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

Citation: *J. M. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 53

Tribunal File Number: GE-15-2833

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Richard Sterne

HEARD ON: April 19, 2016

DATE OF DECISION: April 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, J. M., and his witness, D. M. (brother), attended the hearing by telephone.

INTRODUCTION

[1] On December 31, 2013, the Appellant applied for employment insurance benefits (EI benefits).

[2] The Appellant was employed by O J Pipelines Canada (employer) until September 12, 2014.

[3] On March 6, 2015, the Canada Employment Insurance Commission (Respondent) advised the Appellant that they did not use his hours of work with the employer in calculating his EI benefits because he had voluntarily left his employment without just cause within the meaning of the EI Act.

[4] On March 23, 2015, the Appellant filed a request for reconsideration of the Respondent's March 6, 2015 decision.

[5] On April 17, 2015, the Respondent advised the Appellant that they were unable to pay him any EI benefits because he had lost his employment with the employer on September 12, 2014, as a result of his misconduct.

[6] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the credibility is not anticipated to be a prevailing issue.

c) The fact that the appellant will be the only party in attendance.

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

e) 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

[7] Did the Appellant lose his employment due to his misconduct, pursuant to subsection 30(1) of the *Employment Insurance Act* (Act)?

THE LAW

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

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;

[9] Subsection 30(1) of the Act:

(1) 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, unless

> (a) the claimant 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 claimant is disentitled under sections 31 to 33 in relation to the employment."

[10] Subsection 30(2) of the Act:

> (2) 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

[11] On December 31, 2013, the Appellant applied for EI benefits.

[12] The Appellant was employed by the employer from July 31, 2014 to September 12, 2014.

[13] On September 15, 2014, the employer issued the Appellant's record of employment (ROE)(W35120054) and indicated the reason for issuing the ROE was code M, Dismissal. The ROE stated that the Appellant was dismissed for failure to meet job attendance requirements.

[14] On September 21, 2014, the Appellant submitted a claim for EI benefits for the period from September 7, 2014 to September 20, 2014. In his claim, the Appellant indicated that he did not work or earn wages during the period from September 7, 2014 to September 20, 2014.

[15] On September 22, 2014, the employer amended the Appellant's ROE (W352503020) and indicated that the reason for issuing the ROE was code K, Other. The ROE stated that the Appellant was incarcerated and unable to show up for work.

[16] On February 24, 2015, the employer told the Respondent that the Appellant was dismissed for abandoning his position. The Employer stated that they were later aware that the Appellant was incarcerated however the Appellant had still missed three consecutive days from work without notifying the employer. The employer stated that the Appellant was absent from work without notification or permission on September 15, 16, 17, 2014.

[17] On February 24, 2015, the Appellant told the Respondent that he had been dismissed because he could not show up for work and could not notify the employer, because he was incarcerated from September 13, 2014 to September 19, 2014.

[18] On March 6, 2015, the Respondent advised the Appellant that they did not use his hours of work with the employer in calculating his EI benefits because he had voluntarily left his employment without just cause within the meaning of the EI Act. They said that they believed that voluntarily leaving his employment was not his only reasonable alternative.

[19] On March 23, 2015, the Appellant filed a request for reconsideration of the Respondent's March 6, 2015 decision.

[20] On April 17, 2015, the Respondent advised the Appellant that they were unable to pay him any EI benefits because he had lost his employment with the employer on September 12, 2014, as a result of his misconduct.

[21] On April 18, 2015, a Notice of Debt was sent to the Appellant showing a $4,609.00 overpayment of EI benefits resulted from his disqualification, a $3,908.00 overpayment caused by his misrepresentation of his earnings, and a penalty of $1,503.00. Total Debt owing $10,020.00.

[22] On May 1, 2015, the Respondent advised the Appellant that they had not changed their March 6, 2015 decision.

