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

[TRANSLATION]

Citation: *9091-8558 Québec Inc. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 37

Tribunal File Number: GE-15-2739

BETWEEN:

9091-8558 Québec Inc.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

R. L.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Claude Durand

HEARD ON: January 26, 2016

DATE OF DECISION: March 9, 2016

Canada

REASONS AND DECISION

PERSON IN ATTENDANCE

[1] The Appellant is the Employer, 9091-8558 Québec Inc. (Services Avicole JGL), represented by the co-owner of the company, M. L.

[2] Two witnesses accompanied the Appellant: M. J., owner of the garage, J., and F. J., the person in charge of maintenance for Services Avicole JGL.

[3] The claimant added party, R. L., was present, along with his representative, Gaël Morin Greene.

[4] The Respondent, the Canada Employment Insurance Commission (the "Commission"), was not represented.

[5] 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 in attendance.

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.

INTRODUCTION

[6] In this file, after the dismissal of the claimant, R. L., the Commission approved benefits having determined that the claimant had not lost his employment because of his own misconduct.

[7] The Appellant-Employer filed a request for reconsideration of that decision. On July 29, 2015, the Commission upheld its initial decision (pages GD3-32).

[8] The Employer contested that decision and appealed to the Social Security Tribunal on August 26, 2015 (pages GD2-1 to GD2-9). However, its appeal file was incomplete. It was completed on September 14, 2015.

[9] A hearing was scheduled for December 15, 2015. It was postponed to January 29, 2016.

ISSUE

[10] The Tribunal must decide if it will allow the Employer's appeal on the issue or not, thereby determining if the claimant lost his employment due to his own misconduct under sections 29 and 30 of the *Employment Insurance Act* (the "Act").

THE LAW

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

> *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;*

[12] 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 Commission's file

[13] An initial claim for employment insurance benefits was established beginning on April 12, 2015 (pages GD3-3 to GD3-15).

[14] The claimant worked for Services Avicole JGL and was dismissed (page GD3-7).

[15] The Employer reported that on April 7, 2015, it had called Mr. R. L. to a meeting because he had allegedly committed two breaches. The first was an unjustified absence on March 12, 2015. The other alleged act was having poorly performed work involving the inspection of vehicles and having issued an unjustified negative report.

[16] When he arrived at the office, Mr. R. L. had been under the influence of alcohol and had been verbally aggressive. The Sûreté du Québec was called to the premises to escort him out of the office. The Employer had then decided to dismiss the claimant (pages GD3-17, 20 and 29).

[17] The Employer stated that the claimant had received a number of warnings in the past and provided the file (pages GD3-23 to 27).

[18] According to the claimant's version, he had been experiencing conflict at work and was the victim of harassment by the Employer. The Employer had wanted to force him to falsify his inspection report identifying a defect in a company truck. The claimant denied being inebriated when he arrived (page GD3-18 and 28).

Evidence of the Appellant-Employer at the hearing

[19] The business, Services Avicole JGL, specializes in the handling of poultry. It serves 600 chicken coops in Quebec, Ontario and New Brunswick.

[20] The business employs about 70 people, many of whom are foreign workers.

[21] To ensure transport, the Employer provides workers with minivan-type vehicles that can carry on average 6, 10, 12 and 15 people. The Employer has a fleet of 15 vehicles.

[22] The groups of workers are managed by a team leader.

[23] The claimant added party, R. L., had been a team leader and had also often been a driver.

[24] Drivers receive a premium that is added to their pay. As a safety measure, a second person is designated as the second driver and also receives a premium.

[25] Each driver must carry out a routine check before starting a trip and reports any problems.

[26] The business employs a person who is in charge of maintenance in its own garage and who deals with a certified garage for maintenance of its vehicles.

[27] On January 19, 2015, R. L. had reported a problem with the hand brake on van 18 (Exhibit GD9-15).

[28] On January 20, 2015, the brakes on the vehicle in question were adjusted.

[29] The claimant then reported the same problem with the emergency brake, despite reports from the garage certifying that everything was in order.

[30] This situation had already occurred on several occasions in 2014.

[31] The Employer denied having asked R. L. to falsify an inspection report on a truck indicating a brake defect.

