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

Citation: *Trillium Railway Co. Ltd. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 52

Tribunal File Number: GE-15-2302

BETWEEN:

Trillium Railway Co. Ltd.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

D. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: February 23, 2016

DATE OF DECISION: April 18, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, Trillium Railway Co. Ltd., was represented at the in-person hearing by Mr. Kenneth R. Peel, Legal Counsel, KRP Law, Ms. K. E., President and A. W., General Manager.

The Respondent did not attend.

The Added Party/Claimant, Mr. D. S. and his wife, Mrs. C. S. also attended the hearing as a witness. Mrs. C. S. assisted the Claimant throughout the hearing however, she was not called upon by the Claimant to testify.

INTRODUCTION

[1] On April 8, 2015, the Claimant made an initial claim for employment insurance regular benefits after having been dismissed by his employer on March 30, 2015.

[2] On May 15, 2015, the Canada Employment Insurance Commission (Commission) denied the Claimant's application for employment insurance regular benefits because it determined that the Claimant had lost his employment due to his own misconduct.

[3] On May 21, 2015, the Claimant requested that the Commission reconsider its decision. On June 5, 2015, upon further review of the file, the Commission decided in favour of the Claimant, overturned its initial decision and allowed his claim for benefits.

[4] On July 3, 2015, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal). On September 14, 2015, the Member added the Claimant as a party to this appeal (GD6).

[5] The Claimant requested that the hearing of February 9, 2016 be adjourned and the location changed; the Appellant agreed to request and Member granted the adjournment and change of location (GD1A).

[6] The Appellant requested that the hearing of February 11, 2016 be adjourned and it was granted (GD8 and GD9).

[7] The Member decided to hold the hearing by way of an in-person appearance given (a) the complexity of the issue under appeal (b) the fact that the credibility may be a prevailing issue (c) the fact that more than one party was going to be in attendance and (d) the information in the file, including the need for additional information.

ISSUE

[8] The Member must decide whether the Claimant lost is employment by reason of his own misconduct and whether an indefinite disqualification should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

THE LAW

[9] Section 29 of the EI Act stipulates that 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.

[10] Subsection 30(1) of the EI Act stipulates that 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.

[11] Subsection 30(2) of the EI Act stipulates that 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

[12] On April 8, 2015, the Claimant made an initial claim for employment insurance regular benefits. He indicated that that he was dismissed by his employer on March 30, 2015 because the employer accused him of committing a safety violation (leaving equipment standing foul of an adjacent track), causing damage to 4 railway cars. The incident happened on December 24, 2014, which was 3 months prior to his dismissal. He explained that he thought the track was clear, so as the conductor, he told the engineer to give him slack on the rail cars, but in the move, they got damaged. He worked the rest of the shift, December 29 and 30, 2014 and was off work until January 6, 2015. He and his wife met with the employer that week (4 or 5 days later) to figure out how the incident happened given all his years of experience. The Claimant indicated that it was decided that it was a one-time mistake and that his job was secure; not to worry about it (GD3-9). He continued to work however; on January 22, 2015 he cracked a bone in his hand at work and was off on WSIB. Upon his return on March 30, 2015 he was terminated. The Claimant indicated that he was aware of the safety policy and that he followed it (GD3-3 to GD3-14).

[13] The record of employment indicates that the Claimant was employed with the Appellant for over 14 years and was terminated on March 30, 2015 (GD3-15).

[14] To the Commission, the Appellant stated that the Claimant was terminated for violating rules 114 - 115 of the Canadian Railway Operating Rules (CROR) and that an investigation was ongoing from December 24, 2014; that they had met with the Claimant several times including the week of January 6, 2015. The Claimant did know why the incident happened and indicated

that it was a one-time occurrence. He was advised that the investigation was ongoing and that the outcome would be further discipline up to dismissal (GD3-16).

[15] The employer submitted:

a) Incident report of December 24, 2014 (GD3-18 to GD3-20)

b) Transportation Safety Board Railway Occurrence Report completed by the General Manager (GD3- 21 to GD3-23)

c) President's personal notes from January 10, 2015 meeting with Claimant and his wife (GD3-24)

d) Letter sent to the Claimant from the Appellant dated January 22, 2015 informing of ongoing investigation and that he was on probation until further disciplinary action can be taken (GD3-25)

e) Termination letter of March 30, 2015 indicates that the Claimant was dismissed for violating CROR 114 and 115 when he instructed the locomotive to start moving railcars into an area that had not been properly checked or cleared. Although he admitted to his error, his actions were a serious breach of basic railway rules that cannot be excused or overlooked in any way (GD3-26).

