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

Citation: *A. R. v Canada Employment Insurance Commission*, 2019 SST 562

Tribunal File Number: GE-19-834

BETWEEN:

A. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: April 8, 2019

DATE OF DECISION: May 7, 2019

DECISION

[1] The appeal is allowed. The Commission has not proven that, on a balance of probabilities, the Appellant's separation from employment at X was due to his own misconduct.

OVERVIEW

[2] The Appellant's last day of work as a truck driver at X was August 17, 2018. In his application for regular employment insurance benefits (EI benefits), the Appellant advised he was dismissed for a safety infraction after committing several prior violations, but that he was unaware the conduct in the final incident was considered a safety infraction and, as a result, his union was challenging his dismissal. The Respondent, the Canada Employment Insurance Commission (Commission) disqualified him from receipt of EI benefits because it concluded he lost his employment due to his own misconduct. The Appellant argued he was terminated unfairly and targeted for dismissal because of his seniority. The Commission maintained the original disqualification on his claim, and the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The Appellant was accompanied at the hearing by X (X), who advised he was a Business Agent from X and would be assisting the Appellant with the presentation of his evidence and submissions.

ISSUE

[4] Is the Appellant disqualified from receipt of EI benefits because he lost his job due to conduct that constitutes misconduct for purposes of section 30 of the *Employment Insurance Act* (EI Act)?

ANALYSIS

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

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

[7] 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.

[8] In order to prove misconduct, it must be shown that the Appellant behaved in a way other than he should have and that he 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 his 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 his job performance, or will be detrimental to the interests of the employer or will harm, irreparably, their employer-employee relationship: *CUB 73528.*

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

Issue 1: What is the conduct that led to the Appellant's separation from his employment at X?

[10] The first step in the analysis is for the Tribunal to determine why the Appellant was separated from his employment at X after his last day of work on August 17, 2018?

[11] There is no evidence from the employer about the Appellant's conduct. Despite the Commissions repeated attempts to obtain information from X, the employer provided nothing beyond the Record of Employment indicating that the Appellant was dismissed (GD3-23).

[12] The Appellant's evidence to the Commission was as follows:

a) On his application for EI benefits, the Appellant identified 4 prior incidents between May 10, 2017 and June 11, 2018, for which he received suspensions ranging from 3 – 5 days (GD3-11 to GD3-13). He described the incident that triggered his dismissal as "not wearing seatbelt in a driveway while truck in motion" on August 9, 2018 (GD3-12), but stated that the dismissal was a result of a new policy that had only been in effect for 2 months and that it was difficult to change after 37 years of doing things a different way (GD3-14).

b) When he spoke to the Commission about his termination (see Supplementary Record of Claim at GD3-26 to GD3-27), he said he was not aware that seatbelts had to be worn in a parking lot – he thought they only needed to be worn while driving on the road. He got out of the truck for a minute in the parking lot and then jumped back in, which triggered a newly installed "Dash Cam", and the employer saw he did not have his seatbelt on while the truck was moving.

c) In his Request for Reconsideration, the Appellant stated that his union was fighting his termination and included a letter from his union representative (GD3-32).

d) When he spoke to the Commission during his reconsideration interview (see Supplementary Record of Claim at GD3-37), the agent noted the Appellant's acknowledgment that he was aware seatbelts were required at all times and his admission that he was undergoing progressive discipline for prior safety infractions and had been warned by the employer about losing his job.

[13] In his Notice of Appeal (GD2), the Appellant stated that he knew of other employees who did the same thing and the employer did nothing. He believes he was targeted by the employer because he was a senior employee and they wanted him gone. He got no training or support when the employer installed cameras in the trucks, and was just getting used to a new way of doing things after 32 years. He also explained that he was fighting one of the prior violations. In an attached letter, the Appellant's union representative stated:

"We feel A. R. was terminated unfairly by X. A. R. was let go under a fairly new program implemented regarding the use of "Drive Cam". This program, while relatively new, has not been tested very often.

Rather than let an arbitrator decide first that the policy is fair and just, we feel the company is using a gentleman, like A. R., as a scapegoat into scaring other employees.

Another incident stated in his termination letter reflects an unsafe act which has been identified by us and the company that unsafe equipment was at fault. The company did not have big enough tarps to cover loads and the driver was cited for an unsecured load.

