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

[TRANSLATION]

Citation: *A. M. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 16

Tribunal File Number: GE-16-1658

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alcide Boudreault

HEARD ON: January 17, 2017

DATE OF DECISION: January 31, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Social Security Tribunal of Canada (Tribunal) held a teleconference hearing for the reasons set out in the notice of hearing dated August 10, 2016, namely, the information contained in the file, including the need for additional information. This form of hearing best provides for the accommodations required by the parties. It also respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[2] The Appellant, Mr. A. M., did not attend the hearing held on January 17, 2017.

[3] The Canada Employment Insurance Commission (Commission) did not attend.

[4] When a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if it is satisfied the party received notice of the hearing pursuant to subsection 12(1) of the *Social Security Tribunal Regulations*.

[5] The Tribunal would like to point out that a notice of hearing was mailed to the Appellant on December 15, 2016, to the same address contained in the file. Several documents were mailed to this address and they were not returned by Canada Post. Canada Post's proof of delivery was signed on December 20, 2016, by the Appellant, Mr. A. M. A second Canada Post proof of delivery was signed on December 20, 2016, by the Appellant's representative, Ms. Kim Bergeron.

DECISION

[6] The Tribunal finds that the Appellant lost his employment by reason of his own misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act). The appeal is dismissed.

INTRODUCTION

[7] On January 5, 2016, the Appellant submitted a renewal claim for initial benefits effective December 27, 2015 (GD3-4 to GD3-19).

[8] On January 29, 2016, in its initial notice of decision, the Commission notified the Appellant that he was not entitled to regular Employment Insurance benefits effective December 20, 2015, because he had stopped working for UI CONTACT INC on December 21, 2015, by reason of his own misconduct (GD3-26 to GD3-27).

[9] On February 5, 2016, the Appellant filed a request for reconsideration of the Commission's decision (GD3-28 to GD3-42).

[10] On March 24, 2016, in its notice of decision following an administrative review, the Commission informed the Appellant that it had not amended its decision on the issue (GD3- 73 to GD3-74).

[11] On April 25, 2016, the Appellant filed an appeal before the Tribunal.

ISSUE

[12] The Tribunal must determine whether the Appellant lost his employment because of his misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

EVIDENCE

Evidence in the file

[13] The Appellant worked for UI Contact Inc. from December 30, 2013, to December 21, 2015 (GD3-8 to GD3-12).

[14] An initial claim for Employment Insurance benefits was established, effective December 27, 2015 (GD3-4 to GD3-19).

[15] The Appellant had been accused of time theft and of using techniques to dodge calls. He had also been accused of deliberately hanging up on incoming calls (GD3-9).

[16] The union representative mentioned that the dismissal was wrongful and without valid evidence and that he intended to file a grievance (GD3-11).

[17] The Appellant argues that there was a problem with the phone system such that calls were ending by themselves. He stated that he had contacted technical assistance several times (GD3-21).

[18] A search conducted by the employer over a four-month period showed that, on November 21, 2015, there were 10 interrupted calls and no requests for technical assistance, which confirms that technical problems were not the source (GD3-22). The Appellant had not filed a report with his supervisor.

[19] The supervisor indicated that he had had no problems with the phone system. The employer noted that the keyboard had to be touched manually for it to appear in the report. The employees do not need the F2 and F3 keys (GD3-23).

[20] On July 30, 2015, the Appellant was suspended because he had used a fake extension, indicating that his line was busy, so that he would not receive incoming calls. Furthermore, he had received warnings for hanging up on clients (GD3-to GD3-25).

[21] The employer produced reports on the use of extension #4321 between July 14 and May 12, 2015, as well as a report on conversations of one second or less between November 21 and December 9, 2015 (GD3-44 to GD3-64).

[22] The Appellant was deliberately using the F3 key, thus ending calls. He did not follow the instructions. The employer stated that the Appellant could be dismissed for these actions (GD3-65). There were no written instructions but the claimant had been advised during training that such behaviour not permitted.

[23] The Commission asked the Appellant whether he knew that he was not allowed to use the F2/F3 keys and he responded that he did not realize those keys existed (GD3-68). The claimant had previously been suspended for five days, but he claims that he never did again what he had been accused of (GD3-69).

[24] There were calls that lasted zero to one second, and the report indicates that there were hang-ups with the warning "callback," which proves that it was the Appellant who was deliberately hanging up (GD3-66).

