



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. R. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 118

Tribunal File Number: GE-16-830

BETWEEN:

J. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Joseph Wamback

HEARD ON: September 28, 2016

DATE OF DECISION: September 28, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, J. R. did not attend the video conference hearing. The Tribunal verified that the Notice of Hearing was delivered to the Appellant on May 12, 2016.

INTRODUCTION

[1] The Appellant filed for benefits and was denied at the initial level by the Respondent. The Appellant requested reconsideration and was denied at the reconsideration level by the Respondent. Then Appellant filed an appeal with the Tribunal and a hearing was scheduled.

[2] The hearing was held by Videoconference for the following reasons:

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

[3] The Appellant is appealing the Respondent's decision resulting from his request for reconsideration under Section 112 of the *Employment Insurance Act* (the Act) regarding a disqualification imposed pursuant to sections 29 and 30 of the Act because he lost his employment by reason of his own misconduct.

EVIDENCE

[4] The Appellant filed for sickness benefits on September 9, 2015. He stated he was dismissed from his job. (GD3-3 to 12)

[5] The Appellant worked for The Second Cup Ltd. From July 10, 2015 to August 29, 2015 where he accumulated 300 insurable hours and was dismissed from his job. (GD3-13)

[6] The Respondent attempted to contact the Appellant and the employer without success on October 7, 2015 and October 8, 2015. The Respondent left messages for the Appellant to return the call or they will make a decision based on the information on hand. (GD3-14, 15)

[7] The Respondent notified the Appellant on October 14, 2015 that they are unable to pay Employment Insurance sickness benefits from August 31, 2015 because they do not have a medical certificate to support his claim. (GD3-16)

[8] The Appellant requested reconsideration on January 20, 2016. He explained his late request was because the decision letter was sent to an incorrect address. He stated that his misconduct was a direct result of his sickness. In 2016 his father in laws' legs were amputated and his wife had moved out of the house. He was diagnosed with fibromyalgia. He was worried how these events would affect his health. He was working at South Street Burger prior to taking the job with Second Cup. Because he was working 60 hours or more a week, his doctor and himself decided that he leave South Street Burger to find something else that would allow him to have more time for his health. So he left to go to Second Cup. Initially things were well but deteriorated. He made a formal complaint of harassment but did not hear from anyone until the middle of August. By then his health issues were out of control with constant flare ups. He began gambling as it was his way to escape. He informed his employer that he needed help with a gambling addiction, and this is what brought attention to the actions that he had done. Since then he has reached out for counselling and help and he is still doing so. He stated that if it was not for the downward spiral of his health and eventual gambling addiction he would not have been in this situation. (GD3-20 to GD3-26)

[9] The employer advised the Respondent on February 16, 2016 that the Appellant's dismissal was a result of him stealing cash. The Appellant's immediate supervisor stated the Appellant worked as a manager for their corporate cafe and was dismissed for theft which he admitted to the employer and to the police. The Appellant was charged and the matter is with the police. (GD3-27)

[10] The Appellant advised the Respondent that he lost his employment as a result of an act of theft. He stated that many things were happening in his personal life, including separation from his wife and he decided to take money from his employer to help win back his wife. He

also had some health related issues he was dealing with. He pled guilty to the charge and he is in the process of paying back the money. (GD3-28)

[11] The Respondent notified the Appellant on February 16, 2016 that they have performed an in-depth review of the circumstances of the case and of any supplementary information provided and based on their findings and the legislation advised that they have not changed the decision as communicated on October 14, 2015. (GD3-29)

[12] The Appellant filed an appeal with the Tribunal on February 29, 2016. (GD2-1 to GD2-8)

SUBMISSIONS

[13] The Appellant submitted that;

- a) He took the money from his former employer during the month of August. The money he took was to enable his sickness which is an addiction to gambling. He did not have the issue before this time.
- b) He had personal difficulties the past calendar year. He separated from his wife. He left another employment prior to this one due to health reasons.
- c) At Second Cup things turned sour very quickly and he submitted a formal complaint for discrimination and harassment in July 2015.

