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

Citation: *W. R. v Canada Employment Insurance Commission*, 2019 SST 1064

Tribunal File Number: GE-19-2606

BETWEEN:

W. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

HEARD ON: September 10, 2019

DATE OF DECISION: September 18, 2019

Canada

DECISION

[1] I am dismissing the appeal. The Claimant lost his job because of his own misconduct.

OVERVIEW

[2] The Claimant applied for employment insurance benefits. He had more than one employer. One of the employers dismissed him for driving in a way that was unsafe. The Canada Employment Insurance Commission (Commission) decided that the reason the Claimant lost this job was misconduct. The Claimant asked the Commission to review its decision. The Commission did not change its decision. The Claimant appealed to the Tribunal.

[3] I am dismissing the appeal. The Claimant acted recklessly. He reported to work even though he was too tired to drive safely. He was not fit to drive. He drove in way that was unsafe in a residential neighbourhood. He should have known that the employer would dismiss him because of his actions. He lost his job because of his own misconduct.

PRELIMINARY MATTERS

[4] Tribunal staff mailed a notice of hearing to the Claimant. According to the notice of delivery, Canada Post successfully delivered the notice of hearing to the Claimant on September 4, 2019. Tribunal staff also phoned the Claimant on September 9, 2019 to remind him about the hearing. Tribunal staff left a detailed message for the Claimant with information about the time and date of the hearing.

[5] The Claimant did not connect to the teleconference hearing. He did not call or email the Tribunal on the day of the hearing. He did not ask the Tribunal to reschedule or adjourn the hearing.

[6] I can go ahead with a hearing if the Claimant received notice of the hearing. [1] I think the Claimant received notice of the hearing because he received the notice of hearing by mail and

[1] Section 12 of the *Social Security Tribunal Regulations.*

because Tribunal staff left him a voicemail message with the details about the hearing. I went ahead with the hearing, even though the Claimant did not come to the hearing.

ISSUES

[7] Issue 1 – Why did the employer dismiss the Claimant?

[8] Issue 2 – Did the Claimant drive in way that was unsafe?

[9] Issue 3 – Are the Claimant's actions misconduct?

[10] Issue 4 – Should the Commission disqualify the Claimant from receiving employment insurance benefits?

ANALYSIS

[11] I have to decide whether the Claimant lost his job because of misconduct. This means I have to consider several questions:

- Did the Claimant act deliberately? Did he know what he was doing? Or was he so careless that it seemed like he did not care what might happen to his job?[2]

- Did the Claimant know that he could lose his job because of his actions? Or would a reasonable person understand that someone would probably lose their job if they acted the same way?[3]

[12] If the Claimant lost his job because he did something on purpose, or because he was very careless, **and** if he knew he could probably lose his job because of his actions, then he lost his job because of misconduct.[4]

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[2] At paragraph 4 of its decision *Canada (Attorney General) v. Caul*, 2006 FCA 251, the Federal Court of Appeal notes that the action must be wilful. In *Canada (Attorney General) v. Tucker*, A-381-85, the Federal Court of Appeal notes that misconduct could include an action that was so reckless that it approached wilfulness.
[3] At paragraph 8 of its decision *Locke v. Canada (Attorney General)*, 2003 FCA 262, the Federal Court of Appeal suggests that misconduct can include behaviour that is such a fundamental breach of the employer/employee relationship that any employee would know that dismissal would be likely.
[4] At paragraphs 4 and 5 of its decision *Canada (Attorney General) v. Caul*, 2006 FCA 251, the Federal Court of Appeal defines misconduct as an act or omission, done wilfully, that the claimant should have known would be likely to result in dismissal.

[13] The Claimant cannot use hours from a job he loses because of misconduct to qualify for employment insurance benefits. He has to work enough hours after the misconduct to qualify again for benefits. If he does not work enough hours to qualify again for benefits, he cannot receive employment insurance benefits.[5] This is called a disqualification.

Issue 1: Why did the employer dismiss the Claimant?

[14] The employer dismissed the Claimant because he was driving in way that was unsafe.

[15] The Claimant worked as a driver. The employer told the Commission that they sent the Claimant on a delivery job. While he was out on the job, the Claimant was driving in a residential neighbourhood. People in the neighbourhood called the police and complained that the Claimant was driving erratically. The police found the Claimant pulled over, asleep in the vehicle. The police suspected the Claimant was using drugs or alcohol. The police impounded the vehicle.

