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

Citation: *E. W. v Canada Employment Insurance Commission*, 2019 SST 742

Tribunal File Number: GE-19-1515

BETWEEN:

E. W.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: June 6, 2019

DATE OF DECISION: June 26, 2019

DECISION

[1] The appeal is allowed. I find that the Commission has not met its burden of proving that, on a balance of probabilities, the Claimant lost his employment because of his misconduct.

OVERVIEW

[2] The Appellant, who I shall refer to as the Claimant, was employed as a letter carrier. The employer dismissed the Claimant for violation of its policies. The Claimant made a claim for employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), disqualified the Claimant from receiving EI benefits because it concluded the Claimant lost his job due to his misconduct. The Claimant requested a reconsideration of that decision and the Commission upheld its decision. The Claimant appeals to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTER

[3] The Claimant's appeal was received by the Tribunal on March 25, 2019, more than 30 days after the Reconsideration Decision was communicated to him on March 28, 2018. By way of interlocutory decision, dated April 11, 2019, I allowed an extension of time for the appeal.

[4] The Commission submitted that it made an error when implementing the disqualification. It initially stated in its letter of December 28, 2017, that the disqualification was imposed effective October 8, 2017, but submitted it should have stated "we are unable to pay you any Employment Insurance regular benefits starting September 3, 2017," thus imposing the disqualification on September 3, 2017.

[5] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal.[1] Because the Commission's error did not prevent the Claimant from seeking reconsideration of the Commission's initial decision and later to appeal the reconsideration decision, I find that the error does not cause the Claimant any prejudice or harm.

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[1] *Desrosiers v. Canada (AG)*, A-128-89

[6] The Commission's decision letter of December 28, 2017, also stated that the Claimant's renewal claim for EI benefits could not start earlier than September 24, 2017, because he did not file his application on time and did not show good cause for being late. Requesting that an EI claim be allowed at an earlier date is known as requesting an "antedate" for a claim. The Claimant's request for reconsideration of the Commission's decision made reference to the denial of payment of benefits effective October 8, 2017, but there was no reconsideration of the Claimant's request for antedate. However, the Commission has stated in its submission to the Tribunal that due to a clerical error the disqualification should have taken effect September 3, 2017. As a result, while I have no jurisdiction to decide on the question of antedate, as no reconsideration decision was made, the correction of the clerical error renders the question of antedate moot.

ISSUES

Was the Claimant's employment terminated for misconduct?

ANALYSIS

[7] A claimant is disqualified from receiving any EI benefits if he lost his employment because of his own misconduct.[2] Misconduct is defined [3] as "wilful misconduct" where a claimant knew or should reasonably have known that his conduct was such that it would result in his dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment.[4]

[8] The Commission has burden to prove that misconduct occurred.[5] The burden of proof in this case is a balance of probabilities, which means is it "more likely than not" the events occurred as described.

[2] *Employment Insurance Act* , Sections 29 and 30
[3] for the purposes of subsection 30(1) of the *Employment Insurance Act*
[4] *Canada (Attorney General) v. Lemire,* 2010 FCA 314
[5] *Lepretre v. Canada (Attorney General),* 2011 FCA 30

[9] There is no dispute concerning the basic facts in this case. The Claimant lost his employment because he kept undelivered mail in his vehicle overnight. The Claimant admits to this conduct.

[10] The legal test for misconduct requires a causal relationship between the misconduct of which the claimant is accused and the loss of employment. The conduct must cause the loss of employment, have been committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the employment contract.[6]

[11] Misconduct requires a mental element of wilfulness on the part of the claimant, or conduct so negligent or reckless as to approach wilfulness.[7] Wilfulness has been defined in a number of ways, but generally requires the claimant to have acted consciously, deliberately, or intentionally.

[12] For me to conclude that there was misconduct, there must be sufficiently detailed evidence to know whether the Claimant acted in the manner that he is accused of, and then whether this behaviour is considered misconduct.[8]

[13] The Claimant testified that he was employed as a part-time letter carrier. The Claimant's Representative, affirmed to provide evidence, testified that he is a union representative for persons employed by the Claimant's former employer. The Representative explained that the Claimant was a part-time employee, employed on an indeterminate basis, but was regularly working full-time hours. The Representative testified that letter carriers choose delivery routes based on seniority. He explained that because of his low seniority, the Claimant generally had to choose from less desirable routes, including those involving higher numbers of deliveries or lengthier distances.

[14] The Representative testified that mail for an entire route is placed in a "cage" for sorting by the carrier, into bundles by street address. The Representative testified that on occasion carriers are not able to deliver all the mail on the day it has been assigned. Delivery of mail could be delayed due to weather, or inability to complete a route prior to darkness. In cases

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[6] *Canada (Attorney General) v. Cartier,* 2001 FCA 274
[7] *Canada (Attorney General) v. Tucker,* A-381-85
[8] *Joseph v. Canada (Attorney General),* A-636-85

where the mail could not be delivered, the Representative testified that the carrier is to return the mail to the cage for delivery on the next delivery day.

