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

[TRANSLATION]

Citation: *P. C. v Canada Employment Insurance Commission*, 2019 SST 1069

Tribunal File Numbers: GE-19-2777
GE-19-2778

BETWEEN:

P. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: September 19, 2019

DATE OF DECISION: September 26, 2019

Canada

DECISION

[1] The appeals are allowed. The Canada Employment Insurance Commission (Commission) has failed to show that P. C. (Claimant) lost his employment because of his misconduct, which means that the Claimant is not disqualified from benefits.[1] Furthermore, the Claimant has also accumulated the number of insurable hours of employment to be entitled to Employment Insurance benefits.[2]

OVERVIEW

[2] The Claimant was dismissed because he had not given his employer the necessary information to put his hiring folder in order. The Claimant says that he gave his employer the information when he was hired. He claims that the employer's reason is not the real reason for his dismissal. He says that the real reason for the dismissal is his request for a week of leave. Furthermore, the Claimant argues that, even if he had failed to give his employer the information for his hiring folder, that failure does not constitute misconduct because the Claimant did not know and could not have known that he would be dismissed for failing to give the information.

[3] The Commission accepted the employer's reason for dismissal and found that the Claimant knew that he would be dismissed for not giving his employer the information. The Commission decided that the Claimant had lost his employment for misconduct and disqualified him from receiving Employment Insurance benefits.

[4] Furthermore, the Commission decided that the Claimant had not accumulated enough insurable hours since his dismissal to entitle him to Employment Insurance benefits. The Claimant appealed those two decisions to the Tribunal.

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[1] Section 30 of the *Employment Insurance Act* (Act) disqualifies a claimant from benefits if they lost their employment because of their misconduct.
[2] See section 7(2) of the Act, which sets out the number of insurable hours required to receive benefits.

PRELIMINARY MATTERS

[5] I addressed two preliminary matters: (1) joining the two appeals, and (2) receiving documents the day of the hearing.

[6] I heard the two appeals at the same time. I consider it appropriate to join the two appeals since the appeals raise common questions of fact. Furthermore, doing so is unlikely to cause injustice to the parties and facilitates appeal handling.[3]

[7] The Claimant's representative sent an additional document the day of the hearing. This document was already in the Tribunal's file at GD3-51. As a result, the Tribunal did not give the Commission the opportunity to comment on that document.

ISSUES

[8] **Issue 1: Did the Claimant lose his employment because of his misconduct?**

To answer that question, I must begin by determining why the Claimant lost his employment. Then, I must decide whether the alleged behaviour constitutes misconduct within the meaning of the Act.

[9] **Issue 2: Did the Claimant accumulate enough insurable hours during the qualifying period to entitle him to Employment Insurance benefits?**

ANALYSIS

[10] For the first issue, it must be determined whether the Commission has shown on a balance of probabilities that the Claimant should have been disqualified from receiving benefits because he had lost his employment because of his misconduct.

[3] See section 13 of the *Social Security Tribunal Regulations*.

Issue 1: Why did the Claimant lose his employment and did the Claimant commit the alleged act?

[11] The Claimant lost his employment because he did not provide information to complete his employee file.

[12] The Claimant and the Commission disagree on why he lost his employment. The Commission argues that the employer's reasons are the real reasons for the dismissal. The employer told the Commission that it had dismissed the Claimant because he had not submitted information needed to put his hiring folder in order.

[13] The Claimant disputes the Commission's position. He says that the real reason for his dismissal is his request for a week of leave. He testified that, after he sent a text message asking for a week of leave, his employer told him that he had been dismissed. The Claimant also claims that the employer dismissed him because the employer had drawn negative conclusions about the Claimant's temperament.[4]

[14] Furthermore, the Claimant testified that he gave his employer all of the requested information during his interview, except for a copy of his card from the Commission de la construction du Québec (CCQ) [Québec's construction board]. He testified that he could no longer find his CCQ card but that the employer had called the CCQ to confirm that he was in good standing.

