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

Citation: *L. R. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 100

Tribunal File Number: GE-16-4743

BETWEEN:

L. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: June 22, 2017

DATE OF DECISION: June 29, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for Employment Insurance (EI) benefits on August 16, 2016. On September 26, 2016, the Canada Employment Insurance Commission (Commission) disqualified the Appellant from receiving benefits after finding she lost her employment as a result of misconduct. The Appellant requested a reconsideration of this decision, and on November 12, 2016, the Commission maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on December 19, 2016.

[2] The Tribunal must decide whether the Appellant lost her employment due to misconduct, pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act), and, if so, whether the loss of employment due to misconduct was within three weeks before the day she was to be laid off pursuant to section 33 of the EI Act.

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

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

[4] The following people attended the hearing, the Appellant, L. R., her friend who would be acting as support, D. L., and Katherine Wallocha, an observer. The role of the observer was explained to the Appellant and the Appellant stated she had no objection to the observer being present.

[5] The Tribunal finds that the Appellant is disqualified from benefits because she lost her employment due to misconduct and that she was not going to be laid off. The reasons for this decision follow.

EVIDENCE

Information from the Docket

[6] The Appellant applied for regular EI benefits on August 16, 2016, stating that she was dismissed from her employment because of absenteeism. She stated that she requested permission to be absent explaining that she was going to be laid off on July 26, 2016, due to a shortage of work but she was sick on that day and unable to be at work, so she was let go. The Appellant confirmed that there were other occurrences of absence within the six months prior to her dismissal indicating May 27, 2016, June 24, 2016, and July 25, 2016, as days on which she was absent because she was sick. She stated that two weeks prior to her dismissal she was given a letter by her employer and her union representative indicating that she would be laid off due to a shortage of work.

[7] The employer submitted a Record of Employment (ROE) dated July 28, 2016, indicating that the Appellant began working as a security guard on March 18, 2015, and she was dismissed on July 25, 2016.

[8] The employer was contacted by the Commission and he stated that the Appellant was to be laid off on July 26, 2016, but she was terminated due to absenteeism because it was an ongoing issue. He added that the Appellant was given a final warning for missing a shift on June 24, 2016, and informed that further absences will result in termination. The Appellant then missed work on July 24, 2016, and July 25, 2016, without providing any notice.

[9] The employer explained that as long as the employee calls in before a shift to let the operation centre know they will be absent a replacement will be found for the employee. He stated that for the Appellant's final incident, she had failed to call anyone, and did not show up.

[10] The employer submitted a letter dated July 27, 2016, informing the Appellant that she was released from her employment because of her frequent absenteeism. This letter stated that the Appellant was given numerous verbal warnings about her absenteeism, however her absenteeism continued. She was then issued Records of Conversations dated May 25, 2016, and June 9, 2016 regarding her continued absenteeism with either short or no notice. A Disciplinary Incident Report dated June 28, 2016, stated that the Appellant did not report for her scheduled

shift on June 24, 2016, due to her choice to attend a Trooper concert. This report informed the Appellant that one more incident of tardiness or shift abandonment shall result in her immediate termination. The July 27, 2016, letter also stated that the Appellant's absenteeism continued despite coaching she received as evidenced by her failing to report for her shifts on July 24 and 26, 2016, and not reporting to anyone that she was unable to work those shifts.

[11] The Commission sent a letter dated September 26, 2016, informing the Appellant that she was unable to receive EI benefits because she lost her employment as a result of her misconduct.

[12] The Appellant submitted a letter with her Request for Reconsideration stating that on the last day of her job she was sick and did not make it to work. She stated that July 22, 2016, to July 26, 2016, was supposed to be her holidays that she requested in March 2016. She stated that the plant where she was a security guard was supposed to close on August 1, 2016, and later she got a letter from her employer that she was being moved to another plant. Two weeks later she received another letter that stated she was being let go due to downsizing.

[13] The Appellant submitted a Field Leave Request form dated March 8, 2016, in which she requested leave from July 22, 2016, to July 26, 2016, with a return to work date of August 1, 2016.

