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

Citation: *Chilliwack Towing Ltd. v. Canada Employment Insurance Commission*, 2018 SST 103

Tribunal File Number: GE-17-2129

BETWEEN:

**Chilliwack Towing Ltd.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**D. N.**

Added Party

# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: February 8, 2018

DATE OF DECISION: March 8, 2018

Canada

## REASONS AND DECISION

### DECISION

[1] The appeal is dismissed. The Tribunal finds that the claimant lost his employment and that the Employer failed to prove misconduct.

### OVERVIEW

[2] The claimant made an initial claim for employment insurance benefits stating that he lost his employment as a tow truck driver because the Employer took the truck away from him to sell it. The Employer is appealing the Respondent's determination that the claimant is entitled to benefits. The Employer argues that the claimant quit his employment and should not be entitled to benefits. The Employer also argues that the claimant would have been dismissed for theft had he not quit his employment.

### PRELIMINARY ISSUES

#### Failure to Appear

[3] No one appeared at the February 8, 2018, hearing although all parties were duly notified. If a party fails to appear at the hearing the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing, as provided by section 12(1) of the *Social Security Tribunal Regulations.*

[4] The Tribunal is satisfied the Employer received the Notice of Hearing sent on November 8, 2017. This is because Canada Post's delivery receipt was signed by the Employer on November 15, 2017.

[5] The Tribunal is satisfied that the claimant, who was added to the appeal because he has a direct interest, was notified of the scheduled hearing. This is because when the Tribunal contacted the claimant on January 8, 2018, regarding returned mail containing the notice of hearing, the claimant indicated that he did not wish to provide the Tribunal with his current

address. Therefore, it is reasonable to conclude the claimant was verbally notified of the hearing and he chose not to receive the written notice or attend the hearing.

[6] After consideration that all parties were notified of the hearing, the Tribunal proceeded to determine the merits of this appeal based on the evidence on file, as per section 12(1) of the *Social Security Tribunal Regulations.*

**Post Hearing Submissions**

[7] On February 23, 2018, the Employer's bookkeeper submitted an email to the Tribunal stating that she did not see the notice of hearing until she commenced working for the new owner. She explained that the company changed ownership in January 2018 and that the new owner hired her to be their bookkeeper in February 2018. The bookkeeper does not state when she finished working for the previous owner or the exact date of when she commenced her employment with the new owner.

[8] The bookkeeper also states that the drivers continued to work during the changeover of ownership. The bookkeeper alleges that either the claimant or another driver opened the notice of hearing when it was received in November 2017 by the former owner. The bookkeeper alleges that the drivers hid the notice to prevent her from seeing it. The bookkeeper does not state the name of the other driver and she does not indicate how the claimant would have had access to the Employer's mail in November 2017. Furthermore, the bookkeeper does not indicate if or when the claimant returned to work for the former owner. However, in the bookkeeper's statement that was submitted with the appeal she states that the claimant had requested his job back in January 2017 and he was told there was no possibility of him being rehired. She also states that the claimant was hired by a competing firm.

[9] As stated above, the Tribunal finds that there was sufficient evidence to prove the Employer was notified of the hearing based on the delivery receipt which was signed on November 15, 2017, which was two months prior to the date the bookkeeper states the company was sold. Furthermore, the Tribunal finds that based on the bookkeeper's statements that the Employer sold the company and the new owner only recently hired her as their bookkeeper, there is insufficient evidence to prove the bookkeeper has authority to represent the former owner (Employer), in this appeal.

## ISSUES

[10] The Tribunal must determine the following issues:

a) Did the claimant lose his employment or did he voluntarily leave?

b) If the claimant lost his employment has the Employer proven misconduct?

c) If the claimant voluntarily left, did he leave with just cause?

## ANALYSIS

[11] The Tribunal considered the relevant legislative provisions which are reproduced in the Annex to this decision.

[12] The burden is on the Respondent to prove the claimant voluntarily left his employment (*Green v. Canada (Attorney General)*, 2012 FCA 313; *Canada (Attorney General) v. White*, 2011 FCA 190).

[13] If the Respondent fails to prove the claimant voluntarily left his employment the burden remains with the Respondent to prove the claimant lost his employment due to misconduct (*Canada (Attorney General) v. Bartone*, A-369-88; *Davlut v. Canada (Attorney General)*, A-241-82).

[14] In the case at hand the Respondent determined the claimant lost his employment and that misconduct was not proven. However, the Employer has argued that the claimant quit his employment and should not be entitled to receive benefits. By interpreting the facts in a slightly different manner so as to conclude that the case is one of quitting without just cause rather than one of being dismissed, the Tribunal does not stray from the subject matter it is called upon to consider, which is a disqualification pursuant to section 29 and 30 of the EI Act (*Canada (Attorney General) v. Easson*, A-1598-92).

