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

Citation: *J. A. v Canada Employment Insurance Commission and X*, 2018 SST 1408

Tribunal File Number: GE-18-2649

BETWEEN:

J. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Rodney Antonichuk

HEARD ON: December 6, 2018

DATE OF DECISION: December 27, 2018

Canada

DECISION

[1] The appeal is dismissed. The Tribunal finds that the Respondent has met the burden of proving that on the balance of probabilities, the Appellant lost his job due to his own misconduct.

OVERVIEW

[2] The Appellant was dismissed when his employer accused him of absenteeism. The employer had not given the Appellant permission to be away from work but the Appellant had notified the employer that he would be absent from work and the reason for his absence. The Appellant continued to work from home even though his employer had informed him that if he did not return to the office environment by a specific date the employer would consider it job abandonment and the Appellant would be dismissed. The Appellant informed the employer exactly what he needed to do before he would return to the office environment and since it was not provided to him by the employer he continued to work from his home. The Appellant felt that it was not an abandonment of his position rather it is an assertion of his rights as an employee to be treated in a safe, respectful manner. Based upon the facts on file, the Canada Employment Insurance Commission (the Respondent) determined that the Appellant did not demonstrate just cause for voluntarily leaving his employment.

[3] The Appellant requested reconsideration of the decision and indicated that he had made efforts at addressing his concerns to the employer. He continued his employer away from the presence of the employer while a solution was pursued and it was only the Appellant that provided options to the employer for consideration in his attempt at returning to a safe work environment. Following the request for reconsideration the Commission maintained the decision because the Commission felt that the Appellant's actions of failing to arrive to work, as directed, amounted to misconduct. The Commission also determined that the Appellant did not have just cause to voluntarily leave his employment.

ISSUES

[4] While the Respondent initially ruled that the Appellant had voluntarily left his employment without just cause, the issue presented to the Social Security Tribunal (the Tribunal)

by the Respondent is that a disqualification was imposed because the Appellant lost his employment because of his own misconduct.

[5] Issue 1: Did the Appellant lose his employment because of the alleged offence?

[6] Issue 2: Did the Appellant commit the alleged offence?

[7] Issue 3: Does the alleged offence constitute misconduct?

ANALYSIS

[8] 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. A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct as stated in *The Employment Insurance Act* subsection 30(1). Misconduct is not defined under the Act (*Canada (A.G.) v. Tucker*, A-381-85).

[9] The burden of proof lay with the respondent to prove that misconduct occurred (*Lepretre v. Canada (Attorney General),* 2011 FCA 30). The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means is it "more likely than not" that the events occurred as described.

[10] There must be a causal relationship between the conduct and the loss of employment: the conduct must have been committed by the Appellant while employed by the employer, it must constitute a breach of a duty that is expressed or implied in the employment contract, and it must have caused the loss of employment (*Canada (Attorney General) v. Cartier*, 2001 FCA 274, *Lemire, Supra*).

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

[11] Yes. The Tribunal finds that the Appellant's employer told the Appellant during a phone conversation on March 21, 2018, that if he were not at work on March 28th then the employer would deem that the Appellant abandoned his job.

[12] In the Appellant's application for benefits the Appellant indicated that he had been dismissed due to absenteeism. The Appellant stated that he had not requested permission to be absent; however, he stated that he did notify his employer that he would be absent. He stated he did this through letters written to the president.

[13] The Record of Employment (ROE) that was issued by the employer stated that the Appellant quit his employment (E).

[14] The Appellant stated that there had never been any complaints about the quality of his work and that he had never had a warning. He stated to the Commission that his employer had told him that if he did not show up for work in the office the employer would consider it job abandonment and the Appellant would be dismissed. The Appellant stated that it was not unusual for him to work from home and that is what he told the employer he was going to do.

[15] In a phone conversation between the Appellant and his employer on March 23, 2018, the Appellant was told directly by the employer that if he did not come into work on March 28 then they would deem that he had abandoned his job.

[16] The employer issued a letter to the Appellant on April 3, 2018, stating that the Appellant deliberately did not attend work at the employer's premises on Monday, April 2, 2018, and as a result, he was terminated for job abandonment.

[17] The Tribunal finds that the Appellant was dismissed from his employment due to his failure to attend work at the employer's place of business. The Tribunal finds that the testimony from both parties is clear that his employer stated that if he did not attend work at the employer's place of business then the employer would consider it job abandonment and the Appellant would be dismissed.

Issue 2: Did the Appellant commit the alleged offence?

[18] Yes, the Appellant did commit the alleged offence.

