



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. Z. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 99

Tribunal File Number: GE-16-4426

BETWEEN:

S. Z.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: May 31, 2017

DATE OF DECISION: June 27, 2017

REASONS AND DECISION

INTRODUCTION

[1] Mister S. Z. (Appellant) lost his employment as a security guard because his security guard licence required to perform his duties was not renewed by the issuing authority, due to criminal charges related to the theft of a cellular telephone. The Appellant applied for employment insurance benefits and his request was denied because the Canada Employment Insurance Commission (Commission) determined that the Appellant lost his employment due to his own misconduct. This decision was upheld during administrative reconsideration and the Appellant filed an appeal of the decision.

[2] The Tribunal must decide if the Appellant's loss of employment was due to his own misconduct pursuant to section 30 of the *Employment Insurance Act* (Act).

[3] Pursuant to section 10 of the *Social Security Tribunal Regulations*, the Tribunal asked the employer if they wished to be added as a party to the appeal. The Employer did not express any interest in being added as a party to this appeal. The Tribunal decided not to add the Employer as a party to this appeal as the employer has no direct interest in the decision.

[4] The Appellant participated in the hearing, but the Commission was not present. The hearing was held by Teleconference because this 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.

[5] The Tribunal concludes that the Appellant lost his employment due to his misconduct for the following reasons.

EVIDENCE

[6] The Tribunal took into consideration all of the evidence on file and has established the following to be relevant to the issue at hand.

[7] The record of employment filed in support of the application for benefits indicates that the Appellant was employed by Corps canadien des commissionnaires from June 24, 2012, until June 17, 2016, and separation of employment was due to a dismissal. (GD3-12)

[8] Information obtained from the employer indicates that the Appellant was terminated because his security guard licence was revoked by the Bureau de Sécurité Privé. According to the employer, the revocation of the permit was due to the fact that a few years ago the Appellant had a lapse in judgment (GD3-14). As a matter of fact, while working at the airport, the Appellant found a telephone and instead of returning the telephone to the airport's "lost and found", the Appellant chose to keep it. Due to this incident, the Appellant was suspended and returned to work as the employer determined that the incident did not merit termination of employment. However, when the Appellant applied to renew his security guard licence in June 2016, the incident regarding the telephone came up and his request for a renewal of his permit was denied. The employer further states that the Appellant will return to work once his security guard licence has been renewed. (GD3-20)

[9] During previous conversations with the Commission, the Appellant admitted that he was dismissed because his permit that is required to perform his duties as a security guard was revoked. The Appellant explained that sometime in 2012, he found a telephone on the bus. The telephone did not have any information or a SIM card. He took the telephone home, and his wife began to use it. A month later he was confronted by the Police and he got suspended from work. He was accused of theft in Court sometime in 2013. So when he applied in 2016 to the Bureau Sécurité Privé to renew his security guard licence, his request was denied due to the theft accusation. He will return to work once his licence has been reinstated. He admits he lacked judgment by keeping the telephone but states that it was not intentional and he never thought that he could potentially lose his job over it. He was well aware that having a valid security guard licence is an essential requirement for his employment. (GD3-19, and GD3-21)

[10] In his request for Appeal, the Appellant added that the telephone that he found belonged to one of his colleagues and that a decision on the matter was rendered in 2012. His licence was valid for a period of five years and was renewed annually and it was not until he had to renew for another five years that he was told he had to wait for a year before his licence could be renewed.

Appellant Testimony at the Hearing

[11] During the hearing, the Appellant testified that he worked for the Corps canadien des Commissionnaires who provided security services to various institutions, including the Montreal Dorval airport, where the Appellant worked. To work as a Security guard one must have a valid licence which is issued every five years. The Appellant testified that he never had a problem with the renewal of his licence until June 2016 when his request for a renewal was denied because of criminal charges due to an incident which occurred in 2012. The Appellant provided the following details related to this incident:

