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

Citation: *I. H. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 13

Tribunal File Number: GE-16-3133

BETWEEN:

I. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: January 18, 2017

DATE OF DECISION: January 27, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

I. H. (the Appellant)

INTRODUCTION

[1] The Appellant established an initial claim for Employment Insurance benefits (EI benefits) on May 1, 2016. The Appellant worked as a bus driver for "Southland Transportation" from October 20, 2014, to April 29, 2016, and was dismissed from his employment. The Canada Employment Insurance Commission (Commission) determined that the Appellant lost his employment by reason of his own misconduct and imposed an indefinite disqualification effective May 1, 2016.The Appellant requested a reconsideration of the Commissions' decision, which was denied, and the Appellant appealed to the Social Security Tribunal (Tribunal).

[2] The hearing was held by videoconference for the following reasons: The fact that the credibility may be a prevailing issue; and the availability of videoconference in the area where the appellant resides.

ISSUE

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

THE LAW

[4] Subsections 29 (a) of the EI Act states that: 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.

[5] Subsection 30(1) of the EI Act provides, in part, that 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…" 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. Attorney General of Canada, 2010 FCA 314*; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85).

[6] 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. Attorney General of Canada*, 2010 FCA 314; *Secours v. Attorney General of Canada*, A-1342-92).

[7] 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 (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Nguyen v. Attorney General of Canada*, 2001 FCA 348; *Brissette v. Attorney General of Canada*, A-1342-92).

EVIDENCE

Documentary Evidence

[8] The Appellant applied for EI benefits on May 3, 2016, and established an initial claim on May 1, 2016.

[9] The Appellant indicated he worked for "Southland Transportation" from October 20, 2014, to April 29, 2016.

[10] In his application for benefits, the Appellant indicated he was dismissed for committing a "preventable sideswipe collision." He explained that he drove a school bus and hit a rock. He wrote that the collision was preventable. He explained that if he had looked in the right side mirror he should have seen the rock on the ground. He wrote that the safety manager explained to him that he should have reported the accident immediately to dispatch.

[11] On May 19, 2016, the employer (Ms. C. N.) spoke to the Commission. She explained that the Appellant had a collision on April 29, 2016. She said the accident was deemed to have been

preventable and due to the employer's progressive discipline policy (and previous warnings on the Appellant's file) he was terminated. She then provided a summary of previous warnings issued to the Appellant. She explained that on March 29, 2015, the Appellant had a preventable incident. She said the Appellant received his final written warning for this incident. She further indicated that on March 24, 2015, the Appellant was issued a speeding ticket and on March 28, 2016, the Appellant was issued a speeding ticket. She indicated that the Appellant was to receive a verbal warning for the first incident on March 24, 2015, but since another speeding ticket was received in such a short time frame he was given his verbal warning for the first ticket and written warnings for the second ticket at the same time. She also explained that on September 9, 2015, the Appellant was issued a speeding ticket and given his third and final warning and then suspended from his employment for three-days. She further explained that on March 11, 2016, the Appellant had a non-preventable accident causing damage and it was deemed not to be his fault. She said that on April 29, 2016, the Appellant was determined to be responsible for a preventable sideswipe collision and was given his fourth and final warning that resulted in his termination of employment. She explained that the Appellant would have received training on his speed of travel and if he had not been terminated for his most recent accident causing damage he would have been re-trained on turning his bus to make sure he was aware of where his bus was located.

[12] On May 19, 2016, the employer (Ms. C. N.) provided the following documentation: Previous warnings issued to the Appellant, the employee handbook and policy manual, and the Appellant's letter of termination (Exhibit GD3-20 to GD3-26).

[13] On May 20, 2016, the Appellant spoke to the Commission and explained that all the infractions were minor. He said he was not at fault for these situations. He indicated he was only technically at fault. He explained that it would be "very wrong" to draw the conclusion that he should be fired due to exceeding the speed limit as an average person would. He said that each time he received a speeding ticket he was only going 40 kilometres per hour in a 30 kilometer per hour zone and this was acceptable. He explained that having three speeding tickets was normal and these were minor offenses so he should not have been terminated when he had his final incident of damage on his school bus.

