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

[TRANSLATION]

Citation: *J. P. v Canada Employment Insurance Commission*, 2018 SST 1312

Tribunal File Number: GE-18-1599

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: October 19, 2018

DATE OF DECISION: October 22, 2018

DECISION

[1] The appeal is dismissed. The Tribunal finds that the Appellant stopped working because of his own misconduct.

OVERVIEW

[2] The Appellant worked in carton printing manufacturing at X. He was dismissed on December 4, 2017. The Appellant was incarcerated from November 28, 2017, to December 18, 2017. The Commission found that the Appellant stopped working because of his misconduct. The Appellant stated that his sister had informed the employer of his absence, but the employer was not informed that he was incarcerated until December 18, 2017. The Tribunal must determine whether the Appellant stopped working because of his own misconduct.

ISSUES

[3] Did the Appellant commit the acts alleged by the employer?

[4] If so, do the Appellant's alleged acts constitute misconduct?

ANALYSIS

[5] The relevant statutory provisions appear in the annex of this decision.

Did the Appellant commit the acts alleged by the employer?

[6] The employer told the Commission that the Appellant's sister had contacted them in November 2017 to inform them of the Appellant's absence, but she did not want to provide an explanation for his absence. The employer indicated that, after four days of absence, they asked the company's human resources department to replace the Appellant. The Appellant was dismissed on December 4, 2017, and he contacted the employer on December 18, 2017, indicating that he had been unable to show up to work because he was incarcerated.

[7] The Appellant stated that he had committed an offence because he was arrested while in possession of narcotics before he was hired by X. The Appellant said that he had informed the

employer of this offence when he was hired even though the employer was not aware of the issue. He was incarcerated from November 28, 2017, to December 18, 2017.

[8] Because he was incarcerated, the Appellant was away from work from November 29, 2017, to December 18, 2017. The Tribunal finds that the Appellant committed the acts alleged by the employer.

Do the Appellant's alleged acts constitute misconduct?

[9] The Tribunal must determine whether the Appellant's acts constitute misconduct under the *Employment Insurance Act* (Act) and whether the Commission has the burden of proving that these acts constitute misconduct (*Canada (Attorney General) v Larivée*, 2007 FCA 312 (CanLII)).

[10] Even though the Appellant had said to the Commission that he had contacted the employer to inform them that he would be absent for a period of four to six weeks, he stated during the reconsideration process that it was actually his sister who had contacted the employer and that she had informed it that he would be absent without giving the reason behind it. The Appellant was scheduled to be released on January 9, 2018, but he was released on December 18, 2017. On December 18, 2017, the Appellant contacted the employer, but the employer reportedly told him that the reason for his absence was unacceptable.

[11] However, the Appellant maintains that the employer had accepted his absence of four to six weeks when his sister contacted it and that, in the letter sent by FedEx, the employer indicated that it wanted a response from the Appellant before December 18, 2017, stating the reason for his absence. The Appellant said that he contacted the employer on December 18, 2017, as requested. He argues that he did not commit misconduct and that, instead, he made efforts to maintain the employment relationship while the employer gave contradictory reasons for the termination of employment.

[12] The employer sent the Appellant a letter by FedEx asking him to provide an explanation for his absence. This way, if the Appellant had been absent because of illness and had provided a medical certificate, the employer would have considered this. The Commission's file shows that the employer dismissed the Appellant on December 4, 2017, and issued a first Record of

Employment on December 7, 2017. That Record of Employment indicated [translation] “illness” as the reason. On that day, the employer did not know why the Appellant was absent. Because of this, a second, amended Record of Employment was issued on December 21, 2017, and the employer indicated [translation] “quit” as the reason for the termination of employment.

[13] The Commission found that the Appellant committed misconduct, but, when two distinct notions are dealt with under the same section of the Act, it may well be argued that the issue to be addressed is not the one contained in each of the sections, but rather the overall purpose of the provision. Moreover, the Appellant made submissions based on the issue as presented by the Commission, namely misconduct (*Easson*, A-1598-92).

[14] While the Appellant maintains that the employer had authorized an absence of four to six weeks, the evidence shows that the employer replaced the Appellant on December 4, 2017, and that the first Record of Employment was issued on December 7, 2017. During the hearing, the Appellant admitted that it was his sister who had actually contacted the employer, and he admitted that he did not contact the employer himself before December 18, 2017, to let it know why he was absent.

[15] The Commission maintains that the Appellant committed misconduct because he was responsible for the situation and that, because he was incarcerated, he could no longer show up to work to assume the contractual responsibilities he was hired for.

[16] The Tribunal shares this view. The inability to meet a condition of employment is the result of misconduct, and it is this misconduct that leads to the loss of employment (*Brissette*, A-1342-92).

