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

Citation: *M. N. v. Canada Employment Insurance Commission*, 2018 SST 1012

Tribunal File Number: GE-17-3920

BETWEEN:

M. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Leanne Bourassa

HEARD ON: April 4, 2018

DATE OF DECISION: April 23, 2018

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance benefits on June 27, 2017. On July 28, 2017 the Respondent disqualified the Appellant from receiving benefits after finding she had lost his employment because of his misconduct. The Appellant requested a reconsideration of this decision, and on November 1, 2017 the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on December 1, 2017.

[2] The Tribunal must decide whether the Appellant is disqualified from receiving benefits pursuant to section 30 of the *Employment Insurance Act* (Act) for having lost her employment because of her own misconduct.

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

a) The complexity of the issue under appeal.

b) The fact that credibility is not anticipated to be a prevailing issue.

c) The fact that the Appellant will be the only party in attendance.

d) The fact that the Appellant or other parties are represented.

e) The 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.

[4] The following people attended the hearing: the Appellant M. N. and her Representative Paul Lagace of the X.

[5] The Tribunal finds that the Appellant lost her employment because of her own misconduct and is therefore disqualified from receiving benefits pursuant to section 30 of the Act. The reasons for this decision follow.

EVIDENCE

[6] On June 27, 2017 the Appellant made an initial claim for employment insurance regular benefits indicating she had worked for X (the employer) from July 6, 2016 until June 8, 2017 and she had been dismissed because her employer accused her of using alcohol and/or drugs. She explains that she was frustrated because she felt she was being targeted at work and wasn't receiving a raise when other employees were, so she had a social drink at her home and her manager found out about it. Other employees had social drinks and nothing happened to them or they were given a warning or a suspension but she wasn't treated like the other employees and never given a chance. She had spoken to her supervisor about the situation and was told that she wasn't given a warning or suspension as this wasn't the first call. (GD3-3 to GD3-18)

[7] A Record of Employment (ROE) issued by the employer on June 14, 2017 indicates that the Appellant was dismissed because of "Breach of By-law #1". (GD3-19 to GD3-20)

[8] On July 24, 2017 the Respondent spoke to the employer who confirmed that the Appellant had been dismissed for breach of By-law #1 which is no consumption of alcohol on the reserve. It is a dry reserve and the Appellant was given the By-law in writing and employees are given sign-off sheets. A condition of employment is that you are not allowed to consume alcohol anywhere on the reserve. She was not on shift at the time, but it was reported to her manager that she had consumed alcohol as she was on the road intoxicated. (GD3-21)

[9] The Employer provided the Respondent with copies of X Liquor Control Bylaw No.1 (By-law #1) which indicates at section 3 that everyone who is intoxicated on the reserve of the X is guilty of an offence punishable on summary conviction and that everyone who if found in possession of intoxicants is guilty of an offence punishable on summary conviction (section 4) (GD3-24).

[10] On July 7, 2016, the Appellant signed the "X – Declaration of Understanding Personal Policy" indicating that she had read and understood the X Personal Policy terms and conditions. (GD3-25)

[11] On July 7, 2016, the Appellant also signed a document entitled "Orientation". This document advises employees that they must uphold By-Law #1 – no alcohol or illegal drug use

within the community and that the possession and/or consumption of alcoholic beverages and/or un-prescription drugs on/off the job within the community will not be tolerated. It is also indicated that as an employee, there will be zero tolerance for impairment. (GD3-26)

[12] On June 8, 2017 the employer issued a letter (Termination letter) to the Appellant indicating that they had received a complaint of a public display of intoxication where it was reported that the Appellant was intoxicated on Saturday June 3, 2017. The letter also states that the employer had spoken to the Appellant on May 9, 2017 about a report on April 28, 2017 that she had been seen intoxicated and that as part of that discussion, the X Personnel Policy was reviewed and the Appellant was advised that if another complaint was received it would be grounds for termination. The letter confirms that the Appellant is terminated immediately. (GD3-27)

[13] The Respondent spoke to the Appellant on July 26, 2017 about her claim. The Appellant confirmed that she was drinking at that she was aware of the By-law #1, but that she was not working at the time she drank, it was on the weekend. The Appellant stated that there is whole other side to her claim and that the employer is supposed to give warnings and a suspension and that others that got warnings or suspensions and were now back at work. She did not get a warning and she wasn’t given the Termination letter. The Appellant repeated that they are to give warnings and a suspension and the Respondent invited her to submit any documentation showing that this is in the employer’s policy. (GD3-28)

[14] An extract of the employer’s Personnel Policy Manual adopted on September 12, 2011 outlines, at article 16, matters related to discipline. This section details a series of warnings (verbal, written, suspension and/or probation) as well as dismissal for just cause. (GD3-19 to GD3-30)

