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

Citation: *101156217 Saskatchewan Ltd v. Canada Employment Insurance Commission,* 2017 SSTGDEI 63

Tribunal File Number: GE-16-3206

BETWEEN:

101156217 Saskatchewan Ltd

Appellant

and

Canada Employment Insurance Commission

Respondent

and

T. C.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: April 24, 2017

DATE OF DECISION: May 4, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

101156217 Saskatchewan Ltd, the Appellant (employer) did not attend the hearing.

Mr. T. C., the Claimant along with his representative, Mr. Mark Crawford, Community Unemployed Help Centre attended the hearing.

INTRODUCTION

[1] On March 20, 2016 the Claimant established a renewal claim for employment insurance benefits. On April 28, 2016 the Canada Employment Insurance Commission (Commission) denied the Claimant benefits as it determined he voluntarily left his employment without just cause. On May 20, 2016 the Claimant made a request for reconsideration. On July 21, 2016 the Commission changed its decision and allowed the Claimant benefits as they determined the reason he lost his employment was not considered misconduct. On August 19, 2016 the employer filed an appeal to the *Social Security Tribunal of Canada* (Tribunal).

[2] On January 11, 2017 a Notice of Hearing (NOH) was sent to all parties with an in person hearing date was set for March 1, 2017. On January 18, 2017 Canada Post confirmed that the NOH were successfully delivered to Appellant's address. On February 27, 2017 the Claimant's representative requested and was granted an adjournment. On February 28, 2017 the Tribunal made attempts to contact the Appellant to advise them of the adjournment; however both numbers provided by the Appellant were out of service. The Tribunal then contacted the Appellant via email. On March 1, 2017 the adjournment notice was sent by mail to the Appellant. On March 10, 2017 a NOH was sent to the Appellant for a hearing scheduled on April 24, 2017. On March 29, 2017 the Appellants NOH was returned by Canada Post. On March 31, 2017 the Tribunal sent the NOH to the Appellant by email asking to reply to confirm receipt. On April 4, 2017 the adjournment notice sent to the Appellant was returned by Canada Post. On April 20, 2017 the Appellant had not responded to the email, thus the Tribunal made attempt to contact the Appellant by telephone, with no answer at one number and the second number was out of service. On April 20, 2017 the Tribunal sent a second email including the NOH and asking for a reply. The Appellant did not reply to the email and he failed to attend the hearing.

[3] In accordance with section 19 of the *Social Security Tribunal Regulations* (Regulations) deems when documents sent by the Tribunal are communicated, Members may rely on these when determining if the appellant received notice of hearing.

[4] In this case the Tribunal finds that Canada Post confirmed the initial NOH sent on January 11, 2017 was successfully delivered to the Appellant and thus he would have been aware of the in person hearing scheduled for March 1, 2017. However the hearing did not take place as the Claimant's representative requested an adjournment on February 27, 2017.

[5] The Tribunal finds that the evidence supports that the subsequent adjournment notice and new NOH was returned to the Tribunal, therefore the Appellant did not receive the adjournment or NOH for the April 24, 2017 hearing. However the information was conveyed to Appellant by emails for both the adjournment and the new hearing date.

[6] The Tribunal finds that when an Appellant has not received the NOH the Member must be satisfied that all steps have been taken to locate the Appellant. The Tribunal finds the fact the evidence supports the Appellant received the initial NOH but there was no contact by the Appellant to the Tribunal that he attended the hearing which had been adjourned. Therefore, the Tribunal finds that either the Appellant did not attend because he received the email advising the hearing was adjourned, or he made a choice not to attend the initial hearing and subsequently the hearing on April 24, 2017.

[7] In this case the Tribunal finds extensive efforts were taken to locate the Appellant and give notice of the hearing. The Member decided to proceed with the hearing in the absence of the Appellant and render a decision on the merit as other parties were in attendance and it is in the interest of natural justice to bring finality to the appeal.