[14] On May 26, 2016, the Commission notified the Appellant that he lost his employment by reason of his own misconduct within the meaning of the EI Act. The Commission imposed an indefinite disqualification effective May 1, 2016

[15] In a request for reconsideration (dated stamped by Service Canada on June 6, 2016) the Appellant wrote that the reason for his termination was an accident and not misconduct.

[16] On August 3, 2016, the employer (Ms. H. M./ Payroll Manager) spoke to the Commission. She explained that the final incident on April 29, 2016, occurred when the Appellant saw a truck pulling out of a parking lot. She said the Appellant tried to pull into the parking lot while the truck was still leaving and because he drove so far to the right to avoid the truck he hit a rock which caused the damage. She explained that the Appellant should have waited for the truck to exit before trying to pull in next to the truck and that was why his final incident was considered to be preventable.

[17] In a Notice of Appeal (date stamped by the Tribunal on August 16, 2016) the Appellant wrote that the reason for his dismissal was "preventable sideswipe collision" and not misconduct. The Appellant also submitted his dismissal letter from the employer.

Oral Evidence from the Hearing

[18] The Appellant explained that he did not have his Appeal Docket with him, but wished to proceed with the hearing. He confirmed that he was a school bus driver for the employer. He testified that on April 29, 2016, he had stopped his bus outside a parking lot before his afternoon pick-up. He said that a truck driver was driving out of the parking lot and he steered to the right. He explained that there was a huge rock on the sidewalk. He explained that the top of the rock was on the edge of the road. He said that when he steered to the right he hit the rock. He indicated that when he hit the rock it caused a dent in the bus. He said he made a mistake. He explained that he took pictures of the bus. He testified that he called the safety department manager ("A.") and was suspended without pay for three-days. He indicated that on May 2, 2016, his employment was terminated by the employer. He explained that he e-mailed his employer about appealing their decision, but received no response.

[19] The Appellant testified that he did not dispute the information in his written warnings. He said the facts in his written warnings were accurate. He submitted that his actions in the final incident on April 29, 2016, did not meet the legal test for misconduct. He further testified that his accident on April 29, 2016, was not deliberate. He also indicated that he did not mean to damage the employer's bus on April 29, 2016. He said the accident could have happened to anyone. He said there was no hazard in the final incident. He indicated he was just trying to be "courteous" to another driver in the final incident. He testified that the statements from the employer (Ms. H. M./payroll manager) in Exhibit GD3-38 were not accurate. He said that Ms. H. M. made assumptions. He said that in the final incident there was a huge rock on the edge of the sidewalk and the "tip of the rock was protruding on the edge of the road." He testified that he was on the road when he hit the rock. He said the rock was approximately two metres from the ground. He said he called the safety manager ("A.) after dropping off the children from school in the afternoon. He said he was "shocked" when he hit the rock. He indicated that he made a mistake when he did not immediately contact the safety manager about the accident.

SUBMISSIONS

[20] The Appellant submitted that:

a) His actions in the final incident did not meet the legal test for misconduct.

b) His actions on April 29, 2016, were not deliberate.

c) He did not mean to damage the employer's bus and was trying to be "courteous" to another driver.

d) The comments from employer (Ms. H. M./payroll manager) in Exhibit GD3-38 were not accurate and made assumptions.

[21] The Respondent submitted that:

a) The Appellant had received two speeding tickets in four-days for which he received a written warning and was informed that another comparable incident would

result in further discipline up to and including termination. The Appellant received another speeding ticket and was suspended for three-days.

b) The final incident was when the Appellant damaged the bus on April 29, 2016, and was terminated. The Appellant was well aware of the employer's progressive discipline policy and the speeding tickets and the collision of April 29, 2016, were all preventable.

c) The Appellant was a professional driver and due to his own negligence he was dismissed from his employment for misconduct. The Appellant's progressive discipline and the final incident of the collision on April 29, 2016, constituted misconduct within the meaning of the EI Act, because the Appellant knew that further incidents relating to safety would lead to his dismissal.