[15] The Claimant testified that in May or June of 2017, his employer arranged for him to take a leave of absence to seek treatment for his mental health issues. The Claimant stated that he has been diagnosed with general anxiety disorder. He suffers from panic attacks and has a prescribed medication to take in an emergency.

[16] The Claimant testified that he would sort his mail at the depot prior to taking a cab to the start of his route. He stated that in the week prior to his dismissal there was flooding in the city where he worked. The flooding meant that he was unable to reach certain parts of his route, so he had to return undelivered mail to the depot for delivery on the next delivery day. The Claimant testified that on his last day of employment he had to sort the returned mail and the new mail. He completed the sorting and took a cab to his route. He testified that he was delivering the mail when he got a telephone call from his spouse, who was at work. The Claimant stated his spouse was upset, and told him she had been assaulted at work. The Claimant testified that his first thought was to get to his spouse, because he did not want her driving. The Claimant explained that his wife has mental health issues. The Claimant called a cab to take him back to the depot so he could get his car. The Claimant testified that he started to experience a panic attack while in the cab so he took his prescription medication. The Claimant stated that the medication, taken under the tongue, has an immediate effect of pulling him out of the anxiety or panic attack, making him very relaxed, and that it is like being inebriated without consuming alcohol. The Claimant testified that it would take him 10 to 20 minutes to take the undelivered mail into the depot, put it in the cage, and get to his car. He stated his main concern was to get to his spouse as quickly as possible, so he took the undelivered mail with him to his car and drove to his spouse. The Claimant testified that he did not recall much of the day after his spouse called him but he did recall wanting to first help his spouse and then deliver the mail.

[17] The Claimant testified that the next day he met with management at the depot. He explained what had happened. Management told him that he was expected to call his supervisor when he was not able to deliver all the mail. The Claimant stated that he told management he

had difficulty communicating directly with his supervisor because the supervisor strongly resembled a person from his past who had caused him harm. The Claimant explained that because of the resemblance he would rarely talk to the supervisor, instead he would leave written notes. The Claimant testified that he did not deny that he did not complete the route or that he had taken the mail home with him that day. The Claimant testified, "I told [management] they were welcome to take the mail from my car because I was lucid then." The Representative testified the Claimant was suspended based on that meeting. The Claimant testified that he sought treatment and was in treatment when he received notice that he was dismissed from his employment.

[18] The Claimant submitted a copy of a memorandum of agreement settling a grievance filed on his behalf. The Representative testified that when the union reviewed the Claimant's file and looked at the discharge, it was in the Claimant's best interests to leave his employment. The Claimant had low seniority and was not likely to get his job back. I note the memorandum of agreement converts the termination of the Claimant to a resignation and that the employer agreed to revise the reason for issuing the Record of Employment from M – Dismissal to D – Illness.

[19] The Commission submitted that in this case the Claimant was aware of the Corporate delivery policy because he had received previous warnings. The Commission stated it is sufficient that the reprehensible act or omission complained of be made "wilfully," meaning consciously, deliberately or intentionally. By taking personal possession of letters intended for delivery, the Claimant's actions show wilful gross negligence towards the duties entrusted to him. The Claimant should have known what the consequences would be for taking personal possession of mail and should have reasonably known that he risked being dismissed. The Commission submitted the Claimant's action irrevocably damaged the employment relationship and that this constituted misconduct pursuant to the *Employment Insurance Act*. The Commission further submitted that there is no medical evidence showing the Claimant was unable to carry out the job that he was hired to do and even if the Claimant's health issues affected his job performance, the Claimant still needed to follow the employer's policy of informing the employer of his inability to deliver the mail.

[20] The Claimant submitted that he did not dispute he made mistakes on the job, but said he

was dealing with an immense amount of stress on his last day of employment and was not in a healthy state of mind. He stated he did not have the coping skills to make a rational decision, that he underwent a stressful event on the last day of his employment, and that he was having a panic attack for which he took prescribed emergency medication. The Claimant submitted that the effects of the medication impacted his ability to make rational decisions.

[21] The Claimant submitted the employer recognized that his actions were not willful and changed the ROE. The Representative submitted that there was a memorandum of agreement forfeiting arbitration where the employer agreed that the Claimant's actions were not misconduct. The Representative submitted it was situational anxiety that was supposed to be recorded in the ROE. The Representative testified that there were several emails back and forth with the employer concerning the change to the ROE.

[22] The Representative submitted the employer was aware of the Claimant's mental health issues, having arranged earlier for him to have time off to seek treatment at their suggestion. The Representative testified that in cases where mail was undelivered, the employer would typically take a photograph of each and every piece of undelivered mail to establish how long the mail had been delayed. The Representative testified that in the Claimant's case the employer did not take photographs which, "raised a red flag for me." The Representative submitted that the Claimant intended to finish his route that day but, having taken the medication, he was unable to do so. The Representative noted that he reviewed the Claimant's personnel file and stated that it was clear to him the employer did not want the Claimant at work because of the nature of the warnings he was given, like not walking across lawns.