[8] The hearing was held by In person for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that more than one party will be in attendance.

c) The information in the file, including the need for additional information.

d) The fact that multiple participants, such as a witness, may be present.

e) The fact that the appellant or other parties are represented.

f) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification pursuant to sections 30 of the *Employment Insurance Act* (Act) because he lost his job due to his own misconduct as per paragraph 29(1)(b) of the Act.

EVIDENCE

[10] On his application for benefits the Claimant completed a Fired/Dismissed questionnaire stating the final incident occurred when he text his employer to tell him he was not able to come to work as he had received a call from Saskatchewan Immigration Nominee Program (SINP) regarding his immigration papers. He stated his employer text him back and told him to cancel his appointment if he wanted to keep his job and then asked to return his key to the store. The Claimant stated the reason the employer didn't want him to go was because the employer was on bad terms with SINP. The Claimant also explained the working conditions that were unfavorable (GD3-8).

[11] On April 21, 2016 the Commission contacted the employer who stated the Claimant quit, he was not dismissed. He stated that on March 13th at 10:49 AM, the Claimant text him to say he wasn't going to be in because his son and wife were hospitalized and he would need 3 days off, to which the employer agreed. He stated on March 15th the Claimant asked for the rest of the week off. He stated that on March 29th the Claimant sent him a text a 9 AM saying he would not be in because he had an appointment with the immigration officer. The employer stated he was to start at 9 AM so he text him back and told him to cancel the appointment and come to work because he was already late. He stated the Claimant was to give him 24 hour notice to take time off unless it was for sickness. He stated the Claimant text him back in 10

minutes and said he was sorry he couldn't cancel, so he text him back and told him bring in his keys. The employer stated he would send in the attendance policy and copies of the text messages. He stated he also found out that the Claimant was doing some cash work (GD3-18).

[12] On April 25th and 26th, 2016 the Commission made attempts to contact the Claimant (GD3-19).

[13] On April 28, 2016 the Commission notified the Claimant they were unable to pay him benefits because it was determined he voluntarily left his employment without just cause (GD3-20 to GD3-21).

[14] On May 2, 2016 the employer provided the Commission with the company policy and text messages (GD3-22 to GD3-42).

[15] On May 18, 2016 the Claimant made a request for a record of employment (GD3-41 to GD3-42).

[16] On May 20, 2016 the Claimant made a request for reconsideration stating he was terminated and he did not leave voluntarily (GD3-43 to GD3-47).

[17] On July 4, 2016 the Commission contacted the employer who confirmed all new employees are given a copy of the company attendance policy when they are hired and asked to sign and acknowledge that they read it. He stated the Claimant took his copy and this is when he quit. The employer stated the Claimant did not have an appointment with immigration the day he didn't show up for work, he was just going to check on his status of his claim which he could have done on his phone (GD3-48).

[18] On July 4th and 5th, 2016 the Commission attempted to contact the Claimant (GD3-49).

[19] On July 5, 2016 the Commission notified the Claimant in writing requesting him to contact the Commission regarding the request for reconsideration (GD3-50).

[20] On July 15, 2016 the Commission spoke to the Claimant who stated he was only notified about his appointment with SINP the night before his appointment. He stated he didn't immediately notify his employer about having to miss work the next day because his wife was

seriously ill and he had to take her to the emergency room and she was hospitalized overnight. The Claimant stated this could be confirmed with SINP. He stated he knows he told his boss he had to miss work because of the appointment but he isn't sure if he mentioned his wife was in the hospital. The Claimant stated when he met with SINP they told him his employers account was suspended for failing to complete the paperwork properly and return the letters required for his temporary workers to extend their work permits, which was the same issue the Claimant was having. SINP assisted the Claimant in applying for his Permanent Residency and told him if he had he kept waiting for the letter from his employer, he never would have received it (GD3-51).