[32] On March 12, 2015, the claimant had not reported to work and had not justified his absence. The Employer had informed him that it would be issuing him a disciplinary notice for this breach.

[33] The claimant had already received a number of warnings.

[34] On April 7, 2015, the claimant had been scheduled to work. The Employer had called him to a meeting before his shift to give him the disciplinary notice in person.

[35] The claimant had arrived in an inebriated state. He had smoked openly in the office and displayed vulgar behaviour, swearing at and insulting the Employer. He had also been aggressive by making threats.

[36] The Employer had called in a witness, Mr. F. J., to observe the situation.

[37] The Employer had then called the police to observe the inebriated state and to escort the claimant off the company's premises (Exhibit GD7).

Testimony of F. J., the person in charge of maintenance for the Employer

[38] M. L. had called him at 2:00 p.m. on April 7, 2015 to observe the inebriated state of an employee, R. L.

[39] The latter had put his feet on the desk, had smoked openly, sworn, insulted the Employer and made threats.

[40] Mr. R. L. had smelled strongly of alcohol, had red eyes and stumbled when he got up from his chair. He drank constantly from a water bottle he had been holding in his hand.

[41] He had then suggested to Mr. R. L. that he leave on his own to avoid making the situation worse.

[42] When Mr. R. L. had refused, the Employer had called the police who observed Mr. R. L.'s inebriated state and had shown him off the company's premises.

[43] As for the claimant's repeated complaints about the unsafe brakes on a van, the witness stated that he always checked a vehicle himself before sending it to the J. garage.

[44] R. L. had already made reports identifying an emergency brake problem. For his part, he had not found a problem with the emergency brake system on the vehicles.

[45] In January 2015, the report involved van 18. After changing the brake pads on vehicle 18 and adjusting the tension on the cable, the mechanic had explained to him that he could not do anything more and that there was no problem.

[46] He had talked to the claimant but the latter had refused to accept the mechanic's report and had continued to make reports about the brakes on this van.

[47] The same scenario had happened often. Mr. R. L. had made the same reports about defective brakes on other vehicles.

Testimony of M. J., owner of the J. garage

[48] He is a certified mechanic.

[49] His garage is a family business that has been in operation for 40 years.

[50] He has served Services Avicole JGL for 10 years and repairs the rolling stock.

[51] He can testify that Services Avicole JGL has never skimped on the maintenance of its vehicles.

[52] On January 20, 2015, he had checked vehicle 18 after a report from R. L. that there was a problem with the hand brake. He had made an adjustment to put more tension on the cable and had changed the brake pads which had been rusted. This was normal maintenance.

[53] After that, Mr. R. L. had sent the same report on a number of occasions and often with respect to the same vehicle, number 18, always indicating that there was still a problem with the hand brake. This had also happened in the past.

[54] He had explained verbally to the co-owner, Mr. M. L. and to the person in charge of maintenance, Mr. F. J., that the brakes were fine. What Mr. R. L. was observing is that, even with the emergency brake activated, if the vehicle is running, it could move forward a short distance but with a great deal of resistance. These vehicles are equipped with quite powerful V6 engines; if the engine is running fast, an emergency brake is not 100% effective.

[55] He had also noted in his inspection report that he could not do any better and that there was no problem.

Evidence of the claimant added party, R. L., at the hearing

[56] He had worked for Services Avicole JGL for almost nine years as a team leader.

[57] His duties included training new employees, driving during transport and directing employees to carry out the work at clients' locations.

[58] On March 11, his tibia hurt and he had taken about 10 aspirin and drunk soothing drinks to reduce the pain. He slept 12 hours straight and missed his shift on March 12, 2015.

[59] On April 7, 2015, he had received a call from the co-owner, Mr. M. L., asking him to come in for a meeting before his shift started.

[60] Mr. M. L. had then threatened to cut his pay and suspend him if he did not come in to meet with him.

[61] He had understood that he was suspended. He had been upset.

[62] He admitted having consumed alcohol before meeting with the Employer. The meeting had not gone well and he had been dismissed.

[63] He denied making threats against his employer.