[23] I will deal first with the effect on my decision of the memorandum of agreement resolving the Claimant's grievance with his employer. For a settlement agreement to contradict an earlier finding of the Commission, there must be some evidence which would contradict the position taken by the employer during the investigation by the Commission.[9] A representative of the employer told the Commission the letter of termination outlined that the Claimant had made a false claim for overtime in 2017 and there had been the discovery of undelivered mail in his vehicle on September 7, 2017, that should have been delivered on September 6, 2017. On

[9] *Canada (Attorney General) v. Courchene*, 2007 FCA 183

December 28, 2017, the employer provided the Commission with the letter of termination. In May 2018, the union and the employer drafted a memorandum of agreement. In accordance with the memorandum, the employer paid the Claimant a sum of money, the discharge was rescinded, the Claimant's irrevocable resignation was accepted, the employer agreed to amend the reason for issuing the ROE to D – illness or injury and the union agreed to withdraw the grievance. The Commission initially determined the Claimant lost his employment due to his own conduct as described by the employer and admitted by the Claimant. I note that the memorandum of agreement does not include an admission by the employer, or the Claimant, that the dismissal was not justified. As stated by the Federal Court of Appeal, "the fact that the settlement agreement required the employer to withdraw the allegation of dismissal for cause cannot be treated as conclusive of whether there was actually misconduct for purposes of the *Act*. This is particularly true since the settlement agreement did not include an admission by the employer, either express or implicit, that the dismissal for cause was not fully justified."[10] I am bound to apply that finding and find that the memorandum of agreement, rescinding the letter of termination, is not determinative of the issue before me.

[24] I find that it is an express and implied duty of the Claimant's employment that he deliver the mail tendered to him for delivery and when he is unable to do so to inform his manager. To do otherwise is a violation of the employer's policies. The Claimant testified that he was hired as a letter carrier to deliver mail. He testified that it had always been communicated to him that he was to deliver the mail. He stated that in the past, when he had brought mail back to the depot, he left a note or message saying the mail had not been delivered. In response to the question of if he was told that he could be disciplined or dismissed for not delivering he mail, the Claimant replied that was mentioned to him. The Claimant testified he was sure he was aware that not delivering the mail was a violation or policy and that even if it was onerous, he was to "bring back" mail that was not delivered. The Representative gave evidence that it was permissible in certain circumstances to return undelivered mail to the depot. In light of the forgoing I find that, on a balance of probabilities, the Claimant knew or ought reasonably to have known that he could be disciplined or dismissed for not returning undelivered mail to the depot

[10] *Attorney General of Canada v. Morris,* A-291-98

and for not telling his supervisor that he was unable to deliver the mail.

[25] Misconduct is not defined in the Act, and whether it has occurred is largely "a question of circumstance."[11] As noted above, the case law provides that for misconduct to be found there must be a mental element of willfulness on the part of the Claimant or the conduct must be so negligent or reckless as to approach willfulness.[12] Wilfulness has been defined in a number of ways, but generally requires the claimant to have acted consciously, deliberately, or intentionally. The Claimant testified that he has a diagnosed general anxiety disorder and was prescribed medication to take when he experienced an anxiety or panic attack. He testified that he experienced a very stressful incident while on his route, and that he called a taxi to take him back to the depot to get his car so he could attend to his spouse. He testified that while being driven back to the depot he had an anxiety or panic attack for which he took prescribed medication. The Claimant testified that the medication took immediate affect, making him very relaxed, inducing an inebriation-like state and impairing his ability to make rational decisions. He testified that it would have taken too much time to return the undelivered mail to the cage in the depot, so he instead chose to keep the mail with him so he could quickly get to his car and drive to his spouse's location. He testified that it was his intention to return to the route, after he saw his spouse, and complete the delivery of mail.

[26] I find that, on a balance of probabilities, the effects of the prescribed medication on the Claimant were as he described. The Claimant gave his testimony in a straightforward and forthright manner. His testimony was also consistent with the information he gave to the Commission. As a result, I am satisfied the Claimant's testimony is sufficient evidence to establish that, on a balance of probabilities, due to his mental health issues and the effect of the medication, his actions were not were not conscious, deliberate or intentional. As a result, I cannot find that the Claimant's actions of not delivering the mail and not returning the mail to the depot were misconduct within the meaning of the Act. Accordingly, I find that the Commission has not met its burden of proving that, on a balance of probabilities, the Claimant

[11] *Attorney General of Canada v. Gauthier,* A-6-98
[12] *Canada (Attorney General) v. Tucker,* A-381-85

lost his employment because of his misconduct.

CONCLUSION

[27] The appeal is allowed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	June 6, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. W., Appellant Christopher Tremble, Representative for the Appellant