[14] The employer was contacted by the Commission and he explained that the Appellant was given letters advising of downsizing because they want to keep employees up to date on what is happening. Regardless, the employer stated that had the Appellant not been dismissed for absenteeism, she would be working as they have a lot of work and the Appellant would have been placed on a casual list until a posting came up. He added that she would definitely have had work as even their casual employees are working.

[15] The Appellant was contacted by the Commission and asked if she was approved for leave and if she withdrew her leave request; the Appellant responded "yes, I just went to work but I got sick and I didn't call in that last day." She was asked why she did not call in and she responded that she did not know stating "I guess I should have but it was the last day." The Appellant confirmed that she was aware of how to report absences adding that she knows she should have called in but she was finished anyways. The Appellant further confirmed that she

was aware that the Disciplinary Incident Report warned that any further absenteeism could result in her release from employment. The Appellant stated that she recalls the Disciplinary Incident Report dated and signed on June 28, 2016, and she was asked by the Commission why, after signing this report, would she not have thought it would be absolutely important that she report any absences. The Appellant responded "I just didn't bother."

[16] The Appellant informed the Commission that she was aware that the letters given to her by her employer indicated that the employer was making every effort to find her a new full-time position.

[17] Two letters from the employer were submitted dated April 29, 2016, and July 5, 2016, in which the Appellant was informed that there would be downsizing with the client she was assigned to work for and therefore her position was eliminated effective July 31, 2016. The July 5, 2016, letter stated that every effort was being made to locate a new full-time position for her and she would be reverted to the spare board until a full-time position was found.

[18] The Appellant submitted another letter from her employer dated May 20, 2016, informing her that effective July 31, 2016, she will be moved over to another plant site; she will retain the same schedule and rotation on day shift that she currently works.

Testimony from the Hearing

[19] The Appellant testified that the day she did not go to work was supposed to be her last day of work as her employer was going to lay her off on that date.

[20] The Appellant stated that when she was given notice by her supervisor of her last day she was informed that they would write on her ROE that she was let go due to a shortage of work.

[21] The Appellant stated that there was no work at the other plant and although she was sick and she did not go to work on her last day of work, it was not fair that they fired her since it was her last day of employment.

[22] The Appellant stated that the letter, dated July 5, 2016, from her employer is the letter that informed her she was being laid-off and due to her work rotation July 26, 2016, would have been her last day of employment.

[23] The Appellant stated that she was informed verbally by her supervisor, after receiving the July 5, 2016, letter that she was being laid-off. The Appellant also stated that she does not consider being on the spare board as employment as she was also told be her supervisor that if she did not get enough hours on the spare board she would be laid-off any way.

[24] The Appellant explained that she was actually supposed to be on holidays for the period of July 22, 2016, to July 26, 2016, but once she found out that she was being laid off she requested to work those days instead. The Appellant stated she worked all of the days she was slated to be on holiday except for July 26, 2016.

[25] The Appellant testified that she did not present for work on July 26, 2016, as she had become sick the night before and was unable to work that day. She did not call in to inform her employer of her illness until about four hours after the start of her shift. The Appellant explained that her employer wants to be informed before an employee's shift starts if they are unable to work their upcoming shift. The Appellant confirmed that there is someone on duty at night who she could have called and informed of an inability to work due to illness.

[26] The Appellant claimed the June 28, 2016, Disciplinary Incident Report, was incorrect when it stated that she had missed work on June 24, 2016, due to attending a concert. The Appellant stated that while it was her signature on the form, the information about missing work due to attending a concert was not present when she signed the document, and that she had not read the warning on the Report that one more incident of tardiness or shift abandonment could result in her termination.