[15] The Respondent spoke to the Appellant on July 27, 2017 and advised the Appellant that the employer’s policy with respect to Discipline states that the steps of progressive discipline “may consist of” and as such, does not mean the employer must follow the steps of disciplinary warnings. The Appellant’s husband advised she was in her own home when she consumed alcohol. The Respondent advised the Appellant that as she had signed the declaration of understanding which put her on notice that if she breached the terms and conditions of the policy

she would subject herself to disciplinary action up to and including termination. It was her actions that caused her dismissal. (GD3-31)

[16] On July 28, 2017, the Respondent advised the Appellant in writing that they were not able to pay her regular employment insurance benefits from June 4, 2017 because she lost her employment with the employer on June 8, 2017 as a result of her misconduct. (GD3-32)

[17] On July 28, 2017, the Respondent also advised the Appellant in writing that her employment insurance sickness benefits had been approved from July 23, 2017 to September 23, 2017. She is also advised that once she has received all of her special benefits, the Appellant will not be paid any regular employment insurance benefits because she lost her employment with the employer as a result of her misconduct.

[18] The employer provided the Respondent with a letter dated May 4, 2017 reporting that the Appellant has been seen drunk on the morning of Saturday April 28th, 2017 at 9:00 am. The name of the sender of the message had been redacted for confidentiality purposes. (GD3-36)

[19] On October 2, 2017, the Appellant requested reconsideration of the Respondent's decision of July 28, 2017 disqualifying her from receiving employment insurance benefits for having lost her employment due to her misconduct. The Appellant's Representative explained that the Appellant was facing mental health issues which delayed her request for reconsideration and in any event, she was not aware of the decision to refuse the benefits on September 1, 2017. (GD3-37 to GD3-49)

[20] The Respondent spoke to the Appellant's Representative on November 1, 2017 and was advised that the delay in submitting the request for reconsideration had been accepted. The Representative advised that he had requested the Appellant's personnel file from her former employer. The Respondent advised him that they had documentation on file indicating that the Appellant was warned in writing about drinking on the reserve in the past and that future infractions would result in dismissal and that when it occurred again, she was dismissed. The Respondent advised the Representative that the facts on file confirm misconduct and the decision to disqualify the Appellant would be maintained. (GD3-50)

[21] On November 1, 2017, the Respondent advised the Appellant and her Representative in writing that the decision to disqualify her from receiving employment insurance benefits because she lost her employment due to her misconduct was maintained. (GD3-52 and GD3-53)

[22] At the hearing the Appellant testified that she had worked part-time for the employer from 2010, then was on medical leave but still helped out from time to time and that in 2015 she was hired on full-time. She only signed the orientation documents in 2016 and at the time she understood that the Bylaw #1 meant that there was no drinking of alcohol on the reserve and she understood there could be discipline such as a warning, written warning or suspension if it was not respected. She further testified that on May 9, 2017 she had a conversation with her employer who talked to her about rumours and a call they had received about her drinking, but that she wasn't given a warning or anything like that and she was not under any warning or discipline after that meeting. When she was called in on June 8, 2017 to talk about her drinking, she didn't really say much, she just said OK. She was told there was a complaint that came in that she was intoxicated and she felt like she didn't want to say anything at that time because she was being let go. She felt it was a shock because she had not received a warning in the past. The Appellant testified that she felt she was a target because of the way it was handled because she was just fired and they didn't do the same thing to other employees of the band. The day that she was seen, she was just walking home from a friend's house up the street where she had been drinking the night before and where she had spent the night. Finally she testified that the first time she heard of the Termination letter was when someone from the Respondent read it to her, as her employer never gave her the letter.

SUBMISSIONS

[23] The Appellant submitted that nothing she did during the period leading to her termination should be construed as misconduct. While she consumed alcohol on a First Nations Reserve contrary to a Band bylaw forbidding consumption on reserve, it is not alleged she did so during working hours or that she attended work under the influence of alcohol. Consumption of alcohol while not at work (which is never a firing offence off reserve) should not, but virtue of this bylaw, be a firing offence on reserve. She also submits that the employer did not follow a policy

of progressive discipline as outlined in its own policies and she was treated differently from other employees.

[24] The Respondent submitted that when the Appellant signed the agreement that she would uphold By-law #1, she agreed to this condition of employment and understood this action of violating the bylaw would not be tolerated. The Appellant did receive progressive discipline in the form of a verbal warning and a warning that should another complaint be received, it would be grounds for termination. It is not up to the Respondent to rule on the severity of the disciplinary measure. The Appellant's consumption of alcohol on the reserve constituted misconduct within the meaning of the Act because she had agreed at the time of hiring to follow the Bylaw #1 of no possession and/or consumption of intoxicants on the reserve territory.