[15] First, I cannot accept the Claimant's position that he was dismissed for asking for a week of leave. I accept that the text message ending the employment followed the Claimant's request for leave. However, I note that nothing in the employer's statement or answer says that the Claimant was dismissed because of his request for leave. The employer suggested in its answer to the Claimant that he come to the office to discuss the reason for the dismissal, which suggests that there was a reason other than the request for leave.

[16] Furthermore, I do not accept the Claimant's explanation that he did not commit the alleged act because he had given all the information his employer requested. First, his testimony

[4] The Claimant relies on the employer's comments at GD3-15 and GD3-17.

at the hearing is contradicted by the information he gave the Commission for the reconsideration of the file. The Claimant told the Commission that he had not sent the documents the employer requested.[5] Furthermore, the Claimant's own notes in the documentation he gave the Commission indicate that he had tried numerous times, without success, to send the information his employer requested.[6] The documentary evidence also shows that the employer had sent the Claimant a list of documents it needed to hire him on August 14, 2018. The employer asked the Claimant to [translation] "send them by email or bring them on Monday." The Claimant then sent a text message on August 27, 2018, followed by another text message on August 29, 2019, to ask for his email address and password, because he could not access his inbox at the employer.[7] I find that these facts are incompatible with the Claimant's statement that he had given the employer the documents at his hiring interview.

[17] Furthermore, I reject the Claimant's argument that he did not commit the alleged act because he was never able to access his email. The Claimant argues that the Commission needed to prove that he had received the email in which the employer asked for the hiring information before the Commission could establish that the Claimant had committed the alleged act.

[18] I find that the evidence indicates that the Claimant was aware of the need to access his email because he had followed up with his employer on two occasions to get the login information. I therefore find that the Claimant cannot invoke his own failure to access his emails as a ground of defence.

Issue 1: Does the alleged act constitute misconduct within the meaning of the *Employment Insurance Act*?

[19] The alleged act does not constitute misconduct within the meaning of the Act.

[20] To be misconduct within the meaning of the Act, the conduct must be wilful. That means the conduct was conscious, deliberate, or intentional.[8] Misconduct also includes conduct that is

[5] See GD-3-22.
[6] GD3-51 (see annotation).
[7] See GD3-51 and GD-7-2.
[8] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

so reckless that it approaches a wilful act.[9] The Claimant does not have to have had wrongful intent for his behaviour to be misconduct under the Act.[10]

[21] There is misconduct if the Claimant knew or should have known that his conduct could impair the performance of his duties owed to his employer and that, as a result, dismissal was a real possibility.[11]

[22] The Commission must prove that it is more likely than not that the Claimant lost his employment because of his misconduct.[12]

[23] The Commission states that there was misconduct because a provision of the collective agreement that applies to the Claimant provides for the dismissal of an employee if they do not provide their employer with all the information needed to open their file within five days of their hiring. The Commission argues that the employer asked the employee numerous times to provide the information and his refusal to do so within the maximum time frame of five working days from the beginning of the employment constituted misconduct within the meaning of the Act. According to the Commission, the Claimant had been advised to provide the necessary information and knew the rules of the industry at that level. Despite everything, he chose not to comply.

[24] The Claimant states that there was no misconduct because he did not know that he could be dismissed for failing to provide the information to his employer. He argues that the evidence provided by the Commission is poor and does not prove that he knew or should have known that dismissal was a real possibility.

[25] I find that the Claimant did not know and could not have known that his failure to provide the information within the time allowed would lead to dismissal for two reasons: (1) the provision of the collective agreement is not explicitly aimed at the Claimant's alleged behaviour, and (2) the Claimant did not know that he would be dismissed for his actions.

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[9] *McKay-Eden v Canada (Attorney General)*, A-402-96.
[10] *Canada (Attorney General) v Secours*, A-352-94.
[11] *Mishibinijima v Canada (Attorney General)*, *supra* note 6.
[12] *Minister of Employment and Immigration v Bartone*, A-369-88.

[26] First, I reject the Commission's argument that the collective agreement stipulates that an employee will be dismissed if they do not provide their employer with the information needed to open their file within five days of being hired.

