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

[TRANSLATION]

Citation: *R. G. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 91

Tribunal File Number: GE-15-3999

BETWEEN:

R. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Ambulance Chicoutimi Inc.

Added party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alcide Boudreault

HEARD ON: July 6, 2016

DATE OF DECISION: July 14, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Social Security Tribunal ("the Tribunal") held a hearing by videoconference for the reasons stated in the notice of hearing dated June 23, 2016: the information in the file, including the need for additional information; this method of proceeding best meets the needs of the parties for accommodation; it 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, R. G., was assisted during the hearing on July 6, 2016 by Laurence Coté-Lebrun, an intern from the CSN's Legal Service.

[3] The Canada Employment Insurance Commission ("the Commission") was not in attendance.

DECISION

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

INTRODUCTION

[5] The appellant worked for Ambulance SLM from July 27, 2006 to June 18, 2015 (GD3-5).

[6] On July 7, 2015, the Appellant filed a claim for EI benefits effective June 21, 2015 (GD3-32 GD3-18).

[7] On August 18, 2015, the Commission notified the Appellant in its Notice of Decision that he did not qualify for benefits starting June 21, 2015 because he had lost his employment with Ambulance Chicoutimi Inc. on June 17, 2015 by reason of his own misconduct (GD3-22 GD3-21).

[8] On September 3, 2015, the Appellant filed a reconsideration request with the Commission (GD3-22 to GD3-23).

[9] On October 22, 2015, the Commission notified the appellant in its administrative reconsideration decision that it had not changed its decision on the issue (GD3-32 to GD3-33).

[10] The Appellant filed an appeal with the Tribunal on December 3, 2015.

ISSUE

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

THE LAW

[12] Subsections 29(*a*) and (*b*) of the Act provide as follows:

> 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 provides:

> 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.

[15] A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation and suppositions, and it is for the Commission to convince the Board, the pivotal body in the resolution of unemployment insurance disputes, of the presence of such evidence irrespective of the opinion of the employer (*Crichlow* A-562-97).

[16] The mere existence of a concluded settlement agreement is not of itself determinative of the issue of whether an employee was dismissed for misconduct**.** It is for the Tribunal to assess the evidence and come to a decision. It is not bound by how the employer and claimant or a third party might characterize the grounds on which an employment has been terminated (*Morris*, A-291-98 (Application for leave to appeal was dismissed by the Supreme Court of Canada); *Canada (AG) v. Morris*, [1999] S.C.C., No. 304; *Boulton*, A-45-96; *Perusse*, A-09-81).

[17] The term “misconduct” is not defined as such in the case law. It is largely a question of circumstances (*Gauthier*, A-6-98; *Bedell*, A-1716-83).

[18] The construction of the term “misconduct” is a question of law, but whether a particular act or omission is misconduct is a question of fact (*Tucker*, A-381-85; *Bedell*, A-1716-83).

[19] The proof of a mental element is necessary. The claimant’s behaviour must be deliberate or so reckless as to approach wilfulness (*McKay-Eden*, A-402-96; *Jewell*, A-236-94; *Brissette*, A-1342-92; *Tucker*, A-381-85; *Bedell*, A-1716-83).

[20] Reprehensible conduct is not necessarily misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal (*Locke*, 2003 FCA 262 (CanLII); *Cartier*, 2001 FCA 274 (CanLII); *Gauthier*, A-6-98*; Meunier*, A-130-96).

[21] An employer's subjective appreciation of the type of misconduct that warrants dismissal cannot be deemed binding on the Tribunal and does not satisfy the burden of proof that rests on the Commission (*Fakhari*, A-732-95).

[22] In *Hastings* (2007 FCA 372 (CanLII)), the Court qualified and refined the concept of misconduct. Thus, the Court established that

> … there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the conduct which led to the dismissal was conscious, deliberate or intentional. Put another way, there will be 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 and that, as a result, dismissal was a real possibility.

[23] For the Tribunal to conclude that there was misconduct, it must have relevant facts and sufficiently detailed evidence, first, for it to be able to know how the employee behaved and, second, to decide whether such behaviour was reprehensible (*Meunier*, A-130-96; *Joseph*, A-636-85).

