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

Citation: *J. H. v Canada Employment Insurance Commission*, 2019 SST 870

Tribunal File Number: GE-18-3171

BETWEEN:

J. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: February 28, 2019

DATE OF DECISION: March 4, 2019

Canada

DECISION

[1] The appeal is allowed. The Appellant did not voluntarily leave her employment as a truck driver with X (X) and, therefore, cannot be disqualified from receipt of employment insurance benefits (EI benefits) for doing so. Nor did the Appellant lose her employment at X due to her own misconduct.

OVERVIEW

[2] The Appellant established a claim for regular EI benefits effective December 31, 2017. X advised the Respondent, the Canada Employment Insurance Commission (Commission), of its view that the Appellant quit her job when she abandoned the truck she was driving en route to Montreal and refused the employer's direction to resume driving after it was repaired. The Commission imposed an indefinite disqualification on the Appellant for voluntarily leaving her employment without just cause. The Appellant asked the Commission to reconsider its decision, arguing she was dismissed from her job without cause on January 4, 2018, when she was waiting for the truck to be repaired and received a text from the employer advising of her dismissal. The Commission maintained its decision, and the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal). Her appeal was dismissed by the Tribunal on July 12, 2018.

[3] The Appellant appealed the July 12, 2018 decision to the Appeal Division of the Tribunal (AD). In its decision issued on October 12, 2018, the AD allowed the Appellant's appeal and referred the matter back to the General Division for a new hearing before a different Member of the Tribunal.

ISSUES

[4] Is the Appellant disqualified from receipt of EI benefits because she voluntarily left her employment at X without just cause?

[5] Is the Appellant disqualified from receipt of EI benefits because she was dismissed from her employment due to her own misconduct, namely job abandonment?

ANALYSIS

[6] A claimant who voluntarily leaves their employment is disqualified from receiving EI benefits unless they can establish “just cause” for leaving: section 30 *Employment Insurance Act* (EI Act). Just cause exists where, having regard to all of the circumstances, on balance of probabilities, the claimant had no reasonable alternative to leaving the employment (see *White 2011 FCA 190, Macleod 2010 FCA 301, Imram 2008 FCA 17*).

[7] The initial onus is on the Commission to prove the Appellant left her employment ***voluntarily***; once that onus is met, the burden shifts to the Appellant to prove she left her employment for “just cause” (see *White, (supra)*).

[8] Section 30 of the EI Act in fact provides for an indefinite disqualification from benefits on two related grounds: when a claimant is dismissed by an employer due to their own misconduct ***or*** voluntarily leaves their employment without just cause. The Federal Court of Appeal in *Borden 2004 FCA 176* explained the importance of this linkage as follows:

> “In *Attorney General of Canada v. Easson, A-1598-92, February 1, 1994*, this Court made it clear that "dismissal for misconduct" and "voluntarily leaving without just cause" are two notions rationally linked together because they both refer to situations where loss of employment results from a deliberate action of the employee. The Court went on to add that the two notions have also been linked for very practical reasons: it is often unclear from the contradictory evidence, especially for the Commission, whether the unemployment results from the employee's own misconduct or from the employee's decision to leave. In the end, since the legal issue is a disqualification under subsection 30(1) of the Act, the finding of the Board or the Umpire can be based on any of the two grounds for disqualification as long as it is supported by the evidence. There is no prejudice to a claimant in so doing because the claimant knows that what is sought is a disqualification from benefits and he is the one who knows the facts that led to the seeking of the disqualification order.”

The issue then becomes whether a disqualification under subsection 30(1) of the EI Act is warranted – ***on either of the two grounds for disqualification*** – based on the evidence before the Tribunal.

[9] This is in keeping with the remedy provided for by the AD in paragraph 25 of its October 12, 2018 decision, where the AD noted that if the Tribunal finds the Appellant was terminated, it may be necessary to determine if the termination was due to her own misconduct.

Issue 1: Did the Appellant voluntarily leave her employment at X?

[10] Where a disqualification is being considered for voluntarily leaving an employment without just cause, the Tribunal must first decide if the claimant, in fact, voluntarily left the employment.

