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

Citation: *R. S. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 43

Tribunal File Number: GE-15-3059

BETWEEN:

R. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Kawartha Ethanol

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Joseph Wamback

HEARD ON: March 22, 2016

DATE OF DECISION: March 22, 2016.

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

R. S., the Appellant did not attend the Videoconference.

Mr. L. M., Assets Manager, Kawartha Ethanol Inc., the added Party attended the Videoconference.

INTRODUCTION

[1] The Appellant filed for benefits and was denied by the Respondent at the initial level. The Appellant requested reconsideration and was denied by the Respondent at the reconsideration level. 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 multiple participants, such as a witness, may be present.

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 the Appellant 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 June 3, 2015. He stated he was dismissed from his job. (GD3-3 to 15)

[9] The Appellant worked for Kawartha Ethanol Inc., from June 23, 2010 to May 27, 2015 when he was dismissed from his job. (GD3-16)

[10] The employer advised the Respondent on June 12, 2015 that the Appellant was dismissed for horseplay and property damage. (GD3-17)

[11] The Respondent attempted unsuccessfully to contact the Appellant on July 7, July 8 and July 9, 2015 and left messages on his answering machine. (GD3-18)

[12] The employer advised the Tribunal that Appellant was operating a Genie-Lift and one of the other workers was operating a Bobcat. Out of the blue the Appellant drove the Genie-Lift 20 feet over to the Bobcat and began pushing it while the other worker was still in the vehicle. Although the other machine remained upright and the co-worker was not injured, the Appellant pushed the Bobcat so hard that one of the tires popped off the rim. Once the investigation concluded, the company determined the Appellant's actions were deliberate and not accidental. The decision was made to terminate the Appellant’s employment because of the nature of the actions (i.e. gross negligence, property damage and for violating the company's Health and Safety guidelines). The Appellant had a lengthy history of previous incidents where he had been reprimanded for performance-related issues. The incident happened on a Wednesday and the Appellant was off the next four days. When he returned to work on the following Monday, before he came into the plant, the Appellant was met at the door, brought into a meeting and

informed of the company's decision to terminate his employment. The Appellant did not challenge the dismissal. (GD3-19)

[13] The employer provided a copy of the Appellant's elevated work platform test and certificate, monthly training acknowledgement, health and safety policy and the safe works practices guidelines. (GD3-20 through 26)

[14] The Respondent notified the Appellant on July 9, 2015 that they are unable to pay any Employment Insurance regular benefits because he lost his employment with Kawartha Ethanol Inc. on May 27, 2015 as a result of his own misconduct. He was also advised that because his benefit period begins on May 31, 2015, benefits are refused from that date only. (GD3-27)

[15] The Appellant requested reconsideration on July 27, 2015. He stated that while working with the Genie Boom (Lift), he bumped into the tire of the skid steer because he was working on uneven and rough ground. He denies driving erratically or recklessly as the ground conditions and height did not permit it. A third party went to report to the Manager 'what accidently happened' and as no one spoke to him about the incident he believed the matter had been taken care of. He further argues that a fellow coworker who had been on a long term leave had returned to work the day after he was fired and he feels he was forced out because of his return (GD3-29 to GD3-32).

[16] The Appellant advised the Respondent August 28, 2015 that he did not intentionally hit anyone and he did not intentionally cause damage to the equipment. He stated he was working on uneven ground and was trying to move the genie boom. He stated there was a lot of construction equipment around and he had very little space to move. He stated he was about 5 feet away from the Bobcat, basically working beside the Bobcat. He stated the handle slips easily and he did not make a run at the Bobcat. (GD3-33)

[17] The employer advised the Respondent on September 1, 2015 that the Appellant drives the genie boom on a weekly basis. It is a normal part of his job. He stated the valve stem was sheared off the bobcat when the tire was dislodged; it appears it would have taken some force to achieve this. He had employee statements that witnessed the incident and the Appellant had several warning, corrective actions letters regarding safety infractions and the Appellant did this

intentionally and was laughing about it. He stated he had 2 statements on file. These were two employees that he worked with the Appellant on a daily basis and they no longer felt safe working with him. He stated there were 3 employees in the area including the Appellant. One employee statement says that the Appellant kept pushing and pushing, he was laughing and joking around while doing it and when they heard the pop, he told him to tell S he did it and just continued on. As the tire went flat the Appellant was laughing. The other witness statement said it was intentional, horseplay, he was being goofy. (GD3-34)

[18] The employer provided copies of the company discipline procedure, safety incident May 27, 2015, 2 witness interview summaries and the appellants testing results on the equipment. The discipline procedure specifically states "discipline shall consist if warning, suspension or discharge. However the level at which the disciplinary process is entered is dependent on the seriousness of the violation. (GD3-37 to 50)

[19] The employer advised the Respondent on September 2, 2015 that a Manager replaced the Appellant on the weekends and when needed until they could find a replacement. The person who returned to work did not do the same job the Appellant was doing. The Appellant's primary job was maintenance and he a worked as a stationary engineer just on weekends. His core position was that of maintenance and this is the position they rehired for. The person who returned to work went into an operator's position. (GD3-51)

[20] The Appellant advised the Respondent that he disagrees with the employers and witness versions of events. (GD3-52)

[21] The Respondent notified the Appellant on September 2, 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, they advised that they we have not changed the decision as communicated on July 9, 2015. (GD3-53)

[22] The Appellant filed an appeal with the Tribunal on September 28, 2015. He stated that the employer did not have cause for his termination. He also argues he did not have proper warnings, an opportunity to address the Employer's concerns and they did not follow their own internal policies (GD2-1 to GD25).

