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

Citation: *A. H. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 144

Tribunal File Number: GE-16-1571

BETWEEN:

A. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: November 3, 2016

DATE OF DECISION: November 14, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. H., the claimant, did not attend the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on October 29, 2015. He filed for Employment Insurance (EI) benefits on November 2, 2015. An initial claim for EI benefits was established on November 1, 2015. The Canada Employment Insurance Commission (Commission) denied the claim because it was determined that the claimant lost his employment as a result of his misconduct. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated April 5, 2016. The claimant appealed to the Social Security Tribunal (SST).

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

a) The complexity of the issue under appeal.
b) The fact that the claimant will be the only party in attendance.
c) The information in the file, including the need for additional information.

[3] The claimant did not attend the hearing scheduled for November 3, 2016. The Tribunal waited for more than a week to hear from the claimant however, the claimant did not contact the SST. Information retrieved from Canada Post indicates that the Notice of Hearing was successfully delivered on September 26, 2016.

[4] Subsection 12(1) of the *Social Security Tribunal Regulations* states that 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 the hearing.

[5] Based on the information received from Canada Post, the Tribunal is satisfied that the claimant received notice of the hearing.

ISSUE

[6] The issue under appeal is whether the claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

[7] The claimant applied for regular EI benefits stating that he was no longer working due to a shortage of work and he would not be returning to this employer (Page GD3-3 to GD3-12).

[8] The employer submitted a Record of Employment (ROE) dated November 5, 2015 indicating that the claimant began working as a field labourer on October 14, 2014 and he was dismissed on October 29, 2015 accumulating 2495 hours of insurable employment (Page GD3-13).

[9] The employer was contacted by the Commission and she stated that the claimant was fired because there was incident after incident (Page GD3-15).

[10] The claimant's manager was contacted by the Commission and he stated that the claimant was dismissed for his poor work ethic and general abuse and disregard for company property; in this case, the company vehicle. He explained that the claimant was responsible for the upkeep of the truck but he said that there were cigarette butts, dog hair from the claimant's dog who was not supposed to be in the truck and a strong odour of marijuana. The employer stated that the claimant had received many verbal warnings in the past year and was on his fourth and final written warning at the time he was dismissed (Page GD3-16).

[11] The claimant was contacted by the Commission and he stated that he had gone home for the weekend and when he returned to work on Monday, he was told he was laid off and he did not know that he was dismissed until he was advised by Service Canada. He stated that his manager told him "that's what you get for going to school." He stated that he thinks the employer did not want him to go back to school as he had a contract for pipeline work. He stated that he received a call from the employer advising him that he was being laid off as he was going to school and the employer wanted the claimant to cancel his courses. The claimant

further stated that he was only warned once for being late and there were no other warnings given to him. He stated the warning was about seven or eight months ago (Page GD3-17).

[12] The employer submitted a written warning signed and dated by the claimant on April 12, 2015 for showing up on site not shaved with facial hair and not complying with the customer safety policy (Page GD3-19).

[13] The employer submitted a written warning dated June 19, 2015 stating that the claimant refused to sign. The warning states that the claimant was speeding for an extended period on the highway due to being late for the job; the vehicle was taken away for about five days (Page GD3-20).

[14] The employer submitted a written warning dated September 21, 2015 which indicates that the claimant refused to sign. The warning states that the vehicle slid into pipeline scaffolding and was damaged on the tailgate and right front fender. The vehicle was further damaged while being pulled out by a hoe. The claimant was warned to take proper care of company vehicles and drive them according to weather conditions (Page GD3-21).

[15] The employer submitted a written warning dated October 29, 2015 which is not signed by the claimant. The warning states that the claimant was overbilling customers and overbilling for shop time. The employer indicated that the claimant stated that the customer signed the ticket then it is okay to overbill and with regards to shop time, he needs to make up time somehow (Page GD3-22).

[16] The employer submitted a warning dated October 29, 2015 which is not signed by the claimant. The warning states that the claimant was not completing pre-trip inspections, speeding, the log book in unit #5 must be done and for using the vehicle for personal use. The claimant was requested that he complete the daily inspections. He was warned that the vehicle be used for company use only stating that he used unit #3 for 153Kms for personal use. He was further warned that he was speeding in the new truck and unit #5. The warning stated that the vehicle was taken away for October 29, 30, 31 and November 1, 2015 (Page GD3-23).

[17] The employer submitted a warning dated October 29, 2015 stating that a client safety representative phoned the employer to complain about the claimant's attitude on the worksite.

