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

Citation: *W. R. v Canada Employment Insurance Commission*, 2019 SST 949

Tribunal File Number: GE-19-2435

BETWEEN:

W. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: August 20, 2019

DATE OF DECISION: August 29, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Claimant worked for X. He had to travel by plane to the remote worksite. He worked at the site for several weeks and was granted leaves so that he could return home.

[3] The Claimant was returning to work following an approved leave. While waiting for his flight at the airport, he consumed alcohol with some of his colleagues. The Claimant was denied boarding by the airline gate agent.

[4] The following day the Claimant contacted the human resources manager of X to tell him that he had been denied boarding. He tried to make new flight arrangements to return to work in time for his shift. However, his employer told him that he was dismissed.

[5] The Commission disqualified the Claimant from receiving benefits because the Commission decided that the Claimant had abandoned his position and voluntarily left his employment without just cause. The Commission came to this conclusion based on a deemed resignation clause in the employer's collective agreement.

[6] The Claimant has appealed this decision to the Social Security Tribunal.

PRELIMINARY MATTERS

[7] At the conclusion of the hearing, the Claimant's representative told the Tribunal that she would submit written submissions. The representative however did not submit the written arguments, so the Tribunal rendered its decision based on the representative's oral arguments.

ISSUES

Issue #1: How did the Claimant's employment end?

Issue #2: If the Claimant voluntarily left his employment, did he have just cause to leave because he had no reasonable alternative to leaving?

Issue #3: If the Claimant was dismissed, did his actions constitute misconduct?

ANALYSIS

[8] Although the concepts of "voluntarily leaving without just cause" and "dismissal for misconduct" are separate concepts under the Employment Insurance Act, both result in a claimant being disqualified from employment insurance benefits. This is because in both situations, the claimant's loss of employment is attributable to the claimant's deliberate actions.[1] As such, the only loss of employment that is insured against, by the unemployment insurance regime, is an involuntary loss of employment.

[9] Claimants are disqualified from receiving benefits if they voluntarily leave their employment without just cause.[2] A claimant can establish just cause for voluntarily leaving if he can prove that having regard to all of the circumstances, the claimant had no reasonable alternative to leaving his employment.[3] The Commission has the burden to prove that the leaving was voluntary. Then, the burden shifts to the Claimant who must prove that he had just cause for leaving.[4]

[10] Claimants are also disqualified from receiving benefits if they lose their job due to misconduct. Misconduct arises when a Claimant knew or ought to have known that his conduct impairs the performance of his duties and that as a result, dismissal was a real possibility.[5]

[11] The Commission disqualified the Claimant because he voluntarily left his employment. The Commission further argued that irrespective of whether the Claimant voluntarily left his employment or was dismissed, he should be disqualified from receiving benefits.

[12] The Claimant argued that he did not voluntarily leave his job, but was dismissed by his employer. He argued that his conduct does not amount to misconduct under the Act.

[13] First, I must make a determination about how the Claimant's employment ended.

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[1] *Canada (Attorney General) v Easson*, A-1598-92.
[2] Section 30 of the *Act*.
[3] Paragraph 29 (c) of the *Act*.
[4] *Green v Canada (Attorney General*), 2012 FCA 313.
[5] *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

Issue 1: How did the Claimant's employment end?

[14] I find that the Claimant was dismissed from his employment and did not voluntarily leave.

[15] The Claimant testified that on May 24, 2018, he was returning to work after an approved leave from the workplace. He and several colleagues had drinks at the airport bar while waiting for their flight to return to work. The Claimant testified that he was denied boarding by the airline agent. The next morning he contacted the human resources manager to book another flight to the work site. The employer's statement confirms that the Claimant and the human resources manager spoke after the Claimant was denied boarding. The Claimant testified that the human resources manager told him that he was dismissed from his employment.

[16] The Commission argued that the Claimant had voluntarily left his employment. The Commission relied upon article 19.2.2 of the collective agreement to support its position. This article states that an employee who does not return to work on a specific date following an isolation leave, "shall be deemed to have resigned, except where the employee at the earliest opportunity advises the Contractor of being detained en route due to a lack of transportation and, if requested by the Contractor, provides proof of same[…]". The Commission also relied upon the record of employment issued by the employer which states that the Claimant quit.

[17] The Claimant argued that he did not voluntarily leave his employment. He argued that he did not resign and could have been at work on time for his shift had his employer not told him that he was terminated. The Claimant argues that the collective agreement states that there is a deemed resignation only when the employee does not contact the employer to justify why they were detained en route.

[18] When analysing the circumstances around how the employment relationship ended, it is important to consider who initiated the end of the relationship. Even though the Claimant missed his flight, he contacted the human resources manager and tried to arrange to take another flight so that he could be at work on time for his shift. I therefore find that this is not a situation where the Claimant initiated the end of the employment relationship and quit his job.

[19] I also accept the Claimant's testimony that he was dismissed over the phone by the human resources manager. The Claimant was credible and forthright during the hearing. He has consistently stated to the Commission that he did not quit.

