



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. D. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 90

Tribunal File Number: GE-16-693

BETWEEN:

A. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alcide Boudreault

HEARD ON: June 28, 2016

DATE OF DECISION: June 30, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE AND TYPE OF HEARING

[1] The *Social Security Tribunal* (the "Tribunal") held a hearing in person for the reasons stated in the notice of hearing dated May 19, 2016, namely, the information in the file and the need to obtain additional information. This type of hearing can best accommodate the parties' needs. This type of hearing also respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[2] The Appellant, A. D., was with his counsel, Chantale Désy at the hearing held on July 28, 2016.

[3] The *Canada Employment Insurance Commission* (the Commission) did not appear.

DECISION

[4] The Tribunal finds that the Appellant did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the "Act"). The appeal is allowed.

INTRODUCTION – STATEMENT OF FACTS AND PROCEEDINGS

[5] On December 16, 2015, the Appellant made an initial claim for benefits starting on December 20, 2015 (GD3-3 to GD3-15).

[6] On January 20, 2016, in its notice of decision, the Commission notified the Appellant that he was not entitled to benefits starting on December 13, 2015 because he had lost his job with Transport St-Michel on December 15, 2015 because of his misconduct (GD3-32 and GD3-33).

[7] On January 20, 2016, the Appellant filed a request for reconsideration with the Commission (GD3-34 to GD3-38).

[8] On February 8, 2016, in its administrative reconsideration decision, the Commission informed the Appellant that it had not changed its decision on the question at issue (GD3-43 to GD 3-44).

[9] On February 23, 2016, the Appellant filed an appeal before the Tribunal.

ISSUE

[10] The Tribunal must determine whether the Appellant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the Act.

THE LAW

[11] 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;

[13] 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, 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.

[14] Subsection 30(2) of the Act states:

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

On file

[15] The Appellant was a long-distance truck driver employed by Transport St- Michel (GD3-16).

[16] On December 16, 2015, the Appellant made an initial claim for Employment Insurance benefits established starting on December 20, (GD3-3 to GD3-15).

[17] The Appellant was dismissed for urinating near his truck at a warehouse owned by one of his employer's clients (GD3-17).

[18] The Appellant has health problems. He had a urinary tract infection and prostate problems (GD3-21).

[19] He needed to urinate urgently, and was unable to find a washroom (GD3-21).

[20] The Appellant had already been issued two disciplinary warnings, one for failing to respect driving hours, and another for dangerous driving at a shooting range, endangering public safety (GD3-22).

[21] According to the client's foreman, there were signs showing the location of washrooms (GD3-26).

[22] The Appellant admitted blame for the incident, but said there was no one around to show him to the washroom.

[23] He provided a medical certificate from Dr. Alain Tremblay dated January 16, 2016, confirming his health problem (GD3-37).

At the hearing

[24] He admits to his action but says it was beyond his control.

[25] The warehouse supervisor had asked him to stay in his truck for safety reasons.

[26] The Transport St-Michel company had a rule: if an employee commits 3 violations, he would be suspended for 3 days.

[27] The employer confirmed for the Appellant's information that he had been suspended for 3 days, but he nevertheless asked him to do him a favour by making three additional runs.

[28] The Appellant tried to find out what ever became of his suspension, and he was told it would be taken care of later.

PARTIES' ARGUMENTS

[29] The Appellant submitted that:

- a) He is challenging the Commission's decision;
- b) His actions were involuntary;
- c) He has a related health problem;
- d) He admits that his behaviour was unacceptable.

[30] The Respondent submitted that:

- a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that the claimant lost an employment because of his or her own misconduct. An employee under an employment contract must respect the rule of conduct agreed upon and accepted by professional ethics, common sense, habit or custom;
- b) An employer is entitled to expect an employee, who must respond quickly for health reasons, to ensure that his condition will not lead to disrespectful behaviour and risk damaging

the property of the employer or others; in such circumstances, and individual is compelled to take the necessary steps to avoid such a situation;

c) In this case, the claimant explained that he has a health problem that sometimes forces him to act quickly and after looking around the warehouse for signs of a washroom, with no one around to help guide him, he had to urinate near his truck, but was caught by the foreman of the facility. He said that this was a one-time occurrence;

d) He said he cannot explain why he waited until it was too late. He admits that he knew the office area, where he could have asked to use the washroom. The claimant mentioned he was caught by the foreman; they argued, but he was not arrogant although the client says otherwise. The claimant already has 2 disciplinary notices in his file, which should have made him more aware and should have promoted him to act properly, respectfully and with judgement to avoid dismissal.

