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

[TRANSLATION]

Citation: *J. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 26

Tribunal File Number: GE-15-2532

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Transport Laberge

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Claude Durand

HEARD ON: October 14, 2015

DATE OF DECISION: February 19, 2016

Canada

REASONS AND DECISION

PERSON IN ATTENDANCE

[1] The Appellant, J. P., was present at the hearing. None of the other parties were represented.

[2] This appeal was heard in person for the following reasons:

a) The fact that credibility may be a determinative factor.

b) The fact that more than one party will be present at the hearing.

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

d) The fact that more than one participant, such as a witness, might be present.

e) The fact that the Appellant or other parties are represented.

f) This method of proceeding best meets the needs of the parties for accommodation.

INTRODUCTION

[3] In this case, the Canada Employment Insurance Commission (the "Commission") determined on July 31, 2013 that the Appellant lost his employment due to his own misconduct under the *Employment Insurance Act* (the "Act"). Consequently, the Commission imposed a disqualification on the Appellant.

[4] The Appellant requested an administrative review. The Commission changed its decision in favour of the Appellant and set aside its initial decision on October 2, 2013.

[5] The Employer, Transport Laberge, appealed that revised decision to the Social Security Tribunal.

[6] On April 28, 2014, a member of the Tribunal's General Division concluded that J. P. had lost his employment by his own misconduct under sections 29 and 30 of the Act.

[7] J. P. made an application for leave to appeal to the Appeal Division of the Social Security Tribunal on June 11, 2014. The application for leave to appeal was granted on January 16, 2015.

[8] The appeal was granted on June 5, 2015 and the case was referred to the Tribunal's General Division (Employment Insurance Section) so that a member of the Tribunal could proceed with a new hearing.

ISSUE

[9] The Tribunal must determine if the Appellant lost his employment because of his own misconduct under sections 29 and 30 of the Act.

THE LAW

[10] Subsections 29(a) and (b) of the Act provide as follows:

> *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;*

[11] 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 or voluntarily left any employment without just cause [. . .]*

EVIDENCE

Evidence in the file

[12] A claim for employment insurance benefits took effect on June 23, 2013 (pages GD3-2 to GD3-15).

[13] The record of employment confirms that the Appellant was dismissed on June 17, 2013 (page GD3- 16). He was the driver of an auto transport trailer.

[14] The employer, Transport Laberge, indicated that the Appellant had been given a number of warnings and disciplinary sanctions. The acts complained were, in particular, unjustified absences, a speeding offence, poor work attitude and breakages and accidents with the rolling stock. In terms of the last incident complained of, the Appellant damaged an automobile during his work day (pages GD3-17 to 20 and GD3-27).

[15] The Appellant admitted having accidents while driving but stated that they were not intentional on his part (page GD3-21 and GD3-24 to 26).

[16] The Appellant confirmed having been suspended because of these accidents (pages GD3-26 and 28).

[17] In its notice of appeal, the Employer provided the Tribunal with documentary evidence of a number of incidents complained of against the Appellant (pages GD2-1 to 14, GD3-18 to 20 and GD6-1 to GD6-3 and Exhibit AD-5).

Appellant's evidence at the hearing

[18] He was working as a tractor trailer driver. He transported automobiles on a multi-level trailer for delivery to car dealers.

[19] He was hired by Transport Laberge on January 19, 2012. Prior to that, he had had only one year of experience on large trucks and had never driven heavy loads in winter.

[20] He admitted having had an offence for driving 74 kilometer per hour in a 50 kilometer per hour zone.

[21] As for his absences, the first time he was sick and the second time there was a snow storm and he could not travel.

[22] He admitted having collisions and breakages but they were accidents.

PARTIES' ARGUMENTS

[23] The Appellant presented the following arguments:

a) It is a difficult and stressful trade and the hours are long.

b) He lacked experience; despite the technical training, it is a trade that is *learned on the job*, through experience.

c) If the driver misjudges the height or length, there is inevitably a collision, breakages and incidents.

d) He was unlucky and the more incidents that accumulated, the more stressed and nervous he became and the more mistakes he made.

e) He was never negligent or careless; he may have lacked training or skill but it was not a case of deliberate mistakes.

[24] The Employer presented the following arguments (Exhibit GD3-6):

a) Transport Laberge is a specialized automobile transport company, which demands a great deal of care and professionalism from its drivers.

b) Drivers receive a six to eight-week training program before they are allowed to drive independently.

c) The Appellant received good training but despite that, he accumulated verbal warnings and sanctions because of his negligence and poor work attitude.

d) He was aware that the progress of sanctions would lead to dismissal if he did not improve his performance.

[25] The Respondent Commission presented the following argument (Exhibit AD-5):

a) In light of the documentary evidence provided by the Employer in Exhibit AD1A-1 to 16, the Commission now considered that the Appellant was negligent and careless and lost his employment because of his own misconduct.

ANALYSIS

[26] There is no definition of misconduct in the Act. However, the case law has defined it as follows: in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance (*Tucker,* A-381-85).

[27] In cases involving misconduct, the courts have repeatedly emphasized that the breach of conduct complained of must be serious. Reprehensible conduct is not necessarily misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in dismissal (*Locke,* 2003 FCA 262; *Cartier,* 2001 FCA 274; *Gauthier,* A-6-98; *Meunier,* A 130 96).