[14] The Respondent submitted that;

- a) Subsection 30(2) of the Act provides for an indefinite disqualification when the appellant loses his employment by reason of his own misconduct. For the conduct in question to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or so reckless as to approach willfulness. There must also be a causal relationship between the misconduct and the dismissal.
- b) Admission is the most convincing form of evidence. And the information pertaining to the event leading to the termination of employment is uncontested because the Appellant admitted to it and pled guilty in Court. Since Appellant stated he was in the process of paying back the money, the Respondent contends that his actions do constitute a breach of the employer-employee relationship. The Appellant's behavior hindered the

relationship of trust that existed between him and Second Cup Ltd. Because the Appellant was a store manager, we can only anticipate the impact of his actions on his job performance while handling cash and other valuable items on behalf of the employer. Therefore, his actions fit the definition of misconduct as defined in the jurisprudence.

- c) The Respondent does sympathize with the Appellant for having been though a lot in his personal life but the Appellant must have known that his job could be in jeopardy when he made the decision to take money from the till.
- d) The Respondent submits that the jurisprudence supports its decision. The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of an appellant 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
- e) 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 appellant 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 appellant's misconduct and the appellant'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

ANALYSIS

[15] The Appellant did not attend the videoconference. The videoconference hearing was scheduled to commence at 1:00 PM, September 28, 2016. The Tribunal Member commenced recording the hearing at 12:55 PM September 28, 2016. The Tribunal waited on the videoconference until 1:25 PM September 28, 2016 and the Appellant did not join the hearing, nor did he contact the Tribunal to request an adjournment or delay. The Tribunal is satisfied that the Appellant received the notice of hearing dated February 22, 2016 as documented by Canada Post tracking # X delivered May 12, 2016. The Tribunal proceeded with the hearing in accordance with Social Security Tribunal Regulations 12 (1).

[16] There is only one (1) issue before the Tribunal. The Appellant is appealing the Respondent's decision that the reason he lost his employment constitutes misconduct in accordance with the provisions of the Act.

[17] The Act does not define "misconduct". The test for misconduct is whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his/her actions would have on job performance. According to the Federal Court of Appeal, "... there will be misconduct where the conduct of an appellant was willful, i.e. 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 appellant 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."(*Mishibinijima A-85-06*).

[18] The Court defined the legal notion of misconduct within the meaning of subsection 30(1) of the Act as willful misconduct, where the appellant knew or ought to have known that his/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 appellant's misconduct and the appellant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Lemire*, 2010 FCA 314 (CanLII)).

[19] In this case the Tribunal finds that the evidence provided by the employer was affirmed by the Appellant. The Appellant advised the Respondent that he was dismissed because he was responsible for theft of money from his employer. He pled guilty to the charge and he is in the process of paying back the money. (GD3-28)

[20] The Appellant gave his gambling addiction as the reason for his theft and he contends that this is an illness and that his dismissal was wrongful and because of his illness he was not guilty of misconduct. Gambling addiction is an illness which is deliberately self-inflicted and cannot be relied upon to avoid a finding of misconduct. The Appellant by his own admission had a gambling addiction and he used that fact to attempt to convince the Respondent that his addiction should not be considered misconduct. The Tribunal finds that is an error, however, to characterize an addiction as conduct which is not wilful or deliberate. A gambling addiction is a

personal failing completely under Appellant's control to either let run out of control or to be kept under control by exercising self-control

[21] The Tribunal finds that the Appellant lost his employment because he stole money from his employer. The Appellant's immediate supervisor stated the Appellant worked as a manager for their corporate cafe and was dismissed for theft which he admitted to the employer and to the police. The Appellant was charged and the matter is still in the hand of the police. (GD3-27)

[22] The Tribunal finds that the Appellant's acts clearly constitute misconduct within the meaning of the Act and that the loss of the Appellant's employment is the consequence of one or more deliberate acts on his part.

[23] The Tribunal finds that the evidence presented shows that the Appellant stopped working for his employer because of his willful and deliberate act.

[24] The Tribunal is of the opinion that the Appellant's alleged acts were of such scope that he could normally foresee that it would likely result in the termination of his employment or his dismissal. He was aware that his conduct was such as to interfere with his obligations to his employer and that he could be dismissed.

[25] The Tribunal finds that the Appellant's actions and activities constitute misconduct within the meaning of the Act and that the Appellant's separation from employment is his own fault.

[26] The Tribunal finds that the appeal on this issue does not have merit

CONCLUSION

[27] The appeal is dismissed.

Joseph Wamback
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

30 (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.

(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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

29 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;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment,
and

(xiv) any other reasonable circumstances that are prescribed.