SUBMISSIONS

[27] The Appellant submitted the following:

a) That she received a letter dated July 5, 2016, from her employer which informed her that she was going to be laid off and that due to her shift rotation July 26, 2016, was to be her final day of work.

b) That she had originally applied for vacation for the days of July 22, 2016, to July 26, 2016, but after finding out about her upcoming lay off requested to work those days.

c) That while she was aware of the procedure should she be unable to work due to illness, she did not call in on July 26, 2016, until four hours into her shift.

d) That she had missed work in the past but it was due to medical reasons and the June 28, 2016, Disciplinary Incident Report had not been read by her when she signed it and the information it contained regarding her missing work due to attending a concert was incorrect.

e) That she was informed verbally by her supervisor, after she received the July 5, 2016, letter, that she was being laid-off and that if she was on the spare board and did not get enough hours she would be laid-off anyway.

f) That while there was disciplinary actions on her file, her employment was being eliminated and it was not fair that she was terminated on her last day of work.

[28] The Commission submitted the following:

a) The Appellant had been notified of impending changes to her employment situation but these notices did not inform her that she was about to be laid-off. Rather, the employer advised her that she would remain on the casual list until such time as a new full-time position could be found for her.

b) As such, there was to be no interruption in the employment relationship and the Appellant could have continued working for them indefinitely. It is the Commission's position that it was the Appellant's actions in the final incident which brought an end to the employment. The Commission therefore considers that the provisions of section 33, where a Appellant may be disentitled rather than disqualified if they lose employment within three weeks of being laid-off, are not applicable to the case at hand and the provisions of section 30 must be invoked.

c) The Appellant was terminated as the direct result of a final incident of unreported absence following numerous prior warnings on this issue. Approximately a month prior to the final incident, she had been informed that any further incident of this nature would result in her termination. The Appellant acknowledged her wilful failure to report her

absence in the final incident and confirmed her awareness of the potential consequences of this failure. Consequently, the Commission has concluded that the Appellant's unreported absence constituted misconduct within the meaning of the EI Act.

ANALYSIS

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

Misconduct

[30] The first issue before the Tribunal is whether or not the Appellant lost her employment due to misconduct.

[31] 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 Appellant 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).

[32] 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).

[33] Furthermore, the FCA has explained that to determine whether the misconduct could result in dismissal, there must be a causal link between the Appellant's misconduct and the Appellant'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).

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

[35] The Appellant submitted that she had originally applied for vacation for the days of July 22, 2016, to July 26, 2016, but after finding out about her upcoming lay off instead requested to work those days. The Appellant submitted she was aware of the procedure should she be unable to work due to illness, but she did not call in on July 26, 2016, until four hours into her shift.

[36] The Appellant also submitted that she had missed work in the past but it was due to medical reasons and the July 28, 2016, Disciplinary Incident Report had not been read by her when she signed it and the information it contained regarding her missing work due to attending a concert was incorrect.

[37] The Appellant's employer submitted the Appellant was given warnings and verbally told that if she continued to miss work and not report, she would be dismissed.

[38] The Commission submitted the Appellant was terminated as the direct result of a final incident of unreported absence following numerous prior warnings on this issue. Approximately a month prior to the final incident, she had been informed that any further incident of this nature would result in her termination. The Appellant acknowledged her wilful failure to report her absence in the final incident and confirmed her awareness of the potential consequences of this failure.

[39] The Tribunal finds that the Appellant lost her employment due to her misconduct. The Appellant stated in her EI benefit application that she was dismissed due to absenteeism and stated that she had been absent on two previous occasions. The Appellant also claimed that she was sick and unable to come into work on July 26, 2016. When speaking to the Commission, and during the hearing, the Appellant stated that she was sick on July 26, 2016, but did not call in to inform her employer that she was sick and would be unable to work her shift. The Appellant also stated during the hearing that she was aware of the procedure for calling in sick and there was someone available she could have called to inform her employer that she was unable to work her upcoming shift but she did not call in until four hours into her shift.

