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

Citation: *D. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 109

Tribunal File Number: GE-16-584

BETWEEN:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Extendicare Tuxedo Villa

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: July 14, 2016

DATE OF DECISION: August 13, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. D. B., the Appellant (claimant) along with his representative Ms. Sandra Guevara- Holguin, Community Unemployed Help Centre attended the hearing.

Extendicare Tuxedo Villa, the employer **did not** attend.

INTRODUCTION

[1] On October 4, 2015 the Appellant established a claim for employment insurance benefits. On November 16, 2015 the Canada Employment Insurance Commission (Commission) notified the Appellant that they were unable to pay benefits as it was determined he lost his employment by reason of his own misconduct. On December 16, 2015 the Appellant made a request for reconsideration. On February 2, 2016 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal).

[2] In accordance with subsection 10(1) of *Social Security Tribunal Regulations* (Regulations) states the Tribunal may, on its own initiative or if a request is filed, add any person as a party to the proceeding if the person had a direct interest in the decision. In this case the Tribunal determined the employer had a direct interest and added them as a party to the appeal on March 29, 2016.

[3] In accordance with subsection 12(1) of the Regulations states if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of hearing. In this case on May 13, 2016 Canada Post confirmed the employer received the Notice of Hearing and on July 15, 2016 the employer contacted the Tribunal that they would not be attending hearing. Thus the Tribunal is satisfied the party received notice and therefore proceeded under the authority of the above-noted subsection.

[4] The hearing was held by In person for the following reasons:

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

b) The fact that the credibility may be a prevailing issue.

c) The fact that more than one party will be in attendance.

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

e) The fact that the appellant or other parties are represented.

f) 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

[5] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the *Employment Insurance Act* (the Act) because he lost his employment due to his own misconduct.

THE LAW

[6] Paragraphs 29(a) and (b) of the Act states for the purposes of paragraph 30(a) “employment” refers to any employment of the claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[7] 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.

[8] Subsection 30(2) of the Act stated 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

[9] On his application for benefits the Appellant completed the Dismissed Questionnaire stating he observed a resident walking very exhaustedly and was about to fall so he put her in a wheelchair and protected her with the seatbelt. He stated when his supervisor saw this she called the assistant director and was told he did not have to put the resident in the wheelchair and he was sent home that evening and suspended with pay from September 10 to 29th and then dismissed on September 30, 2015. He stated on October 6, 2015 the union sent the management a letter protecting against his dismissal and asked he be reinstated, however they refused. He stated that there were no previous occurrences of this type (GD3-7).

[10] A record of employment indicates the Appellant was employed with Extendicare from September 8, 2009 to September 30, 2015 and he was dismissed from his employment (GD3-13).

[11] On November 5, 2015 the Commission contacted the employer who stated the Appellant was dismissed because of his abuse of the care-home's resident and the Appellant was aware of the policies pertaining to the restraint of residents but he restrained a resident without authorization. The employer stated the Appellant admitted in the investigative interview that he violated the policy and signed a counselling memo and the employer would send it to the Commission. The Commission followed up on the counselling memo however the employer now states there is not one and agrees to send a copy of the investigation notes. The employer stated that without a doctor's or nurse's approval, the Appellant should not have restrained the movement or freedom the residents and although this was the only violation that the employer was aware of, the employer considers it as a gross misconduct (GD3-14).

[12] A letter of termination dated September 30, 2015 indicates the Appellant on more than one occasion (1) confined a resident to a wheelchair; (2) applied a physical restraint without an order to do so; and (3) placed a resident with a history of falls at an increased risk for injury. It further stated his actions were unacceptable and in serious violation of Extendicare's C.A.R.E principals, Extendicare's Standards of Conduct, Extendicare's Commitment to Residents and Extendicare Tuxedo Villa's Resident Bill of Rights (GD3-15).

[13] The employer provided a copy of the investigative report and the Extendicare Policy on Restraints (GD3-16 to GD3-50).

[14] On November 16, 2015 the Commission notified the Appellant they were unable to pay benefits as it was determined he lost his employment by reason of his own misconduct (GD3-52 to GD3-53).

[15] On December 31, 2015 the Appellant made a request for reconsideration. He included a copy of his Canadian Union of Public Employees grievance form as well as details of the situation and his actions in relation to the alleged misconduct. He stated that he took the action to place the resident in the wheelchair and fasten the protective belt for her own safety and he had coworkers who attested to the situation however their testimonies were ignored (GD3-54 to GD3-58).