The claimant was given the client's "pre-job" to read and sign off and basically signed it and passed it back to the safety person. When the claimant was asked why he did not bother to read it over, he gave the safety representative attitude. The claimant was later told to put different safety glasses on but he did not listen and continued working. The warning stated that upon returning from this job, the claimant's crew truck was taken away from him for the weekend. He did not leave the keys with them and they were forced to track him down and recover both sets of keys (Page GD3-24).

[18] The employer submitted a warning notice dated November 2, 2015 which is not signed by the claimant. This warning states that upon inspection of unit #3 which was the crew truck the claimant was in charge of, they found a number of cigarette butts littering the vehicle. The vehicle was also completely disgusting with garbage and filth spilt and littered throughout the truck. There was also dog hair all over the vehicle's seats and headrests which the claimant had been warned about both smoking in the vehicle and keeping the vehicle clean and not having his dog in the company vehicle. The warning stated that it was determined that after numerous warnings and discussions that the claimant did not care about the employer's rules and procedures and he was subsequently let go from his position (Page GD3-25).

[19] The employer submitted pictures of the truck with one picture showing cigarette butts and a package of Export A cigarettes (Pages GD3-26 to GD3-31).

[20] The employer submitted the Company Vehicle Agreement of Usage signed by the claimant on November 19, 2014 which states, in part, that he agreed to drive in a safe and respectful manner, to complete a daily mileage log and to inform the employer prior to any personal travel if he wishes to use the vehicle for over 100KMs travel understanding that he will be responsible for any fuel for personal travel over 100KM. The Agreement further stated that the vehicles are non-smoking and the claimant was responsible for keeping the truck clean (Page GD3-22).

[21] The employer submitted a Distance Travel Report from October 28, 2015 showing the claimant drove the vehicle for 153KMs however it is handwritten on the report that the claimant he did not work this day (Page GD3-33).

[22] The employer was contacted by the Commission and the manager stated that the claimant was dismissed due to the condition of the truck. He was asked about the claimant's statement that he cancel his training and the employer responded that this was not even discussed. The employer confirmed that the claimant was dismissed over the phone (Page GD3-35).

[23] The claimant was contacted by the Commission and he stated that he called the employer on Monday and asked about work; he was told that it was rather slow and he can cancel the school. The claimant stated that he was already booked in to school and whether the employer had the pipeline work, he was going to school; he was told that if he was going to be like that he would be laid off now. The claimant further stated that the truck he used was also driven by other employees and he disputes that he was smoking in the truck. He stated that he smokes John Player. He added that he did not have time to clean the truck due to the long hours (Page GD3- 36).

[24] The Commission sent a letter dated January 25, 2016 informing the claimant that he was unable to receive EI benefits because he lost his employment as a result of his misconduct (Page GD3-38).

[25] Following the claimant's Request for Reconsideration he was contacted by the Commission and he stated that he disagrees that misconduct was proven. He stated that he was laid off by his manager who told him that there was not much work and asked him if he wanted a lay off as he was going to attend his apprenticeship training soon anyways. He added that he left his work boots there as he assumed he would be returning. He stated that he found out he was being dismissed during the course of the initial investigation into his reason for separation (Page GD3-41).

[26] The claimant stated that the employer was getting back at him for leaving and going to school even though there was a big job coming up with the pipeline. He stated that he was approved to go to school but did not have a start date yet. He stated that the employer said he was dismissed because he wanted to "fuck him over" for leaving when a big job was about to start (Page GD3-41).

[27] The claimant was asked about the disciplinary notices and he stated that he was aware of a couple and stated that all employees received notices during the course of employment; they were just part of the job and a requirement for the employer to have a safety record (Page GD3-41).

[28] The claimant was asked about the warning dated April 5, 2015 and he stated that he was shaved and it was his partner who was not. The customer complained to the employer and both employees were written up as it is part of the customer's safety policy that all workers are clean shaven. The claimant stated that he was forced to sign the warning (Page GD3-41).

[29] The claimant was asked about the warning dated June 19, 2015 and he stated that the truck's GPS showed he was going fast however, he refused to sign the warning since he was not speeding. He stated that his helper was driving the vehicle and he was the one who received the warning. While the warning stated that his truck was taken away, he stated that he still used it to get to and from work and during work hours (Page GD3-41).

[30] The claimant was asked about the warning that stated he damaged the vehicle due to him sliding into the scaffolding and he agreed there was an accident but he stated that the weather was an issue and if his employer thought he was driving unsafely, he wondered why he was not required to take a "piss test." The claimant stated that the incident did not warrant a suspension or disciplinary action and again he refused to sign the warning (Page GD3-41).