[11] X's opinion that the Appellant's behaviour was tantamount to quitting her job is not determinative of this question. For the leaving to be ***voluntary***, there must be credible evidence that the Appellant herself took the initiative to sever the employment relationship. The Tribunal finds there is no such evidence in the Appellant's case.

[12] The Appellant testified as follows:

- She was driving a truck for X when it broke down in X, Ontario on December 31, 2017.
- She immediately contacted the employer but they "ignored me for a few hours", until around 5:00pm when the owner called and told her to "get going". The employer wanted the truck driven to Montreal "broken down or not".
- The Appellant said that was impossible because the "DEF" light was on and the truck was not operating correctly. DEF is an emissions fluid that is added to the truck's fuel.
- She called X, the manufacturer of the truck, for roadside assistance, but they were unable to do anything. She called some repair shops, but it was already late in the day on New Year's Eve and she couldn't reach anyone.
- It was very cold, "minus 50 something" – but she stayed in the truck overnight.
- On January 1, 2018, she continued to call repair shops, talked with the employer and waited for the employer to make a decision about what to do with the truck.
- Around 12 noon on January 1, 2018, the truck "stopped running" and the employer finally decided to get someone to tow it.
- The truck was towed to a repair shop in X around 11:00pm on January 1, 2018. The Appellant travelled in the tow truck to the repair shop in X.
- The employer was unwilling to arrange a hotel or a place for her to stay in X. She was told at the repair shop that they wouldn't even be looking at the truck for a few days. She

called a friend to pick her up in Thunder Bay and drive her home to Winnipeg, where she would wait for instructions.

- The next morning (January 2, 2018), she contacted X to explain what had happened and where the truck had been towed. X has a satellite system to run computer diagnostics on its trucks and they are involved in the repair process.
- She didn't call the employer from the repair shop on the night of January 1, 2018 because it was nearly midnight at the time. However, she was in touch with the employer the very next morning (January 2, 2018). The employer said they would keep her posted because the repair was expected to take about 2 weeks.
- However, X was threatening to make the Appellant pay for the towing and the repairs to the truck because they said it was her fault the truck broke down.
- She checked in with X on January 3, 2018 about the tests they had run. X told her their diagnosis was "this is not driver error" and confirmed that the repair would take about 2 weeks.
- She called the repair shop again the next day, on January 4, 2018, but was told they weren't allowed to give her any more information about the truck because she had been let go.
- Later that day, she received a text from the employer (at GD3-51), in which the employer stated she was dismissed "today".
- She applied for EI benefits that night.
- She believes X dismissed her because the problem with the truck was <u>not</u> her fault and so they weren't going to be able to make her pay for the towing and repairs.
- She was supposed to get a pay cheque on January 5, 2018, but received no pay at that time.
- This led to an exchange of text messages about what she was owed.
- X kept putting off paying her. They made various promises to pay her on January 11th or 12th, which was around the time the truck would be ready, if she went and picked up the truck and finish the route. But she had already found another job and told them she would not pick up the truck.
- She believed X didn't have the money to pay for the repairs, and that even if she'd gone back to work for them and drove the truck to Montreal, she herself would never have

been paid. This is because she knows the driver X hired to replace her, a man named "X". He was in X on January 12, 2017, but had to hang around for about a week "waiting for X to pay the repair bill so the truck would be released". X wasn't paid while he waited.

- X finally picked up the truck on January 18, 2018 and continued on to Montreal.
- It took a while, but X has now paid the Appellant "just about everything" she was owed.

[13] The Appellant emphatically stated that she never abandoned the truck, but remained with the vehicle until it was safely towed to the repair facility arranged by the employer. However, the Appellant submits the employer abandoned her on December 31, 2017, when they expected her to drive a broken down truck to Montreal and refused to put her up at a hotel, which meant she had to stay in the truck overnight in **-50°C** weather until the truck finally ran out of fuel and had to be towed. She maintained contact with the employer and assisted X with the information for the diagnostics, but when the problem with the truck was not attributed to driver error – and there was no basis to recover any costs from her – she was dismissed by a text message on January 4, 2018.