[21] On July 19, 2016 the Commission contacted the SINP who confirmed it was possible the Claimant's appointment was only made the day prior and as the office closes at 5 PM, he would have notified the Claimant before then. He stated the Claimant made the appointment because his employer was stalling on the process of submitting paperwork which the Claimant required for his immigration process. He stated that he was aware the Claimant's wife was very ill and the appointment could have been rescheduled. The SINP stated that the day of the meeting the Claimant filed a complaint against the employer and it was also discovered that the employer was breaching the agreement. The SINP stated that according to the initial statement the Claimant provided he was only advised of his schedule on the day of the 29th of March and that he was scheduled to work at noon, not 9 AM (GD3-52).

[22] On July 20, 2016 the Commission contacted the Claimant who stated he was only advised of his shift the day before and as far as he could remember he was to start at noon. He stated he believed his appointment with SINP was at 11 AM and his wife was discharged from the hospital approximately 10 AM. The Claimant stated the reason he made the appointment with SINP was primarily because the employer was refusing to file his work permit paperwork, but also because he was being underpaid and doing duties that he was not supposed to be doing according to his work permit. He stated his work permit only allowed him to work as a graphic designer and all these issues were presented to SINP at the meeting (GD3-53).

[23] On July 20, 2016 the Commission contacted the employer who stated the Claimant was to start work at 9 AM and open the store so it was opened late. He stated the Claimant never mentioned anything about his wife being in the hospital. He stated he had previously given the

Claimant 10 days off and he should have given the employer a 24 hour notice. He stated he didn't realize the Claimant had an official appointment with immigration, he thought he was just inquiring about the status of his file. The employer stated that he didn't delay in filing paperwork and it was submitted on time. The employer stated that opening the store and helping customers was part of the Claimant's duties. The Commission asked the employer for a copy of the Claimant's contract and he stated that the Claimant took the information with him when he left and he no longer has it and the contract is being investigated and the Claimant manipulated the contract (GD3-54).

[24] On July 21, 2016 the Commission notified the employer and Claimant that the decision of voluntary leave had been changed to dismissal – Misconduct not proven and advised of the right to appeal to the Tribunal (GD3-55 to GD3-58).

[25] On August 19, 2016 the employer filed a Notice of Appeal stating that the Claimant did not give any notice to not show up for work. He stated he disagrees with the Commission and believes they made their decision on a conversation with the Claimant's immigration officer and allegation the Claimant was bringing against the business. He stated the Claimant left voluntarily and there is no evidence he was dismissed. The employer stated he found out that the Claimant had been giving his friends discounts and free service which he was not authorized to give. He stated he has included letters signed by customers and information from the immigration program to support his appeal (GD2-1 to GD2-12).

EVIDENCE AT THE HEARING

[26] The Claimant along with his representative stated that they support the Commission's decision and that the employer lacks credibility.

[27] The Claimant along with his representative stated that the day of the final incident he had a valid reason for missing work. He stated that he was in danger of losing his work permit because he employer had delayed in submitting the paperwork.

[28] The Claimant stated that he called SINP to get an appointment, which he thought would take a couple of weeks, but was offered one at 11 AM the next day. He stated he was at the hospital with his wife and he text his employer to advise him he wouldn't be in.

[29] The Claimant stated that he was to start work at noon that day. He stated there was no regular schedule and the employer would only tell him the night before what time he was to come in the next day.

[30] The Claimant stated when he did text the employer to advise him he would not be in as he had an appointment with SINP, his employer told him to cancel it. However due to the importance of the meeting, he told his employer he couldn't. It was then the employer told him to return the keys to the store. He stated he did this and was done working.

SUBMISSIONS

[31] The Appellant submitted that:

a) The Claimant left voluntarily;

b) The Immigration officer mislead the investigation when he spoke to the Commission;

c) There is no evidence the Claimant was dismissed; and

d) He discovered after the Claimant left that he was working privately and doing graphic work for the employer's customers for a cheap price and he was giving his friends discounts and free service which he was not authorized to do.