[16] The Claimant stated to the Commission, that he simply made a mistake when he did not check that the track was clear (GD3-27).

[17] On May 15, 2105, the Commission denied the Claimant's application for benefits. It determined that the Claimant had lost his employment due to his own misconduct (GD3-28).

[18] On May 21, 2015, the Claimant requested that the Commission reconsider its decision noting that the Appellant had reassured him, after the incident, that no disciplinary action would take place. It was only after the injury to his hand on January 22, 2015 that the Appellant advised him that he was now on probation. He was terminated when he returned to work on March 30, 2015 (GD3-21 to GD3-32).

[19] On June 5, 2015 the Commission reconsidered the circumstances of this case and decided in favour of the Claimant and overturned its initial decision of May 15, 2015 (GD3-33 to GD3- 36).

[20] The employer submitted further documentary evidence (GD10):

a) Incident reports (3) dated January 2005 (car over derailment due to insufficient handbrakes used), March 2008 (derailment due to crew using push/pull method), October

   2010 (radio communication; car struck gate) -- Claimant was an engineman at the time of these incidents.

b) Warning letter to the Claimant dated December 2010 placing him on a 3-month probation for inappropriate behaviour (aggressive and threatening language and tone to coworkers).

c) Pay increase letter dated December 15, 2010, includes acknowledgement that he is on probation and notes the terms of employment.

d) Letter of offer of wage increase to the Claimant dated November 28, 2008.

e) Invoices for car repairs for present incident.

Testimonies

Mr. A. W., General Manager

[21] Mr. A. W. testified that the Claimant was trained in the CROR on hire, tested and qualified several times. The Claimant was the conductor on December 24, 2014; he makes the control decisions and communicates them to the engineer by radio and hand signals. Mr. A. W. testified that the Claimant violated Rule 114 (knowing the route is clear) and Rule 115 (being in a position to observe the movement as it occurs). He stated that these are the responsibilities of the Claimant.

[22] He testified that he met with the Claimant after the incident and that the Claimant stated that he failed to check to make sure that the cares would clear. Mr. A. W. testified that it was a clear, cold day with no snow and the Claimant would have to walk 200 feet to check for an obstruction and nothing prevented him from doing so. He stated that the Claimant had no explanation for his conduct; that he was visibly upset and shaken and that he asked whether he was going to be fired. Mr. A. W. testified that he responded "not today" because he didn't have the authority but that he is expected to go fill out an incident report (see GD3-20). Mr. A. W. testified that he did not reassure the Claimant that there would be no consequence or that he would not lose his job. He stated that he prepared GD3-21 as per the regulations when there is damage to a tanker car. He also prepared GD3-22 on site; he took photographs and the Claimant walked him through what he did. Mr. A. W. stated that they both concluded that the Claimant couldn't see if the path was clear from his position.

[23] Mr. A. W. testified that he was unable to get estimates for the damage to the cars until February 23, 2015 and confirmed the costs to the railway cars were accurate (GD10-20).

[24] Mr. A. W. testified that he was present at the meetings of January 6, 2015 and March 30, 2015. Mr. A. W. testified that the Claimant was informed that he was on probation on January 22, 2015 and at the March 30, 2015 termination meeting, the Claimant did not offer an explanation for the incident of December 24, 2015.

<u>K. E., President</u>

[25] Ms. K. E. testified that she learned of the incident of December 24, 2015 after the holidays. She met with the Claimant the week of January 6, 2015 and again, on January 10, 2015 with his wife. Ms. K. E. testified that the Claimant was honest, forthright and reiterated what he had written in his statement. He had no explanation for the incident but just kept saying it wouldn't happen again and asked whether he would lose his job. Ms. K. E. stated that she told the Claimant that he may possibly lose his job and that the situation had to be assessed. The Claimant reassured her that nothing was wrong; that all was well; there were no distractions and that he was excited about the holidays. Ms. K. E. stated that her notes (GD3-24) were prepared after her meeting with the Claimant and his wife and that they are accurate. Ms. K. E. testified that they all knew of the seriousness of the incident and the Claimant knew he would face

serious consequences. She confirmed that she met with the Claimant on January 22, 2015 and placed him on probation while Mr. A. W. was still trying to get estimates for the damage. The Claimant needed the income and although she knew that he had to follow the rules, she allowed him to keep working.

[26] Ms. K. E. testified that there was a delay between January 2, 2015 and March 30, 2015 because the Claimant was off work due to a hand injury. They had made the decision while he was off work but she waited until the Claimant returned to work to give him the termination letter. The reasons for the termination are in the letter. His termination had nothing to do with his hand injury. Ms. K. E. stated that it was difficult to make the decision however she could not ignore the fact that the Claimant violated a serious safety rule; the first and most basic rule in the CROR. He was honest and repeatedly stated to her that nothing else caused the incident other than he did not check that it was clear to move the cars. It was his job to control those trains.