[27] Rather, the provision of the collective agreement requires the employer to have the employee fill in a specific form, and it is only when the employee refuses to provide the information that dismissal will follow. The provision reads as follows:

> [Translation]
> Within a maximum of five working days of employment when an employee is hired, **the employer must have the employee fill out and sign a form on which they must indicate their name** [...]. The form provided by the employer must be in the format set out in Schedule H. **The employee's refusal** to fill out and sign this form is good and sufficient cause for dismissal without further notice.

[28] The Commission did not provide evidence that the employee refused to fill out and sign the form. Starting on August 27, 2018, the Claimant reported to his employer that he was unable to access his email. This indicates that the employer knew that the Claimant was trying to comply with the request but was unable to do so. Furthermore, the employer confirms that the Claimant did not refuse to provide information. The employer told the Commission that the Claimant had not refused to provide the information but that he always had a reason not to provide it.[13] I find that the Claimant's conduct constitutes, at most, a failure to provide the information and not a refusal.

[29] Second, I find that the Claimant did not know that his behaviour would jeopardize his employment. I accept the Claimant's testimony that he did not know about this rule in the collective agreement. The Claimant's testimony on this point was clear, and there is no evidence that the employer warned the Claimant about the existence of this rule. Incidentally, the employer did not mention in its email asking for the information that the Claimant had a specific time frame in which to provide the information and after which he would be dismissed. Furthermore, the employer confirmed to the Commission that it had not informed the Claimant

[13] GD3-45 and GD3-46.

that he faced dismissal if he did not provide the information within five working days of the beginning of his employment.[14]

[30] I do not accept the Commission's position that the Claimant knew that he would be dismissed and its claim that he had to be aware of that rule since he was an experienced worker in the construction industry. I am of the view that there needed to be more convincing evidence to contradict the Claimant's statement that he was not aware of that provision in the collective agreement.

[31] Furthermore, I find that the Claimant could not have known that he would be dismissed for his failure. The evidence shows that the Claimant remained on the job after the five-day period despite the failure to give the employer the information. For that matter, the first time the Claimant contacted his employer to tell it that he could not access his email from the office, seven days had already passed since his hiring date. Since the employer had tolerated his failure, the Claimant could not know that he would be dismissed for not having given the information within five days.[15]

[32] Given the grave consequences it carries, a finding of misconduct can be made only on the basis of clear evidence and not of speculation and suppositions.[16] I find that the Commission has not met its burden of proof and has failed to show on a balance of probabilities that the Claimant was dismissed for misconduct within the meaning of the Act.

Issue 2: Did the Claimant accumulate enough insurable hours during the qualifying period to entitle him to Employment Insurance benefits?

[33] To be entitled to Employment Insurance benefits, a claimant must have accumulated the required number of insurable hours during the qualifying period.[17]

[34] The Commission argues that the Claimant had not accumulated the number of insurable hours since the imposition of his disqualification on September 2, 2018, because of the loss of

[14] GD3-45.
[15] *Canada (Attorney General) v Castonguay*, A-189-09.
[16] *Crichlow v Canada (Attorney General)*, A-562-97.
[17] See section 7(2) of the Act.

his employment for misconduct.[18] The Claimant argues that he has enough insurable hours because the disqualification should never have been imposed and that, without that disqualification, he would have had more than the 665 hours required to be entitled to benefits.

[35] Given my findings on the issue of misconduct, the insurable hours accumulated before September 2, 2018, that fall within the qualifying period must be considered.

[36] There is no dispute about the qualifying period. It is from March 25, 2018, to March 23, 2019. There is also no dispute that the unemployment rate in the Claimant's economic region was 6.1%, and the Claimant therefore needed to accumulate 665 insurable hours of employment during the qualifying period.

[37] The Records of Employment on file show that the Claimant had more than 665 insurable hours during the qualifying period.[19] As a result, he had the number of insurable hours required to be entitled to receive Employment Insurance benefits.

CONCLUSION

[38] The appeals are allowed.

Christianna Scott
Member, General Division – Employment Insurance Section

HEARD ON:	September 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. C., Appellant Yvan Bousquet, Representative for the Appellant

[18] The Commission claims this under section 30(5) of the Act.
[19] See GD3-18 to GD3-24 of file GE-19-2777.