[23] On May 26, 2015, the Respondent date stamped as received, a medical certificate for EI sickness benefits, signed by the Appellant's doctor on May 15, 2015. The doctor stated that the Appellant suffered from acute depression, AdHd, and addiction issues that resurfaced following a traumatic event ending with the death of his child.

[24] On August 21, 2015, the Appellant's doctor signed a medical certificate for EI sickness benefits, which indicated that the Appellant was ready to re-enter the work force as of August 21, 2015.

SUBMISSIONS

[25] The Appellant submitted that:

a. he was applying for an appeal late because he was confused about the process.

b. he was sick and going through some serious health issues, and was unable to keep his records straight on the timeline.

c. his Human Rights were being violated and he was being persecuted without any evidence.

d. he wasn't issued a verbal or written warning in regards to his absenteeism, because he didn't miss any time prior to the incident.

e. he had passed word through his brother to his foreman that he was unable to make it to work due to extenuating circumstances.

[26] The Respondent submitted that:

a. the Appellant lost his employment by reason of his own misconduct, and therefore they imposed an indefinite disqualification effective September 7, 2014, pursuant to subsection 30(1) of the EI Act.

ANALYSIS

[27] Subsection 30(1) of the Act states that a claimant is disqualified from receiving any benefits if they lost their employment as a result of their own misconduct.

[28] While the Act does not define the term "misconduct", the Federal Court of Appeal has stated that there will be misconduct where the conduct of the claimant was willful, 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 claimant knew or ought to have known the conduct was such as to impair the duties to the employment such that dismissal was a real possibility.

Tucker A-381-85; Locke 2003 FCA 262

[29] During the hearing, the Appellant stated that he was incarcerated from September 13, 2014 to September 19, 2014. The Appellant stated that on Saturday September 13, 2014, he asked his brother to contact his supervisor to advise him that the Appellant would not be able to come into work on Monday September 15, 2014. The Appellant's brother confirmed that he left

a voice message on the supervisor's phone advising him that the Appellant would not be into work on the Monday.

[30] The Appellant stated that he asked his brother to contact his supervisor again on Monday September 15th to advise him that the Appellant would be into work on the Tuesday after his bail hearing. The brother confirmed that he did call the Appellant's supervisor in the afternoon of September 15th to advise him that the Appellant would be into work on Tuesday. The brother stated that the supervisor told him to tell the Appellant not to bother coming to work because he had already gotten somebody else.

[31] The Appellant stated that he did not think that he would lose his job for being absent one day of work.

[32] The Tribunal found the Appellant and his brother were credible during the hearing in that they were open and consistent in their comments and answers to questions, while under oath.

[33] The Tribunal finds that the Appellant did make an effort to contact his supervisor to advise him that the Appellant would not be into work on Monday September 15th, as confirmed by his brother.

[34] The Tribunal finds that the employer decided to terminate the Appellant on Monday September 15th, as evidenced by the supervisor's statement to the Appellant's brother not to bother coming to work because he had already gotten someone else. This finding is also confirmed by the fact that the employer issued the Appellant's ROE on September 15, 2014, and indicated the reason for issuing the ROE was code M, Dismissal.

[35] The Tribunal does not accept the employer's statement that the Appellant was terminated because he was absent from work without notification or permission on September 15, 16, 17, 2014. The evidence shows that the employer had already terminated the Appellant on September 15, 2014.

[36] The Tribunal finds that there is no evidence that the Appellant had received written or verbal warnings about violating the employer's Attendance Policy prior to his termination.

[37] The Tribunal finds that there is no evidence that the Appellant knew or should have known that his actions would result in his dismissal.

[38] The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a claimant 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

[39] 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 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 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, 2010 FCA 314

[40] The Tribunal finds that the Appellant's actions were not willful, deliberate, or conscious to the extent that he knew that they could result in his dismissal and do not constitute misconduct, pursuant to sections 29 and 30 of the Act.

CONCLUSION

[41] The appeal is allowed.

Richard Sterne

Member, General Division - Employment Insurance Section