[24] In *Fakhari* (A-732-95), the Court held as follows:

> … An employer's subjective appreciation of the type of misconduct which warrants dismissal for just cause cannot be deemed binding on a Board of Referees. It is not difficult to envisage cases where an employee's actions could be properly characterized as misconduct, but the employer's decision to dismiss that employee would be rightly regarded as capricious, if not unreasonable. We do not believe that an employer's mere assurance that it believes the conduct in question is misconduct and that it was the reason for termination of the employment, satisfies the onus of proof which rests on the Commission under section 28.

[25] In *Canada (Attorney General) v. Larivée* (2007 FCA 132), the Federal Court of Appeal established that it is up to the Commission to discharge the burden of proving, on a balance of probabilities, that one of a claimant's actions constituted misconduct.

[26] In *Canada (Attorney General) v. Tucker* (A-381-85), the Federal Court of Appeal specified what constitutes misconduct, which the Act fails to do. The Court established that, “in order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance.”

[27] For behaviour to amount to misconduct under the *Employment Insurance Act*, it is not necessary that there be wrongful intent. It is sufficient that the reprehensible act or omission complained of be "wilful," that is, conscious, deliberate or intentional (*Caul*, 2006 FCA 251; *Pearson*, 2006 FCA 199 (CanLII)).

[28] The purpose of the Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment against which the person is insured must be involuntary (*Gagnon*, 1988 CanLII 48 (SCC), [1988] 2 S.C.R. 29).

EVIDENCE

[29] The Appellant is a paramedic and was dismissed by his employer for administrative reasons: for driving an emergency vehicle with a non-renewed driver's licence (GD3-16).

[30] The employer learned during an annual check with the Société de l'assurance automobile du Québec (SAAQ) that the Appellant had not renewed his licence.

[31] On March 11, 2014, the Appellant was suspended for an identical infraction. He had been notified that he might face dismissal if another, similar incident occurred.

[32] The Appellant acknowledges that, on the first occasion, he no longer had a domicile and was living in his car and therefore had not renewed his licence.

[33] The following year, when the situation reoccurred, he had not completed a change of address because he had not received a notice of renewal.

[34] On June 8, 2015, the employer notified the Appellant that he no longer had a valid licence. The Appellant had been without a valid licence for more than eight months.

[35] The Appellant's file is in arbitration with his union, the CSN. He is trying to have himself reinstated in his position (GD3-22 and GD3-23).

[36] Dr. Gérard Leblanc, MD, FRCP (Psychiatrist), submitted an assessment stating that, in his opinion, it is likely that the major stress factors the Appellant has experienced since 2013 (and those experienced to a lesser degree in the past) and the psychological condition he has

exhibited since that time may largely explain Mr. R. G.'s behaviour and the criticisms the employer appears to have levelled at him.

[37] Furthermore, those factors as a whole likely explain in large part the behaviours described and some of the errors Mr. R. G. made in failing to renew his driver's licence in September 2014 (distractions, oversights, incorrect conclusions, deteriorating management of his personal affairs, tendency to procrastinate and so on).

[38] Dr. Leblanc suggested that the employer and/or decision-maker consider the entire situation described and the worker's psychiatric condition in selecting and enforcing appropriate disciplinary and or accommodation measures.

SUBMISSIONS OF THE PARTIES

[39] The Appellant stated the following:

a) he challenged the Commission's decision;

b) his representative could prove he was suffering from psychological problems that explain his behaviour;

c) his representative could prove that his dismissal was unjust.

