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

Citation: *D. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 83

Tribunal File Number: GE-16-4160

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: June 8, 2017

DATE OF DECISION: June 9, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The claimant made an initial claim for Employment Insurance (EI) benefits on December 22, 2014. On August 15, 2016, the Canada Employment Insurance Commission (Commission) disqualified the claimant from receiving EI benefits after finding that he was dismissed from his employment on May 2, 2015 due to misconduct. Further, the claimant was imposed a warning because he did not notify the Commission that he lost employment and it was determined that he knowingly made a false representation. The claimant requested a reconsideration of this decision, and on October 17, 2016 the Commission maintained its initial decision. The claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on November 9, 2016.

[2] The Tribunal must decide the following issues:

- whether the claimant lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act); and
- whether the claimant should be assessed a warning pursuant to section 41.1 of the EI Act for making a misrepresentation by knowingly providing false or misleading information to the Commission.

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

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

[4] D. L., the claimant, attended the hearing via teleconference.

[5] The Tribunal finds that the claimant lost his employment due to his own misconduct; however, the Tribunal further finds that the claimant should not be issued a warning penalty because he did not knowingly provide false or misleading information to the Commission.

[6] The reasons for this decision follow.

EVIDENCE

Information from the Docket

[7] The claimant established a claim for regular EI benefits on December 21, 2014.

[8] The employer submitted a Record of Employment (ROE) dated January 7, 2015 indicating that the claimant began working as an operator on April 26, 2014 and he was no longer working due to a shortage of work on December 18, 2014 accumulating 1795 hours of insurable employment.

[9] The same employer submitted a ROE dated May 20, 2015 indicating that the claimant began working on January 14, 2015 and he was dismissed on May 2, 2015 accumulating 657 hours of insurable employment.

[10] The claimant applied for regular EI benefits on November 23, 2015 indicating that he worked from May 8 to November 7, 2015 and it was unknown whether he would be returning to work for this employer. He further indicated that he had worked since he completed his last application for EI benefits from January 12 to May 2, 2015 and he was dismissed from this employment because his employer accused him of using alcohol and drugs.

[11] The claimant explained that he was partying the night before and was caught coming to work while still intoxicated so they fired him. He stated that he spoke to his employer and told them he would go to rehab but they did not care.

[12] The employer was contacted by the Commission and the Payroll Administration stated that the claimant was dismissed for being under the influence and using drugs while at work. She stated that the claimant admitted to the safety supervisor and he signed a document stating he used drugs while at work and was under the influence of drugs at work.

[13] The employer was asked to submit this signed statement to the Commission but the employer called back and said that the claimant did not sign a statement saying he was using drugs at work and she would not be sending any documents.

[14] The claimant was contacted by the Commission and he stated that he did smoke a joint before going to work and a supervisor who did not like him heard about it and told him he would be tested after work. He stated that he did have to go see the safety officer and admitted to the drug use; he requested rehab but was denied. The claimant stated that he did not do drugs while at work and he did not sign anything.

[15] The Commission provided the Full Text Screens Telephone Reporting Service for the period of April 26 to May 9, 2015 which the claimant completed on May 8, 2015. The claimant reported that he did work 59 hours and received $1,416.00 in earnings. He further reported that he did not stop working for any employer during the period of the report; he was asked to confirm his answer and he confirmed that he did not stop working for an employer.

[16] The Commission provided a Summary of Benefits Paid from December 21, 2014 to December 19, 2015. This indicates that the claimant did declare earnings starting on January 18, 2015 until the week beginning May 3, 2015 in which he did not declare any earnings. He then declared earning for the week beginning May 10 until November 1, 2015.

[17] The Commission provided an Overpayment Calculation worksheet explaining that the claimant's benefit rate was $514.00 per week and benefits paid while on claim varied due to the claimant's declared earnings from employment. The worksheet further explained that as a result of the retroactive imposition of the disqualification, the claimant was not entitled to benefits after the week commencing April 26, 2015; this resulted in an overpayment of $4,354.00.

