if you have complaints, frustrations or otherwise need to vent, call the office. Do not record your frustrations in the In-Home Client Log." The employer stated that after the Appellant put the "WTF" comment in the log book along with question marks all over the patients daughters comment to Personal Service Workers's in the book the daughter had called the office very upset. Employer stated that she sent over the picture of the comment and demanded an explanation. Employer stated that the daughter who managed her father’s care was threatening to cancel all services with the company due to this incident. Due to the seriousness of the breach of policy and the results of her behaviour he felt as though it constituted a serious enough violation of the company's policy that it warranted immediate termination of employment. The employer stated that the Appellant never came to them with any of her concerns regarding the patient’s medication and had she come to them and advised them on the errors with the medication and her recommendation that it be put in blister packs they would have brought that up with the patient’s doctors and power of attorney (the daughter). (GD3-27, 28)

[15] The Appellant advised the Respondent on July 21, 2015 that her supervisor was new in his role and was sticking too close to the written rules and did not understand nor was he aware of the realities in the field. She stated that yes she knows she should not have done it but she made a mistake. She stated she upset stating that she knows what she did was not appropriate but that she had been having a bad day and did not think her actions would be a game changer. (GD3-19, 20)

[16] The Respondent notified the Appellant and the employer on July 23, 2015 that have performed an in-depth review of the circumstances of the case and of any supplementary information provided, and based on their findings and the legislation, they are unable to pay the Appellant any Employment Insurance regular benefits starting April 26, 2015 because she lost your employment with 9080899 Canada Inc. on 27/04/2015 as a result of her misconduct. (GD3- 33 to 36)

[17] The Appellant filed an appeal with the Tribunal on August 7, 2015

[18] The Tribunal advised the Appellant of the hearing and requested her to appear as an added party. (GD5-1)

[19] The employer requested added party status at the appeal. (GD6-1, 2)

[20] The Tribunal scheduled a hearing. (GD1-1)

[21] The Appellant provided a copy of Ministry of Labour hearing Claim Number: 70155511-0 (GD8-1, to 4)

[22] The Appellant stated to the Tribunal that she made an error in judgment and was frustrated at the time due to previous issues with missing medication. She stated that a no time did she contemplate she could be dismissed because of a comment in the patients log that she believed registered her frustration. She stated she has an excellent work record with no record of any disciplinary actions.

[23] The employer advised the Tribunal that although he has a policy and procedures manual that he presented to the Respondent (GD3-24, 25) he did not present this to the Appellant when she was hired nor did he provide her with a copy prior to her dismissal. The employer state that he did no present an employment agreement to the Appellant for review and signature. He just hired her as she was an experience Personal Service Worker.

SUBMISSIONS

[24] The Appellant submitted that;

a) She was abruptly dismissed by her employer with no explanation.

b) She was paid her employment insurance benefits for several months and then they were going to be cancelled due to her misconduct. She took offense to the term of "misconduct" stating it was hurtful and did not speak to her character.

c) She wrote the objectionable term in the log book; however she never thought her employment could be jeopardized. She states her comment was completely misconstrued and her intention was purely in the best interest and wellbeing of the patient.

[25] The Respondent submitted that;

a) Subsection 30(2) of the Act provides for an indefinite disqualification when the Appellant 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.

b) In this case, the Appellant was employed in the capacity of a personal support worker by Comfort Keepers and as such was one of several personal support workers providing care for the patient. A standard tool used for consistency of care was the communication book where each personal support worker would write notes about the patient care to keep the next staff member coming on shift. The employer provided each employee, including the Appellant, with the policies and expectations as well as the communication book guidelines.

c) On the policies and expectations it states that client care includes documentation in the log record and communication binder, and that the intention of the book is to allow other staff members to share information to help provide a high quality of care. In bold type on this guideline it states “Keep it professional and write ONLY factual comments necessary to provide continuity of care” as the book may be ready by the client and the family (GD3-24 to GD3-25).

d) The Appellant requested the patient’s medication be ordered in blister pack, however his daughter, who was also his power of attorney, wrote in the log book that the medication would be staying as is instead of blister packed. In a statement of frustration the Appellant wrote “WTF” with her initials, and added question marks around the patient’s daughter’s comment. When the patient’s daughter saw the Appellant’s comment she threatened to cancel all services with the company due to this incident. As a result the employer dismissed Ms. C. M. due to her inappropriate comment which in turn equates to misconduct pursuant to the employment insurance act.

e) The legal test to determine misconduct pursuant to sections 29 and 30 of the employment insurance act is as follows: Does the information in the file support the finding that the misconduct and does the information in the file support the finding that the Appellant lost her employment because of these actions.

f) When Ms. C. M. first applied for employment insurance benefits she admitted she wrote an inappropriate comment in the employee log book, and later when contacted by the Respondent she also stated she did not write the “actual words”, but instead wrote WTF.

g) In the Appellant’s appeal she argues the acronym actually meant “Why the Friction” and instead it was misconstrued. If the Appellant actually meant “Why the Friction” by the acronym, she would not have indicated the comment was inappropriate and would have clarified what she meant by “WTF” when first speaking to the Respondent. The employer has provided the communication book guidelines, as well as a photo of the entry in the book where it clearly shows the Appellant has written “WTF” along with several question marks and her initials.

h) The Respondent concluded that the Appellant's action of writing an inappropriate comment in the log book shared by other personal support workers as well as the patient's family constituted misconduct within the meaning of the Act because the Appellant acted willfully and ought to have known that her behaviour would have a negative impact on the employment relationship. The Appellant admitted she knew what she did was wrong, and that her comment in the book was inappropriate (GD3-18, GD3- 29).