[25] The union representative explained that they have a good relationship with the employer and that they have managerial rights. However, they offered to the employer to reintegrate the Appellant with two weeks salary and a suspension. He explained that they had reasonable doubt and that there were possibly technical problems (GD3-69).

[26] The employer checked to confirm whether there were technical problems in December, as reported by the Appellant. The employer indicates that there were seven line outputs, but that none of them correspond with the hang-ups on the reports provided (GD3-71).

[27] The Commission concluded that the Appellant lost his employment because of his misconduct. Therefore, the Commission imposed an indefinite disqualification on him, effective September 22, 2013.

PARTIES' ARGUMENTS

[28] The Appellant presented the following arguments:

a) He disputes the Commission's decision because it is unfounded in fact and in law.

[29] The Respondent made the following submissions:

a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is determined that the claimant lost their employment due to their own misconduct.

b) The Respondent maintains that the Appellant had ample opportunity to explain himself during the process: January 5, 2016, at the time of the original filing of his claim; and March 11, 2016, following his request for administrative review. It also maintains that the facts provided by the Appellant were considered and that a fair and impartial decision was rendered.

c) That the Appellant mentions that it relied on unofficial documents, that it relied on the testimony of his former supervisor and on Utopia administration, which were responsible for his dismissal, when he had given the names of other witnesses who participated in his report concerning technical problems with Uniphi and that his former supervisor, Mr. M., had given false testimony denying that he had already reported the technical problem with the system since August 2015.

d) It conducted a reasonable search with the two parties and considered all the information. It determined whether the received documents must be considered in rendering the decision. Misconduct under the Act must be established based on the preponderance of the evidence, in considering the facts provided by both parties.

e) When an appellant files a claim for benefits, the Commission is required to make a decision on the issue; it is not necessarily determinative of the decision with respect to misconduct. It is not related to the decision of a grievance. It is the Commission's role to determine entitlement to benefits, based on the facts on file.

f) The Appellant maintains that there were technical problems. Indeed, the employer confirmed that there could have been technical problems. However, it stated that although there could have been technical problems, they were unrelated to the claimant's hang-ups.

g) The Appellant states that he was prepared to be penalized, while he denied the employer's accusations and maintained that it was a technical problem. Furthermore, he denied using the F2 and F3 keys, while he admitted that he had a five-day suspension in July 2015 for having used a number to avoid calls and that he did not realize it was prohibited to do so.

h) The evidence on file shows that the claimant was informed by communication dated July 23, 2015, following his suspension letter of July 22, 2015, of the importance of using the tools in a proper and professional manner at all times. The inappropriate use of these tools could lead to his dismissal.

i) The Commission gave credibility to the employer because it was able to show the events that the claimant was accused of in the report of events that occurred in July 2015 and December 2015. The Commission maintains that the claimant's actions represent the immediate cause of his dismissal and constitute misconduct under the Act. There was a causal relationship between the misconduct and the dismissal and the misconduct constitutes a breach of the expressed employment contract.

j) It concluded that the claimant's actions in order to deliberately avoid incoming calls constituted misconduct within the meaning of the Act because the claimant could reasonably see that he should not do that. Furthermore, he was issued a warning dated July 23, 2015, indicating that such actions were formally prohibited. Having already been suspended for dodging calls in July 2015, the Appellant should reasonably have known that he was exposing himself to dismissal. The Commission submits that its decision is supported by the case law.

ANALYSIS

[30] The relevant legislative provisions are reproduced in an appendix to this decision.

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

[32] The Federal Court of Appeal (FCA) established that there will be misconduct where the claimant knew or ought to have known the conduct was such as to impair the duties to the employment and that, consequently, there was a real possibility of dismissal. **(***Tucker* A-381-85; *Locke* 2003 FCA 262) (CanLII)

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

[34] The performance of services is an essential condition of the employment contract. When a claimant, through his own actions, puts himself in a situation where he is no longer able to perform his duties under the employment contract and, thus, loses his employment, he “cannot force others to bear the burden of his unemployment, no more than someone who leaves his

employment voluntarily" (*Wasylka*, 2004 FCA 219; *Lavallée*, 2003 FCA 255; *Brissette*, A-1342-92).

[35] For behaviour to constitute misconduct under the Act, wrongful intent is not required. It is sufficient that the wrongdoing or omission complained of be "wilful," that is, conscious, deliberate or intentional (*Caul* 2006, FCA 251; *Pearson* 2006, FCA 199; *Bellavance* 2005, FCA 87; *Johnson* 2004, FCA 100; *Secours*, A-352-94; *Tucker* A-381-85).