[16] On January 15, 2016 the Commission contacted the Appellant who stated that he did use a restraint on a resident and knew of the policy. He stated that the reason he did was the resident was tired and was going to fall. He stated this is his patient and he stays with her all night. He stated he put the patient with others and was only gone for 5 minutes when he went to dispose of the laundry and the supervisor saw her strapped in and reported him. He stated the policy came in two years ago and he has worked for the company for 6 years and had never had an incident. He stated is concern was for the patient and not for the rules because he knew what was best for the resident (GD3-59).

[17] The employer submitted the Extendicare Tuxedo Villa Resident Bill of Rights and Extendicare Resident Abuse – Staff to Resident Policies (GD3-61 to GD3-70).

[18] On January 22, 2016 the Commission contacted the employer who confirmed the Appellant was dismissed for breaching company policy for restraining someone. The Commission asked the employer to clarify the procedure if a patient was tired and he responded the patient should have been taken to her room. He stated that the Appellant was wrong when he stated he was not allowed to take her back to her room. He stated that this patient was unable to unbuckle the seatbelt so one should not have been put on. The employer stated that the patient was the mother of another staff member but she worked on a different wing and they

would not come into contact with each other. He stated it nurse in charge the Appellant worked with reported the incident (GD3-71).

[19] On February 2, 2016 the Commission contacted the Appellant informing him the decision was maintained and of the employer statements. The Appellant stated that he should not have been dismissed and he should have been given a 3 day suspension. He stated he was only trying to help the person he had cared for six years (GD3-72).

[20] On February 2, 2016 the Commission notified all parties the decision of misconduct was maintained and provided the information on their right to appeal to the Tribunal (GD3-73 to GD3-76).

EVIDENCE AT THE HEARING

[21] The Appellant along with his representative argued:

a) The resident is the mother of a nurse who works in the facility;

b) This particular resident has a history of falling and the Appellant often would put the resident in a wheelchair and would leave her walker close by in the event she wanted to get up. However in this situation the resident was extremely tired and about to fall over and get seriously hurt, so for her safety he placed her in the wheelchair and fastened the seatbelt;

c) The Appellant took the resident to the nurses station where she could be close to a nurse if something happened;

d) The Appellant could not put the resident in bed and leave her alone because she would just attempt to get up and could fall;

e) The rest of the health care aides were also very busy with their own residents;

f) After the Appellant put the resident in the wheelchair he quickly went to drop off the laundry and return to the resident however by then the nurse had seen the patient with

the seatbelt on and filed a complaint against the Appellant and he was dismissed immediately;

g) The employer failed to provide copies of the policies the Appellant allegedly did not follow;

h) The Appellant has filed a grievance against the employer's decision with arbitration process to begin in November 2016; and

i) In C.D. v. Canada Employment Insurance Commission (2014 SSTGDEI 138) concluded on a similar case and S.L. v. Canada Employment Insurance Commission (2014 SSTGDEI 30) ruled in on an almost identical case.

SUBMISSIONS

[22] The Appellant along with his representative submitted that:

a) The Digest of Benefit Entitlement Principals, on section 7.3.3 talks of insubordination and that no misconduct exists where the refusal or disobedience can be explained by a serious and genuine misunderstanding not involving any bad faith on part of either party. The same can be said when it is apparent that there was a personality conflict between the employee and the employer and was the cause for the dismissal and the reason given by the employer was a mere pretext. An employee may find it impossible le, in all conscience, to follow a policy set out by the employer It should be considered in this case what is the situation that led to the problem, whether the actual policy appears to be reasonable and whether in the circumstances other reasonable alternatives existed which would have remedied the situation;

b) He was aware of the policy that clearly states: 2.3 Emergency Restraint: The occurrence of behaviour that is imminent danger to the resident or others and which necessitates and leads to the use of a Restraint and 2.6 A front closing seat belt or a lap tray that can be easily removed by a resident is not a Restraint. In this case he made the decision to fasten the resident's seatbelt; the sole purpose of this action was to keep the resident safe. He did not want her to fall and get seriously hurt. The resident was extremely tired

and restless so he decided to protect her. Also, the employer has acknowledged that the resident was able to remove the seat belt if needed. Moreover, nowhere in this policy is it specified that not following these procedures could lead to immediate termination;

c) In the termination letter the employer accused him of violating up to four policies (GD3-15); however in the docket the employer only provided the Restraint Policy, the Resident Abuse policy and the Resident Bill of Rights, none of which he violated;