i) The Respondent submits that the jurisprudence supports its decision. The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a Appellant 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

j) 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 Appellant 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 Appellant's misconduct and the Appellant'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

k) On the last page of the Ministry's decision letter (GD8-4), marked with asterisks by the Appellant, the Ministry case officer stated: "I determine that the Appellant's conduct writing WTF in the communication log book amounts to misconduct because it is an acronym for a profanity and it challenged the authority of the daughter of the employer's client regarding how medication was to be given." The Ministry also determined that the Appellant was entitled to termination pay of one week of regular wages plus vacation pay, under the Employment Standards Act 2000. However, both decisions are irrelevant to this appeal. The Ministry of Labour has no authority over decisions made by the Respondent under the Employment Insurance Act, just as the Respondent has no authority over the decisions the Ministry of Labour makes under the Employment Standards Act 2000. The fact that the Ministry of Labour determined that the Appellant was payable one week's termination pay

in no way impacts whether or not the Appellant's reason for separation constituted misconduct within the meaning of the Act.

l) The Respondent submits that the Appellant's submission of the Ministry of Labour's decision under the Employment Standards Act 2000 is irrelevant under the law as to the issue of the disqualification for misconduct under sections 29 and 30 of the Employment Insurance Act currently before the Tribunal

ANALYSIS

[26] The only issue before the Tribunal is whether or not the Appellant lost her employment as a result of her own misconduct in accordance with subsection 30(1) of the EI Act.

[27] The EI Act does not define "misconduct". 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 effects his or her actions would have on job performance. According to the Federal Court of Appeal,

> "... there will be misconduct where the conduct of an appellant was willful, i.e. 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 Appellant knew or ought to have known that his/her conduct was such as to impair the performance of the duties owed to his/her employer and that, as a result, dismissal was a real possibility." *Mishibinihim*, A-85-06.

[28] The case law since Tucker is very clear: an act is deliberate where it is done consciously, willfully or intentionally.

[29] This issue before the Tribunal is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his/her dismissal.

[30] In determining whether the appropriate mental element of willfulness, as defined above, was proven, the Tribunal looked to the whole of the circumstances and evidence surrounding the Appellant's dismissal including the notices and the employer's evidence.

[31] In this case the employer dismissed the Appellant from her job because it was alleged that the Appellant placed a note in a patient's log that he deemed offensive. (GD3-23). The Tribunal finds that both the Appellant and the employers evidence support the allegation and agree that the note was placed by the Appellant

[32] The employer's complaint refers to a violation of a company policy "Caregiver Policies and Expectations" (GD3-24 and 25) but has failed to provide any documentation to demonstrate that the Appellant was presented this policy when she was hired. The employer's direct evidence to the Tribunal confirms that the Appellant was never provided with a copy of the employer's policy. The employers did not provide a copy of the Appellant's termination letter.

[33] The Tribunal finds that the Appellant provided a reasonable explanation for comment placed in the patients log book as she stated she was frustrated because of lost medication and wanted to ensure medication was provided in a "blister pak" to ensure it could be accounted for. The Tribunal does not condone nor agree that the comment was appropriate.

[34] The misconduct must be "willful or deliberate or so reckless as to approach willfulness" (*M. Brissette,* Federal Court A-1342-92). Misconduct evidence must be "sufficiently detailed" to permit a Board to decide that the conduct in question was "reprehensible" (M.L. *Joseph, Federal* Court A-636-85).

[35] The Tribunal finds that the Appellant provided the Tribunal with direct evidence that she was never provided any written documentation regarding the employer's policy and at no time did she believe that her actions would jeopardize her employment.

[36] Subsection 30(1) of the EI Act provides that an Appellant is disqualified from receiving any benefits if the Appellant lost any employment because of their misconduct or voluntarily left any employment without just cause …..... The legal notion of misconduct for the purposes of this provision has been defined in the case law as willful misconduct, where the appellant knew or ought to have known that his or her conduct was such that it would result in dismissal: *Canada (A.G.) v. Tucker*, [1986] 2 F.C. 329 (C.A.)

[37] The Tribunal prefers the direct evidence of the Appellant during the hearing where she stated that she did not intend to breach any provisions of the employer's policy and does not believe that she did. The Tribunal finds no direct evidence to support the employer's allegation that the Appellant was aware of his company policy and a violation of that policy would result in immediate dismissal.

[38] The notion of willful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional: *Canada (Attorney General) v. Secours (*1995), 179 N.R. 132 (F.C.A.).

[39] The Tribunal finds that there was no misconduct as the actions of the Appellant were not willful, in the sense that the acts which led to her dismissal were not conscious, deliberate or intentional due to the Appellant's belief that she never expected that her employment would be terminated over the incidents complained of.

[40] In *Tucker* (A-381-85), the Federal Court of Appeal adopted the following language from Justice Reed's decision as Umpire:

> "Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behaviour which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent..."

[41] It is well established that the onus of proving misconduct lies on the party or parties alleging it (*Bartone* (A-369-88), *Meunier* (A-130-96), *Gagnon* (A-3-96). In this case the Tribunal prefers the direct evidence of the Appellant when she advised that she was never provided with a copy of the employers policies, and never thought that she could be dismissed over a comment in the patients log book.

[42] The Tribunal finds that the Appellant did not lose her employment as a result of her own misconduct in accordance with subsection 30(1) of the Act

CONCLUSION

[43] The appeal is allowed.

Joseph Wamback
Member, General Division - Employment Insurance Section