[18] The Commission sent a letter dated August 15, 2016 informing the claimant that according to their records, he failed on one occasion to provide information; he failed to disclose that he was dismissed from his employment. The Commission concluded that the claimant knowingly made this false representation but did not ask that he pay a monetary penalty given the circumstances surrounding the false representation.

[19] The claimant was sent a Notice of Debt dated August 20, 2016 in the amount of $5,204.00.

[20] Following the claimant's Request for Reconsideration, he was contacted by the Commission and he stated that he made a mistake when he was filing his reports as he did not

realize that he had not reported the dismissal. He stated that he was simply doing his cards as usual and he changed the phone number of the employer; by doing so, he thought that it might be enough and it would change automatically.

[21] The claimant agreed that he was asked on the report card if he had been terminated or if he had quit a job but stated that he just answered "no" automatically as usual and it was a mistake. He stated that he tried to call Service Canada to correct the mistake but it is impossible to get to talk to someone. He stated that he did not go to a Service Canada Centre because he was working and it is not open on weekends. He stated that he never tried to falsify anything.

[22] The claimant was asked if he wanted the Commission to reconsider the decision that had been rendered regarding his dismissal for misconduct and he stated "no" as he does not dispute it.

Testimony from the Hearing

[23] The claimant testified at the hearing that he was working while in receipt of EI benefits and he did not report that he was fired from his employment. He stated that he was busy and rushed and made a mistake pushing in the wrong numbers so he attempted to contact the Commission through the 1-800 number but could not get through. He stated that he tried for a week without success and could not go to Service Canada because he found a job and he could not take time off work.

[24] The claimant stated that he changed the employer's telephone number in his reports and hoped that his would trigger someone to call him; he continued to complete his reports and when he did not receive a call from the Commission, he thought he was okay. He added that he did not know until a year later that he was denied EI benefits because of the dismissal when someone finally contacted him from the Commission.

[25] The claimant stated that not being able to get through to the Commission is a huge issue as he currently has an address change but continues to not been able to get through. The claimant asked how he was to correct the mistake he made if he cannot get through and speak to the Commission.

[26] The claimant stated that he has no problem admitting that he lost his job due to misconduct because it is the truth adding that he learned from his mistake.

SUBMISSIONS

[27] The claimant submitted the following:

a) He disagrees with the Commission's decision because he truly made a mistake not clarifying on his report cards that he was fired from his employment on May 2, 2015 because he was under the impression that he did not have to report until the end of the season claim. He started a new job and reported the new phone number and he thought it would be picked up by the automatic telephone report cards.
b) He does not dispute the fact that he got fired as he was responsible for that. He disputes the fact that he is unable to get through to the Commission when he needs to.
c) Services were not provided to him when he needed them when he tried to get a hold of the Commission. None of this would have happened if he would have been able to get through to someone and was able to change his report and then he would have known to not complete his reports and his EI benefits would have stopped.
d) He was laid off on November 9, 2015 but had enough hours to start a new claim. Due to the economy in Alberta, he only started working again on June 15, 2016 and he did not work from November 9, 2015 to June 15, 2016. This Notice of Debt is going to be a financial burden on him.
e) He cannot afford to pay back the debt; if he has a shortage of work he will have to file bankruptcy.

[28] The Commission submitted the following:

Misconduct

a) The claimant was dismissed from his employment on May 2, 2015. He stated he was dismissed because he had been "partying the night before" and went into work the next day while still intoxicated. He later admitted that he had smoked a joint before going to work and the employer confirmed that the claimant was dismissed for being under the influence while at work.

b) The claimant's action of showing up at work while under the influence of alcohol and/or drugs (marijuana) was willful and deliberate, or so reckless as to approach wilfulness, and constitutes misconduct within the meaning of the EI Act.
c) The fact that the alcohol and/or drug use occurred before the commencement of the claimant's shift is irrelevant. In the claimant's position as an operator, it was of the utmost importance that the claimant's skills, ability, and judgment not be compromised or affected by either alcohol or drugs.

