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

Citation: *C. P. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 42

Tribunal File Number: GE-15-2889

BETWEEN:

C. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Match Transact Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Joseph Wamback

HEARD ON: March 17, 2016

DATE OF DECISION: March 17, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. P., the Appellant did not attend the Videoconference Hearing. The Tribunal commenced the Videoconference Hearing and recording at 12:55 PM March 17, 2016 and waited until 1:30 PM March 17, 2016 and the Appellant did not attend to the Videoconference.

INTRODUCTION

[1] The Appellant filed for benefits and the Respondent approved his claim. The Appellant's employer requested reconsideration and the Appellants claim was subsequently denied. The Appellant filed an appeal with the Tribunal and a Videoconference 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 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 his 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 he lost his employment by reason of his 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 April 23, 2015. He stated he was dismissed from his employment. He stated his employer terminated his employment because of his fraudulent activities which he denies. He stated he was never warned or given any notice. He stated he spoke with the Labour Board and took other action. (GD3-3 to 17)

[9] The Appellant worked for Match Transact Inc. from March 19, 2014 to February 28, 2015 when he was he was dismissed from his job. (GD3-18)

[10] The Respondent notified the Appellant on May 22, 2015 that they approved his claim for benefits. (GD3-21)

[11] The employer requested reconsideration on June 22, 2015. They stated that the Appellant was discovered making 23 fraudulent activations resulting in credits to his account of $1,790.00. They provided a copy of the offer of employment, a memorandum from the Loss Prevention manager stating that their investigation revealed the Appellant committed fraudulent activity where the Appellant processed 23 fraudulent activations using former customers with false drivers licenses and citizenship documents for credit evaluation. They also found the Appellant fraudulently obtained false friend credits from Fido with credits accruing to his personal account. The employer's code of business specifically states that theft or fraudulent activity will be subject to disciplinary action up to and including immediate termination of employment. (GD3- 22 to 41)

[12] The employer advised the Respondent on July 24, 2015 that the Appellant was dismissed for fraudulent activities. The employer stated that their systems detected 23 fraudulent activities in which the appellant used improper or bogus identifications of individuals to inflate his sales, which resulted in his financial gain. The employer stated that the Appellant simply manipulated the number from the driver's licenses and citizenship cards to inflate his sales. The employer has provided a copy of transactions under the Appellant's account. (GD3-42)

[13] The Appellant advised the Respondent on July 28, 2015 that he was a top salesperson and thus should have been given a warning. He stated that he was never informed of any wrong

doings. The Appellant stated that he was only following his training guidelines which were minimal. (GD3-43)

[14] The Respondent notified the Appellant and the employer on July 28, 2015 that they 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, advised that the Appellant lost his employment by reason of his own misconduct, as defined by the Act. The Respondent imposed an indefinite disqualification effective April 19, 2015, pursuant to subsection 30(1) of the Act and stated that a Notice of Debt, with a notice that repayment instructions will be sent shortly. (GD3-45 to 49)

[15] The Respondent issued a Notice of Debt in the amount of $4,113.00 (GD3-50)

[16] The Appellant filed an appeal with the Tribunal on Sept 2, 2015 (GD2-1 to 8)

[17] The Tribunal scheduled a Videoconference hearing for March 17, 2016.

SUBMISSIONS

[18] The Appellant submitted that;

a) He has submitted everything to the Respondent, including his termination letter which explained his termination. The Appellant argues that did not "hide anything or lie about anything".

[19] The Respondent submitted that;

a) Subsection 30(2) of the Act provides for an indefinite disqualification when the appellant loses his employment by reason of his 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 the case at hand, the Appellant was employed as a mobile telephone sales representative and was expected to follow policies and guidelines in accordance with his

employer's Operational Manual which clearly stated that "any employee who engages in unacceptable conduct will be subject to disciplinary actions, up to and including immediate termination of employment" (GD3-36).

c) The employer policy (GD3-36) clearly described the following activities as unacceptable conduct:

    (i) Falsification of payroll or Respondent records

    (ii) Falsification of incentive program submissions for personal gain

d) In the case at hand, evidence from the employer shows that the Appellant falsified customers' identifications by manipulating the identification numbers to misrepresent his sales numbers for personal gain. Given the evidence at hand, the Respondent could only conclude that a reasonable person should have known that participating or initiating in such conduct could lead to an immediate dismissal. For his part, the Appellant should have been aware of the consequences of such conduct because he accepted the employer's policy on March 19, 2014. As such, the Respondent could only conclude that the Appellant lost his employment as a result of his own misconduct and that an indefinite disqualification, pursuant to Section 30 of the Act, was warranted.

