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

Citation: *X v Canada Employment Insurance Commission and J. P.*, 2020 SST 659

Tribunal File Number: GE-20-1544

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

J. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: June 19, 2020

LAST FILING DEADLINE: June 25, 2020

DATE OF DECISION: July 8, 2020

Canada

DECISION

[1] The Appellant (Employer) has not proven that the Added Party (Claimant) lost his job because of misconduct. This means the Claimant is not disqualified from being paid EI benefits.[1]

OVERVIEW

[2] The Employer dismissed the Claimant on February 11, 2020. The Employer says it dismissed the Claimant because of his behaviour, insubordination, attendance and bullying. The Claimant argues that the Employer only raised these issues after he threatened to file a complaint with the labour standards board on January 7, 2020. The Claimant filed the complaint on January 15, 2020.

[3] The Commission decided the reason the Claimant was dismissed was not misconduct under the *Employment Insurance Act*. The Commission says the Employer relied on previous incidents to dismiss the Claimant after he filed the complaint. It says the evidence does not show a causal relationship between the Claimant's conduct and his dismissal. The Employer has appealed this decision because it says the Claimant's actions are misconduct under the *Employment Insurance Act*.

POST-HEARING DOCUMENTS

[4] I allowed the Employer to file post-hearing documents about warnings he had given to the Claimant. These warnings were mentioned in documents previously filed with the Tribunal. Warnings are relevant to whether the Claimant lost his job because of misconduct, in that to be misconduct, a claimant has to know or ought to know that dismissal was a real possibility.

[5] I allowed the Claimant until June 25, 2020, to file a response about the warnings. The Claimant's response was shared with the Employer. Before deciding the appeal, I waited more than a week to see if the Employer would file a response. As of today, the Employer has not filed a response.

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[1] Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid EI benefits.

[6] The Employer asked if it could file a written statement from the Claimant's former employer after the hearing. The former employer was scheduled to attend the hearing as a witness, but did not. I did not allow the Employer to file a statement from this witness after the hearing. I found a witness statement about the Claimant's work for another company in 2014 was not relevant to the Claimant's dismissal by the Employer in 2020. This was especially so because the Claimant had quit this other job; he had not been dismissed for his behaviour.[2]

ISSUE

[7] Did the Claimant lose his job because of misconduct? To determine this, I will first decide the reason why the Claimant lost his job. Then I will decide if the reason amounts to misconduct under the law.

ANALYSIS

Why did the Claimant lose his job?

[8] The Claimant and the Employer do not agree on the reason why the Claimant lost his job.

[9] The Employer set out its reasons for dismissing the Claimant in a dismissal letter. The letter says the Claimant was dismissed because of:

a) behavior issues and bullying,

b) insubordination, including refusing to train others and do his job as painter, and

c) attendance (missing work without calling in).[3]

[10] The Claimant says the real reason the Employer dismissed him was because he threatened, then made a complaint to the labour standards board about the employer. The Commission agrees with the Claimant that the Employer relied on previous incidents for dismissing the Claimant after he filed the complaint.

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[2] The record of employment showing the Claimant quit is at page GD14-6.
[3] His notice of dismissal is dated February 11, 2020, and is found on page GD3-27.

[11] I find it is likely that the Employer would have continued to tolerate the Claimant's conduct had he not threatened, then filed a complaint with the labour standards board. This is because the evidence shows that the Claimant's first written warning was only given *after* he threatened to file a complaint.

The Employer knew the Claimant intended to file a complaint on January 7, 2020.

[12] The Claimant says during their meeting on January 7, 2020, he told the Employer he planned to file a complaint with the labour standards board. J. S., the owner of the Employer, testified that he did not know about the complaint until some time after he gave the Claimant the January 15, 2020, written warning.

[13] However, I find it more likely that the Employer knew of the Claimant's intention to file a complaint on January 7, 2020. This is because during his testimony J. S. said that when the Claimant left his office on January 7, 2020, he was yelling that he was going to "report me somewhere." [4] I find this shows that the Employer knew on January 7, 2020, that the Claimant was going to file a complaint, even if he did not know where.

The first written warning was given on January 15, 2020.