ANALYSIS

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

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

[24] The Tribunal finds the Appellant established an initial claim for EI benefits on May 1, 2016.

[25] The Tribunal finds the Appellant worked as a bus driver for "Southland Transportation" from October 20, 2014, to April 29, 2016, and was dismissed from his employment.

[26] The Tribunal recognizes that on May 26, 2016, the Commission notified the Appellant that he lost his employment by reason of his own misconduct within the meaning of the EI Act. The Commission imposed an indefinite disqualification effective May 1, 2016.

[27] The Tribunal recognizes there were conflicting statements from the employer and the Appellant. The Tribunal further recognizes the Appellant submitted that his actions in the final incident did not meet the legal test for misconduct. The Tribunal will address the conflicting statements and the Appellant's submissions in a moment, but will initially emphasize the legal test for misconduct. First: Subsection 30(1) of the EI Act provides, in part, that 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…" Second: 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. Attorney General of Canada*, 2010 FCA 314; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85)

[28] The Tribunal realizes the employer (Ms. H. M./payroll) told the Commission that in final incident on April 29, 2016, the Appellant saw a truck pulling out of a parking lot. She explained that the Appellant tried to pull into the parking lot while the truck was still leaving and because he drove so far to the right to avoid the truck he hit a rock which caused the damage. She indicated the Appellant should have waited for the truck to exit before trying to pull in next to the truck. On the other hand, the Appellant testified that he did not pull into the parking lot in the final incident. He testified that a truck driver was driving out of the parking lot and he steered to the right as a courtesy. He testified there was a huge rock on the sidewalk and when he steered to the right he hit the rock. He indicated that when he hit the rock it caused a dent in the bus. The Tribunal prefers the Appellant's testimony on this matter for two reasons. First: The employer (Ms. H. M.) did not witness the final event and worked in payroll for the employer. Second: The Appellant's testimony was consistent and plausible.

[29] The Tribunal realizes that during the hearing the Appellant did not dispute the information in his previous written warnings listed in Exhibit GD3-20 to GD3-26. Instead, the Appellant argued that his actions in the final incident did not meet the legal test for misconduct. The Appellant specifically submitted that his actions on April 29, 2016, were not deliberate and he was trying to be courteous to another driver when he accidentally hit a rock on the side of the road. Did the Appellant's actions in the final incident meet the legal test for misconduct? In

short: Were the Appellant's wilful and deliberate? The Tribunal finds the Appellant's actions in the final incident lacked a mental element of wilfulness for several reasons. First: The Appellant was not driving recklessly in the final incident, but had steered to the right as a courtesy for a truck coming out of a parking lot. Second: The Appellant did hit a rock when he steered to the right with his bus, but there was no indication he was proceeding in a dangerous manner or speeding. Third: The Appellant's collision with a rock on the road was accidental.

[30] The Tribunal does realize the Commission (the Respondent) submitted that the Appellant's progressive discipline and the final incident of the collision on April 29, 2016, constituted misconduct, because the Appellant knew that further incidents relating to safety would lead to his dismissal. Nevertheless, the Tribunal finds that on March 11 (2016) the Appellant had a "non-preventable accident" which was deemed not to be his fault. Furthermore: The majority of the Appellant's written warnings were for speeding and the final incident involved a minor collision with a rock where the Appellant was not speeding.

[31] The Tribunal wishes to emphasize that it was the employer's prerogative to dismiss the Appellant if they were displeased with his performance as a bus driver. Still, the Tribunal must apply the legal test for misconduct to the evidence and cannot conclude the Appellant's actions in the final incident were wilful or deliberate. The Tribunal does recognize the Appellant's actions in the final incident might have been imprudent. Nevertheless, the Tribunal finds the Appellant's actions in the final incident lacked a mental element of wilfulness and would not meet the legal test for misconduct.

[32] In summary: The Tribunal finds the Appellant did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[33] The appeal is allowed.

Gerry McCarthy

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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.

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.