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

Citation: *T. A. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 24

Tribunal File Number: GE-16-2634

BETWEEN:

T. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Alyssa Yufe

HEARD ON: February 8, 2017

DATE OF DECISION: February 22, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing on February 8, 2017 together with an interpreter, "AS."

There was no one else in attendance.

DECISION

[1] The Tribunal finds that the Commission has proven on a balance of probabilities that the Appellant lost his employment because of his own misconduct.

[2] The appeal is, accordingly, dismissed.

INTRODUCTION

[3] The Appellant applied for employment insurance benefits on June 15, 2015 (GD3-12). The claim was effective June 7, 2015 (GD4-1).

[4] On August 5, 2015, the Canada Employment Insurance Commission (the "Commission" or the "Respondent") decided that it could not pay the Appellant employment insurance benefits because the Appellant lost his employment on account of his misconduct (GD3-18).

[5] On September 22, 2015, the Commission reconsidered its decision following the Appellant's request and decided to maintain its original decision (GD3-33).

[6] The Appellant appealed the reconsideration decision to the Social Security Tribunal on July 4, 2016 (GD2), beyond the time limit set out in subsection 52(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The Appellant also filed a copy of the Commission's reconsideration decision on August 4, 2016, which was a few weeks after it was requested by the Social Security Tribunal (GD2A).

[8] By way of interlocutory decision dated October 25, 2016, the Tribunal granted the Appellant an extension of time and allowed the appeal to proceed.

FORM OF HEARING

[9] The hearing was held by teleconference for the reasons indicated in the Notice of Hearing dated December 23, 2016.

ISSUE

[10] Whether or not the Appellant lost his employment by reason of his own misconduct pursuant to subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")?

EVIDENCE

Application for Benefits (, GD3-2 to GD3-12):

[11] The Appellant worked for "Au" (the "Employer") from May 2, 2011 to June 2, 2015 as a "motor vehicle jockey". It was unknown whether the Appellant would be returning to work with the Employer. The Appellant was no longer working on account of a shortage of work (GD3-5).

Request for Reconsideration (August 13, 2015, GD3-22):

[12] The Appellant lost his license due to a court decision, which revoked his license for 3 months.

[13] The Employer was aware of this since the beginning of the infraction. JA (the general manager at the time) advised that he would give the Appellant another position in the company.

[14] The Employer (NN) submitted a letter to the court, which provided that the Appellant "was a key asset to the day to day operations of the sales and service department."

[15] The Appellant was surprised when he learned that the Employer said that he was dismissed for misconduct. The Appellant even worked for the Employer doing other tasks, which did not require him to have a driver's license until June 2, 2015. The Employer advised that it would lay the Appellant off until he got his license back. This proves that there was other work for the Appellant, which did not require a driver's license or that the Appellant did not need a driver's license to continue working at the Employer.

[16] It was only about 3 weeks later, when the Appellant spoke with the Commission that he learned that he had been dismissed from his job.

Notice of Appeal:

[17] The Appellant advised at GD2-4 that he received the Commission's reconsideration decision on September 22, 2015 and was late with filing his Notice of Appeal on account of a language barrier and because he required the assistance of an advocate to complete his previous application (request for reconsideration) and that he could not afford to pay the advocate again to file the Notice of Appeal.

[18] The Appellant also advised that the Employer was aware that the Appellant would lose his driver's license some 4 or 5 years before. The Appellant also continued to work for the Employer for more than a week after his license was suspended. After working for 1 week, the Appellant was deprived of his work.

Letter from Employer (NN) dated April 11, 2013 (GD3-24)

[19] The Appellant has been working for the Employer group since 2008 and switched to the Employer branch in 2011.

[20] The Appellant held a full time position as a "yard manager" and was a "key asset to the day to day operations of the sales and service department". The Appellant's tasks included, picking up cars from other dealers, arranging the stock yard and coordinating all deliveries of sold vehicles with the sales department.