[40] The Respondent stated the following:

a) Subsection 30(2) of the Act provides that an indefinite disqualification is imposed if it is established that the claimant lost the employment by reason of his or her own misconduct. For the alleged action to constitute misconduct under section 30 of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. There must also have been a causal relationship between the misconduct and the dismissal;

b) The employer dismissed the Appellant because he had not renewed his driver's licence;

c) The Appellant was a paramedic, and possession of a driver's licence is required under article 1.21 of the collective agreement;

d) The Appellant was aware of the potential penalties for failing to have a driver's licence;

e) The Respondent cannot accept any excuse for the Appellant's behaviour since it was his responsibility to ensure he had all the necessary licences;

f) The period of more than eight months during which he drove the employer's vehicle without a licence is not at issue;

g) The Respondent considers that the fact the Appellant was not in peak form is no justification for breaching an essential condition of employment, particularly since the Appellant had previously been suspended for the same reason;

h) The Respondent reminds the Tribunal that the Appellant was required to hold a valid driver's licence in order to work. Driving without a licence in itself constitutes a contravention of the Act;

i) The Respondent considers that the employer is somewhat responsible for the fact that the claimant did not complete his change of address or pay for his driver's licence;

j) The Respondent does not consider that there is a time bar as the claimant has not been licensed to drive since September 3, 2014, that is for more than eight months;

k) The Respondent contends that the Appellant lost his employment by reason of his negligence. The Appellant did not have a valid licence at the time the employer conducted the check with the SAAQ;

l) The Respondent is of the view that obtaining a valid driver's licence was one of the Appellant's obligations. However, he neglected to pay for his licence. It is clearly established that failure to have a driver's licence constitutes misconduct under the Act;

m) The Appellant's psychological problems do not release him from his obligations;

n) The evidence clearly establishes that the claimant was dismissed as a result of his misconduct. The Commission submits that its decision is supported by the case law.

ANALYSIS

[41] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving benefits if he or she loses an employment because of misconduct.

[42] 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. In the Tribunal's view, neither the Commission nor the employer discharged that onus.

[43] "The onus of proving on a balance of probabilities that the claimant lost [his] employment because of [his] misconduct rests with the employer and the Commission." (*Larivée*, 2007 FCA 312 (CanLII)) However, the Tribunal is of the view that neither the employer nor the Commission discharged that onus based on the evidence submitted.

[44] 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)).

[45] For the Appellant to be charged with misconduct, he must have been aware that his act would invariably lead to his dismissal. It is unreasonable to conclude that the Appellant knew or ought to have known that his behaviour could lead to his dismissal since his psychological health was greatly compromised.

[46] The evidence shows that the Appellant lost all notion of the ordinary responsibilities of life. He lost his natural and psychological reference points and was unable to assess the scope of his actions as a whole.

[47] The Appellant's representative pointed out at the hearing that reprehensible actions of the same type by co-workers have been penalized by a requirement not to drive emergency vehicles but to work as support technicians.

[48] The Tribunal relies on the decision in *Mishibinijima v. Canada*, 2007 FCA 85 (CanLII), which 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."

[49] The Tribunal is of the view that the Appellant's act cannot be characterized as wilful or deliberate or so reckless or negligent as to approach wilfulness. As a result of several harmful experiences, the Appellant had simply lost his bearings.

[50] The Tribunal relies on the Federal Court of Appeal (*Tucker*, 1986 FCA 381), which determined that, "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."

[51] The Federal Court of Appeal determined that there must be a causal link between the misconduct complained of and the loss of employment.

[52] "The misconduct must cause the loss of employment and must be an operative cause." (*Brissette*, A-1342-92)

[53] However, the evidence clearly shows that the Appellant was no longer capable of calmly assessing the various situations he faced.

[54] The evidence does not show that the Appellant committed an act that resulted in his dismissal. His behaviour was not "wilful or deliberate or so reckless as to approach wilfulness," as established in *Tucker* 1986 FCA 381.

[55] For the Tribunal to conclude that there was misconduct, it must have relevant facts and sufficiently detailed evidence, first, for it to be able to know how the employee behaved and, second, to decide whether such behaviour was reprehensible (*Meunier*, A-130-96; *Joseph*, A-636-85). The medical evidence submitted by Dr. Gerard Leblanc, MD, FRCP (Psychiatrist), meets this requirement and provides a basis on which to find that the Appellant was not in any condition to know that his behaviour might lead to his dismissal.

CONCLUSION

[56] The appeal is allowed.

DATE OF REASONS: July 14, 2016

Alcide Boudreault
Member,
General Division
Employment Insurance Section