### Voluntarily Leaving vs. Loss of Employment

[15] The Tribunal finds the claimant lost his employment because the claimant did not have the choice to stay or leave his employment on December 14, 2016. The Employer attended the claimant's residence and removed the tow truck from the claimant which ended his

employment. Furthermore, there is insufficient evidence to prove the Employer's submission that the claimant quit his employment. Also, the Employer conceded in their reconsideration request that the claimant was going to be dismissed for theft (*Canada (Attorney General) v. Peace*, 2004 FCA 56).

[16] Having found that the claimant lost his employment, the Tribunal must now determine whether the Respondent has proven his loss of employment was due to misconduct.

**Misconduct**

[17] The Employer bears the burden to prove the claimant lost his employment as a result of his misconduct. If misconduct is proven the claimant is disqualified from receiving employment insurance benefits under subsection 30(1) of the *Employment Insurance Act* (Act).

[18] The Act does not define misconduct; therefore, the Employer is required to prove, on a balance of probabilities, the claimant knew or ought to have known that dismissal was a real possibility as a result of his behaviour (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36).

[19] There must be a causal relationship between the misconduct and the loss of employment. This means that the misconduct must cause the claimant's loss of employment (*Canada (Attorney General) v. Cartier*, 2001 FCA 274; *Smith v. Canada (Attorney General)*, A-875-96; *Canada (Attorney General) v. Nolet*, A-517-91).

[20] The Tribunal finds that the Employer submitted insufficient evidence to prove the claimant committed theft or that this alleged theft is what caused the claimant to lose his employment. Therefore, the Employer has failed to prove the claimant lost his employment due to misconduct. The Employer states the claimant failed to turn in cash he collected as payment for work performed, he stole fuel, and that he stole equipment from the tow truck. However, the Employer submitted no evidence to support these allegations. Such evidence could have been dispatch records, receipts for fuel, invoices to prove that the claimant had completed the alleged work for cash, and deposit records which confirm the claimant failed to give the Employer the cash. Furthermore, the Employer did not provide evidence that a police report was filed to

support the allegation that the claimant had stolen cash and equipment and did not appear to provide affirmed testimony.

[21] Upon review of the written statements made by the Employer's bookkeeper and the claimant, it is evident that this employer/employee relationship became acrimonious. There is evidence that a heated discussion between the Employer and claimant occurred on December 14, 2016, when the Employer attended the claimant's residence to remove the tow truck. Based on the Employer's submissions this discussion involved the claimant's concerns about whether he would be receiving his pay cheque and the Employer had concerns about equipment that was not inside the truck. However, there is insufficient evidence to prove that the claimant committed theft or that the alleged theft is what caused the claimant to lose his employment. Rather, the evidence on file supports that the Employer attended the claimant's residence on December 14, 2016, removed the tow truck and the company was later sold.

[22] The bookkeeper states in her February 23, 2018, email that the company was sold in January 2018. However, there is insufficient evidence to prove the actual date the tow truck which was being operated by the claimant was sold. The Employer could have sold that tow truck in December 2016 or sometime in 2017, shortly after it was removed from the claimant and causing the claimant's employment to end, while the Employer continued to operate his business until the company was sold in January 2018.

[23] As stated above, the burden is on the Employer to prove the claimant knew or ought to have known that dismissal was a real possibility as a result of his behaviour, which the Employer has failed to do. The Employer provided insufficient evidence to prove the claimant committed an act of theft; therefore, it cannot be said that the claimant knew his behaviour would result in the loss of his employment.

[24] Furthermore, the Tribunal finds there is insufficient evidence to prove a causal relationship between the alleged theft and the loss of employment. Rather, the Tribunal accepts that the claimant lost his employment based on the Employer's actions of removing the tow truck from the claimant's possession. Therefore, there is insufficient evidence to prove the claimant lost his employment due to misconduct. Accordingly, the claimant is not subject to a disqualification of benefits under sections 29 and 30 of the *Employment Insurance Act* (Act).

## CONCLUSION

[25] The Tribunal finds that the claimant lost his employment and the Employer has failed to prove he lost this employment due to misconduct. Accordingly, the Employer's appeal is dismissed.

Linda Bell

Member, General Division - Employment Insurance Section

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| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | No one |

## 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.

**49(2)** The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30 or disentitling the claimant under section 31, 32 or 33, if the evidence on each side of the issue is equally balanced.