[14] The Employer says it gave the Claimant many written and verbal warnings before it dismissed him. However, the evidence shows the first written warning the employer gave the Claimant was on January 15, 2020. I find that the earlier emails the Employer says are warnings, are not warnings. They are more like reminders, as they do not state consequences.

[15] For example, the Employer says it gave the Claimant written warnings in November 2019, in a string of emails between the Claimant and the Employer.[5] I find these were not warnings because they remind the Claimant to use a respectful tone in his emails, but set out no consequences for failing to do so. There is no mention of any disciplinary action.

[4] Recording at 22:59.
[5] See pages starting at GD14-8 and GD16-3.

[16] Even though the Employer says it planned to dismiss the Claimant during the summer of 2019, and again in November 2019, I see no written warnings in the file around these dates.[6] I note, however, that the Employer agreed to give the Claimant a pay raise in May 2019, which implies that it was not planning on dismissing him at that time.[7]

The Claimant's complaint led to his dismissal.

[17] The Employer sought out the Claimant to work for it in 2017, even though it knew of the Claimant's reputation for creating a difficult work environment.[8] Despite various issues with the Claimant's behaviour, it did not provide any written warnings or discipline until after the Claimant threatened to file a labour standards complaint. The warning letter dated January 15, 2020, states that the Claimant had not been previously disciplined.[9]

[18] I noted J. S.'s comment during the hearing that the Claimant had acted similarly at another employer, making safety and other complaints that eventually led to his leaving the company.[10] I find this shows that it is likely the Employer considered the Claimant's complaints when it decided to dismiss him.

[19] Considering the evidence as a whole, on a balance of probabilities, I find the real reason the Employer dismissed the Claimant when it did was because of his complaint to the labour standards board.

Is the reason for the Claimant's dismissal misconduct under the law?

[20] The reason is not misconduct because the Claimant could not have known that filing a complaint with the labour standards board would have prompted the Employer to dismiss him. Further, the Employer has not shown a causal link between the Claimant's alleged misconduct and his dismissal.

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[6] Statements about the Employer's intention to dismiss the Claimant are found at page GD3-33 and GD6-5.
[7] Information about the pay raise is at page GD6-5 and GD6-6.
[8] GD3-33
[9] Page GD6-4, 10th point.
[10] Recording at 1:59

[21] The law says that to be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it approaches willfulness.[12] The Claimant does not have to have a wrongful intent for his behaviour to be misconduct under the law.[13]

[22] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility.[14] There must be a causal link between the claimant's alleged misconduct and the loss of employment.[15]

[23] The Employer has to prove that it is more likely than not[16] that the Claimant lost his job because of misconduct.[17]

[24] The Employer says it had just cause to dismiss the Claimant, and that any employer would have dismissed the Claimant on the spot for his behaviour. While that may be the case, for the reasons that follow, I find that the Employer has not proven that the Claimant's conduct was "misconduct" under the law relating to EI benefits.

Could not have known dismissal for filing a complaint was a real possibility.

[25] Since retaliatory dismissals for filing a complaint are contrary to the law, I find the Claimant could not have reasonably known that filing a labour standards complaint would lead to his dismissal.

No causal link between the alleged misconduct and dismissal.

[26] I agree with the Commission that the Employer has not proven that there was a causal link between the Claimant's alleged misconduct and his dismissal. This is because I find the Employer has failed to establish that it is likely the Claimant did any of the alleged conduct after

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[11] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] *McKay-Eden v Her Majesty the Queen*, A-402-96.
[13] *Attorney General of Canada v Secours*, A-352-94.
[14] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] *The Minister of Employment and Immigration v Bartone*, A-369-88.
[16] The Commission has to prove this on a balance of probabilities which means it is more likely than not.
[17] *The Minister of Employment and Immigration v Bartone*, A-369-88.

the first warning on January 15, 2020. If he did not do any of the conduct, there is no causal link between the Claimant's actions and his dismissal.

Behaviour issues and bullying

[27] In the dismissal letter, the Employer says the Claimant did not change his behaviour. However, the employer did not identify any incident that happened after the January 15, 2020, warning.