d) The Commission failed to ask the employer to explain why and how the Appellant seriously violated these policies and where does it say what he did was considered "gross misconduct";

e) The Digest of Benefit Entitlement Principals on Section 7.1.0 defines misconduct and in this case his actions cannot be considered ill-intentioned or incompatible with the suitable carrying out is duties. He was trying to protect a resident from imminent danger. He needed to carry out the rest of his duties that involved taking care of the other 12 residents that same night. He did what a reasonable person would have done in this case; protect the safety of a senior resident. Also, he could not have foreseen that by doing this, he could get immediately dismissed;

f) He has been accused of gross misconduct following the violation of several policies. The documents in the docket do not prove any misconduct. Instead, it shows that the Appellant applied an "emergency restraint" to a patient in imminent danger;

g) His actions should not be considered gross misconduct. He did not break any policies and the purpose of his actions was to protect the resident against getting hurt by her own actions. This is a patient with Alzheimer's disease and cannot be responsible for her own actions and cannot make reasonable decisions; and

h) The employer has not provided any documented proof of gross misconduct. The Appellant's actions were justified by the circumstances and he was no committing an infraction that constituted gross misconduct either.

[23] The Respondent submitted that:

a) It is not in dispute that the claimant used a safety belt on a resident, without authorization. The use of a safety belt, according to the employer's policy is considered a 'physical restraint'. During the employer's investigation, the claimant acknowledged he participated in the restraint policy review, which is held 3-4 times per year and that it was clear that a nurse has the authority to apply a restraint; he accepted the blame for the use of the unauthorized safety belt but he felt it was for the safety of the resident; and he confirmed a seatbelt is considered a 'restraint';

b) By the claimant's own admission, he was aware of the employer's policy regarding the use of restraints on a resident. The Commission recognizes that there was no wrongful intent but respectfully submits that the act of restraining the resident in the wheelchair was none the less a conscious act;

c) It was the claimant's own actions that caused his job loss; he breached the employer's policy regarding the use of restraints on a resident. The Commission maintains that the claimant's belief that using the safety belt on the resident while she was in the wheelchair was for the safety of the resident, is not relevant on whether or not his conduct constitutes misconduct;

d) Furthermore, the Federal Court has held that it is not necessary that there be wrongful intent for an act to amount to misconduct. It is sufficient if the act is done consciously, deliberately, or intentionally. *Canada (AG) v. Hastings*, 2007 FCA 372; *Canada (AG) v. Johnson*, 2004 FCA 100; and

e) Based on the evidence, the Commission concluded that the claimant's loss of employment constituted misconduct within the meaning of the Act because he wilfully restrained a resident in a wheelchair without authorization and in doing so, knowingly breached the employer's policy on 'restraining' a resident. Consequently, the claimant should be subject to disqualification pursuant to section 29 and 30 of the Act.

ANALYSIS

[24] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

[25] 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 misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemier*, 2012 FCA 314).

[26] As Justice Nadon wrote in (*Mishibinijima v. Canada* 2007 FCA 36), 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.

[27] The Tribunal must first identify if the alleged act constituted misconduct and if the Appellant's conduct complained of was the cause of the dismissal and not merely an excuse for dismissal. (*Davlut v. Canada (A.G)*, A-241-82).

[28] In this case, the Tribunal finds that the alleged breach of polices would constitute misconduct and from the Appellant's own admission that he did place a resident in a wheelchair and fasten the seatbelt. However, in this case the Tribunal cannot find that Appellant's actions were willful and of such disregard that a breach in the employer-employee relationship caused irreparable damage to the employer and was cause for the Appellant's dismissal.

[29] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as she did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[30] The Respondent presents the argument that it is not in dispute that the claimant used a safety belt on a resident, without authorization. The use of a safety belt, according to the employer's policy is considered a 'physical restraint'. During the employer's investigation, the claimant acknowledged he participated in the restraint policy review, which is held 3-4 times per year and that it was clear that a nurse has the authority to apply a restraint; he accepted the blame for the use of the unauthorized safety belt but he felt it was for the safety of the resident; and he confirmed a seatbelt is considered a 'restraint'. The Respondent presents the argument that it was the claimant's own actions that caused his job loss; he breached the employer's policy regarding the use of restraints on a resident. The Commission maintains that the claimant's belief that using the safety belt on the resident while she was in the wheelchair was for the safety of the resident, is not relevant on whether or not his conduct constitutes misconduct.