[40] The Appellant disputed that she had read the June 28, 2016, Disciplinary Incident Report, which indicated she could be terminated for another incident of tardiness or absenteeism, when she signed it and submitted that the information in it was incorrect. The Tribunal finds that by signing the Disciplinary Incident Report the Appellant agreed that she had read the warning, understood it, and discussed it with her supervisor, which demonstrates to the Tribunal that she was aware another incident of absenteeism or tardiness could result in her dismissal.

[41] The Tribunal finds that the Appellant was aware of the possibility of being terminated should she be tardy or absent again, and was aware of the procedure to inform her employer she was unable to work the day of July 26, 2016, but despite that, intentionally failed to appear for her scheduled shift or inform her employer she would be unable to work said shift. The Tribunal further finds that the Appellant's actions constitute misconduct and her termination was the direct result of her misconduct.

Was the Appellant to be laid off?

[42] Having found the Appellant's termination was due to her misconduct the next question before the Tribunal is whether the Appellant's loss of employment due to misconduct was within three weeks before the day the Appellant was to be laid-off.

[43] The Tribunal finds that the Appellant was not going to be laid-off from her employment.

[44] The Appellant submits that the letter dated July 5, 2016, informed her that she was to be laid-off and due to her shift rotation, July 26, 2016, was her final day of work. The Appellant also submitted that she did not consider being on the spare board full-time employment and that she was told verbally by her supervisor, after July 5, 2016, that she was going to be laid-off. The Appellant further submitted that her supervisor told her even if she was on the spare board, if she did not get enough hours, she would be laid-off.

[45] The Commission submits the Appellant had been notified of impending changes to her employment situation but these notices did not inform her that she was about to be laid off. Rather, the employer advised her that she would remain on the casual list until such time as a new full-time position could be found for her. As such, there was to be no interruption in the employment relationship and the Appellant could have continued working for them indefinitely.

[46] In examining the July 5, 2016, letter the Tribunal finds that while it does state the Appellant's position had been eliminated effective July 31, 2016, the letter does not indicate that the Appellant had been, or was going to be, laid-off by her employer. The letter goes on to state that every effort would be made to locate another full-time position for her and should that fail, she would be placed on the spare board until a full-time position could be found. The offer of continued employment in another full-time position, or on the spare board, further demonstrates to the Tribunal that the Appellant was not being laid-off. The Tribunal also notes the letter dated May 20, 2016, which stated that due to an amalgamation the Appellant's current position would be shifted over to a different plant site but at no point mentioned the Appellant would be laid-off.

[47] The Tribunal also notes the comments from the Appellant's employer when contacted by the Commission that a replacement for the Appellant was hired to a full-time position and the employees on the spare board are also working, as further evidence that the Appellant, had she not lost her employment due to misconduct, could have continued working for her employer.

[48] The Tribunal also finds there is no evidence to support the Appellant's testimony at the hearing that she was informed verbally that she would be laid-off. The Tribunal notes that all of the changes to the Appellant's position had been documented in writing and finds, that on a balance of probabilities, the Appellant's employer would have informed her of such a change in writing.

[49] The Tribunal finds that the Appellant was not going to be laid-off from her employment and could have continued working with her employer had she not lost her employment due to her misconduct. Therefore, section 33 of the EI Act does not apply to remove the disqualification of benefits imposed on the Appellant for losing her job due to misconduct, under section 30 of the EI Act.

CONCLUSION

[50] The Tribunal finds that the Appellant lost her employment due to her misconduct and that her loss of employment due to misconduct was not within three weeks before the day she

was to be laid-off. The Tribunal finds that the Appellant was not going to be laid-off from her job and could have continued working for her employer had she not lost her employment due to misconduct.

[51] The appeal is dismissed.

Gary Conrad
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.

33 (1) A claimant is not entitled to receive benefits if the claimant loses an employment because of their misconduct or voluntarily leaves without just cause within three weeks before

(a) the expiration of a term of employment, in the case of employment for a set term; or

(b) the day on which the claimant is to be laid off according to a notice already given by the employer to the claimant.

(2) The disentitlement lasts until the expiration of the term of employment or the day on which the claimant was to be laid off.

Employment Insurance Regulations