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

Citation: *S. S. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 24

Tribunal File Number: GE-15-2955

BETWEEN:

S. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Weimer's Hometown- SJD Sales Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: February 9, 2016

DATE OF DECISION: February 15, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. S. S., the Appellant (Claimant) along with his representative Ms. K. L. attended the hearing.

INTRODUCTION

[1] On July 13, 2015 the Appellant made an initial claim for employment insurance benefits. On August 7, 2015 the Canada Employment Insurance Commission (Commission) denied the Appellant benefits because it was determined he lost his employment due to his own misconduct. On September 10, 2015 the Appellant made a request for reconsideration. On September 24, 2105 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal). On December 14, 2015 the Tribunal granted an adjournment at the request of the Appellant's representative due to schedule conflict.

[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 November 6, 2015 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 confirmed the employer received and signed for the notice of hearing on December 17, 2015. Thus the Tribunal is satisfied the party received notice and made a decision not to participate in the hearing 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 a disqualification should be imposed because the Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the Act).

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.

[8] Subsection 30(2) of the Act states 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

[9] In his application for benefits the Appellant stated he was dismissed for committing an act of violence and/or inappropriate behavior. He stated that he started arguing with his employer and how he treats employees and customers and it escalated very quickly. He stated he told his employer exactly how he felt and how he thinks he treats everybody and it ended with his employer telling him to leave. He stated this was their first real argument in three years of service and he was dismissed on the spot and feels it was unfair. He stated he didn't know if there was a policy in place and he stated he never spoke to anyone following the dismissal. He stated he didn't know what else to do (GD3-9).

[10] On August 4, 2015 the employer stated to the Commission that the Appellant posted on Facebook that he wasn't giving him (the Appellant) all his wages that he was entitled to and told people to stop shopping there. The employer stated that Facebook removed the post after he complained to them but he did keep a copy of it and will provide it to the Commission. He stated the Appellant had not really received any previous warnings prior the Facebook post but the post was slanderous and the Appellant was dismissed as soon as he became aware of it (GD3-17).

[11] On August 7, 2015 the Appellant stated to the Commission that he did post the message to Facebook on Weyburn Confessions. He stated he didn't know why he did it and it was a bad idea. The Commission stated to the Appellant that posting slander on social media was considered disrespectful misconduct and that if he had issues with wages he should have gone to the labour board not social media (GD3-20).

[12] On August 11, 2015 the employer submitted the Facebook posted by the Appellant and also stating that the Appellant has written the post on his coffee break from his (the employers) computer while he was away on holidays (GD3-18 to GD3-19).

[13] On September 10, 2015 the Appellant made a request for reconsideration reiterating his dismissal was caused for confronting his employer and it was unfair (GD3-21 to GD3-22).

[14] A record of employment indicates the Appellant was employed with Weimers's Hometown SJD Sales Inc. from August 27, 2012 to June 30, 2015 and he was dismissed from his employment (GD3-23).

[15] On September 21, 2015 the Claimant confirmed to the Commission that he had made the slanderous post about his employer on Facebook. He stated he made the post prior to going to work on June 30, 2015 and it was something about the employer not paying his employees their wages or vacation pay and people should stop shopping at the store. He stated the post was no longer on and he didn't have a copy of it. The Appellant stated that he had become angry and his temper was stirred up by co-workers and customers. He stated he constantly heard for the past two years about the employer not paying vacation pay to other staff and he was also angry with being a paid a vacation day when it was a sick day. The Appellant stated that he was paid

his wage the same and he believed he was being over paid instead of it being vacation pay. He stated he never spoke to his employer; he just kept his monies and paid his bills (GD3-24).

[16] The Appellant stated to the Commission that on June 30, 2015 he started by posting the comment about his employer on Social Media and then he went to work as usual. He guesses sometime during the day the employer must have heard or seen the post. He stated the employer arrived at the store at closing time and asked him about the post and then dismissed him. He stated that they argued about wages and vacation pay and he took this opportunity to ask the employer for a pay out of his vacation pay. He stated he asked the employer whey he was paid out a vacation day when he was sick and the employer told him that vacation pay was not paid out during a sick day. The Appellant stated he knows he was wrong in making the post and that he should have spoken to his employer which he never did until his dismissal. He stated he has worked out everything with his employer and received all his pay with regards to the separation (GD3-25).