[28] For behaviour to amount to misconduct under the *Employment Insurance Act*, it is not necessary that there be wrongful intent. It is sufficient that the reprehensible act or omission complained of be "wilful", that is, conscious, deliberate or intentional (*Caul*, 2006 FCA 251; *Pearson*, 2006 FCA 199; *Bellavance*, 2005 FCA 87; *Johnson*, 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85)

[29] The onus lies on the Commission and/or the employer (only where the employer is the appellant) to establish (on a balance of probabilities) that the loss of employment by the claimant was because of the claimant's own misconduct. For that onus to be discharged, the Tribunal must be satisfied that the misconduct was the reason for the dismissal, not the excuse for it. This requirement necessitates a factual determination after weighing all of the evidence (*Bartone*, A-369-88; *Davlut*, A-241-82, [1983] S.C.C.A. No. 398).

[30] Proof of a mental element is necessary. The claimant's conduct must be wilful or so reckless as to approach wilfulness (*McKay-Eden*, A-402-96; *Jewell*, A-236-94; *Brissette*, A-1342-92; *Tucker*, A-381-85; *Bedell*, A-1716-83

[31] In *Mishibinijima v. Canada (A.G.)*, 2007 FCA 36, the Federal Court of Appeal wrote that there will be misconduct where the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.

[32] My analysis in this case will be based on these broad principles developed in the case law.

[33] First, it is useful to clarify that the dismissal is not at issue in this appeal; rather it is a matter of determining if misconduct is the cause of that dismissal.

[34] I weighed the evidence submitted by the Employer. It is detailed and establishes that the Appellant was warned on several occasions and that he performance at work was not satisfactory.

[35] Over an 18-month period, from 2012 to 2013, the acts by the Appellant complained of included, in particular, three unjustified absences, using his cell phone while driving (once) and exceeding the posted speed limit (once). Although not inconsequential, these breaches are not the core of the matter. The Appellant admitted these breaches.

[36] The real reason for the dismissal, what the Employer was particularly critical of and what is evident from the file as a whole, is the fact that he damaged the cargo in his charge (Exhibit GD6-5 and 6, letter of dismissal):

a) Suspension for five (5) days, March 13, 2013, for damage to the cargo;
b) Reprimand on October 29, 2012, for damage to the cargo;
c) Warning on October 4, 2012, for damage to the cargo;
d) Suspension for three (3) days, on October 4, 2012, for damage to the cargo;
e) Warning on July 30, 2012, for damage to the cargo;
f) Reprimand on July 30, 2012, for damage to the cargo.

[37] The Employer therefore appeared to have good cause for dismissing the Appellant. Can it therefore be concluded that misconduct is the cause of this dismissal?

[38] I questioned the Appellant during his testimony. He is obviously a strapping fellow who speaks loudly but who seems to me to be a nervous person, and I would do so far as to say agitated.

[39] I evaluated his testimony during the hearing. He clearly described to me the problems he encountered in his work as an auto transport driver: difficulties attributable to the size of the vehicles, the weight of the cargo, the state of the roads and the weather conditions, but also his lack of experience and his stress.

[40] Moreover, I note that, on page GD2-6 of the report provided by Transport Laberge, the Appellant had refused to drive because of a snow storm and reduced visibility <u>because he did not feel comfortable being in his first winter driving season with a class 1 licence</u> (emphasis added).

[41] I note that this confirms the Appellant's statements regarding his lack of experience when hired by Transport Laberge. I accept his argument in this regard and consider plausible the state of stress and nervousness that he described to me.

[42] When speaking of the damage to the cargo, the Appellant explained that it could describe anything from scratches on the truck to a damaged car mirror to a crushed car roof because of a miscalculation of the clearance.

[43] I note that, with respect to the damages caused by the Appellant to his cargo, there are five incidents that occurred respectively on July 30, 2012, October 4, 2012, October 29, 2012, March 13, 2013 and a final incident, specifically, damage to a Caravan van on June 17, 2013 (page GD6-4).

[44] The Appellant did not deny the mistakes complained of. However, he denied that those mistakes were committed through negligence or carelessness. He described the incidents as accidental and not wilful. I accept that the term "unlucky", which he used to describe himself, seems appropriate to me.

[45] The Appellant convinced me. I consider his statements credible. Listening to him explain his setbacks to me, the following question automatically came to mind: did the Appellant really have all of the necessary skills to perform this work, even though he held the required licence? And is incompetence synonymous with misconduct under the Act?

[46] This question has already been asked. In a similar case heard in 983, Umpire Dubinsky reached the following conclusion (CUB 8112):

Needless to say, the claimant was unfortunately involved in several accidents. However, the testimony does not imply that the claimant was guilty of deliberate negligence. I do not blame Canadian Pacific Express for dismissing him after his last accident. However, while it is obvious that the claimant did not have the ability required to drive trucks and was consequently unsuited to his job, there is nothing to indicate that his negligence was deliberate to the point

that misconduct within the meaning of section 41(1) of the Act can be considered to have occurred. It was a matter of incompetence rather than deliberate misconduct.

[47] I reach the same conclusion. I find that the Appellant was dismissed from his employment because of a number of incidents but that those incidents are attributable more to incompetence than to negligence.

[48] The case law informs us that evidence of a mental element is necessary. The Appellant's conduct must be wilful or so reckless as to approach wilfulness (*McKay-Eden*, A-402-96; *Jewell*, A-236-94; *Brissette*, A-1342-92; *Tucker*, A-381-85; *Bedell*, A-1716-83).

[49] I do not find elements in this case that make it possible to find that the Appellant's conduct was wilful or so reckless as to approach wilfulness. Accordingly, proof of a mental element has not been provided.

[50] The Tribunal finds that the Appellant did not lose his employment due to misconduct under sections 29 and 30 of the Act.

CONCLUSION

[51] The Appeal is allowed.

Claude Durand
Member, General Division – Employment Insurance Division