[17] Because he was incarcerated, the Appellant was unable to show up to work and perform his work. This misconduct constitutes a breach of an express or implied duty of the Appellant’s employment contract (*Canada (Attorney General) v Lemire*, 2010 FCA 314).

[18] Although the Appellant submits that he did everything to maintain his employment relationship, the facts show that he was incarcerated from November 29, 2017, to December 18, 2017, and that he was unable to perform his work during that period. The employer dismissed the

Appellant on December 4, 2017, because he had not shown up to work since November 29, 2017. A copy of a text message conversation between the Appellant's sister and the X human resources manager shows that on December 6, 2017, the Appellant's sister indicated to the employer that the Appellant needed time away from work and that his employment was important to him. Of course, after this exchange, the employer sent the Appellant a letter asking him to specify the reason for his absence before December 18, 2017. Although the Appellant maintained that he responded to the employer by the required deadline of December 18, 2017, the evidence shows that he was not able to perform his work from November 29, 2017, to December 18, 2017. Also, even though the Appellant stated that the employer had authorized the absence, the evidence shows instead that the employer replaced the Appellant as early as December 4, 2017; that the employer issued a first Record of Employment on December 7, 2017; and that, if the Appellant was away from work because of illness, the employer should have considered this reason.

[19] Misconduct must constitute a breach of an express or implied duty resulting from the employment contract. This is the Appellant's situation. He committed an offence before being hired by the employer, but his incarceration for this offence took place while he was employed by X. 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 [their] unemployment, no more than someone who leaves the employment voluntarily" (*Wasylka*, 2004 FCA 219; *Lavallée*, 2003 FCA 255; *Brissette*, A-1342-92).

[20] The Tribunal is of the view that the Appellant's employment ended because he had not shown up to work since November 29, 2017, and not because he failed to comply with the company's rules or because of the sentence he received (*Locke*, 2003 FCA 262).

[21] An appellant whose employment ends following incarceration or another court order that makes them unable to show up to work is disentitled from receiving Employment Insurance benefits whether or not the termination of employment is the result of voluntarily leaving without just cause or dismissal for misconduct (*Borden*, 2004 FCA 176; *Lavallée*, A-720-01; *Easson*, A-1598-92; *Brissette*, A-1342-92).

[22] Although the Appellant maintains that his absence and incarceration were not deliberate and that he did not commit misconduct, the Tribunal is of the view that the Appellant's misconduct stems from his unavailability for work; his inability to perform his work is the result of his incarceration. The Appellant was incarcerated, and he was unavailable for work and unable to perform his work for four weeks; **every incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability** (*Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc.*, 2003 SCC 68 (CanLII)).

[23] The Tribunal is of the view that the Appellant did not meet an essential condition of his employment contract because he could not show up to work. It is precisely this inability on the part of the Appellant that led to his misconduct.

[24] The Tribunal heard the Appellant's arguments and understands that he wanted to keep his employment and that he contacted the employer as soon as he could. However, wrongful intent is not a necessary element of misconduct. To the extent that the act or omission, relied on by the employer in dismissing an employee, is wilful, that is a conscious, deliberate, or intentional act or omission, misconduct has been shown (*Canada (Attorney General) v Pearson*, 2006 FCA 199).

[25] In this case, the Appellant committed an offence that led to his incarceration, and it is not showing up to work that is a wilful act. If the Appellant had not committed the offence for which he was punished, he would not have been incarcerated and he would have been able to show up to work and perform his work.

[26] Even though the employer's statements do not support the version of events from the Appellant, who maintains that the employer had authorized or could have authorized his four-week absence, the Tribunal points out that it is not the Tribunal's role to determine whether the dismissal or penalty was justified. It must instead determine whether the claimant's action constituted misconduct under the Act, and this is the case here (*Fakhari*, A-732-95; *Marion*, 2002 FCA 185).

[27] The Tribunal also heard the Appellant's arguments stating that the reason for the absence was not acceptable for the employer even though the employer apparently tolerated similar situations with other colleagues. However, each situation must be assessed on a case-by-case basis.

The Tribunal also understands that the Appellant did what he could, despite being incarcerated, to keep his employment relationship. However, the Tribunal is of the view that it is the Appellant's inability to perform his work that constitutes misconduct, even if this situation is the result of his incarceration. The Tribunal sympathizes with the Appellant's situation, but it is not exempt from applying the Act for this reason.

[28] The Tribunal finds that the Commission met the burden of proving, on a balance of probabilities, that the Appellant lost his employment because of his misconduct, and the evidence on file demonstrates that misconduct was the direct result of the Appellant's inability to carry out his duties, and, for this reason, the direct connection between the act committed (inability to perform his duties) and the dismissal is established (*Brissette*, A-1342-92).

[29] The Tribunal finds that the Appellant stopped working because of his own misconduct.

CONCLUSION

[30] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	October 19, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	J. P., Appellant Félix Arsenault, Representative for the 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

(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.