[21] All of these tasks mentioned above require the Appellant to have a valid driver's license at all times and the Appellant would not be able to work without it.

Record of Employment:

[22] According to the record of employment ("ROE") dated June 9, 2015, the Appellant worked at the Employer from March 1, 2015 to June 2, 2015, as a "jockey". The reason for issuing the ROE was "dismissal" and code "M" (GD3-14).

Commission's Conversations with the Employer:

[23] "ZH" the bookkeeper/accountant advised that the Appellant was a good employee and worked well and that the dismissal was due to the loss of his driver's license, which was essential for him to carry out his employment duties. No other position was available. The Appellant worked for the Employer for several years. On March 1, 2015, the Employer became a new legal entity. This is why the ROE had a different start date (Commission notes, July 3, 2015, GD3-15).

[24] "FT" the director advised that the Appellant's continued work was temporary and that he did mainly office work or "worked on the inside". The Appellant did not drive in the parking lot at that time because he was not able to. The Employer consulted with the company lawyer and was told that the Appellant could not do this. FT said that he advised the Appellant that the Employer would do everything possible to keep the Appellant. The Employer was unable to keep him more than a week and a half. The Employer was prepared to take him back once his license was returned. The Appellant would have to have his car equipped with an alcohol detector so they would not be able to take him back for the moment. FT added that even the receptionists were required to have a driver's license. The Appellant worked as a "jockey" and required a driver's license. The Appellant worked well and did other tasks, and would go and get the permits for the new cars. The Employer did its best to keep him. The Appellant was replaced with another employee who had a driver's license. The Employer could not create another position. FT then advised that although he spoke with the Appellant, the Appellant was stating that it was Mr. A (Commission notes, September 21 and 22, 2015, GD3-30).

Commission's Conversations with the Appellant:

[25] In response to the Commission's queries regarding his dismissal and conduct, the Appellant advised that he thought that he had just been laid off. The Appellant's last day of work was June 2, 2015 (Commission notes, July 10, 2015, GD3-16).

[26] The Appellant lost his driver's license on May 22, 2015. The Appellant's license was suspended for 3 months for something, which he had done 4 years ago. The Appellant drove from dealer to dealer for the Employer for 5 years. The Appellant thought that he would be laid off (Commission notes, July 13, 2015, GD3-17).

[27] The Appellant's representative advised the Commission that the Appellant was offered another position for a week and a half. The ROE should indicate "layoff" because the Appellant continued to work at the Employer. The drinking and driving incident occurred in 2013. The Appellant's license was suspended in May 2015 (Commission notes, September 16, 2015, GD3-29).

Testimony at the Hearing:

[28] The Appellant testified under solemn affirmation.

[29] AS solemnly affirmed to interpret to the best of his ability from English to Tamil and from Tamil to English.

[30] The Appellant testified that he had been working at the Employer for 4 years as a car jockey before his license was suspended and before he was dismissed. The Appellant testified that his license was suspended in May 2015.

[31] The Appellant testified that the incident upon which the charges were based, occurred in 2010. The Appellant testified that he had a 3 month license suspension and that he was also required to have an alcohol ignition interlock system installed in his car for 1 year.

[32] The Appellant repeated his arguments and evidence from the file. The Appellant emphasized that he had worked with the Employer for 1.5 weeks prior to being dismissed.

The Appellant also testified that he really thought that the Employer would retain his employment status and that he would be working for the Employer in another capacity. The Appellant explained that he was very shocked and disappointed when his employment was terminated. The Appellant advised that he would have gone to work elsewhere had he known in advance that the Employer was not going to keep him.

[33] The Appellant testified that he is not currently working at the Employer.