[36] The facts in the file are clear—the Appellant was dismissed after breaching the employer's instructions with regard to respect for rules of conduct toward clients.

[37] The Appellant was employed as a telephone operator in a call centre. He was accused of diverting calls so he would not have to respond to clients, of time-theft and of using techniques to dodge calls. He was also accused of deliberately hanging up on incoming calls.

[38] The Appellant stated that there were technical problems and that he did not do what his employer was accusing him of. The problems came from the system itself. He contacted technical assistance in order to solve the problem.

[39] The employer looked into possible technical issues. There had been seven line outputs, but none of them corresponded with the interrupted calls in the reports.

[40] The Appellant stated that he did not know he was not allowed to use the F2/F3 keys (shortcut keys). These keys allowed the Appellant to return to the bottom of the waiting list so that he did not receive calls. The Appellant claims that he did not know these keys existed. However, in May 2015, the Appellant had received a warning that he was formally prohibited from using these shortcut keys. In July 2015, the Appellant had been suspended for similar reasons.

[41] The Appellant claims that the accusations against him were false; according to him, it is the system that is defective. He claims that he never used codes to avoid incoming calls and that he notified technical services without success. On July 22, 2015, the Appellant was suspended for five days.

[42] The two parties have provided contradictory evidence. It is of primary importance to support one's claims with documented evidence. The employer submitted a number of documents: a suspension letter, a dismissal letter, reports on the Appellant's alleged actions, reports on the Appellant's use of extension #4321 between July 14 and May 12, 2015, and the report on the length of conversations of one second or less, conducted between November 21 and December 9, 2015.

[43] According to the Appellant, tests were carried out by the union's computer experts and they were categorical—what the employer is claiming is impossible. Unlike the employer, neither the Appellant nor the union submitted any evidence to back up their claims. The Tribunal cannot consider the Appellant's statements.

[44] The employer conducted a search over a period of four months in order to clarify the facts. Out of 120 employees, two made codes to enter into the system—the Appellant and his friend. If the situation was the result of technical problems, the employees had instructions to immediately call technical assistance. It was important for employees to report technical problems because they affected their statistics.

[45] There was no call to the supervisor's office; therefore, the issue was not technical problems. The employer concluded that there was no issue with the telephone system and that you really had to manually press the keys. The employer was convinced that the employee had used keys that were not allowed. Furthermore, when there were interrupted calls, the employer was supposed to notify the supervisor, which the Appellant failed to do. Even if there were no written instructions on the subject, the Appellant had been advised in trainings that he was not allowed to act in such a way.

[46] The Appellant states that he had, in fact, avoided calls, but that he did not know it was not allowed. However, he had been advised that non-compliance with directives could lead to dismissal.

[47] The union representative explained that they had reasonable doubt that there were possible technical problems. He confirmed that the appellant had avoided 25% of calls.

[48] The Appellant was dismissed because he had a lengthy disciplinary file as well as alleged actions, not to mention that he was on a plan to improve customer call-backs. The Tribunal is of the opinion that the progress of sanctions was done correctly and that the Appellant disregarded them.

[49] For the Tribunal, the evidence on the employer's side is abundant and relevant, unlike that of the Appellant, who cites a lot of facts that are unsupported by solid evidence. According to the Appellant, his union has IT experts, but no IT expert's report was submitted.

[50] A contract of employment contains not only rights, but obligations as well. One of these is to respect the employer's various policies.

[51] The Appellant broke his employer’s rules while fully aware of the possible consequences of his actions. The Appellant lost his employment because of his misconduct, and the Commission’s decision to disqualify him from receiving Employment Insurance benefits is justified under the circumstances.

[52] The Tribunal does not find the Appellant's explanations to establish a case plausible. The Tribunal determines that the Appellant wilfully put his employment at risk and demonstrated such recklessness that he wilfully chose to ignore that his actions were likely to result in his dismissal. The Tribunal discards the Appellant's arguments that he was unaware that his actions were prohibited and does not consider his testimony credible.

CONCLUSION

[53] The appeal is dismissed.

DATE OF REASONS: January 31, 2017

Alcide Boudreault
Member,
General Division –
Employment
Insurance Section

ANNEX

THE LAW

Employment Insurance Act

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.