Mr. D. C., Claimant

[27] Mr. D. C. testified that Mr. A. W. did reassure him when they were on site that he would not lose his job. In response, to the prior incidents submitted by the employer, the Claimant stated "I have never had an incident like that - never misjudged a clearance in my whole career".

[28] The Member asked the Claimant to explain his submission (GD7) that he disagrees with certain statements made by the Appellant in GD2-7 paragraph 7, GD2-19 and GD2-20 and GD3- 22 paragraph (j). The Claimant stated that he did not understand why it took so much time for the employer to get the damage to the cars costed when it's been done a lot quicker in the past (GD2-7). With respect to GD2-19 and GD2-20, the Claimant stated that at the meeting with Ms. K. E., he and his wife were told that the incident was "water under the bridge", that he was the very best employee and that his job was safe. In GD3-22, it is not true that the car "was left foul… by approximately 10 feet". He missed it by 6 to 8 inches. The Claimant stated "I made a mistake, that's all I can say", "I felt bad about it", "Damages could have been worse" and "In my mind, I thought I was right and boy was I wrong".

[29] Mr. D. C. testified that on December 24, 2015, he was feeling great as it was Christmas Eve. He stated that he had a plan, he was sure the cars would clear even when he went to the switch he did not think he was 6 to 8 inches fall/short. Mr. D. C. stated “no, I did not put myself on the spot” and that “based on my experience, I thought it was going to clear”.

[30] The Claimant stated he knew the rule and stated “I know it’s a rule” and “everyone makes those mistakes and that’s why they make the rules …”.

SUBMISSIONS

[31] The Appellant/Employer submitted that:

a) the Claimant was terminated for violating a basic safety rule (CROR rules 114 and 115) and for breach of duty of care. He did not check that the way was clear and ensure that rail equipment could pass safely without striking other rail cars. It was his duty to do so and he did not comply. This was a serious lack of judgment and compliance failure and breach of duty of care; his termination had nothing to do with his hand injury of January 22, 2015;

b) the Claimant had no explanation for his actions; could not provide reasons for the CROR rules violation;

c) he was a trained and qualified, experienced conductor and knew the CROR rules; the Claimant admitted to his mistake and that he could not afford to lose his job therefore knew of the severity of the incident; the Claimant had been involved in other railway incidents in 2005, 2008 and 2010 so he had knowledge of, and understood that violation of the rules resulted in consequences/discipline (was suspended in the past) - besides, it goes to credibility, as the Claimant was not incident free as he stated to the Commission (GD3-8);

[32] The Respondent/Commission initially submitted that the Claimant did not lose his employment by reason of his own misconduct because the Claimant’s actions were not determined to be ill intended, willful or deliberate; it is reasonable to assume that the Claimant did not consciously have railway cars released knowing that the path was not clear.

[33] The Respondent/Commission now concedes on the issue (GD11) and submits that:

a) it failed to conduct fact-finding with either party during the reconsideration process and as a result, did not request the relevant history of previous discipline as well as the related safety policies and procedures which the employer has now provided in their appeal submission;

b) it erred in its interpretation of the element of willfulness; it focused on whether the Claimant's actions were "ill-intended or willful" and not the complete definition of misconduct according to Tucker, A-381-85;

c) the final event which led to the Claimant's termination was certainly not wilful in the sense of deliberately trying to cause an accident, but was fundamentally negligent, or reckless – so as to approach willfulness; he failed to look to see if the way was clear and thus violated the most basic tenet of the safety protocols;

d) the Claimant was an experienced conductor, aware of the safety protocols and hazards and had a history of previous incidents so he was well aware that there was a potential of dismissal; the Claimant therefore, lost his employment by reason of his own misconduct.

[34] The Added Part/Claimant submitted that:

a) he simply made a mistake when he didn't check to see if the track was clear; it was a one-time mistake that he will never make again;

b) he has 25 years of experience and has never had this type of accident/incident before.

ANALYSIS

[35] Section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by reason of his/her own misconduct.

[36] The Member recognizes that the legal test to be applied in cases of misconduct is whether the act under complaint was willful, or at least of such careless or negligent nature that one could determine that the employee willfully disregarded the effects his/her actions would

have on job performance (McKay-Eden A-402-96, Tucker A-381-85). That is, the act that led to the dismissal was conscious, deliberate or intentional, where the claimant 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 (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[37] Further, the Member recognizes that the onus is on the employer and the Commission to show that the Claimant, on a balance of probabilities, lost his employment due to his own misconduct (Larivee A-473-06), Falardeau A-396-85).