SUBMISSIONS

[34] The **Appellant** submitted that:

a) The Appellant filed the Notice of Appeal late because of a language barrier and because he needed the assistance of an advocate and was not offered one (GD2- 4);

b) The Appellant did not lose his employment because as a result of his misconduct (GD2, GD3);

c) The ROE should have stated layoff because he was not dismissed for misconduct (GD2, GD3-29);

d) Having a license was not an essential condition of the Appellant's employment because he worked for the Employer in other capacities for a week and a half after his license was suspended (GD3-29, GD2, GD3-22, testimony);

e) The Appellant continued working at the Employer for one and half weeks and that the Employer wrote the Appellant a reference letter, proves that there was no misconduct (GD3); and,

f) The Employer knew since at least 2013 that the Appellant's driver's license would be suspended and the Employer undertook to retain his employment in the event of the suspension (GD3-29, GD2, GD3-22, testimony);

[35] The **Respondent** submitted that the Appellant lost the employment by reason of his own misconduct for the following reasons:

(a) Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant loses his/her employment by reason of his or her 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 and it must constitute a breach of an express or implied duty of the contract of employment (*Lemire* 2010 FCA 314; *Mishibinijima* 2007 FCA 96) (GD4-3, GD4-4, and GD4-5);

(b) A decision to disqualify someone from benefits in such circumstance may only be made if the Commission can answer yes to the two specific questions concerning misconduct: "Does the information in the file support the finding that the Appellant committed actions or omissions as defined by the interpretation given to the word "misconduct"?"; and, "Does the information support the finding that the Appellant lost his or her employment because of these actions or omissions?" (GD4-3);

(c) The information in the file shows that the Commission can answer yes to the two questions (GD4-3);

(d) There is clear evidence that the Appellant was dismissed because his driver's license was suspended and he could not perform the tasks related to his positon without it (GD4-3);

(e) Since the Appellant was driving a vehicle to work, he should have known that he needed his driver's license to perform tasks related to his position (GD4-3);

(f) By "doing an action that made his driver's licenses [sic] suspended, the [Appellant] put himself in a position where he no longer met the conditions set for the position held (GD4-3);

(g) There are numerous acts and omissions that can be labeled misconduct, in the sense that they are incompatible with the objectives of an employment contract, present a conflict of interest with the employer's activities, or have a negative effect on the relationship of trust between the parties. This would also be the case where it is a violation of a law, a regulation, or of a professional code of ethics that results in no longer meeting the condition if employment and has led to the dismissal. The person who, as a condition of employment requires a driver's license, loses this permit and as a consequence loses employment, would be subject to a disqualification from benefits (GD4-3);

(h) Since the Appellant was driving from dealer to dealer, a valid driver's license was an essential condition of the employment (GD4-4);

(i) There is clear evidence that the reason for the dismissal was that the Appellant's driver's license was suspended (GD4-4);

(j) The Commission understands that the Appellant was a good employee but this does not change the fact that the Appellant lost his job because his driver's license was suspended (GD4-4);

(k) That the Employer had the Appellant work an additional week and a half does not negate the real reason for the loss of employment (GD4-4);

(l) Had the Appellant not lost his driver's license, he would still be employed and would not have been assigned temporary work (GD4-4);

(m) The Employer had to replace the Appellant in the position, which he could no longer fill (GD4-4);

(n) When an employee loses his employment because he is no longer able to work due to a driver's license suspension for failure to make child support payments, as ordered by a court, he loses his employment due to misconduct. Non compliance constitutes misconduct within the meaning of the Act *(Churchi* A-666-02; *Desson* (A-78- 04)(GD4-5);

(o) “It would fundamentally be altering the nature and principles of the employment insurance scheme and Act if employees, who lose their driver’s license, and consequently their employment, for inexcusable or unjustifiable non-compliance with a lawful order to pay a fine could be entitled to receive regular unemployment benefits” (*Lavalee* (A-720-01); *Wasylka* (A-255-03)(GD4-5); and,

(p) Although *Churchi* A-666-02; *Desson* (A-78-04) and *Neveu* (A-72-04) only apply to a very specific situation, in which the loss of a driver’s license results from the failure to comply with a lawful court order, they are important in the sense that the court clearly establishes what constitutes misconduct within the meaning of the Act in such situations (GD4-5).