[19] The Appellant contends that he was working from home and thus it was not job abandonment. He was working and he was performing his duties. He stated that he spoke to his employer numerous times and stated to him that he was concerned for his safety because the

Appellant had been harassed by his employer. The Appellant wrote in a letter dated February 26, 2018, that that he would continue to work from the safety of his home until the employer could provide him with a safe work environment. He stated that he returned to the office environment on March 28. He further stated that after the phone call in which his employer stated that if he did not return to the office, the employer would consider the Appellant abandoned his job and he would be dismissed, he told his employer that he would not be in the office if the employer were there. The Appellant did not attend work on April 2, 2018, as he had not received assurances of a safe and respectful workplace and he knew that the employer would be in the office that day.

Issue 3: Does the alleged offence constitute misconduct?

[20] Yes. I find that the Appellant had been told directly by his employer that he needed to come into work and that if he continued to work from home they would consider it job abandonment and he would be dismissed.

[21] The Act does not define misconduct. The Federal Court of Appeal (FCA) has explained the legal notion of misconduct for the purposes of the Act as acts that are wilful or deliberate, where the Appellant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *Tucker v. Canada (Attorney General)*, A-381-85.

[22] Wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional (*Lemire v. Canada (Attorney General)*, 2010 FCA 314; *Secours v. Canada (Attorney General)*, A-1342-92).

[23] There must be a causal relationship between the conduct and the loss of employment: the conduct must have been committed by the Appellant while employed by the employer, it must constitute a breach of a duty that is expressed or implied in the employment contract, and it must have caused the loss of employment (*Canada (Attorney General) v. Cartier*, 2001 FCA 274, *Lemire, Supra*).

[24] While the Appellant and his representative have argued that there was extenuating circumstances to the dismissal of the Appellant, the issue before the Tribunal is the question as to whether the Appellant lost his employment due to his misconduct. The Tribunal finds that the Appellant and the employer spoke via a phone call on March 23, 2018. During the conversation, the Appellant was told directly by his employer that if he was not at work on the 28th then the employer will have deemed that the Appellant had abandoned his position. The Appellant stated that he was not going to be in the office when the employer was there. The Appellant further stated that he was not abandoning the position. The employer stated that the Appellant's job was in the office and if he was not coming into the office then he had abandoned the position. The Appellant further stated that he felt that it was not a safe work environment and that he would file a general workplace harassment charge and that as long as there is a threat of harassment he would not say that he was going to return to the work environment. While the Appellant stated that he did work from his home, the evidence suggests that the Appellant was either on the road once or twice per month checking on the progress of the various projects. The Tribunal finds that while the Appellant may have worked outside of the office environment it was not a regular occurrence and as such, it was not out of place for the employer to expect the Appellant to be at work in the office environment. The Appellant stated that the reason for his absence from the office environment was due to his concern for his safety. He felt that the employer was not offering him a safe work environment.

[25] The Tribunal finds that the evidence is very clear. His employer told the Appellant that if he did not return to the office environment by March 28 the employer would consider him to have abandoned his job. The Appellant did return to the office environment on that date, as he was aware that the employer was on holidays and as such felt safe in the work environment. However, the employer returned to work on April 2 and found that the Appellant had not attended work in the office on that date, did not request permission to be out of the office and had been told to be in the office. As a result, the employer dismissed the Appellant on April 3 due to his not being on the work premises on April 2. The Tribunal further finds that the Appellant was told by his employer what the consequences would be if he stopped attending work in the office environment and stated that he was aware of the consequences of his actions.

[26] While the Appellant and his representative spent considerable time focussing on the reasons for the Appellant's unwillingness to return to the office environment, the Tribunal's task is clear. The Tribunal must determine if the Appellant's actions constituted misconduct. The role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Canada (Attorney General) v. Caul,* 2006 FCA 251). The Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It had to determine whether the claimant's conduct amounted to misconduct within the meaning of the EI Act (*Canada (Attorney General) v. Marion,* 2002 FCA 185). Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (*Canada (Attorney General) v. McNamara,* 2007 FCA 107; *Fleming v. Canada (Attorney General),* 2006 FCA 16). The Tribunal finds that the Appellant's actions were wilful or deliberate, where the Appellant knew or ought to have known that his conduct was such that it would result in his dismissal.

CONCLUSION

[27] The appeal is dismissed. The Tribunal finds that the Appellant lost his employment because he did not go into the office when instructed to by his employer. By doing so, the Appellant was aware that his conduct would result in his dismissal. The Tribunal further finds that this conduct constitutes misconduct as the conduct was deliberate and the Appellant ought to have known that such conduct would lead to dismissal. Consequently, the Appellant is disqualified from benefits pursuant to subsection 30(1) of the Act.

Rodney Antonichuk

Member, General Division - Employment Insurance Section

HEARD ON:	December 6, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	J. A., Appellant Brent Robinson, Representative for the Appellant G. T., Added Party Grant Stapon, Representative for the Added Party