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

Citation: *DM v Canada Employment Insurance Commission*, 2020 SST 1051

Tribunal File Number: GE-20-1913

BETWEEN:

D. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: September 30, 2020

DATE OF DECISION: September 30, 2020

DECISION

[1] The appeal is allowed.

[2] The Commission has not proven, on a balance of probabilities, that the Appellant's separation from employment at Sterling Crane was due to his own misconduct.

OVERVIEW

[3] The Appellant worked at Sterling Crane for approximately 2 weeks before he was dismissed for failing to show up for work. He applied for employment insurance benefits (EI benefits), and the Respondent, the Canada Employment Insurance Commission (Commission), investigated the reason for his separation from employment. The employer said the Appellant had received a written warning for lateness and lack of attendance; and was aware that if he showed up late or missed another shift, his employment would be terminated. The Appellant said that he was late for work because he had taken cold medication that caused him to sleep through his alarms; and that he was sick with a cold was because the employer did not heat the cab of the crane he had been operating. The Commission decided that the Appellant lost his employment due to his own misconduct and imposed a disqualification on his claim for EI benefits.

[4] The Appellant asked the Commission to reconsider its decision, arguing the illness that caused him to be late and miss work was due to the employer's failure to provide heat in the crane in winter conditions. The Commission maintained the disqualification on the Appellant's claim, and he appealed to the Social Security Tribunal of Canada (Tribunal).

[5] On June 15, 2020, the Tribunal dismissed his appeal. The Appellant appealed that decision to the Appeal Division of the Tribunal, arguing that the Tribunal erred in failing to consider the employer's role in his separation from employment. On September 9, 2020, the Appeal Division allowed the Appellant's appeal and referred the matter back to the General Division for reconsideration.

[6] I must decide whether the Appellant lost his employment at Sterling Crane because of conduct that constitutes misconduct for purposes of section 30 of *the Employment Insurance Act* (EI Act). If he did, he is disqualified from receipt of EI benefits.

[7] The Commission says that the Appellant's failure to attend work after receipt of a written warning for lateness and absenteeism was deliberate or reckless behaviour that caused him to lose his job. It also argues that the unheated crane did not relieve the Appellant of his responsibility to report to work on time or notify his employer in advance that he would be absent. The Appellant disagrees that his behaviour was deliberate or reckless. He argues that the employer's failure to adhere to provincial workplace health and safety requirements caused him to get sick, and this illness was the reason he was late for work.

[8] I find that the Appellant's conduct in being late and failing to show up for work on April 6, 2018, after receipt of the written warning, was not deliberate or so reckless as to be wilful. As such, it does not constitute misconduct for purposes of section 30 of the EI Act.

[9] As a result, the Appellant is not disqualified from EI benefits.

ISSUE

[10] Is the Appellant disqualified from receipt of EI benefits because he lost his job due to conduct that constitutes misconduct for purposes of section 30 of the EI Act?

ANALYSIS

[11] Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lost their employment because of their own misconduct.

[12] The onus is on the Commission to prove that the Appellant, on a balance of probabilities, lost his employment at Sterling Crane due to his own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[13] The term "misconduct" is not defined in the EI Act. Rather, its meaning for purposes of the EI Act is established by decisions of courts and administrative bodies that have considered

section 30 of the EI Act and set out guiding principles, which are to be considered in the circumstances of each case.

[14] In order to prove the Appellant lost his employment due to misconduct within the meaning of section 30 of the EI Act, it must be shown that he was dismissed because he behaved in a way other than he should have ***and*** that he did so willfully, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. For an act to be characterized as misconduct, it must also be demonstrated that the Appellant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Lock 2003 FCA 262*.

[15] The Federal Court has said that, in certain circumstances, I must also consider the employer's conduct prior to the alleged "misconduct" in order to properly assess whether the employee's conduct was intentional or not: *Astolfi v. Canada (A.G.), 2020 FC 30*.

[16] But the main analysis is set out by the Federal Court of Appeal: I must determine the real cause of the Appellant's separation from employment and whether it amounts to misconduct for purposes of section 30 of the EI Act: *Macdonald A-152-96.*

Issue 1: What is the conduct that led to the Appellant's separation from employment?

[17] The first step in the analysis is to determine why the Appellant was separated from his employment at Sterling Crane.

[18] The employer told the Commission that:

- The Appellant was dismissed because he was consistently late for work and then did not show up for work on April 6th and 7th, 2018 and did not contact the employer.
- He had been given prior verbal warnings and a written warning, which he signed.
- The written warning was issued on March 29, 2018 for "Attendance" and reads:

  "This is a written warning being issued to you for your lack of attendance and late notification on March 28th.