[31] The claimant stated that the next warnings are fabricated by the employer and he was not told about them and denies that the infractions occurred. The claimant stated that he bills customers properly as per his employer's instructions and overbilling for shop time did not occur. The claimant stated that on October 28, 2015 he was advised by the employer to go to the shop and he lives 50KMs away from work. He further stated that he always does a pre-trip inspection, he was not speeding, he did not use the vehicle for personal use and he is never required to complete a log book and had never been asked to do so (Page GD3-41).

[32] The claimant disagreed with the warning that discussed the claimant's attitude problem on the work site. He stated that the story is made up. Regarding the safety glasses, the claimant stated that if he was not wearing the proper safety glasses, the safety representative would have

shut down the job site immediately. The claimant was asked about his truck being taken away and he stated that he left the truck at his place of employment and left the keys on the key board where he normally leaves them. The claimant said again that he thought he had been laid off and left the truck there since he was not working there (Page GD3-41).

[33] The claimant was advised that the employer submitted pictures of the truck and he responded by stating that he does not believe the employer took pictures of the truck he was using. The claimant stated that he knows not to smoke in the truck and had never been warned about it before because he had never done it before. He also denied having his dog in the truck at any time. The claimant stated that he is confused as to why his employer would attack him like this and stated that all the later warnings on October 29 to November 2, 2015 are made up just to have a reason to dismiss him; his employer was really mad about him leaving to go to school (Page GD3-42).

[34] The employer was contacted by the Commission and the manager stated that he made it clear to the claimant that he was dismissed because of the many issues listed in the warnings. The employer stated that the claimant texted him two days after he was dismissed and asked if he could be laid off instead so he could still collect EI benefits. The employer further stated that it was the claimant's requirement to complete the log books daily for the larger vehicles he was driving. The employer stated that he would often get phone calls about the claimant's attitude and the employer would try to work with the claimant when he received these calls. The employer denies that he called the claimant in to work on October 28, 2015 and thought that the claimant used the truck to go hunting that day but is unable to prove it. The employer admitted that there was a big pipeline job coming up but he was going to fire the claimant regardless. The employer further stated that he did not know when the claimant was going to go to school and he did not care because of the other issues he was having with him. He stated that the final warnings on October 29, 2015 were made clear to the claimant and he was aware of them; the claimant just shrugged them off and did not say anything. The employer agreed to send pictures but did not have the texts or log books (Page GD3-43).

[35] The employer resent the pictures via email which now clearly show garbage and cigarette butts with a package of Export A cigarettes, the seats and the head rests are covered in dog hair and there are spills in the cup holders (Pages GD3-44 to GD3-50).

[36] The claimant stated that he was registered for school in early 2015 and it was planned for so long. He confirmed that he took a layoff to go to school in January and February (Page GD2- 5).

SUBMISSIONS

[37] The claimant submitted that:

a) He paid into EI for many years without collecting a dime. His employer lied to him and said he would give him a layoff for school and decided later to terminate him without reason. He needs EI to go to school and pay for his mortgage; if he does not get it he will lose everything (Page GD3-39).

b) His employer said he would keep him employed until he was ready to go to school in January and February 2016 but he found out when he applied for EI for January and February that his employer opted to fire him without reason instead because he wanted to go to school instead of work during the winter; his employer tried to screw him over by lying to him (Page GD2-5).

[38] The Commission submitted that:

a) The claimant lost his employment by reason of his own misconduct. As a result the Commission imposed an indefinite disqualification effective November 1, 2015 pursuant to subsection 30(1) of the EI Act (Page GD4-2).
b) Numerous warnings had been given to claimant regarding various infractions. The final incident that culminated in claimant's dismissal was the cleanliness of truck. The employer had provided pictures of the trucks interior as well as numerous written warnings. The statement of the claimant that he was not smoking in the truck is not credible. The claimant is denying most of the allegations submitted by the employer but his statements are not credible as there are written warnings to support otherwise. The

claimant should have been aware that his employment was tenuous due to the number of warnings given to him and he should have adhered to policy of employer (Page GD4-3).

ANALYSIS

[39] The relevant legislative provisions are reproduced in the Annex to this decision.

[40] The EI Act does not define misconduct. The Federal Court of Appeal (FCA) has explained the legal notion of misconduct for the purposes of this provision as acts that are wilful or deliberate, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Tucker v. Canada (Attorney General)*, A-381-85)

[41] The FCA has further explained that wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Secours v. Canada (Attorney General)*, A-1342-92).