e) The Commission concluded that the act of urinating in a client's warehouse is serious, and that being arrogant to the same client amounted to misconduct within the meaning of the Act, because despite the fact that he has a health problem in this regard, it was his responsibility to act promptly by asking for a washroom, rather than wait too long, because he understood the need to act quickly, despite the fact that the employer had told him to wait in his truck. It is unacceptable for an employer to tolerate such behaviour and risk losing important clients or tarnishing its reputation;

f) The Commission submits that its decision is supported in case law.

ANALYSIS

[31] Subsection 30(1) of the Act provides that claimants are disqualified from benefit if they lose their employment by reason of misconduct.

[32] To prove misconduct, the onus is on the employer and the Commission to prove that the Appellant knew or ought to have known that his behaviour was inconsistent with his employment.

[33] The Appellant admitted to his fault. He knew the rules and he knew he would be suspended for 3 days. The employer disregarded his own rule and dismissed the Appellant for misconduct.

[34] In the Tribunal's view, neither the Commission nor the employer discharged the onus of proving that the Appellant knew or ought to have known that his behaviour was wrongful and inconsistent with his employment

[35] *"The onus of proving on a balance of probabilities that the claimant lost her employment because of her misconduct rests with the employer and the Commission."* (**Larivée 2007 FCA 312**) (**CanLII**)

[36] To charge the Appellant with misconduct, he must have been aware that his action would invariably lead to his dismissal. It never occurred to him that he might one day be accused of disrespecting the rules by this action.

[37] It would not be reasonable to conclude that the Appellant knew or ought of have known that his behaviour would lead to his dismissal, because he had to remain near his truck for security reasons. The Appellant also had to be ready for the moment when he was needed to load his truck.

[38] The Appellant has a urinary problem and he had to take medication. He acted in good faith, without trying to cause harm to his employer or disrespect the client. The situation was beyond his control.

[39] The decision in *Mishibinijima v. Canada 2007 FCA 85* (CanLII) establishes: "that there is 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 his employer."

[40] The evidence as a whole leads us to find that the Appellant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer, since he had to be ready to load his truck, but unfortunately, he could control himself given his health problem.

[41] In the Tribunal's view, the action cannot be deemed wilful for deliberate, or so reckless as to approach wilfulness. The Appellant's one thought was to answer his pressing need to urinate.

[42] The Employer did not intend to discipline the Appellant by suspending him for 3 days. Her intention was to dismiss him.

[43] *"The misconduct must cause the loss of employment and must be an operative cause."* (**Brissette A-1342-92**). The evidence does not clearly show that the Appellant had acted wilfully.

[44] The Tribunal relies on the Federal Court of Appeal (**Tucker 1986 FCA 381**) which determined, "for there to be a ruling of misconduct under the Act, the act complained of must be wilful or deliberate or so reckless as to approach wilfulness." »

[45] The Federal Court of Appeal determined that there must be a causal link between the claimant's alleged misconduct and the loss of the claimant's employment.

[46] In cases of misconduct, the Federal Court of Appeal has affirmed that the Tribunal is not required to consider whether the dismissal or punishment was justified (**Fakhari A-732-95**). Rather, the issue to be decided is whether the claimant's actions amounted to misconduct within the meaning of the Act (**Marion 2002 FCA 185 (CanLII)**).

[47] The evidence does not show that the Appellant committed an action that led to his dismissal. His behaviour was not "wilful or deliberate or so reckless as to approach wilfulness," as set out in **Tucker 1986 FCA 381**.

[48] [36] For the Tribunal to conclude that there was misconduct, it must have before it relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible (**Meunier, A-130-96**); (**Joseph, A-636-85**). The evidence submitted by the employer does not allow us to find that the Appellant knew that his conduct could result in his dismissal.

CONCLUSION

[49] The Tribunal relies on the decision in (Bartone A-369-88) and (*Davlut A-241-82*) which establish: «The onus lies on the Commission and/or the employer (...) 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.» The Appellant did not lose his employment because of his own misconduct; he was dismissed. The appeal is allowed.

Alcide Boudreault
Member, General Division, Employment Insurance

DATE OF REASONS: June 30, 2016