[28] The Employer mentioned an incident that happened on January 10, 2020, where the Employer says the Claimant made defamatory comments about J. S. and his brother. It says the Claimant said J. S. was a thief, and since the Claimant denies saying some of the comments, the Employer says the Claimant is calling J. S. a liar. The Employer did not mention this incident in the January 15, 2020, warning. Since the incident happened before that warning, I find it does not show a causal link between his conduct and his dismissal.

[29] The Employer provided a copy of a Workplace Inspection Report from Occupational Health and Safety.[18] The report is not dated, but the Employer says the complaint was made around January 15, 2020.[19] The Employer says it does not know who filed the report, but suggested it could have been the Claimant because the complaint was about the paint booth where the Claimant did not want to work. The Employer says that making an anonymous safety complaint was a dirty trick or tactic to hurt the company. The Claimant denies he made the complaint. I find the Employer has not proven that it was more likely than not that the complaint was made by the Claimant. Further, given that Occupational Health and Safety issued two warnings, I find that the Employer has not shown that the complaint was unfounded or vexatious.

Insubordination; Refusal to train others and to paint.

[30] The incident referred to in the Claimant's dismissal letter happened on September 6, 2019, which is well before the January 15, 2020, warning. As such, I see no causal link between this action and the Claimant's dismissal.

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[18] Page GD6-34.
[19] Page GD6-7 (Safety Services).

[31] The Employer says the Claimant refused to train other employees on the MultiCam. The Employer emailed the Claimant on January 9, 2020, to see if the Claimant would do the training. In the email, the Employer says that if the Claimant did not want to do the training, another employee had already agreed to do it.[20] Even if this refusal had been after January 15, 2020, I see no causal link in the Claimant's refusal to his dismissal, as the Employer offered the Claimant a choice.

[32] The Employer says the Claimant refused to paint but the incidents he referenced were before January 15, 2020.

Attendance.

[33] The only days the Employer says the Claimant missed after the January 15, 2020, warning, were February 6 and 7, 2020.

[34] The Employer says the Claimant missed work without notice on February 6 and 7, 2020. The Claimant testified that he told J. L. he would not be in on the February 6, 2020, by telephone, and sent him a text message on February 7, 2020. The Claimant provided a copy of the text message. In reply, J. L. said that both days he told J. S. that the Claimant would not be in. [21] Given J. L.'s reply about notifying J. S. about *both* days, and since the Claimant notified the Employer of his absence on February 7, 2020, by text message, I believe him when he says he also notified J. L. about the first day by telephone. I prefer the Claimant's testimony to the Employer's statements because it is consistent with the text message.

Other warnings and dismissal.

[35] The Claimant was given a second written warning on February 7, 2020. Since the Employer has not proven there were any incidents after January 15, 2020, I find the warning on February 7, 2020, and the related meeting on February 11, 2020, were most likely intended to paper the file to justify the Claimant's dismissal.

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[20] Page GD12.-5.
[21] Page GD12-6 and 7.

[36] I find it likely the Employer intended to dismiss the Claimant during the February 11, 2020, meeting, no matter how the Claimant responded, for the following reasons. First, the Employer prepared both a suspension letter and a dismissal letter. Secondly, the other employee who attended the meeting said (via text message to the Claimant), that the Employer did not react well to the Claimant's questions or counterpoints, that he felt the Employer overreacted to the Claimant's questions and that the Employer did not seem to want a dialogue. The employee said he was surprised that the situation elevated to a dismissal.[22] I consider the evidence from this employee reliable because it was written immediately following the Claimant's dismissal. Further, since both the Claimant and the Employer relied on statements from that employee to support their arguments, I find it likely that his statements are credible.

[37] There is a heavy burden on the party alleging misconduct to prove it. To prove misconduct on the part of an employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employee's conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.[23]

[38] There is no doubt the Employer found the Claimant's conduct reprehensible, but, on the balance of probabilities, it has not proven a causal link between the alleged behaviour and the Claimant's dismissal.

CONCLUSION

[39] The appeal is dismissed. This means that the Claimant is not disqualified from being paid EI benefits.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section

[22] Text message dated February 11, 2020, page GD12-11 and 12.
[23] *The Minister of Employment and Immigration v Bartone*, A-369-88.

HEARD ON:	June 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. S., Representative for the Appellant J. P., Added Party