For these reasons, we feel A. R. should be entitled to benefits as we are taking his case to arbitration with a high level of confidence in our case." (GD2-7)

[14] The Appellant and X testified at the hearing as follows:

- The employer introduced its "Drive Cam policy" in the spring/summer of 2017. A handful of things were "new" under this policy, including mandatory wearing of seatbelts in parking lots and no hand-held devices – including "Blue Tooth".
- The policy has not been challenged by the union yet. But the Appellant grieved his termination on the day he was fired and filed for arbitration 30 days later. His will be the first individual challenge of the employer's Drive Cam policy.
- Of the Appellant's 4 prior suspensions for health and safety violations between May 2017 and June 2018, three (3) were Drive Cam-related. That is, they were for infractions caught by the camera the employer installed in the truck.
- The one (1) violation that was not a Drive Cam incident was the police ticket he received in June 2018 for having an unsecured load. In that case, the employer is paying a lawyer to get the Appellant off the ticket because they supplied the wrong size of tarp to cover the load.
- Health and safety violations are not subject to progressive discipline. In each instance, the employer has discretion to issue a suspension or proceed directly to termination.
- The Appellant did not sign any of the 4 prior discipline notices he received, although he was warned each time that similar further conduct could lead to his dismissal.
- The Appellant is the first and only employee to be terminated for a Drive Cam-related infraction since the policy was put in place in spring/summer of 2017.

- This is in spite of the many identical seatbelt infractions by other X employees both before and after the Appellant's termination.
- Under the old rules, drivers had to "follow the law", which meant wearing their seatbelts when they were driving on public roads.
- But under the employer's new rules, drivers must wear their seatbelts "if the vehicle's wheels are turning" – regardless of where they are, be it a parking lot, private driveway or public roadway.
- This was a very hard change for all of the X drivers to get used to, especially since they are jumping in and out of their trucks many times a shift during bin deliveries.
- There have been many seatbelt infractions by drivers at X since the new policy was implemented, and they have always resulted in a warning.
- After the Appellant's termination for his seatbelt infraction in August 2018, the employer went back to issuing warnings and continues to do so even now, 8 months later in April 2019.
- They are using him as a test case and to see if their Drive Cam policy will be upheld.
- The Appellant worked for X for 39 years and was never once disciplined for not wearing a seatbelt prior to the incident caught on the dashboard camera.
- There was no such thing as a seatbelt infraction for close to 40 years, but the employer offered no re-training or support when it instituted its new policy. They just installed the cameras and had a meeting.
- By choosing to make an example of the Appellant, the employer got the benefit of not having to pay him any severance for his 39 years of service.
- There are 78 drivers employed by X. Many of these drivers have had more than one suspension for the very same thing the Appellant was terminated for. It was not uncommon for drivers to have 2 or 3 suspensions of between 3-5 days each for seatbelt infractions under the Drive Cam policy.
- At the time of the final incident in August 2018, the Appellant was aware that other drivers had been suspended for seatbelt infractions.
- At that time, the policy was just over a year old and cell phone and seatbelt use were "hot button issues" for the employer. The employer wanted to send a "shock and awe" message that there were too many suspensions, so they terminated a single employee –

the Appellant, to send a message. The message was that employees needed to comply with the new safety rules.

- But the number of suspensions for seatbelt violations are still very high. And no one else has been terminated for a Drive Cam-related violation – even repeat offenders.
- For the final incident, the Appellant was working with a bin in a private driveway when he "bumped the bin" with his truck. The dashboard camera automatically comes on and starts recording when the truck bumps into something. Small bumps up against bins are common during the delivery process, as the drivers often have to work in tight spaces. Drivers are always in and out of the trucks during bin drop off and pick-up. It didn't even register with the Appellant that there had been a bump or that the camera had come on. He didn't even know that he did not have his seatbelt on at the time.
- Then, 2 or 3 days later, he was told by management that the camera had come on and they had reviewed the recording and saw he was not wearing his seatbelt at the time. He was told the employer was considering what to do. He thought he might be suspended, as was the employer's consistent practice at the time.
- He never thought he could be terminated for not wearing his seatbelt while in a private driveway.
- Prior to the Drive Cam-related incidents, the Appellant had a clean discipline record and no driving convictions.
- If the employer was really worried about whether the Appellant was driving safely, why did they allow the Appellant to continue to work and drive around delivering and removing bins while they considered what to do?
- The final incident occurred on Thursday, August 9, 2018 - the week before the Appellant was fired.
- The Appellant was called in to talk to the Employer on the following Tuesday. At that meeting, he was told of the infraction, apologized, and stated it was "an honest mistake". The employer said they would let him know. There was no mention of termination. He was expecting another suspension.
- Two days later – on Thursday, the union steward and business agent were given "a heads up" that the Appellant was going to be fired that day.