[14] The Tribunal accepts the Appellant's testimony that she never quit her job and was, in fact, actively monitoring the repair process and awaiting further instructions from the employer when she was dismissed on January 4, 2018. The Appellant gave a detailed chronology of events that is supported by her contemporaneous application for EI benefits on January 4, 2018 – where she gave separation from employment as dismissed (GD3-9) – and is consistent with her initial statements to the Commission (GD3-34 to GD3- 36) and during the reconsideration process (GD3-170 to GD3-173 and GD3-176). The Appellant was particularly compelling during her testimony about how the employer was withholding her pay in an attempt to get her to come back to work for them after the truck was repaired. The Tribunal notes this is consistent with her statement during the reconsideration process that "X" at X told her on January 11, 2018 that she would be paid the rest of what she was owed if she returned to work (GD3-176).

[15] The Tribunal gives less weight to the statements from the employer because they changed over time – starting with their first version of events to the Commission (at GD3-29) when they said they put the appellant up in a hotel for one or two nights and then she disappeared. The

Appellant has provided call records and screen shots of texts showing contact with the employer throughout the period between December 31, 2017 and January 4, 2018, and vigorously denies she was put up in a hotel by the employer or that the employer offered to pay for a hotel when the truck broke down on December 31, 2017. During the reconsideration process, the employer's representative first said they put the Appellant in a hotel in X, Ontario, but then admitted he couldn't remember if they had done so and was not sure what happened (GD3-175).

[16] The Tribunal is also troubled by the employer's statement that the Appellant abandoned her job on or about January 12, 2018 when they asked her if she wanted to return to work (GD3-175). This actually reinforces the Appellant's evidence that she was dismissed by the employer's text on January 4, 2018, which clearly stated she was dismissed as of that day (GD3-51). The balance of their communications between January 4 and 11, 2018 related to the Appellant's attempts to be paid for the work she had already done. Why would the employer have to ask the Appellant if she wanted to return to work for them if she was still considered to be employed? The employer's representative admitted he couldn't recall if the Appellant responded or showed any interest (GD3-175). The overall impression created by the employer's conflicting statements and casual disregard for the details of what actually occurred, is of a desire to prevent the Appellant from receiving EI benefits. This is not helpful in determining the real cause of the Appellant's separation from her employment at X.

[17] For these reasons, the Tribunal gives greatest weight to the Appellant's testimony at the hearing and finds that the Appellant did not initiate the severance of her employment at X.

[18] The Tribunal therefore finds the Appellant did not voluntarily leave her employment at X and, therefore, cannot be disqualified from receipt of EI benefits for doing so.

Issue 2: Did the Appellant abandon her job at X?

[19] The Commission submitted the Appellant abandoned her job on January 12, 2018 when she failed to "resume her employment" after the truck was repaired (GD4-3).

[20] The Tribunal disagrees. The Tribunal finds the Appellant never abandoned her job at X – ***not*** when the truck broke down and she returned to Winnipeg on January 1, 2018, and ***not*** when the employer contacted her on January 12, 2018 about going back to work for them.

[21] For the reasons set out in the analysis under Issue 1 above, the Tribunal accepts the Appellant's testimony that she did ***not*** abandon the truck when it broke down. The Appellant gave detailed, credible evidence about the steps she took when the truck broke down and the communications she had with the employer between December 31, 2017 and January 4, 2018. By contrast, the employer's evidence about the events during this period is unreliable.

[22] The Tribunal finds that the Appellant's employment came to an end because X decided to dismiss her on January 4, 2018, as evident by the text from the employer at GD3-51.

[23] The Tribunal's conclusion that the Appellant was dismissed on January 4, 2018 is amply supported by the Appellant's testimony at paragraph 12 above, and by the fact she applied for EI benefits on the same day and gave her reason for separation from employment at X as dismissed. It is also supported by the Appellant's actions to immediately look for other work with a different employer. The Appellant was dismissed on January 4th (a Thursday). She testified that she began looking for new employment on Monday, January 8th, went for a job interview and was hired by "X" between January 9th and January 12th, and started working for them on January 17th.

