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

Citation: *K. B. v Canada Employment Insurance Commission*, 2019 SST 254

Tribunal File Number: GE-18-3703

BETWEEN:

K. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: John Noonan

HEARD ON: February 7, 2019

DATE OF DECISION: February 21, 2019

Canada

OVERVIEW

[1] The Appellant, K. B., a worker in Labrador City NL, was initially approved for benefits but was upon reconsideration requested by the employer, informed by the Commission, that it was unable to pay him Employment Insurance regular benefits starting August 7, 2018 because he was dismissed from his employment with X, a subcontractor to X, on that date as a result of his own misconduct. The Appellant asserts that he had not been involved in any "horseplay" as was the accusation against him. The Tribunal must decide if the Appellant committed the act in question and, if so, did his actions constitute misconduct. The results will determine eligibility for benefits under the Employment Insurance Act (Act).

DECISION

[2] The appeal is allowed. The Appellant has succeeded with his burden to demonstrate that his actions in this case do not meet the threshold where they could be considered wlful to the point where he would / could be expected to be dismissed. Therefore he is entitled to receive EI benefits on this claim.

ISSUES

[3] Issue #1: Did the Appellant commit the alleged act?

Issue #2: If so, did the Appellant do so wilfully to the point he could reasonably expect to be dismissed or suspended from his employment for his actions?

Issue #3: Whether a disqualification should be imposed pursuant to sections 29 and 30 the *Employment Insurance Act* (Act) because the Appellant lost his employment by reason of his own misconduct.

ANALYSIS

[4] The relevant legislative provisions are reproduced in GD-4.

[5] *The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. (Tucker A-381-85)*

[6] *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 (McNamara 2007 FCA 107; Fleming 2006 FCA 16).*

[7] *The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities LARIVEE A-473-06, FALARDEAU A-396- 85.*

[8] *There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).*

[9] *The fact that the claimant acted impulsively is not relevant to determine whether his actions constitute misconduct. In acting as he did, the claimant ought to have known that his conduct was such that it might lead to his dismissal (Kaba 2013 FCA 208; Hastings 2007 FCA 372).*

Issue #1: Did the Appellant commit the alleged act?

[10] No.

[11] The Appellant has never denied the fact he had been tugging on a rope. He was in the process of moving the rope in question, a part of his job description, to facilitate the placement of a large piece of equipment. The rope was snagged and he tugged harder which loosened an object on the overhead beam which fell and hit the Appellant in the head.

[12] This event was witnessed by a co-worker in the immediate area who gave the same version of events. Others only saw the Appellant on the floor bleeding after the incident with one exception, an individual working some distance away indicated that she witnessed "horseplay".

[13] The co-worker who witnessed the event was suspended for a day as the employer accused him of lying. This would be enough for others to agree with the employer's interpretation of events. It must be kept in mind that the Appellant was not represented by a union and had no place to go. Furthermore testimony at the hearing stated that the company safety representative who attended the hospital with the Appellant stated that his was the fifth event that day requiring an employee to attend the emergency room. I note that this is hearsay information but tribunals have a greater degree of latitude to allow such to be taken into consideration.

[14] All this information gives credence to the Appellant's assertion that the employer wanted to avoid having to report injuries, it is easier for them to let someone go.

[15] The Appellant's X supervisor provided him with a reference letter which helped him obtain his present employment. Surly, if there were realistic concerns regarding the Appellant's adherence to safety protocols, such a recommendation would not be offered or given.

[16] I find the Appellant did not commit the alleged act.

[17] It is noted also that the Letter of Dismissal issued by the employer has the Appellant "partaking in horseplay on August 8, 2018" a date which he was not on the worksite.

[18] The decision of Worksafe Newfoundland, which seems to be based on the employer's version of events is not binding on this Tribunal.

Issue #2: If so, did the Appellant do so wilfully to the point he could reasonably expect to be dismissed or suspended from his employment for his actions?

[19] No.

[20] The Appellant could not expect any negative effect for doing an assigned task.

[21] I find the Appellant could not have known that his actions would lead to his dismissal and therefore he does not meet the mental element of wilfullness inherent in a finding of misconduct.

Issue #3: Should a disqualification be imposed pursuant to sections 29 and 30 the *Employment Insurance Act* (Act) because the Appellant lost his employment by reason of his own misconduct.

[22] No.

[23] The employer and the Commission have not shown that the Appellant lost his employment due to misconduct, the decision having been made on the balance of probabilities LARIVEE A-473-06, FALARDEAU A-396- 85.

[24] I find that, given the lack of any degree of wilfullness, it would not be probable to conclude misconduct on the part of the Appellant. There should, as the Commission originally determined, be no disqualification.

CONCLUSION

[25] *The Tribunal "Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment" (Meunier A-130-96*).

[26] In having done so, I find that, having given due consideration to all of the circumstances, the Appellant's actions in this case did not amount to misconduct under the Act therefore his appeal is allowed and benefits are payable.

John Noonan

Member, General Division - Employment Insurance Section

HEARD ON:	February 7, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	K. B., Appellant J. B., Representative for the Appellant