- But the Appellant finished his shift on Thursday and left at the end of the day as usual – and no one said anything to him.
- If X was going to fire him, he should have been fired at the start of his next shift on Friday.
- But the Appellant showed up for his shift at 6am and was given runs that had him working the full day. He was fired at the end of his shift at 3:30pm.
- The Appellant later found out that another driver had phoned in sick and the employer was in a bind that day.
- The employer was not concerned about whether the Appellant was violating its safety policy. They Appellant was fired because the employer wanted to send a message to all of the employees to take the new rules seriously.

[15] The testimony of the Appellant and X is consistent with the Appellant's statements on his application for EI benefits and to the Commission about this being a wrongful dismissal and a targeted action by the employer. While it is not the Tribunal's role to determine whether a dismissal is justified or too severe of a penalty in the circumstances (see *Caul 2006 FCA 251, Secours A-352-94, Namaro A-834-82*), the Tribunal is nonetheless troubled by the detailed testimony regarding the employer's alternative motive for terminating the Appellant's employment. The testimony of X – who as business agent for the unionized employees at X offered details on the history and implementation of the Drive Cam policy and the employer's disciplinary approach under this policy – was especially compelling.

[16] The Tribunal gives significant weight to the testimony at the hearing regarding the background on the Drive Cam policy at X, the relatively recent imposition of the policy and the lack of training provided to employees, the changes that long-standing drivers would have to get used to under it, and the employer's consistent disciplinary practice under the new policy of allowing employees to accumulate multiple suspensions for Drive Cam-related violations. All of this would have figured in to the Appellant's expectation as to the consequences of his action – had he even been conscious of not wearing his seatbelt at the time of the final incident. This is especially the case since the Appellant himself had received 3 suspensions for different Drive

Cam-related violations and was aware of co-workers who had multiple suspensions for seatbelt violations.

[17] The Tribunal also accepts the Appellant's evidence that he was unaware he had violated the policy when he triggered the Drive Cam on August 9, 2018 and was recorded operating the truck in the private driveway without his seatbelt on. The Appellant didn't even know he'd committed an infraction, let alone have any expectation he could lose his employment for it. By contrast, the employer was at the one-year mark under the new policy and was dissatisfied with the high number of suspensions for Drive Cam-related infractions. The employer was motivated to act in response to what it saw as a lack of compliance by employees and to make an example of a non-compliant individual. The Tribunal is supported in its analysis by two factors: the Appellant was allowed to continue driving for a period of time while the employer thought about what it wanted to do; and then the employer immediately reverted to its original practice of multiple suspensions for Drive Cam-related infractions. It seems quite likely that the employer's true purpose in terminating the Appellant was to send a message to the drivers at large and then await the outcome of this one grievance/arbitration to test their right to terminate for Drive Cam-related infractions.

[18] The Tribunal is not satisfied that the Appellant's violation of the employer's seatbelt policy on August 9, 2018 was the real cause of the separation from employment in this case. The Tribunal finds it is just as likely – if not more likely – that this infraction was merely an excuse to dismiss the Appellant; and that the real cause of the separation from employment was the employer's decision to send a strong message to all of its drivers about the need to take the Drive Cam policy seriously.

Issue 2: Does this constitute "misconduct" for purposes of the EI Act?

[19] It is not the role of the Tribunal to determine whether the steps taken by the employer were appropriate or justified (*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*).

[20] The Federal Court of Appeal has held that 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, and that it is for the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97*. It is not the excuse used by the employer for dismissing a claimant but the real reason for the dismissal that is relevant to a finding of misconduct: *Davlut A-241-82*.

[21] As set out in the analysis under Issue 1 above, the Tribunal has significant doubt about whether the Appellant was terminated because he violated the employer's Drive Cam policy or because the employer was fed up with the high rate of violations under its new policy and wanted to send a message to the workforce. This is especially the case given that the Appellant is the only driver to have been terminated for a Drive Cam-related violation – even though there were many similar infractions ***before*** his dismissal, and the infractions have continued apace ***after*** his dismissal. The Appellant has raised genuine and troubling issues about the employer's true motivation for the dismissal and, as a result, the Tribunal must be guided by the Federal Court of Appeal's rulings in *Bartone A-369-88* and give the benefit of the doubt to the Appellant.

[22] For these reasons, the Tribunal finds there is no evidence that conclusively points to willful or reckless behavior on the part of the Appellant which he knew or ought to have known could have resulted in dismissal from his employment at X. Therefore, the evidence relied upon by the Commission is insufficient to prove misconduct in the present case.

CONCLUSION

[23] The Commission has not proven that, on a balance of probabilities, the Appellant lost his employment by reason of his own misconduct.

[24] The Tribunal therefore finds that the Appellant is ***not*** subject to disqualification from EI benefits pursuant to section 30 of the EI Act.

[25] The appeal is allowed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	April 8, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	A. R., Appellant X, Business Agent, X, Representative for the Appellant