[24] The Tribunal's conclusion about the Appellant's dismissal on January 4, 2018 is further supported by the Appellant's testimony about what she was told by the repair shop on January 4, 2018 about how they were no longer permitted to give her any information about the truck; and the fact that they confirmed this in writing by the letter at AD 5-1. That letter, from X on September 4, 2018, was written by the X technician who advised X that the problem with the truck was not due to driver error. It is a highly relevant piece of evidence and bears quoting in its entirety:

> "X Transport unit 318 broke down outside of X *(sic)* between Christmas and New Year 2017 – 2018
>
> Unit was towed to X in X because the engine failure had made the unit not drivable
>
> The repair work order was opened on January 3 2018
>
> While communicating about the repair with X Transport I was instructed to NOT talk to the driver as she had been let go --- this was during the week sometime between January 3rd and January 5th" (AD5-1)

[25] As the Appellant was no longer employed by X as of January 4, 2018, there was no job for her to abandon when X called her on January 12, 2018. The call on January 12, 2018 was a fresh offer of employment. The Appellant declined the offer of employment because she had secured employment elsewhere and her new job was going to start shortly, and because she had unresolved pay issues. The Appellant did not have an employment agreement or any other obligation to X when they contacted her on January 12, 2018 about coming back to work for them now that the truck was ready for pick-up. The fact that, as at January 12, 2018, X was still withholding monies owed to the Appellant for mileage and hours worked prior to her dismissal – and appeared to be making payment of those monies conditional on the Appellant returning to work for them – is not evidence of job abandonment, but of an attempt extort the Appellant into driving the employer's truck the rest of the way to Montreal.

[26] For these reasons, the Tribunal finds that the Appellant did not abandon her job at X and, therefore, cannot be disqualified from receipt of EI benefits for doing so.

Issue 3: Did the Appellant lose her job at X due to her own misconduct?

[27] Section 30 of the EI Act provides that a claimant is disqualified from receiving EI benefits if the claimant has lost or been suspended from their employment as a result of misconduct.

[28] The onus is on the Commission to prove that the Appellant, on a balance of probabilities, lost her employment at X due to her own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[29] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act has been established by the jurisprudence from courts and administrative bodies that have considered section 30 of the EI Act and enunciated guiding principles which are to be considered in the circumstances of each case.

[30] In order to prove misconduct, it must be shown that the Appellant behaved in a way other than she should have and that she did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must be

demonstrated that the Appellant knew or ought to have known that her conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*; and that the conduct will affect the Appellant's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528*.

[31] As set out by the Federal Court of Appeal in *Macdonald A-152-96*, the Tribunal must determine the real cause of the Appellant's separation from employment and whether it amounts to misconduct for purposes of section 30 of the EI Act.

[32] The Tribunal has already found that the Appellant did not initiate the severance of the employment relationship and did not abandon her job. Rather, her employment came to an end because the employer decided to dismiss her on January 4, 2018, a decision it communicated not only to the Appellant but also to the Freightliner technician repairing the truck.

[33] A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence of the conduct itself and not merely on speculation and suppositions. It is up to the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. There must be sufficiently detailed evidence before the Tribunal for it to determine how the employee behaved and to judge whether the behavior was misconduct: *Joseph v C.E.I.C A-636-85.*

[34] In the present case, there is no conduct identified by the employer as misconduct, merely a bald statement that X considered the Appellant to have abandoned her job when the truck broke down and she refused to continue driving it after it was repaired. As set out in the analysis in Issues 1 and 2 above, the Tribunal does not find this to be credible.

[35] The employer may well have concluded it no longer wished to have the Appellant working for them after the truck was towed in for repairs in X. However, it is not the role of the Tribunal to determine whether the steps taken by the employer were justified or appropriate (*Caul 2006 FCA 251*), but rather whether the conduct in issue amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[36] For the reasons set out above, there is no credible evidence that points to willful or reckless behavior on the part of the Appellant which she knew or ought to have known could have resulted in the termination of her employment. As such, the Commission has not satisfied the onus on it to prove that the Appellant lost her employment due to her own misconduct. The Tribunal therefore finds that the Appellant cannot be disqualified from receipt of EI benefits for having lost her employment due to her own misconduct.

CONCLUSION

[37] The Tribunal finds the Appellant did not voluntarily leave her employment at X and, therefore, cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act for doing so.

[38] The Tribunal further finds that the Appellant did not abandon her job at X or otherwise engage in conduct that could be considered misconduct for purposes of section 30 of the EI Act. As a result, the Appellant cannot be disqualified from receipt of EI benefits pursuant to section 30 of the EI Act because she lost her employment at X due to her own misconduct.

[39] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	February 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. H., Appellant