



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. R. v. Canada Employment Insurance Commission*, 2018 SST 323

Tribunal File Number: GE-17-1732

BETWEEN:

D. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: February 22, 2018

DATE OF DECISION: March 29, 2018

REASONS AND DECISION

DECISION

[1] The appeal is dismissed. The Appellant's actions of claiming to be at work when he wasn't caused him to lose his job.

OVERVIEW

[2] The Appellant was terminated from his job for pretending to be at work when he wasn't and reporting he worked around midnight when he actually finished at 9:30 P.M. The Appellant denies the allegations and he believed he had been laid off at the time he filed for employment insurance benefits. The Canada Employment Insurance Commission (Respondent) denied the Appellant benefits because he lost his employment by reason of his own misconduct.

ISSUES

[3] The Tribunal must determine:

- 1) Did the Appellant lose his employment because of the alleged offence?
- 2) Did the Appellant commit the alleged offence?
- 3) Does the alleged offence constitute misconduct?

ANALYSIS

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

Issue #1: Did the Appellant lose his employment because of the alleged offence?

[5] Yes, the Appellant lost his employment because he reported to be at work when he wasn't. The employer submitted copies of a vehicle log, phone records, a door access code report and witness statements to support the reason for the dismissal.

Issue #2: Did the Appellant commit the alleged offence?

[6] Yes, the Tribunal finds Respondent has proved the Appellant committed the alleged offence as the employer has presented a more credible version of the events by submitting copies of phone records, door access code report and three witness statements to support the Appellant lied that he was working when he was not.

[7] The Tribunal finds the Appellant's argument that he left at 9:30 P.M. at the end of his shift lack credibility because what he said at the hearing is contradictory to his initial statements. The Appellant's initial statements were that he didn't go home at 9:30 P.M. but was on his lunch break until 10:30 P.M. had gone to the gas station and then returned to work.

[8] The Tribunal finds the employers evidence of the telephone record and door access code report to be credible as it provides a time line to support the employer called the Appellant at 10:11 P.M. and at 10:14 P.M. the Appellant called his co-worker to return to work. The door access code report with access number 1234560, which the Appellant conceded belonged to him and his co-worker, registered being accessed at 10:52 P.M.

[9] The Tribunal finds that more weight is given to the co-worker's statement because it collaborates the evidence submitted by the employer that he and the Appellant had left work early on January 5, 2017, around 9:20 P.M. and then he was called by the Appellant to return to work at 10:45 P.M.

[10] The Tribunal finds that more weight should be given to initial and spontaneous statements than those made following an unfavourable decision by the Respondent (*Bellefleur v. Canada (AG)*, 2008 FCA 13).

Issue #3: Does the alleged offence constitute misconduct?

[11] There will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, 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 (*Canada (AG) v. Lemier*, 2010 FCA 314 (CanLII); *Hastings* 2007 FCA 372 (CanLII)).

[12] The onus lies on the Respondent to establish that the loss of employment by the claimant resulted from the claimant's own misconduct (*Lepretre*, 2011 FCA 30 (CanLII); *Granstrom*, 2003 FCA 485 (CanLII)).

[13] The Act does not define misconduct; therefore, the Respondent 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 (CanLII)).

[14] The Tribunal finds that the Appellant's actions were wilful and deliberate and they were detrimental to the employer's interest or welfare as the employer clearly felt the Appellant's actions to attempt to get paid for hours he never worked were one of intent to which impaired the employee/employer relationship.

[15] The Appellant denies the employer's allegations and argues that he finished work at 9:30 P.M. and went home. He never returned to the work site, he never called his co-worker to return to work and the call he received from the employer was before 9:30 P.M.

[16] The Appellant contradicted himself that he never left early when he conceded that when the employer came to speak to him on the following day about the incident, he admitted he made a mistake and asked her to forgive him, but she said no, he lied and she took his pass and company phone away and told him he was let go.

[17] The Appellant didn't know where the employer came up with the evidence but he was not able to provide any reasonable explanations for the telephone logs or how his access code was used at 10:52 P.M. The Appellant couldn't explain why his story at the hearing is different than what he told the Commission.

[18] The relationship between employment and misconduct is not one of timing, but one of causation (*McNamara* 2007 FCA 107 (CanLII)).

[19] In addition to the causal relationship, the misconduct must be committed by the employee while he was employed by the employer, and must constitute a breach of a duty that is expressed or implied in the contract of employment (*Canada (Attorney General) v. Nolet*, F.C.A., A-517-91

[20] An employer is entitled to require certain ethical standards of honesty and trustworthiness in employees. When an employer discovers that an employee had conducted himself in a way which undermines the employer's confidence that those personal qualities existed, dismissal, even without notice, is justified.

[21] The Tribunal finds the Appellant lost his job when he made a conscious decision to leave work early and his actions were wilful and deliberate. The Appellant conceded that he admitted to the employer he had made a mistake and asked his employer to forgive him.

[22] The Tribunal finds on the balance of probabilities the Appellant's actions of calling the co-worker to return to the work site, following a phone call from his employer asking how much work they had left to do, after he had already left the job site, he knew or ought to have known he could be fired for trying to hide the fact he left early.

CONCLUSION

[23] The Tribunal finds the Respondent had proved the Appellant lost his employment due his own misconduct and correctly imposed an indefinite disqualification under sections 29 and 30 of the *Employment Insurance Act* (Act).

[24] The appeal is dismissed.

Teresa Jaenen
Member, General Division - Employment Insurance Section

METHOD OF

HEARING: In person

APPEARANCES: D. R., Appellant

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

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,