[32] The Respondent submitted that:

a) In situations where a claimant's employment has ended due to absences they are in some cased viewed as voluntary leaving. While in others they are viewed as a dismissal. In the case at hand, the Commission initially viewed the Claimant's separation as voluntarily leaving without just cause; however after the reconsideration process the agent determined that it was a case of dismissal and misconduct was not proven;

b) The Commission concluded that the Claimant did not lose his employment by reason of his own misconduct because his absence from work was to attend an appointment with Immigration given he feared losing his work-permit as his employer was delaying in submitting it;

c) It is unclear what the Claimant's actual start time was on this day, given the conflicting statements from both parties; but it is considered the Claimant did contact the employer to notify him of his absence. Additionally the employer's company policy states that an employee will only be considered to have quit their job if they miss work without notification and it does not stipulate how much notice one is required to give if they are unable to work a shift;

d) The Claimant being fearful of his employer, who had control over his work-permit; which was confirmed by the SINP, had previously been allowed to miss work without repercussion, but in this instance, when he mentioned who his appointment was with, the employer immediately dismissed him; misconduct not proven; and

e) The employer has since submitted letters written by various customers who state the Claimant provided services to them for free or at a discount rate plus he had been seeking work and/or working under the table for cash; however this information is irrelevant to the case at hand because the Claimant's employment was terminated after he failed to report to work due to having an appointment scheduled with SINP given he feared losing his work-permit.

ANALYSIS

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

[34] Under subsection 30(1) of the Act, an employee is disqualified for receiving EI benefits if he loses his job as a result of misconduct, or voluntarily leaves his job without just cause.

[35] The Appellant argues that the Claimant voluntarily left his employment and there is no evidence the Claimant was dismissed.

[36] The Respondent argues that in situations where a claimant's employment has ended due to absences they are in some cased viewed as voluntary leaving. While in others they are viewed as a dismissal. In the case at hand, the Commission initially viewed the Claimant's separation as voluntarily leaving without just cause; however after the reconsideration process the agent determined that it was a case of dismissal and misconduct was not proven. The

Commission concluded that the Claimant did not lose his employment by reason of his own misconduct because his absence from work was to attend an appointment with Immigration given he feared losing his work-permit as his employer was delaying in submitting it.

[37] The Tribunal finds from the Appellant's evidence on the file cannot support a finding of voluntary leave but rather one that supports the Appellant was dismissed. The Tribunal finds the documentary evidence of the text conversation between the Claimant and employer supports it was the employer who severed the relationship when he told the Claimant to cancel his meeting with SINP and show up for work and when the Claimant replied he couldn't the employer told him to return the keys by 6 PM.

[38] The Tribunal finds that the legal issue at stake is a disqualification under subsection 30(1) of the Act which states a claimant will be disqualified from benefits if he lost his employment by his own misconduct or voluntarily left his employment without just cause (*Canada (Attorney General) v. Desson*, 2004 FCA 303 (CanLII)).

[39] The Supreme Court of Canada has stated that the cardinal principal of section 28 (now section 29) is that the loss of employment which is insured against must be involuntary. Thus claimants are disqualified if they lose employment by reason of their own misconduct, or if they voluntarily leave their employment without just cause. The consequences under (i.e., disqualification under section 30(1) whether it is found that he claimant lost his employment because of misconduct or because he voluntarily left under the Act are the same. Parliament linked voluntary leaving and misconduct due to the fact that contradictory evidence may make it unclear to the cause of the claimant's unemployment (*Canada A.G. v Easson* A-1598-92).

[40] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost he employment due to his own misconduct and therefore not to allow this claim free from disqualification.

[41] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct, where the claimant knew or ought to have known that her misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's

misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemire*, 2012 FCA 314).

[42] The Tribunal must first identify if the alleged act constituted misconduct and if the Claimant's conduct complained of was the cause of the dismissal and not merely an excuse for dismissal (*Davlut v. Canada (A.G)*, A-241-82).