[64] He had denounced the unsafe condition of some of the company's vehicles for a long time and was not appreciated by the Employer.

[65] He had submitted a number of reports and the Employer had not considered them.

[66] He had been dismissed because the Employer no longer wanted to hear about brake problems and safety.

PARTIES' ARGUMENTS

[67] The Appellant-Employer presented the following arguments:

a) The claimant had a long list of various warnings in his file.

b) The Employer had already been informed that the claimant had driven a company vehicle after having consumed alcohol. However, no one had wanted to testify to this fact because the workers were afraid of reprisals.

c) The work at Services Avicole JGL is difficult. When an employee is a good worker, they show tolerance to keep him, which is what had happened in the past with Mr. R. L. But in this case, he had stepped over the line.

d) Services Avicole JGL employs foreign workers. Four years ago, a highway accident resulted in the loss of lives. Although there had never been a question of the company being responsible, the Employer had doubled its efforts to ensure its rolling stock was in perfect condition. It would never have allowed a van on the road knowing that there was a problem with the brakes.

e) The Employer had never told the claimant that it refused to repair a brake system because it was too expensive given the age of the vehicle.

f) Contrary to the claimant's statements, the latter had never been suspended over the telephone. He had been required to report to work; he was also the second designated

driver. However, before starting his shift, he had been asked to come to a meeting to receive a disciplinary notice.

g) The claimant had reported to work drunk, threatening and arrogant.

h) After his dismissal, the claimant had filed a complaint with the CSST to denounce the working conditions that were allegedly dangerous to his health. The CSST report had revealed that all workplace health and safety conditions were being rigorously respected. The only element to be corrected had been a garbage can that has been placed in front of a garage door.

[68] In support of its comments, the Employer adduced the documents found at pages GD14-6, GD14-8, GD14-9, GD14-11, GD14-11, invoices, GD14-15, 19 GD14-20, 21, 22, 23, reports from the garage, CSST report, GD14-32-33.

[69] **The representative of the claimant added party presented the following arguments:**

a) The claimant had several years of seniority in his work. He was a good worker and liked by clients. Moreover, his good work had been recognized in the past.

b) In the past, the claimant had requested a meeting with the boss, Mr. M. L., to make him aware of the condition of certain trucks. It had been then that the boss had told him that this type of repair cost almost $1,200. Given the age and condition of the truck, the owner believed that the repair costs were too expensive and had urged him to no longer note brake problems in his reports.

c) When the employer had called him before he went to work on April 7, 2015, Mr. R. L. had felt intimidated and attacked by the tone of the discussion.

d) Mr. R. L. had been upset and had understood that he had been suspended. He had given in to his emotions. He had consumed some wine before going to meet his employer; he had believed that he was not working.

e) His client had certainly acted improperly in reporting to the Employer after drinking alcohol, but his degree of intoxication had never been proved.

f) On that day, the claimant was not acting as a team leader or as the driver. He was not supposed to drive and would not have had a drink if he knew he had been expected to drive.

g) The claimant had been under constant pressure to stop pointing out the problem with the emergency brake on the vehicles.

h) The meeting had been scheduled shortly after he had again pointed out this problem in an inspection report. The real reason for the dismissal was that the Employer had wanted to get rid of an employee who was reporting a problem that it did not want to address.

i) The claimant's conduct does not reflect the repetitive aspect of wilful, reckless conduct that represents misconduct.

j) Mr. R. L. did not act to provoke his dismissal. On the contrary, he wanted to keep his job. He has filed a complaint with the Commission des normes du travail to challenge his dismissal.

[70] In support of his statements, the claimant's representative adduced a number of documents (Exhibits GD-14) consisting mainly of a note of appreciation from a client to R. L., a copy of certain pages of the guide, "Conduire un poids lourd" [driving heavy loads], dealing with the vehicle inspections and driver logs. Several cases of jurisprudence were adduced at the hearing.