- a) To get from the airport to the parking lot and vice versa, employees had to take a bus which was used only by employees of the airport. Sometime in October 2012, at the end of his shift on Friday, the Appellant found a telephone on the bus on his way to the parking lot. The telephone did not have a SIM card or any other identifier permitting the Appellant to identify its owner. The Appellant tried to leave the telephone with the driver of the bus, but the driver told the Appellant that he had to leave the telephone at the “lost and found” at the airport. Since the Appellant’s shift had ended and he had already arrived at the parking lot, the Appellant took the telephone home with him with the intention of bringing the telephone back to work on Monday.
- b) Once the Appellant got home, he told his wife that he found the telephone on the bus and that she could use it as her own telephone was not functioning. And the Appellant completely forgot about returning the telephone to the Airport’s “lost and found”.
- c) Approximately, two weeks later, the Police went to the Appellant’s wife workplace to recuperate the telephone as the owner of the telephone, who happens to be one of his work colleagues, had filed a report to the Police. The latter also charged the Appellant with theft of a telephone. Given this criminal accusation, the Montreal Dorval Airport told the Appellant that he could no longer work at the Airport until the issue related to his criminal charges were resolved. As such the Appellant was suspended for three or four days by his employer “the Corps canadien des commissionnaires”. At the end his suspension, the Appellant continued working for the Corps canadien des

commissionnaires by performing his duties as a Security guard on a permanent basis at the Old Port of Montreal instead of the Dorval airport.

- d) The Appellant maintains that whilst he was accused of theft, he is not a thief as he found the telephone and he did not steal it. However, sometime in 2013, the Appellant was advised by his lawyer to accept a plea deal. As such, the Appellant pleaded guilty to the theft charge and agreed to pay \$800 to a woman's shelter.
- e) Despite having accepted a plea deal, when the Appellant tried to renew his Security guard licence in June 2016, his request was denied because his criminal charge related to the theft was still appearing in his file. The Appellant was advised by the National Pardon Centre that it takes five years from the date of the incident for his criminal charge to be removed from his file. Hence, the Appellant's file will not be cleared until June 17, 2017. Since the Appellant needs a licence to perform his duties as a Security guard, the employer had no choice but to terminate his employer. However, the employer has promised to rehire him once his licence is reissued.
- f) The Appellant stated that contrary to the Commission's position, he could not have known that by taking the telephone he would put his employment at risk, because he had every intention of returning the telephone to the "lost and found" at the airport. Furthermore, according to his employer's statement, his employer does not think that his lack of judgment was worthy of dismissal.

SUBMISSIONS

[12] The Appellant submitted that he did not lose his employment because of his own misconduct. While it's true that he lacked judgment by keeping the telephone, the Appellant maintains that the gesture was not intentional and that he could not have known that he could potentially lose his employment over it.

[13] The Commission argued that the Appellant lost his employment because he no longer met an essential requirement of the job, namely, the possession of a valid security guard licence. According to the Commission a causal relationship exists because as a result of his criminal conviction, the Appellant lost his licence, and by losing his licence, he lost the right to work as

a security guard. In short, the Commission argued that the claimant should reasonably have known that if he were found guilty of a criminal charge, it would affect his licence, and to work as a security guard, he should reasonably have known that he needed to have a valid security guard licence.

[14] The Commission maintains that the decision complies with the Employment Insurance Act and is supported by case law. Accordingly, the Commission requests the Tribunal to dismiss the appeal.

ANALYSIS

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

[16] Subsection 30(1) of the Act provides that a claimant is disqualified from benefits if he or she loses employment due to misconduct. "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 (*Brissette* A-1342-92). 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)

[17] And it is not necessary that there be a wrongful intent for behaviour to amount to misconduct under the Act. It is sufficient that the reprehensible act or omission complained of be made "wilfully", i.e. consciously, deliberately or intentionally (*Caul* 2006 FCA 251; *Pearson* 2006 FCA 199; *Bellavance* 2005 FCA 87; *Johnson* 2004 FCA 100; *Secours* A-352-94; *Tucker* A-381-85).

[18] In other words, 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.

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

What is the alleged conduct?

[20] According to the Commission, the Appellant's actions constituted misconduct within the meaning of the Act because the Appellant neglected to return a telephone that he found on work premises to lost and found, which resulted in criminal charges being filed against the Appellant, and said criminal charges led to the revocation of the Appellant's security guard licence. The inability to fulfill a condition of employment resulted from that misconduct and entailed as a consequence the loss of employment. Thus, according to the Commission the loss of employment was due to misconduct.

[21] The Tribunal finds that the Commission has proven that the conduct occurred. The Tribunal's finding is based on the Appellant's testimony at the hearing as well as his statements to the Commission where the Appellant admitted that his involvement in the incident related to the "telephone" was the reason why his request for a renewal of his licence was denied. This fact is further corroborated by the employer who explained that the Appellant's employment contract was terminated because the Appellant no longer met one of the requirements of employment, which was the possession of a valid security guard licence.