ANALYSIS

The Test for Misconduct:

[36] According to subsection 30(1) of the Act, a claimant is disqualified from receiving benefits if the claimant lost any employment because of his or her misconduct.

[37] “Misconduct” is not defined in the Act. 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 or her actions would have on job performance (*Tucker* A-381-85) or of a standard that an employer has a right to expect (*Brisette* A-1342-92, [1994] 1 FC 684 (“Brisette”)). For conduct to be considered “misconduct” under the Act, it must be so willful or so reckless so as to approach willfulness (*Mackay-Eden* A-402-96; *Tucker* A-381-85).

[38] The misconduct may manifest itself in a violation of the law, regulation or ethical rule and it should be shown that the impugned conduct constitutes a breach of an express or implied duty or condition included in the contract of employment of such scope that the employee would normally foresee that it would be likely to result in his or her dismissal (*Brisette; Nolet* A-517-91; *Langlois* A-94-95).

[39] It is also required to be established that the misconduct was the cause of the Appellant's dismissal from employment (*Cartier* A-168-00; *Namaro* A-834-82). In fact, the misconduct must be the operative cause for the dismissal and not merely an excuse to justify it (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398; *McNamara* A-239-06, 2007 FCA 107; CUB 38905; 1997).

[40] In this regard, the Commission must prove on a balance of probabilities that the Appellant lost his or her employment due to his or her own misconduct (*Larivee* 2007 FCA 312, *Falardeau* A-396-85).

[41] With respect to the question as to whether or not the termination of the Appellant's employment by the employer was the appropriate sanction, the Commission, the Tribunal and the Court are not in a position to evaluate or review the severity of the sanction. Rather, the sole question with which the Tribunal must concern itself, is whether or not the impugned conduct amounts to "misconduct" within the meaning of section 30 of the Act (*Secours* A-352-94, [2002] FCJ. 711 (FED CA); *Marion* 2002 FCA 185, A-135-01; *Jolin* 2009 FCA 303; *Roberge* 2009 FCA 336; *Lemire* 2010 FCA 314).

[42] As such, the Tribunal must query whether or not it has been clearly established, on a balance of probabilities that the Appellant violated a rule or law, or a standard which was established by the Employer or otherwise amounted to an express of implied condition of the employment (*Tucker* A-381-85).

Findings of Fact:

[43] The Tribunal finds that the Appellant lost his license on May 22, 2015 due to a court decision, which revoked his license for 3 months (GD3-22, testimony). The Appellant was also required by court order, to have an alcohol interlock mechanism installed in his vehicle for 1 year (testimony, GD3-30). The Appellant worked as a jockey for approximately 4 years at the Employer until his license was suspended. The Appellant required a valid driver's license for the "jockey" job (GD3-24).

[44] The Appellant told the Employer after he was charged (2010) that there was a risk that his license would be suspended. The Employer advised that it would endeavor to maintain the Appellant's employment notwithstanding the license suspension.

[45] After the Appellant's license was suspended in May 2015, the Employer attempted to retain the Appellant and assign him to a different role, where a license was not required. The attempt to reassign the Appellant, however, only lasted one and a half weeks.

[46] Although the Appellant does not contest the conduct, which is impugned, (the conviction for which the Appellant's license was suspended), the Appellant argues that he was a model employee at the Employer, and that impugned conduct predated the employment from which he was dismissed and was unrelated to it.

The Nature of the Impugned Conduct:

[47] The Tribunal finds that the Appellant's submission, that he should not be penalized for past conduct is logically sound. The Tribunal also has sympathy for the Appellant because he was not rehired at the Employer and because he appeared to have been very satisfied at work.

[48] The Tribunal finds that although the misconduct in questions lacks a direct temporal connection with the employment from which the Appellant was dismissed, the court imposed license suspension arose from the Appellant's past misconduct (the charges for which the Appellant was convicted) and this bridged the termination of the employment with the past misconduct because it rendered him unable to fulfill a condition of his employment (*Brisette,* [1994] 1 F.C. 684 (C.A.), A-1342-92; CUB 65001).