[71] **In its submissions adduced <u>before the hearing</u>, the Respondent Commission made the following arguments:**

a) During the interview on April 7, 2015, the tone rose on both sides. The claimant stated that the Employer had yelled at him and the Employer stated that the claimant's behaviour had been unacceptable. Both parties denied the other's claims.

b) The Commission therefore considered the claimant's statements credible since there was no evidence that the claimant had been intoxicated and there had been no progressive application of sanctions. The Employer had not established the claimant's misconduct.

c) To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty in the contract of employment (*Canada (AG) v. Doucet*, 2012 FCA 105; *Canada (AG) v. Gagné*, 2010 FCA 237; *Canada (AG) v. Lemire*, 2010 FCA 314).

ANALYSIS

[72] 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 willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance" (*Tucker*, A-381-85).

[73] The Federal Court of Appeal has also defined the legal concept of misconduct within the meaning of subsection 30(1) of the Act as wilful misconduct where the claimant knew or ought to have known that their conduct was such that it could result in dismissal. "*To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant'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*, 2012 FCA 314).

[74] In *Mishibinijima v. Canada (A.G.)*, 2007 FCA 36, the Federal Court of Appeal wrote: "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 the employer and that, as a result, dismissal was a real possibility".

[75] 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).

[76] 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).

[77] 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).

[78] The Tribunal must decide this case based on these principles: did the claimant have the attitude complained of and does it constitute misconduct under the Act?

[79] I will begin by disposing of the Commission's argument that there is no evidence to support the Employer's claims regarding the claimant's state of inebriation in the workplace on April 7, 2015.

[80] This argument resulted from the fact that the claimant had initially denied showing up drunk on the day of his dismissal (page GD3-28).

[81] The Employer provided evidence of the consumption of alcohol by the claimant. On October 7, 2015, it submitted information to that effect from the Sûreté du Québec (page GD7-2). In the information, it states that on April 7, 2015, R. L., intoxicated by alcohol, had been driven back to his home by police after having refused to leave the Employer's office.

[82] Moreover, the claimant admitted it at the hearing, attributing his drinking to the emotions experienced when his employer had called him to a meeting to give him a disciplinary notice before his shift.

[83] In this case, the onus was on the Employer to establish that the claimant had lost his employment because of his own misconduct. For that onus to be discharged, the Tribunal must be satisfied that the misconduct is the real reason for the dismissal, not the excuse for it. This is a question of factual determination after weighing all of the evidence.

[84] The claimant claimed that he was a satisfactory employee while the Employer argued the opposite.

[85] According to the claimant, he was the victim of the Employer who had objected to his reports concerning the unsafe nature of the emergency brake system on several vehicles.

[86] The Employer denied this version of the facts and stated that the claimant's attitude led to his dismissal.

[87] I have examined the documents adduced by the Employer in GD3-25 and 25, specifically, R. L.'s file. I note that from 2014 to April 7, 2015, there are no less than 35 reported incidents. Those incidents range from notes about the loss of equipment to complaints from dissatisfied clients to unjustified absences.

[88] For his part, Mr. R. L.'s representative adduced a note of appreciation from a client (page GD14-2).

[89] The weight of the evidence is in the Employer's favour. I accept the Employer's testimony that the claimant, Mr. R. L., had a long list of various warnings.

[90] I reject the Commission's argument, following on the claimant's claim, that with no disciplinary record, there was no progression of sanctions and the Employer did not have good cause to dismiss him.

[91] It is useful to reiterate that the dismissal is not at issue in this appeal; rather it is a matter of determining if the dismissal was the result of the employee's misconduct.

[92] It is possible that the employee had not received any disciplinary sanctions but that does not mean that there was no file or that there were no grounds for dissatisfaction.

[93] In the case before us, I accept that grounds for dissatisfaction existed before the last incident complained of on April 7, 2015. I also accept that the claimant, Mr. R. L., was aware of that situation.

[94] I considered the claimant's claims that the Employer neglected the maintenance of its rolling stock, objected to his frequent reports in this regard and that that was the real reason for his dismissal.

[95] The documentary evidence to that effect shows that from January 2014 to April 2015 (Exhibit GD-9), Mr. R. L. filled out at least 10 forms indicating that there was a problem with the emergency brake system.

[96] I note that each of these reports was followed up on by the J. garage and that the situation had been corrected or assessed as being normal or satisfactory, and no further improvement was possible. I also note that mechanical inspections were carried out regularly by the Société de l'assurance automobile du Québec.