Does the behaviour constitute misconduct within the meaning of the Act?

[22] The Appellant was charged with theft of a cellular telephone in 2012 while he was employed as a security guard by Corps canadien des commissionnaires. The Appellant pleaded guilty to the offence in 2013. The Appellant continued to work for the same employer until June 2016, when the Appellant's security guard licence, was revoked. Consequently, the Appellant could not perform the work for which he was hired because possession of a valid security guard licence was an essential condition of employment.

[23] According to the case law in *Brissette (A-1342-92)*, a claimant's breach of an employment contract through the loss of a licence results in a ground of misconduct. In the case at bar, the Appellant was required, as an essential condition of his employment, to hold a valid security guard licence. By losing his licence as a result of his wrongful act, the Tribunal finds that the Appellant breached an express duty in the contract of employment.

[24] The Federal Court of Appeal has upheld the principle that there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. (*Mishibinijima v. Canada* (AG), 2007 FCA 36)

[25] In this case, the Commission maintains that the fact that the Appellant neglected to return the telephone to the employer's premises is a clear demonstration that this conduct constitutes misconduct as the Appellant had no intention of returning the telephone so its rightful owner could recover it. In his defence, the Appellant testified that he had every intention of returning the telephone during his shift which was scheduled on the Monday following. However, once he brought the telephone home, he gave his wife permission to use the telephone and the Appellant simply forgot about the telephone. At the hearing, the Appellant maintained that losing his security guard licence was not intentional. He attested that he could not have known that keeping the telephone would cause his dismissal. Had he known that the dismissal was a possibility, he would not have engaged in the alleged behaviour. The Appellant stated that he has paid a heavy price for his mistake.

[26] After taking into consideration the specific circumstances surrounding the act of which the Appellant is accused, the Tribunal finds that the Appellant's actions amounted to misconduct. Indeed, the mere fact that the Appellant gave his wife permission to use the telephone that he knew belonged to someone else was intentional, and sufficiently voluntary to amount to misconduct within the meaning of the Act.

[27] The Tribunal empathizes with the Appellant's plight. However, the performance of services is an essential condition of the employment contract. Where a claimant, through their own actions, can no longer perform the services required from them under the employment contract and as a result loses their employment, that claimant "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily" (*Wasyłka* 2004 FCA 219; *Lavallée* 2003 FCA 255; *Brissette* A-1342-92).

[28] Furthermore, the decisions rendered in *Cartier* (A-168-00) and *MacDonald* (A-152-96) confirms the principle established in *Namaro* (A-834-82) according to which it must also be established that the misconduct was the cause of the claimant's dismissal. In this case, the employer confirmed that the employment relationship was terminated by necessity. As a matter

of fact, after the Appellant's permit was revoked, the Appellant no longer satisfied an essential requirement of employment, and the employer had no other alternative but to terminate him. Hence, the Tribunal finds that there is no doubt that the Appellant lost his employment due to his misconduct.

[29] Lastly, for the Appellant to be charged with misconduct, he must have been aware that his action would invariably lead to his dismissal (*Nolet A-517-91; Langlois A-94-95*). The Appellant argued that he could not have known that his behaviour could lead to his dismissal and his employer also indicated that his behaviour did not warrant dismissal. With all due respect, the Tribunal cannot share that point of view, as while the Appellant was not dismissed immediately after the incident which occurred in 2012, he was dismissed four years later. And it is clear that his dismissal was related to his behaviour in 2012 as that is the reason why the Appellant's security guard licence was revoked.

CONCLUSION

[30] In conclusion, the Tribunal finds that the Commission has proven on a balance of probabilities, that the Appellant's conduct amounted to a breach of the express or implied terms of the Appellant's contract of employment and caused the loss of employment (*Tucker A-381-85; Brisette A-1342-92*). The conduct was foreseeable because the Appellant knew or ought to have known what was expected of him in the context of his employment. (*Lemire, 2010 FCA 314; Nolet A-517-91; Langlois A-94-95*.) With respect to the element of causation, the Tribunal finds that there is no question that the conduct caused the dismissal and loss of employment (*Nolet A-517-91; Langlois A-94-95*).

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

Bernadette Syverin
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.