[49] In this regard, the Tribunal finds that the Appellant can be said to have willfully committed acts as a consequence of which, he is unable to continue employment. This is the case notwithstanding that the underlying misconduct did not actually occur at the place of employment (*Brisette,* [1994] 1 F.C. 684 (C.A.); CUB 75959; CUB 79422, 2012).

[50] Put another way, at the root of the court imposed restrictions, which caused the Appellant to be unable to perform his job, is the misconduct. The court imposed

restrictions exist because they are derived ultimately from the Appellant's wrongdoing. That the Appellant was unable to carry out the functions of his job and meet the standards required of him because of his past misconduct is what caused his termination. This is in and of itself misconduct according to the jurisprudence (*Brisette,* [1994] 1 F.C. 684 (C.A.); *Lemire* 2010 FCA 314; CUB 80483, 2013; CUB 80208, 2012).

[51] The Tribunal also notes that a finding that there is no misconduct in this case would be inimical to the purpose and public policy and principles of the Act and the employment insurance scheme (*Wasylka* 2004 FCA 219; *Neveu* 2004 FCA 362).

[52] As was held by the Federal Court of Appeal in *Wasylka* 2004 FCA 219:

> "There is a long line of authorities stating that where an employee, through his own actions amounting to misconduct, can no longer perform the services required from him under the employment contract and as a result loses his employment, that employee "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily: see *Canada (A.G.)* v. *Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684; *Attorney General of Canada* v. *Lavallée*, 2003 FCA 255 (CanLII), at paragraph 10, followed in *Attorney General of Canada* v. *Borden*, 2004 FCA 176 (CanLII), a decision rendered on April 28, 2004."

[53] Similarly, in *Brisette*, [1994] 1 F.C. 684 (C.A.), the Federal Court of Appeal (quoted the *dicta* of Justice Pratte in *Tanguay* (1985), 10 C.C.E.L. 239 (F.C.A.) and) held that the disqualification for misconduct in the Act "is an important provision in an Act which creates a system of insurance against unemployment, and its language must be interpreted in accordance with the duty that ordinarily applies to any insured, not to deliberately cause the risk to occur."

Was the Conduct Sufficiently Foreseeable?

[54] With respect to the element of foreseeability, in committing the acts for which the Appellant was convicted, the Appellant knew or ought to have known that such conduct might have ramifications, including possible challenges in maintaining his license and in obtaining and securing future employment. In this regard, the Appellant could be said to have willfully disregarded the effects that his actions would have on his job performance

(*Tucker* A-381-85) or of the standard that the Employer had a right to expect (*Brisette*, [1994] 1 F.C. 684 (C.A.); *Lemire* 2010 FCA 314).

[55] For these reasons, the Tribunal finds that the Appellant knew or ought to have known that his conduct would have resulted in him being unable to fulfill an essential condition of his employment or would have otherwise of had lead to the loss of his employment (*Nolet* A-517-91, *Langlois* A-94-95, *Lemire* A-51-10, 2010 FCA 314).

Did the Conduct Cause the Loss of Employment?

[56] With respect to the Appellant's argument that the Employer represented that it would maintain the Appellant's employment in another capacity if his license was suspended, and that the Appellant worked in another capacity for a week a half, the Tribunal finds that while the position last held by the Appellant may not have required him to have a valid license, the reason why the Appellant lost his job security and was ultimately unemployed was the suspension of his driving license.

[57] In this regard, the Tribunal finds that court imposed restrictions arose from the Appellant's misconduct and that the misconduct was the operative cause of the Appellant's dismissal (*Brisette*, [1994] 1 F.C. 684 (C.A.)*; Cartier* A-168-00; *Namaro* A- 834-82; *McNamara* 2007 FCA 107, CUB 38905, 1997).

CONCLUSION

[58] For the foregoing reasons, the appeal is dismissed.

Alyssa Yufe

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.