[16] The Claimant agrees that he was asleep in his vehicle. He says that he passed a breathalyzer test. He says that he was sleeping because he was too tired to drive safely. The police called his employer. The employer fired him because of this incident.

[17] The Claimant and the employer disagree about why the Claimant was asleep in the vehicle. However, the Claimant and the employer agree that the employer dismissed the Claimant because of this incident.

Issue 2: Did the Claimant drive in way that was unsafe?

[18] It is likely that the Claimant was driving in way that was unsafe.

[19] The Claimant argues that he passed the breathalyzer test. He says that he was too tired to drive safely. He says that he had to pull over to sleep. He also agrees that the police impounded his vehicle.

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[5] Section 30 of the *Employment Insurance Act*.

[20] The Claimant did not appear at the hearing. He did not explain how he was driving before he pulled over. He did not explain where he pulled over to sleep.

[21] The employer says that the Claimant was in a residential neighbourhood. The employer says that the Claimant was driving the vehicle dangerously. People in the neighbourhood complained to the police.

[22] I must make a decision on the balance of probabilities.[6] This means I have to consider all of the evidence and decide what most likely happened. The Claimant did not give me any evidence to contradict the employer's information. Since the Claimant agrees that he was too tired to drive, it is likely that he was driving in a way that was unsafe before he pulled over to sleep. The Claimant does not say where he pulled over, so I will rely on the employer's information. It is likely that the Claimant pulled over to sleep in a residential neighbourhood.

[23] I find that it is likely that the Claimant was driving in a way that was unsafe in a residential neighbourhood.

Issue 3: Are the Claimant's actions misconduct?

[24] I must make a decision with the information I have. The Claimant acted recklessly because he reported to work when he was too tired to drive safely. He should have known he could lose his job because of his actions. The Claimant lost his job because of his own misconduct.

[25] The Claimant agrees that he pulled over to sleep in his vehicle. He says that he was too tired to drive safely. He argues that he had to sleep because he could have caused an accident if he kept driving. I accept that the Claimant was too tired to drive safely.

[26] The employer says that it was the Claimant's first day back to work after two days off. It was the beginning of his shift. The Claimant has not given a different explanation, and so I will rely on the employer's information.

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[6] The Federal Court of Appeal says that the standard of proof is the balance of probabilities for employment insurance matters in its decision *Canada (Attorney General) v. Corner*, A-18-93.

[27] The Claimant has not explained why he reported to work even though he was too tired to drive safely. He had just started his work week, and so there is no obvious explanation for why he was too tired to drive safely.

[28] Misconduct does not necessarily mean that the Claimant had a wrongful intention. [7] In other words, for the Claimant's actions to be misconduct, I do not have to find that the Claimant deliberately meant to do something wrong at work. An action can be misconduct if it is so reckless that it almost seems to be wilful or deliberate.[8]

[29] I find that the Claimant's actions were so reckless that he did not seem to care about what might happen to his job. The Claimant worked as a driver. He should have known that he had to report to work ready to drive. He should have known that he might lose his job if he was not prepared to drive safely. Nevertheless, the Claimant deliberately reported to work, even though he was too tired to drive safely. He drove in a way that was so unsafe that people in the neighbourhood called the police.

[30] The Claimant should have known that he could lose his job because of his actions. The Claimant lost his job because of his own misconduct.

Issue 4: Should the Commission disqualify the Claimant from receiving employment insurance benefits?

[31] I will not make a decision about whether the Commission should disqualify the Claimant. The Claimant has not made any arguments about whether he has worked enough hours to qualify for benefits after his dismissal. He has not said that he wants his appeal to include this issue. He did not come to the hearing to give more information about his appeal.

[32] If the Claimant thinks that he has worked enough hours since his dismissal to qualify for benefits, then he should make a new appeal specifically about this issue.

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[7] The Federal Court of Appeal says this in its decision *Attorney General of Canada v Secours*, A-352-94.
[8] In its decision *McKay-Eden v Her Majesty the Queen*, A-402-96, the Federal Court of Appeal says that misconduct can include an action that is so reckless that it approaches wilfulness.

CONCLUSION

[33] I am dismissing the appeal. The Claimant lost his job because of his own misconduct.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

HEARD ON:	September 10, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	No party appeared at the hearing