ANALYSIS

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

[26] Subsection 30(1) of the Act states that a claimant is disqualified from receiving any employment insurance benefits if they lost their employment because of their own misconduct.

[27] The Act does not define misconduct. The legal notion of misconduct for the purposes of subsection 30(1) of the Act is therefore defined in the jurisprudence, where it has been held that there is misconduct when the conduct of the claimant is wilful, in the sense that the acts which lead to dismissal were conscious, deliberate or intentional and that the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to his employer and as a result, dismissal was a real possibility. (*Canada (Attorney General) v. Tucker*, A-381-85 (*Tucker*) and *Mishibinijima v. Canada (Attorney General)* (2007 FCA 36) (*Mishibinijima*)).

[28] The onus in cases of misconduct is on the Respondent to establish, on the balance of probabilities that the Appellant's loss of employment was "by reason of his own misconduct". To discharge that onus, the Tribunal must be satisfied that the misconduct was the reason for the dismissal, not the excuse for it. (*The Minister of Employment and Immigration v. Bartone* A-369-88; *Davlut v. Canada* (Attorney General) A-241-82).

[29] Finally, if there was misconduct committed by the Appellant, it must be proven that there is a causal relationship between the misconduct of which an employee is accused and his employment. The misconduct must be committed by the Appellant while employed by the employer and must constitute a breach of a duty that is express or implied in the contract of employment. (*Canada (Attorney General) v. Brissette*, A-1342-92, *Canada (Attorney General) v. Cartier*, 2001 FCA 274.)

[30] The first factor the Tribunal must consider is why the Appellant was dismissed from her employment.

[31] The Respondent argues that the Appellant was dismissed for having been found to have consumed alcohol on the reserve of the X in contravention of By-law #1.

[32] The Appellant submits that she was being targeted by her employers and was terminated due to having a social drink in her home.

[33] The termination letter issued by the Employer on June 8, 2017 indicates that the Appellant was being dismissed because she had been seen intoxicated on April 28th, 2017 and she had been advised that a second complaint would be grounds for termination. Her employer had received another report of her being seen intoxicated on June 3, 2017 and she was therefore terminated. (GD3-27)

[34] The ROE issued by the Employer indicates that the reason for separation is “Breach of By-law #1”. (GD3-19)

[35] From this evidence, the Tribunal finds that the reason for the Appellant’s dismissal was that she had been reported as having been intoxicated which was in contravention of By-law #1.

[36] The next question the Tribunal must address is whether or not the Appellant engaged in the conduct that lead to her dismissal.

[37] The Appellant confirmed that she was drinking on the territory of the reserve, but that it was not while she was working, it was on the weekend on her own time and she did not attend work while under the influence of alcohol.

[38] As the Appellant has confirmed this in previous discussions with the Respondent and again directly during her testimony before the Tribunal, the Tribunal finds that she did engage in the consumption of alcohol on the reserve. From the text of the By-law #1, the Tribunal notes that anyone found in possession of intoxicants is in violation of the By-law, so she was therefore in violation of the By-law.

[39] Having found that the Appellant was dismissed for having breached By-law #1 and also finding that the Appellant has admitted she had been drinking on the band property in violation of this By-law, the next question the Tribunal must address is whether the Appellant's conduct constituted misconduct under the Act.

[40] In *Canada (Attorney General) v. Lemire*, 2010 FCA 314, the Federal Court of Appeal refers back to *Tucker* and *Mishibinijima* to outline that the legal notion of misconduct for the purposes of subsection 30(1) of the Act has been defined as wilful misconduct, where the claimant knew or ought to have known that the conduct was such that it would result in dismissal.

[41] The notion of wilful misconduct as defined in the case law does not imply that it is necessary that a breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional: *Canada (Attorney General) v. Secours* A-325-94. In the matter at hand, the Tribunal finds that even if the Appellant did not have a wrongful intent in drinking on the reserve, her actions were deliberate and she knew or ought to have known that dismissal was a real possibility.

[42] The Respondent submits that the Appellant's actions constituted misconduct within the meaning of the Act because when she signed the agreement that she would uphold Bylaw #1 the Appellant agreed to this condition of employment and understood that this action would not be tolerated.

[43] The Appellant's representative argued in the notice of appeal that consumption of alcohol while not at work (which is never a firing offence off reserve) should not, by virtue of the By-Law, be a firing offence on reserve. He questions whether breaking a community bylaw is misconduct as defined by the Act.

[44] The Tribunal notes that the testimony presented by the Appellant before the Tribunal is not consistent with the statements she had made previously to the Respondent. In particular, at the hearing the Appellant testified that at the time that she was allegedly seen as intoxicated by the party making the complaint to her employer, she was in fact returning home from her friend's home where she had spent the night, after having had a few drinks the night before. This is not in keeping with her statements to the Respondent that she had had a social drink in her own home on the night in question.