Misrepresentation

d) The claimant made a misrepresentation when he failed to report that he had lost his employment when he completed his claimant report on May 8, 2015.
e) The claimant knew that he was no longer working when he completed his claimant report on May 8, 2015. He was specifically asked "Did you stop working for any employer during the period from April 26 to May 9?", and replied "no" even though he had to have known that he had been dismissed from his employment on May 2, 2015.
f) As a result of this false and/or misleading statement, benefits continued to be paid to the claimant for the period from April 26, 2015 to December 19, 2015. A subsequent investigation determined that the claimant was not entitled to these benefits, as he had been dismissed from his employment for misconduct. This resulted in the payment of $4,354 in EI benefits to which the claimant was not entitled.
g) It was determined that this was the claimant's first incident of misrepresentation. Rather than imposing a monetary penalty, the Commission determined that the imposition of a non-monetary warning penalty pursuant to section 41.1 of the EI Act would be sufficient. The Commission submitted that it rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when assessing the penalty amount.

ANALYSIS

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

Misconduct

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

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

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

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

[34] The claimant does not dispute that he was dismissed from his employment due to his misconduct. He accepted responsibility for his actions, admitted to the behaviour that caused the loss of his employment and stated that he has learned his lesson. The Tribunal accepts the claimant's statements and testimony that he was responsible for the loss of his employment.

[35] Further, the Tribunal finds that the act of going to work while under the influence of drugs or alcohol is a breach of the terms of his employment contract both expressed and implied and this is considered misconduct within the meaning of the EI Act. The Tribunal has no doubt that the claimant knew his actions could result in his dismissal.

[36] The claimant's argument is not with the denial of EI benefits due to the disqualification caused by the misconduct but with his inability to contact the Commission in order to change his report cards. The claimant makes a valid point as the Tribunal has heard from many claimants who have become frustrated with their inability to get through to the Commission representatives using the 1-800 number. The Tribunal further recognizes that not every claimant has the ability to attend a Service Canada Centre.

[37] However, the claimant was dismissed from his employment and admits to the misconduct which caused his unemployment; therefore the Tribunal finds that the claimant was disqualified from receiving EI benefits under section 30 of the EI Act.

[38] This means that the claimant received EI benefits that he was not entitled to. Section 44 of the EI Act states that "a person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be."

[39] The Tribunal is unable to intervene regarding the overpayment as the claimant received EI benefits that he was not entitled to and the EI Act clearly states that any overpayments must be repaid.

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

Penalty

[41] In order for the Commission to impose a penalty or a warning, the false or misleading statement must be made knowingly. Knowingly is determined on the balance of probabilities based on the circumstances of each case or the evidence of each case.

[42] The FCA decision in *Canada (Attorney General) v. Mootoo*, 2003 FCA 206 in which the court confirmed the principle that for a finding of misrepresentation, the claimant must have subjective knowledge that the report was false in order to penalize him or her.

[43] The Tribunal finds that the claimant's credibility is not in question as he routinely reported his earnings accurately, he was truthful when he explained why he lost his job, and he admitted that he wrongly answered very simple questions. The Tribunal does not doubt that the claimant was rushed and made a mistake answering the questions on the report card.

[44] Further, the Tribunal accepts that the claimant attempted to contact the Commission numerous times to correct his mistake but was unable to get through. From this, the Tribunal is convinced that the claimant did not knowingly provide misinformation to the Commission because he made a mistake and he attempted to correct that mistake.

[45] The Tribunal finds that the claimant should not be issued a warning penalty under section 41.1 in the EI Act; he should not be penalized for making a mistake and not being able to contact the Commission to correct that mistake because of the congested call centre telephone lines.

CONCLUSION

[46] The Tribunal concludes that the claimant must repay the overpayment as he lost his employment due to his own misconduct; the Commission was appropriate in imposing a disqualification from receiving EI benefits under section 30 of the EI Act.

[47] The Tribunal further concludes that it is not appropriate for the Commission to issue a warning penalty in accordance with section 41.1 in the EI Act because the claimant made a mistake and did not knowingly make statements or representations that he knew to be false or misleading.

[48] The appeal is dismissed with modifications.

K. Wallocha
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.

41.1 (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

(2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.