[17] On September 22, 2015 the employer stated to the Commission that he nothing more to add and agreed to everything he had already submitted (GD3-26).

[18] On September 24, 2015 the Commission notified the Appellant they were maintaining the original decision on misconduct and his right to appeal to the Tribunal (GD3-27 to Gd3-29).

[19] In his Notice of Appeal (NOA) the Appellant stated that in three years he had one argument with his employer and was let go on the spot. He stated it has been three months and he is still unable to find work. He stated he is not eligible to receive social assistance because of the ruling of employment insurance. He stated he has no income and no way to live. The Appellant stated that he was never provided with the opportunity to tell his side of the story. He stated that he lost his temper after he learned from other employees and multiple customers that his boss was saying things about him. He stated he confronted his employer about it and was fired on the spot. He stated he believes this to be unfair as he was a good employee who received many compliments from customers (GD2-1 to GD2A-10).

SUBMISSIONS

[20] The Appellant along with his representative submitted that:

a) The legal test stated on (GD4-4) in that for it to be misconduct the claimant knew or ought to have known that his or her conduct would result in dismissal is not the case. She stated that the Appellant never thought he would be dismissed. She stated he made the post in the heat of the moment and has since regretted doing it;

b) The statement in (GD3-18) is not true, the Appellant stated he made the post from home at 10 PM and not from his employers office;

c) The post as stated in (GD3-19) was made to Weyburn Confessions and it was supposed to be an anonymous. The Appellant's representative stated that they don't know how the Appellant's name appeared and he should have been issued a number;

d) The Appellant stated he contacted Weyburn Confessions to remove the post but it was too late, and after then post was gone;

e) He made the post after he had heard gossip from coworkers and he lost judgment. He stated that he wasn't feeling appreciated by his employer;

f) The employer came back from the lake and called him into the office, he stated the employer began yelling at him about the post and fired him;

g) Her son came to her house and was extremely upset over being dismissed and he didn't apply for employment insurance right away because he thought he would find another job;

h) The Appellant stated that he never made any attempt to notify his employer that he had made the post in haste prior to him being dismissed or made any attempt to apologize to his employer at the time of the dismissal or at any time after the dismissal to see if he could get his job back;

i) The representative stated that the post was made in haste and that that it was wrong, however the Appellant regrets doing the post and the consequences have been severe for him. This situation had been very hard on her son's self-esteem and he has been out of work now for over five months; and

j) The Appellant stated that it was the employer who confronted him over the post on Facebook and not himself as he stated in the evidence on the file, and that the argument was over the Facebook post which led to the employer firing him.

[21] The Respondent submitted that:

a) The Claimant admits to posting slanderous comments about his employer as shown in (GD3-19) on social media on June 30, 2015. He also admits he was wrong to do so;

b) The employer stated that the Claimant was dismissed because of the slanderous comments made by the Claimant on social media;

c) The Commission submits that an employer is entitled to require certain ethical standards of honesty and trustworthiness in employees. When an employer discovers that an employee had conducted himself or herself in a way which undermines the employer's confidence that those personal qualities existed, dismissal, even without notice, is justified;

d) The Claimant's slanderous comments about the employer on social media constituted misconduct within the meaning of the Act because the Claimant admitted to making the comments and that he knew that do so was wrong;

e) The Claimant's actions were willful and designed to cause harm to the employer's business and resulted in the Claimant's dismissal because the employer could no longer trust the Claimant; and

f) The Commission 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 claimant was willful in the sense the acts which led to the dismissal were conscious, deliberate or intentional (*Mishibinijuma v. Canada* (A.G), 2007 FCA 36).

ANALYSIS

[22] 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).

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

[24] In this case the Respondent alleges the Appellant lost his employment when he posted slanderous comments about his employer, which would be unacceptable behavior that would cause irreparable damage to the employee/employer relationship. Therefore the Tribunal finds the Appellant's action constitutes misconduct within the meaning of the Act and therefore was the cause of the dismissal.

[25] 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.

[26] 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.