[45] Regardless of this contradiction, the Tribunal does note that in both cases, the Appellant does admit to having consumed alcohol at some place within the reserve. Although the Appellant does insist that the consumption was in a private home, By-law #1 does not exclude any area of the reserve from the application of the By-Law. As such, we can conclude that as the Appellant admits she had been drinking on the reserve, and she was aware of the By-law, she did willfully violate the By-law.

[46] Furthermore, the Tribunal notes that the Appellant did sign, on July 7, 2016, a document entitled "Orientation" in which it is explicitly stated that employees must uphold the By-law #1 and that the possession and/or consumption of alcoholic beverages and/or un-prescribed drugs, on/off the job, within the community would not be tolerated. This document also advises that there would be zero tolerance for Impairment. (GD3-26)

[47] The Tribunal finds that in failing to respect the terms of this "Orientation" agreement signed by the Appellant, the act of having consumed alcohol in violation of By-law #1 constituted a clear breach of an express duty resulting from the contract of employment as outlined in *Canada (Attorney General) v. Cartier*, 2001 FCA 274. Although the violation of a community bylaw may not be grounds for dismissal "off reserve" in the matter at hand, the respect of the By-Law was an explicit condition of employment agreed to by the Appellant and thus, the act of violating the By-Law is a violation of the employment contract and is misconduct under the Act.

[48] The Tribunal also finds that the "Orientation" document also expressly mentions that the prohibition on the consumption of alcoholic beverages is not limited to "on" the job, but is not tolerated regardless of whether the employee is "on/off" the job.

[49] The Appellant has also argued, that her dismissal was not appropriate because the employer did not respect its own policy of progressive discipline and as such, she could not have known that she was at risk of termination.

[50] The Appellant's Representative argued at the hearing that further to section 34 of the Personnel Policy Manual, at subsection f) (GD6-4) a breach of the By-Law #1 is grounds for disciplinary action and that disciplinary action is outlined in Section 16 of the Personnel Policy Manual entitled "Discipline". (GD3-29 to GD3-30). For that reason, the employer should have applied a progressive discipline procedure as outline in section 16 of the Policy and in failing to do so, acted unfairly towards the Appellant in dismissing her without prior warnings.

[51] The Tribunal does not agree with the Appellant's argument that the Employer was obligated to follow the steps of progressive discipline in the matter at hand.

[52] First, the Federal Court of Appeal in *Canada (Attorney General) v. Marion*, 2002 FCA 185 confirms that it is not the role of the Tribunal (Board of Referees as it was) to determine whether the severity of the penalty imposed by the employer is justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct under the Act. It is therefore not before the Tribunal to determine if the Appellant should have been suspended instead of dismissed, or if dismissal was the appropriate sanction. (*Canada (Attorney General) v. Caul*, 2006 FCA 251)

[53] Next, the Tribunal finds words of the Federal Court of Appeal in *Canada (Attorney General) v. Jolin*, 2009 FCA 303, apply to the current case, when it is stated that:

> "Here, there is no doubt that the claimant's conduct was wilful and that the claimant knew that this conduct could lead to serious disciplinary consequences. […] That the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct."

[54] Having heard the Appellant's argument, the Tribunal is not convinced that the Employer was bound to follow the steps of progressive discipline. A review of Article 16, entitled "Discipline" clearly states that the steps of progressive discipline <u>may</u> consist of a verbal warning, written warning, suspension and/or probation and finally dismissal for Just Cause.

However, this document also states that an employee may be dismissed for just cause and without notice, severance or pay in lieu thereof and provides a non-limited list of circumstances, which appears to be incomplete. The Tribunal therefore concludes that the Employer was not required to follow the steps of progressive discipline and it was open to them to proceed with a dismissal for cause without notice, severance or pay in lieu of notice.

[55] Finally, the Appellant has also argued that other employees of the employer had committed similar infractions and had not been dismissed. The Federal Court of Appeal has stated in *Canada (Attorney General) v. Namaro*, A-834-82 that the fact that other employees guilty of similar misconduct were not dismissed is not relevant to a determination of whether or not the specific Appellant has committed misconduct under the Act. The treatment of other employees is therefore not relevant to the matter at hand.

[56] For all of the foregoing reasons, the Tribunal finds that the Respondent has met its onus to show that the Appellant lost her employment because of her misconduct within the meaning of the Act, as interpreted by case law. In consuming alcohol on the Band property the Appellant willingly violated By-law #1, and failed to respect the explicit terms of her employment agreement, thus committing misconduct under the Act. She is therefore disqualified from receiving employment insurance benefits further to subsection 30(1) of the Act.

CONCLUSION

[57] The appeal is dismissed.

Leanne Bourassa

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.