e) The Respondent maintains that its decisions to impose a retroactive disqualification and the subsequent overpayment comply with the Employment Insurance legislation and are supported by case law. 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 an 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

f) 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

ANALYSIS

[20] The Appellant did not attend the Videoconference. The Videoconference Hearing was scheduled to commence at 1:00 PM March 17, 2016. The Tribunal Member commenced recording the Hearing at 12:55 PM March 17, 2016. The Tribunal waited on the Videoconference until 1:30 PM March 17, 2016 and the Appellant did not attend to the Hearing. The Tribunal is satisfied that the Appellant received the notice of hearing dated December 2, 2015 as documented by Canada Post tracking # X delivered December 11, 2016. The Tribunal proceeded with the Hearing in accordance with *Social Security Tribunal Regulations* 12 (1)

[21] The added Party did not attend the Hearing and provided additional submissions (GD8-1 to 6)

[22] There is only one (1) issue before the Tribunal. The Appellant is appealing the Respondent's decision that the reason he lost his employment constitutes misconduct in accordance with the provisions of the Act.

[23] 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/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."(*Mishibinijima* A-85-06).

[24] Although the Act does not define misconduct, the case law in *Tucker* (A-381-85) indicates that:

> ". . . 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."

[25] The Court defined the legal notion of misconduct within the meaning of subsection 30(1) of the Act as willful misconduct, where the appellant knew or ought to have known that his/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 (*Lemire, 2010 FCA 314* (CanLII)).

[26] The Tribunal finds that the Appellant's termination of his employment is a direct result of his employer's policies.

[27] For the act complained of to constitute misconduct under section 30 of the Act, it must have been willful or deliberate or so reckless as to approach willfulness. There must also be a causal link between the misconduct and the dismissal. The Appellant advised the Respondent on July 28, 2015 that he was a top salesperson and thus should have been given a warning. He stated that he was never informed of any wrong doings. The Appellant stated that he was only following his training guidelines which were minimal. (GD3-43) The evidence provided by the employer (GD3-24 through 40) clearly identified that the employer's loss prevention investigation revealed that the Appellant conducted 23 separate occasions of fraudulent activity. (GD3-36) The Tribunal finds on the balance of probabilities that the Appellant was fully aware that his conduct was fraudulent by activating phones using false identification.

[28] The Tribunal finds that the warnings in the employer's handbook clearly state that "any employee who engages in unacceptable conduct will be subject to disciplinary actions, up to and including immediate termination of employment" The handbook further clarifies that falsification records or incentive programs are clearly unacceptable. The employer's evidence shows that the Appellant accepted these terms of employment including the express provision

that his employment can be terminated immediately if he commits any act of unacceptable conduct. (GD3-39)

[29] An employment contract can be defined overall as an agreement between an employer and the employee assigning payment of wages and other benefits in exchange for services which, by virtue of this mutual interest, implies respect for rules of conduct agreed by the parties and sanctioned by professional ethics, common sense, general use, or morals.

[30] Many actions or omissions may be considered misconduct in the sense that these actions are incompatible with the intent of an employment contract, conflict with the employer's activities or undermine the trust between the parties.

[31] Breaches of established standards, instructions, formal or implicit rules or regulations or the collective agreement constitute misconduct where such standards, instructions, rules or regulations are shown to exist and the breach is clearly established.

[32] In this case, the employer's evidence shows that the Appellant conducted fraudulent activity by activating telephones using false identification to increase his sales.

[33] The Tribunal finds that the Appellant's act clearly constitutes misconduct within the meaning of the Act and that the loss of the Appellant's employment is the consequence of one or more deliberate acts on his part.

[34] The Tribunal is of the opinion that the Appellant could not be unaware of the scope of his act. The Tribunal does not accept the Appellant's argument that he was following training guidelines that were minimal. (GD3-43)

[35] The Tribunal finds that the evidence presented shows that the Appellant stopped working for his employer because of his willful and deliberate act.

[36] The Tribunal is of the opinion that the Appellant's alleged act was of such scope that he could normally foresee that it would likely result in the termination of his employment or his dismissal. He was aware that his conduct was such as to interfere with his obligations to his employer and that he could be dismissed. (GD3-39)

[37] The Tribunal finds that the Appellant's actions and activities constitutes misconduct within the meaning of the Act and that the Appellant's separation from employment is his own fault.

[38] The Tribunal finds that the appeal on this issue does not have merit

CONCLUSION

[39] The appeal is dismissed.

Joseph Wamback

Member, General Division - Employment Insurance Section