[27] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not

have acted as he did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[28] The Respondent presents the argument that the Claimant's slanderous comments about the employer on social media constituted misconduct within the meaning of the Act because the Claimant admitted to making the comments and that he knew that do so was wrong. The Claimant's actions were willful and designed to cause harm to the employer's business and resulted in the Claimant's dismissal because the employer could no longer trust the Claimant.

[29] The Respondent further argues that an employer is entitled to require certain ethical standards of honesty and trustworthiness in employees. When an employer discovers that an employee had conducted him or herself in a way which undermines the employer's confidence that those personal qualities existed, dismissal, even without notice, is justified.

[30] The Appellant along his representative argue that the legal test stated on (GD4-4) in that for it to be misconduct the claimant knew or ought to have known that his or her conduct would result in dismissal is not the case. She stated that the Appellant never thought he would be dismissed. She stated he made the post in the heat of the moment and has since regretted doing it.

[31] The Appellant presents the argument the statement in (GD3-18) is not true, the Appellant stated he made the post from home at 10 PM and not from his employer's office. He further argued that the post as stated in (GD3-19) was made to Weyburn Confessions and it was supposed to be an anonymous. The Appellant's representative stated that they don't know how the Appellant's name appeared and he should have been issued a number.

[32] The Tribunal finds that the Appellant disputes the post was not made from his employers office does not change the fact the Appellant, for his own admission made the post, nor if the post was to be anonymous as it would still have had a negative impact on the employee/employee trust.

[33] The Tribunal finds from the evidence on the file and from the Appellant's oral evidence that it is clear and uncontested that the Appellant lost his employment because he made a slanderous post on social media about his employer. The Tribunal finds the Appellant's alleged

actions constituted misconduct and there is no doubt that he lost his employment by reason of his own misconduct. The Tribunal relies on (*Brissette* A-1342-92; *Langlois;* A-94-95; *Johnson* A- 296-03).

[34] The Tribunal finds from the Appellant's oral evidence that he became angry and lost judgment and since has regretted his actions. The Tribunal finds that although the Appellant testified that he regretted making the post on social media and that he tried to get the post removed, he testified he never made any efforts to make his employer aware of what he had done prior to the employer making the discovery. The Appellant provided testimony that he never made any attempt to apologize for his actions when the employer confronted him on the post, or even after the dismissal. The Tribunal finds that the Appellant has not provide any evidence to support his argument that he regretted making the slanderous post about his employer.

[35] The Tribunal finds from the Appellant's argument that he did not believe he would lose his job cannot be supported as it demonstrates a disregard for the consequences his actions would have on the employee/employer relationship and that he did not accept any responsibility for his actions.

[36] The Tribunal finds that the Appellant acted deliberately and that he was the author of his misfortune because of his misconduct and because he broke the bond of trust with his employer. As a result it is more than fair that he should be the only one to bear the consequences of his actions and therefore be disqualified to receive employment insurance benefits, which he had hoped to receive.

[37] The Tribunal find from the Appellant oral evidence that he stated that it was the employer who confronted him over the post on Facebook and not himself as he stated in the evidence on the file, and that the argument was over the Facebook post which led to the employer firing him.

[38] The Tribunal find the Appellant's initial statements to the Commission and including his appeal to the Tribunal that he was the one who confronted the employer regarding wages and that his employer dismissed him to be contradictory to his oral evidence and confirms those statements to be untrue and confirms he lost his employment because he posted slanderous comments about his employer and was fired for doing so.

[39] The Appellant's representative presented the argument that Appellant made the post in haste and that that it was wrong and the Appellant regrets doing the post and the consequences have been severe for him. This situation had been very hard on her son's self-esteem and he has been out of work now for over five months.

[40] The Tribunal finds the Appellant's poor judgment has placed him in an unfortunate situation, however the Tribunal finds the slanderous postings the Appellant posted on social media broke the breach of trust with his employer and such actions would have caused the employer to suffer negatively from the slanderous comments. Especially as it was posted to a social media site that would have been viewed by his employees and customers.

[41] The Tribunal must make its decision based on the facts in the relation to the issue before it and it does not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (A.G.) v. Levesque*), 2001 FCA.

[42] The Tribunal relies on (*Canada (A.G.) v. Knee*) 2011 FCA 301 which stated the principal that adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning.

CONCLUSION

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

[44] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section