[31] The Appellant presents the argument that he was aware of the policy that clearly states: 2.3 Emergency Restraint: The occurrence of behaviour that is imminent danger to the resident or others and which necessitates and leads to the use of a Restraint and 2.6 A front closing seat belt or a lap tray that can be easily removed by a resident is not a Restraint. In this case he made the decision to fasten the resident's seatbelt; the sole purpose of this action was to keep the resident safe. He did not want her to fall and get seriously hurt. The resident was extremely tired and restless so he decided to protect her. Also, the employer has acknowledged that the resident was able to remove the seat belt if needed. Moreover, nowhere in this policy is it specified that not following these procedures could lead to immediate termination.

[32] In this case the Tribunal finds the Appellant to be a credible witness and that he acknowledges that he did place the resident in wheelchair and fasten the safety belt was only done for the resident's safety, which the Tribunal finds would be a reasonable act.

[33] The Tribunal finds the restraint policy submitted the employer states: Situations may arise where the safety of resident or others is at risk. In such situations interventions will be implemented to reduce the level of risk; the use of a restraint may be one such intervention. When restraints are required the least restrictive type of restraint will be implemented; and Registered Staff may initiate the use of a restraint in an emergency situation and the use of the

restraint may last no longer than 12 hours without a physician order. As it well it outlines the procedures of using it does not specify it must be however it does not indicate that failing to abide by the policy would lead to immediate termination.

[34] The Tribunal finds from the Appellant`s oral evidence that staff are trained and are Certified Healthcare Attendants and in this situation he believed that when he seen the resident having difficulty walking down the hall she was in imminent danger of falling and he made the decision to place her in a wheelchair.

[35] The Tribunal finds from the Appellant`s oral evidence that substantiates his actions were solely based on safety, as when he did secure the resident in the wheelchair he moved her to the nurses station to ensure she would be cared for in the event something was to go wrong before he was able to return, which in this case would have been minutes.

[36] The Tribunal finds from the evidence on the file, in particular in the letter of termination, the employer clearly supports that this particular resident has a history of falls at increased risk for injury. The policy also states that registered staffs may initiate restraint in an emergency situation, to which the Appellant believed be so.

[37] The Tribunal finds that an essential element of the kind of misconduct that warrants dismissal is that the conduct must have been willful and in disregard of the effect on the job performance.

[38] The Tribunal finds the evidence cannot support the Appellant`s actions were willful and that he knew or ought to have known he would lose his job for ensuring the safety of a resident. The Tribunal finds that had the Appellant not attended the resident and ensured her safety then misconduct would apply. However this is clearly not the case.

[39] The Appellant presents the argument that in the termination letter the employer accused him of violating up to four policies (GD3-15); however in the docket the employer only provided the Restraint Policy, the Resident Abuse policy and the Resident Bill of Rights, none of which he violated. The Commission failed to ask the employer to explain why and how the Appellant seriously violated these policies and what he did was considered “gross misconduct”.

[40] The Tribunal finds that it unfortunate the employer did not attend the hearing to support the allegations as outlined in the termination letter or how the Appellant violated the four polices, and in this case the Tribunal finds the employer failed to provide evidence to support he violated the policies, including the Restraint Policy considering the circumstances where the resident was clearly in imminent danger.

[41] The Tribunal finds that the Commission failed to discharge the burden of proving the Appellant's misconduct within the meaning of the Act. Therefore with the evidence before it, the Tribunal accepts the direct evidence of the Appellant than that of the employer`s hearsay evidence and the Tribunal relies on the Federal Court decision of (*Canada v. Jones* A-371-06.) and finds the Appellant should not be disqualified from benefits because his dismissal was not caused by his own misconduct (*Meunier v. Canada (A.G.))* A-130-96; and (*Choinier v. Canada (A.G.)* A-471-95

[42] As cited in (*Canada (A.G.) v. Tucker*) A-381-85, misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Willful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere "carelessness" does not meet the standard of willfulness required to support a finding of misconduct.

[43] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[44] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the claimant's dismissal from employment (*Macdonald* A-152-96).

[45] The Tribunal finds that a disqualification should not be imposed because the Appellant did not lose his employment due to his own misconduct as per the Act.

[46] In this case the Tribunal finds the Appellant has provided substantial evidence that he did not know that his actions would lead to his dismissal and the Tribunal is satisfied the

Appellant believed he was making the right decision and his actions were made out of care and compassion for the safety of the resident and were not wilful.

CONCLUSION

[47] The appeal is allowed.

Teresa Jaenen
Member, General Division - Employment Insurance Section