[97] I examined the testimony of the person in charge of maintenance, Mr. F. J., and of the owner of the garage responsible for maintaining the Employer's fleet, Mr. M. J. Their explanations were clear and detailed. I consider their testimony credible.

[98] It was established that Mr. R. L.'s frequent claims had been dealt with conscientiously and that the problem he had identified with the vehicles' emergency brake system had been addressed and dealt with. I accept that explanations had been given to Mr. R. L. regarding the problems he had raised. I also accept, based on their testimony, that the Employer maintained its vehicle fleet and did not skimp on its maintenance.

[99] In light of the foregoing, I also accept the Employer's statements regarding its concern for the safety of the workers that it is required to transport. De facto, I therefore reject Mr. R. L.'s statements when he told me that the employer had allegedly told him that it was refusing to have a brake system repaired because it would cost too much given the age of the vehicle.

[100] I consider it plausible that the Employer was annoyed by the claimant's frequent reports, which it apparently considered unjustified.

[101] That the employer wanted this situation resolved is one thing. However, the Employer's intention to dismiss the claimant because of his reports was not established. I reject that claim.

[102] The claimant, Mr. R. L., did not satisfy me and I attach a preponderant value to the Employer's testimony, which was corroborated by two witnesses.

[103] In Exhibit GD-9, Mr. R. L. stipulated in his application to participate in the hearing that it would be very important to require the Employer to provide the CSST report arising from the complaint he filed after his dismissal. He felt that that document was directly related to this case.

[104] I examined the CSST report found in Exhibit GD-14. The only item to be corrected was a garbage can that was blocking a door (page GD14-33).

[105] If Mr. R. L. hoped to convince me of his employer's negligence in this manner, he failed to do so. I find nothing convincing in the report to support his statements.

[106] The Appellant's representative also submitted that when Mr. R. L. reported to the Employer's office on April 7, 2015:

- His degree of intoxication had not been established;

- He believed that he had been suspended and therefore he had no intention of going to work after drinking;

- Furthermore, he had not been the first designated driver; he did not have to drive;

- He had been stressed and gave in to his emotions.

[107] I reject these arguments. Mr. R. L. knew that his employer was dissatisfied and that the meeting to which he had been called before going to work was related to the issuing of a disciplinary notice.

[108] Duly called in by his employer, he should have shown up to that meeting in an acceptable condition. It must be remembered that the meeting was a work-related meeting, not a random encounter or social event.

[109] Mr. R. L. decided to consume alcohol before going to meet his employer. No one forced him to drink; it was a voluntary action. Moreover, when he showed up at the work site, drunk, his behaviour was reprehensible to the extent that the Employer had called the police. The police had to escort him to his home because he had refused to leave the premises.

[110] I accept the testimony of Mr. F. J. and the Employer, Mr. M. L., on Mr. R. L.'s condition and his conduct. I reject Mr. R. L.'s version of the facts that minimizes his own actions.

[111] I accept that Mr. R. L. was supposed to work that day. Whether he was the lead driver or not is of little consequence. An employee cannot perform his work when inebriated, whether he has to drive a vehicle or not.

[112] It is not useful in this case to determine Mr. R. L.'s degree of intoxication. It is enough to understand that he deliberately chose to act in such a way that his behaviour was altered and he could not, as a result, carry out an essential condition of his employment, namely, performing a duty and behaving at his place of work in a manner so as not to impair his employment relationship.

[113] The Tribunal believes that the evidence adduced by the Employer was sufficiently detailed to determine how the claimant had acted and whether his conduct was reprehensible.

[114] According to the Federal Court of Appeal, 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 the employer and that, as a result, dismissal was a real possibility.

[115] After analysing the evidence and examining the facts, the Tribunal finds that the claimant acted deliberately with such recklessness or negligence that one could say he wilfully disregarded the effects his actions would have on his employment, which represents misconduct.

[116] The Tribunal allows the Employer's appeal on the issue, thereby determining that the claimant lost his employment because of his own misconduct under sections 29 and 30 of the Act.

CONCLUSION

[117] The appeal is allowed.

Claude Durand
Member, General Division - Employment Insurance Section