[20] As such, I find that the Commission has not proven on the balance of probabilities that the Claimant voluntarily left his employment. Rather the evidence shows that the Claimant was trying to return to the work site in time for his shift but he was dismissed by his employer. As such, I find that it was the employer who ended the employment relationship.

Issue #2: Did the Claimant voluntarily leave with just cause because he had no reasonable alternative to leaving?

[21] Given my conclusion on issue # 1, I will not respond to this issue.

Issue # 3: Did the Claimant's actions constitute misconduct?

[22] I find that the Claimant's actions did not amount to misconduct under the Act.

[23] The Claimant testified that in November 2017, he tested positive for cocaine while on the worksite. He enrolled in an employer sponsored drug and alcohol program. In February 2018, the Claimant signed a return to work checklist and agreed to abide by a drug and alcohol return to duty protocol. The Claimant testified that he participated fully in the rehabilitation program. He testified that he was subject to random drug testing and that he had to abstain from using all prohibited drugs that were identified in the drug and alcohol standards. The Claimant testified that he was never required to abstain from consuming alcohol while away from the worksite and had never consumed alcohol while on the worksite. He indicated that the program sponsor who was supporting him in his post-treatment care knew that he consumed alcohol. The Claimant testified that he never knew that he would be terminated for drinking alcohol while away from work and thought that when he contacted the human resources manager he would simply make arrangements to take another flight.

[24] The Commission argued that the Claimants actions constituted misconduct because the Claimant knowingly violated a return to work agreement. The Commission argued that the agreement stated that the Claimant was supposed to abstain from drugs and alcohol as part of the

agreement. Therefore, the Claimant's wilful actions (drinking) resulted in him missing his flight and a scheduled shift. The Commission stated that the Claimant know or ought to have known that drinking alcohol and missing his flight would likely jeopardize his employment.

[25] The Claimant argues that the he did not know and could not to have known that drinking would lead to his dismissal.

[26] I find that the Claimant was dismissed because he consumed alcohol and missed his flight. The employer also stated to the Commission that the employment relationship ended because the Claimant failed to show up at work due to his own negligence. The Claimant acknowledged openly during the hearing that he drank with his colleagues and did not return to work on his scheduled flight.

[27] Even though the Claimant drank before the flight, I accept the Claimant's position that he did not know and could not to have know that this conduct would lead to dismissal.

[28] I accept the Claimant's statement that his return to work protocol did not require him to stop drinking alcohol. He testified sincerely and openly about his understanding of the return to duty requirements. Moreover, the return to duty document says that the Claimant must "abstain from all prohibited drugs…." and speaks to "random drug testing for a period of 12 month". There is no mention of refraining from alcohol consumption in the return to work protocol or the return to work checklist. The only mention of a requirement around alcohol was that the Claimant was supposed to attend self help at a support group (Alcohol Anonymous, Narcotics Anonymous and Cocaine Anonymous). The Claimant explained that this was a general self-help group for people with different kinds of additions and that he was not targeting an alcohol addiction problem. I therefore do not accept the employer's statement that the Claimant was expected to refrain from drinking alcohol for at least 12 months.

[29] I note that even if I accept that the Claimant violated the terms of his return to work protocol by drinking alcohol, neither the return to work protocol nor the checklist contain a last chance clause. Therefore, the Claimant did not know or could not have known that a violation of the protocol would lead to his dismissal.

[30] Moreover, the employer stated to the Commission that they do not have a drug and alcohol policy and that they followed the guidelines of another employer. As such, I find that there was no policy that stated that the Claimant would be dismissed for drinking alcohol offsite. I also find that the Claimant did not receive any written or verbal warnings that he would be terminated if he drank alcohol. The employer corroborated the Claimant's testimony that he did not receive any progressive discipline or warnings relating to alcohol use. In the absence of a clear zero tolerance policy that addresses this type of off duty conduct, I conclude that the Claimant did not know that he would be dismissed for drinking alcohol.

[31] I also note that the Claimant was drinking with his colleagues. They were all returning to work on the same flight. Those colleagues drank and returned to work, while the Claimant did not.

[32] Even though the Claimant missed his flight, I accept the Claimant's position that he did not know and ought not to have know that this conduct would lead to dismissal The Claimant testified that in the past he had missed flights on two occasions. In both instances, the Claimant testified that he was able to book another fight at his own expense.

[33] When I asked the Claimant what he thought would happen when he contacted the human resources manager after he missed his flight, he stated that he thought he would book another flight at his own cost. I accept this Claimant's testimony because his belief was based on his experience with missing flights.

[34] Last, the collective agreement does not explicitly state that the employment relationship will end when an employee fails to return to work on the specified date following an approved leave. The collective agreement provision is nuanced. It states that when an employee does not return on time after a leave, they can provide justification to the employer.

[35] Consequently, I find that the Commission has not proven on the balance of probabilities that the Claimant knew or ought to have known that he would be likely be dismissed for his conduct.

CONCLUSION

[36] The appeal is allowed.

Christianna Scott

Member, General Division - Employment Insurance Section

HEARD ON:	August 20, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	W. R., Appellant Sandra Guevara-Holguin, Representative for the Appellant