[42] Furthermore, the FCA has explained that to determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment. The misconduct must not be an excuse or pretext for dismissal; it must cause the loss of employment (*Lemire v. Canada (Attorney General), 2010 FCA 314*; *Nguyen v. Canada (Attorney General)*, 2001 FCA 348; *Brissette v. Canada (Attorney General)*, A-1342-92).

[43] The onus of proof, on the balance of probabilities, lies on the Commission to establish that the loss of employment by a claimant was "by reason of their own misconduct" (*Minister of Employment and Immigration v. Bartone*, A-369-88).

[44] In this case, the claimant applied for EI benefits stating that he was no longer working due to a shortage of work. When he was contacted by the Commission he stated that when he returned to work he was told that he was laid off and he did not know that the employer had

said he was dismissed until he was advised by Service Canada. He stated that he believed his manager was angry with him because they had a big pipeline contract coming up and the employer did not want him returning to school.

[45] The employer tells a different story. The employer explained that the claimant was dismissed from his employment because of his poor work ethic and general abuse and disregard of the company property, namely the company vehicle. The employer stated that the claimant received many verbal warnings in the past year and was on his fourth and final written warning at the time of his dismissal.

[46] Conflicting evidence should be resolved by accepting the evidence which is relevant, reasonable and reliable having regard to the circumstances. In the present case, the Tribunal finds the statements made by the employer to be more reliable and therefore, more credible. The claimant initially explained that he returned to work on Monday and was told that he was laid off. He then stated that his employer called him and told him he was laid off and in a subsequent interview with the Commission he stated that he called the employer. The claimant applied for EI benefits stating that he would not be returning to work with this employer but then later stated that he left his work boots behind because he assumed he would be returning to work. The claimant initially informed the Commission that he was only warned once for being late and there were no other warnings given to him however, the employer submitted several warnings which the claimant was asked about and acknowledged he knew about. As a result of these discrepancies with the claimant's statements, the Tribunal is more willing to accept the employer's statements as more credible. Therefore, the Tribunal is satisfied that the claimant was not let go due to a shortage of work but was dismissed from his employment.

[47] The Tribunal sought guidance from CUB 67184, where Justice Goulard upholds the principle established by Justice MacGuigan in the FCA decision *Tucker*, A-381-85 who states:

> "Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces wilful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behaviour which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent ..."

[48] Further, in the FCA decision *Joseph v. Canada (Attorney General)*, A-636-85, Justice Dubinsky states:

> "To prove misconduct by an employee it must be shown that he behaved in some way other than he should have. Accordingly, such an allegation is not proven simply by showing that the employer found his employee's conduct to be reprehensible, or charged him with misconduct in general terms. For a board of referees [now the Tribunal] to conclude that there was misconduct by an employee, it must have before it sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible."

[49] The Tribunal finds that the claimant lost his employment as a result of his own misconduct. The employer provided the verbal and written warnings the claimant received regarding the claimant's various infractions and further confirmed that the reason the claimant was dismissed was due to the condition of the truck. The Tribunal is convinced that the claimant's use the company vehicle for personal use, his smoking in the vehicle and the general cleanliness of the vehicle evidenced by the pictures provided by the employer shows carelessness and a disregard of standards of behaviour which the employer has a right to expect and this is considered misconduct within the meaning of the EI Act.

[50] While the claimant argued that the warnings from October 29 to November 2, 2015 were made up to justify his termination, the Tribunal has already determined that the employer's evidence is more credible as the claimant has provided inconsistent and contradictory statements. Given that the claimant had already received numerous warnings, the Tribunal is satisfied that by failing to follow the company's vehicle use policy, the claimant had to know that he was jeopardizing his employment.

[51] The claimant further argued that he has paid into EI for many years without collecting a dime and he needs his EI benefits while going to school. As has often been said, the EI system is designed to support those who, through no fault of their own, find themselves unemployed. In this case, the claimant is responsible for not following the company's vehicle use policy. Simply paying premiums in to the EI system is not a guarantee that EI benefits will be payable. Claimants are still required to satisfy the necessary conditions of eligibility. Furthermore, the claimant did not apply for apprenticeship training, and receiving EI benefits while going to

school is generally not permitted unless the claimant has been authorized by the Commission or designated authority.

[52] For these reasons, the Tribunal concludes that the claimant lost his employment due to his own misconduct. The Commission is appropriate in imposing an indefinite disqualification to benefits pursuant to subsection 30(1) of the EI Act.

CONCLUSION

[53] The appeal is dismissed.

K. Wallocha
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.