[43] In this case, the Tribunal finds the Claimant was accused of not providing notice of his absence from work; however unless there is significant evidence to prove the acts were willful issues of disobedience it is not to be associated with misconduct. The Tribunal does not find that there is sufficient evidence to support the Claimant's actions were willful and of such negligence that he knew or ought to have known his actions would cause him to lose his employment due to his own misconduct.

[44] The Appellant argues that the Immigration officer mislead the investigation when he spoke to the Commission.

[45] The Tribunal finds there is no evidence to support that the cause of the dismissal was due to the information provided by the Immigration officer. The evidence on the file supports the reason the Appellant needed time off from work was to deal with his work-permit and that the situation was time sensitive, which did not leave the Claimant the option of canceling his meeting at the request of his employer.

[46] The Tribunal finds from the Claimant's oral testimony that he was provided with an appointment on very short notice and he notified his employer as soon as he knew. The Tribunal finds the text messages confirm the Claimant contacted the employer at 9 AM.

[47] The Tribunal finds from the evidence on the file that the employer may have misunderstood that the Appellant had a set meeting and also the importance of the meeting until his conversation with the Commission, as he stated to (GD3-54) "He states he didn't realize the Claimant had an official appointment with immigration. He thought he was just inquiring about the status of his file".

[48] The Tribunal finds from the evidence on the file that the employer didn't ask the Claimant to provide any details of the meeting or the urgency for it, but only to cancel it and if not to bring in the keys. The Tribunal finds from the statements provided by the Immigration officer and from the Claimant that this meeting was crucial to his livelihood and time sensitive.

[49] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[50] As cited in (*Canada (A.G.) v. Tucker* A-381-85), misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Willful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere "carelessness" does not meet the standard of willfulness required to support a finding of misconduct.

[51] As Justice Nadon wrote in (*Mishibinijima v. Canada* 2007 FCA 36), there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[52] The Tribunal finds there is no evidence to support the Claimant would have known or ought to have known when he advised his employer he was not able to come to work because of his important meeting with Immigration that he would lose his job.

[53] The Tribunal finds from the Appellant's evidence on the file that he had provided the Claimant with time off when requested. As well the evidence is clear the Claimant was upfront and honest with the reason for needing the time off. The Tribunal finds that the company policy that states an employee will only be considered to have quit their job if they miss work without

notification and it does not stipulate how much notice one is required to give if they are unable to work a shift and this is not what occurred in the case at hand.

[54] The Appellant argues that he discovered after the Claimant left that he was working privately and doing graphic work for the employer's customers for a cheap price and he was giving his friends discounts and free service which he was not authorized to do.

[55] The Respondent argues that the employer has since submitted letters written by various customers who state the Claimant provided services to them for free or at a discount rate plus he had been seeking work and/or working under the table for cash; however this information is irrelevant to the case at hand because the Claimant's employment was terminated after he failed to report to work due to having an appointment scheduled with SINP given he feared losing his work-permit.

[56] The Tribunal finds the letters submitted are hearsay and there is no evidence to support the Appellant was dismissed because these allegations, but rather when he failed to cancel his appointment and show up for work.

[57] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[58] Determining whether dismissing the Claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the Claimant's dismissal from employment (*Macdonald* A-152-96).

[59] The Tribunal finds the Claimant to be a credible witness and there is ample evidence of probability which should be resolved in the favor of the Claimant.

[60] The Tribunal finds that the Appellant failed to discharge the burden of proving the Claimant's misconduct within the meaning of the Act. Therefore with the evidence before it, the Tribunal finds the Claimant should not be disqualified from benefits because his dismissal was not caused by his own misconduct (*Meunier v. Canada (A.G.)* A-130-96); and (*Choinier v. Canada (A.G.)* A-471-95).

CONCLUSION

[61] The appeal is dismissed.

Teresa Jaenen
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.