[23] The Tribunal requested the employer to be an added party on October 1, 2015.

[24] The employer provided copies of the Appellant's discipline history. See GD3-12. 22, 23 (GD7-1 through 31)

SUBMISSIONS

[25] The Appellant submitted that;

a) The employer did not have cause for his termination. He also argues he did not have proper warnings, an opportunity to address the Employer's concerns and they did not follow their own internal policies.

[26] 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) The arguments presented by the Appellant do not address the issue at hand. The Respondent does not review whether or not the Employer had cause for the dismissal or if they followed their own policies. The Respondent reviews the acts and/or omissions of the Appellant which led to the dismissal.

c) In this case, the Appellant's safety infraction and failure to report the incident as demonstrated by the Employer's statements, witness statements and policies and procedures of the Employer constitutes misconduct because he intentionally caused damage to company property, and put the safety of his co-workers at risk as a result.

d) Although the Appellant denies the act of popping the tire was intentional he ought to have known that horseplay with heavy machinery is a safety infraction and ought to have known the seriousness of the actions he took in the workplace could lead to the termination of the employment. Furthermore, his inaction in reporting this to the

Employer is considered a breach of policy, he ought to have reported the incident to the Employer immediately.

e) The Respondent concluded that the Appellant's failure to follow safe operating procedures and failure to report an incident constituted misconduct within the meaning of the Act.

f) The Employer has shown the Appellant's actions were careless and a willful disregard of the safety policies and procedures. 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

g) 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

h) The additional submissions from the employer include a history of counselling meetings and written warnings that, on multiple occasions, demonstrate that the employer did provide proper warnings and provided the Appellant with opportunities to address the employer's concerns as well as his own.

i) The employer's additional submissions establish a pattern of problematic behaviors and performance issues of which the Appellant was advised, refuting the Appellant's appeal statement. Furthermore, this disciplinary history provided also demonstrates a pattern of willful disregard of the negative impact that the Appellant's inappropriate behavior's and insubordination had on his work performance and on his employer's, as well as his

own, interests. The Appellant knew, or ought to have known, that his actions could result in his termination, as he was advised so on several documented occasions.

ANALYSIS

[27] The Appellant did not attend the videoconference. The Videoconference Hearing was scheduled to commence at 1:00 PM March 22, 2016. The Tribunal Member commenced recording the Hearing at 12:55 PM March 22, 2016. The Tribunal waited on the videoconference until 1:16 PM March 22, 2016 and the Appellant did not attend the Hearing. The Tribunal is satisfied that the Appellant received the notice of hearing dated December 3, 2015 as documented by Canada Post tracking # X delivered December 10, 2016. The Added Party attended the Videoconference. The Tribunal proceeded with the Hearing in accordance with Social Security Tribunal Regulations 12 (1)

[28] 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.

[29] 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).

[30] In this case the Tribunal finds that the evidence provided by the employer and the witnesses to the incident that the Appellant's actions were intentional and willful. One employee stated that the Appellant kept pushing and pushing, he was laughing and joking around while doing it and when they heard the pop, he told him to tell the employer, he did it

and just continued on. As the tire went flat the Appellant was laughing. The other witness statement said it was intentional, horseplay, he was being goofy. (GD3-34)

[31] 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."

[32] The Tribunal finds that the Appellant was trained on the operation of the equipment (GD3-39, 46, 47, 49, 50) and familiar with its use. The Tribunal finds that the Appellant's actions disregarded the safety of his co-workers as well as the employer's equipment by using the equipment in an unsafe manner by pushing a skid steer with an operator on board with the elevated work platform to the point where the tire was dislodged from the skid steer. (GD3-40)

[33] 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)).

[34] The Tribunal finds that the Appellant's termination of his employment is a direct result of his actions using the elevated platform lift in an unsafe manner causing damage to his employer's equipment. (GD3-40, 41)

[35] The Appellant advised the Respondent that he disagreed with the employer's version of events. The Tribunal finds the employer's evidence and witness statements more credible than the assertions of the Appellant. The Appellant did not attend the videoconference nor did he provide any additional submissions or arguments to support his version of events.

[36] The Tribunal finds that the employer provided numerous warnings throughout the Appellant's tenure (GD7-1 through 31) and that the employer's disciplinary procedures (GD3-38) are clear and unambiguous. "The level at which the disciplinary process is entered is dependent on the seriousness of the violation". The Tribunal finds that the employer's investigation of the violation is documented and witnessed by the Appellant's co-workers.

[37] 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.

[38] 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.

[39] 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.

[40] In this case, the employer's evidence shows that the Appellant conducted himself in such a manner while operating equipment that endangered the equipment and co-workers. The employer advised the Respondent that the Appellant's co-workers no longer felt safe working with him (GD3-34)

[41] 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.

[42] 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 disagreed with the employers and witness versions of events. (GD3-52)

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

[44] 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.

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

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

CONCLUSION

[47] The appeal is dismissed.

Joseph Wamback
Member, General Division - Employment Insurance Section