[38] The Member notes that it must first be established that the Claimant's actions were the cause of his dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). In this case, it is undisputed evidence that the Appellant dismissed the Claimant on March 30, 2015 for violating a basic railway safety rules (CROR 114 and 115) and for breach of duty of care (GD3-26).

[39] The Member next considered that in order for misconduct to exist, it must be established that the Claimant committed the alleged offence. In other words, did the Claimant violate CROR 114 and 115 by instructing the engineer/locomotive to start the movement of railcars without properly/visually checking whether the area was clear? The Appellant submitted that the Claimant did not check that the way was clear and ensure that railcars could pass safely without striking other railcars. It was his duty to do so and he did not comply. The evidence shows that the Claimant has been honest and forthcoming to the Appellant, the Commission and the Tribunal that he was not in a position to see whether there was sufficient clearance for the railcars to clear yet, he instructed the engineer to start moving them. He stated that he simply made a mistake and will never do it again (GD3-7, GD3-20, GD3-22 and GD3-27). At the hearing, the Claimant testified that he did not put himself on the spot to see if the cars would clear. He thought, based on his experience that they were going to clear. The General Manager, Mr. A. W. testified that the Claimant violated CROR 114 and 115 when he did not stand in a position to observe the movement as it occurred and to know that the route was clear. The Member finds therefore, that the Claimant committed the alleged offence.

[40] In order for misconduct to exist however, the Commission and the Appellant must show that the act that led to the dismissal was conscious, deliberate or intentional, where the Claimant knew that his conduct was such as to impair the performance of the duties owed to his employer and dismissal was a real possibility. In this case, the Member finds that the Claimant's actions were conscious and he acted in such a careless manner that it can reasonably be concluded that his actions were willful.

[41] The Member considered that the Claimant was an experienced, trained and qualified conductor who knew the CROR. The Claimant did not dispute the General Manager's testimony that he was trained and repeatedly qualified for his position. In fact, the Claimant testified that he was experienced and that he relied on that experience, when he thought the railcars would clear. The Claimant also testified that he knew the CROR and acknowledged their importance. The Member agrees with the Claimant that his prior incidents and warnings do not show that he was involved in a similar incident in the past. The Member agrees with the Appellant however, that although not related to this incident, having been involved, warned, and suspended (GD10-16) for past incidents of violating rules (safety or otherwise), shows that the Claimant was aware of, and understood that violating rules would result in some form of discipline. The Member agrees with the Commission, that the Claimant did not intentionally set out to cause damage to the Appellant's property, and believes the Claimant when he stated that he "thought" the railcars would clear. The Member finds however that the Claimant did consciously decide to violate a known, basic, safety rule by not moving where he can visually ensure the railcars would not collide. The Member agrees with the Appellant that the railway industry is dangerous and highly regulated, and as an experienced conductor and engineer of 25 years who was repeatedly trained on the CROR, the Claimant ought to have known that a violation of any safety rule could result in his dismissal.

[42] The Member understands that the Claimant feels that he made a grave mistake and is very remorseful. The Member however, must consider the Claimant's actions at the time of dismissal and decide whether those actions amount to misconduct under the EI Act. Whether the Appellant representatives reassured him, while the incident was being investigated, that he would not lose his job, is not relevant to the issue at hand. The Member notes that the legislation is clear, that when determining whether a Claimant's actions amount to misconduct,

it is the actions of the Claimant that are to be considered, and not those of the employer. The Tribunal's jurisdiction is not to comment on whether the sanctions of the employer were appropriate; nor can it comment on the manner or behaviour of the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (McNamara 2007 FCA 107; Fleming 2006 FCA 16).

[43] Finally, the Member also notes that although the Appellant provided the Member with copies of other misconduct decisions of the Tribunal, they were reviewed for information purposes only and are not precedence (the Member was provided with appeal number GE-13-294, GE-13-374, GE-13-726, GE-13-1967/1968, GE-13-2174, GE-13-2312 and GE-13-2746).

[44] The Member finds that the Appellant and the Commission met the onus of demonstrating that the Claimant's actions that led to his dismissal were conscious and that he knew or ought to have known that his conduct was such that dismissal was a real possibility.

[45] The Member finds therefore, that on a balance of probabilities, the Claimant lost his employment as result of his own misconduct and an indefinite disqualification must be imposed pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[46] The Appellant's appeal is allowed.

Eleni Palantzas

Member, General Division - Employment Insurance Section