> This is your only warning. If you show up late or miss another shift, your employment will be terminated." (GD3-16)

[19] The Appellant told the Commission that:

- He started on the night shift and found it "extremely hard" to make the transition to nights. On his second or third shift, he slept in.
- The crane he was operating did not have heat, and sitting in a cold cab for 10 hours a night in March took its toll on him and he developed a flu.
- He raised the lack of heat with his supervisor multiple times. He told the employer that the heat didn't work on the crane. They told him to put a tarp over the cab and warm the engine up, but no other action was taken.
- According to the union, the employer was required to have heat in the crane he was operating.
- Then a week or so later, he slept in again – this time due to being sick.
- He was unable to fall asleep and had taken some Nyquil to deal with his bad head cold. It made him so drowsy that he didn't even hear his alarms.
- He had taken the precaution of setting multiple alarms. But after being unable to sleep all night long, he was exhausted and slept through his alarms.
- He called his supervisor and said he would be about 90 minutes late, but was told not to come in.
- He was off work the next day as well due to this illness.

[20] The Appellant provided the Commission with a receipt for the various cold medications he purchased on April 2, 2018 (GD3-23).

[21] I find that the Appellant was dismissed from his employment at Sterling Crane because he did not show up for work on April 6, 2018. The employer unequivocally identified the no-show as the reason for the dismissal; and the Appellant does not dispute the incident or that it was the cause of his dismissal. He admits to oversleeping and not showing up for work, but maintains it was not a deliberate act and was caused by the employer's failure to heat the crane.

Issue 2: Does this conduct constitute "misconduct" for purposes of the EI Act?

[22] I must next consider whether the conduct found to be the cause of the Appellant's separation from employment constitutes misconduct within the meaning of section 30 of the EI Act (*Marion 2002 FCA 185*).

[23] I find that it does not.

[24] In his appeal materials, the Appellant stated that his foreman knew how sick he was and that he should not have even gone to work on the day he overslept. He had not been able to sleep properly "for days" and had been sitting in a crane with no heat "for over a week" (GD2-2).

[25] The Appellant testified that the temperature at the time was -25°C.

[26] I accept the Appellant's evidence and testimony that he was ill, but that he was still prepared to continue working and complete the 4-week shut-down contract with Sterling Crane. He did not call in sick. Rather, he took cold medication and tried to get some sleep. He set multiple alarms to ensure that he would be up in time for his shift the next day. He had no intention of being late or missing work; and taking cold medication with multiple, back-up alarms set to wake him up cannot be said to be reckless behaviour. The fact that he ultimately slept through his alarms and did not show up for work was unfortunate and cost him his job. But it was not a deliberate or willful act and, as such, does not constitute misconduct for purposes of section 30 of the EI Act.

[27] It is not the role of the Tribunal to determine whether the steps taken by the employer were appropriate or justified (*Caul 2006 FCA 251*). However, I cannot disregard the employer's role in the events that led to the Appellant failing to show up for work on April 6, 2018.

[28] The Appellant had the right to equipment that was adequately heated in cold weather. Article 14.05 of the Saskatchewan Provincial Operating Engineers' Agreement (Crane Rental) provides:

> "All hoisting equipment equipped with cabs shall be adequately heated in cold weather. Employees will be protected against excessive heat, cold and noise. No Employee will be disciplined for refusing to work under unsafe conditions or in contravention of established safety rules and regulations." (AD1C-22)

[29] The events under consideration took place in March in Regina, Saskatchewan. The Appellant consistently told the Commission that there was no heat in the cab of the crane he was operating. He even said that an animal wouldn't be expected to work in those conditions (GD3-33). Yet there is no evidence in the file that the Commission ever asked the employer about the lack of heat in the crane they had tasked the Appellant with operating. Or that the Commission asked whether the employer was aware the Appellant's health was suffering as a result of sitting in the cab of an unheated crane for many nights in a row in late March, when the temperature was -25°C. In the absence of any such information from the employer, there is no reason to doubt the Appellant's credibility on this issue.

[30] I therefore find that the employer did not respect the Appellant's rights when it failed to ensure proper working conditions and remedy the heat in the crane after the Appellant complained.

[31] I further find that the illness the Appellant was suffering from, and that caused him to fail to show up for work on April 6, 2018, was due or at least seriously exacerbated by the employer's failure to comply with the provincial health and safety requirements for crane operators.

[32] There were serious negative implications of the employer's inaction. And these implications add important context to my assessment of whether the conduct that caused the Appellant to lose his job was intentional or not. The first implication was to the Appellant's health; and the second was to the Appellant's employment. The Appellant lost his job because he failed to show up for work, but the reason he failed to show up for work was because he became ill due to the employer's failure to comply with workplace health and safety requirements. There is a direct connection between the employer's conduct leading up to April 6, 2018 and the Appellant's conduct in failing to show up for work that day. As a result, it cannot be said that the Appellant's action of oversleeping and failing to show up for work was deliberate or intentional.

[33] For all of these reasons, I find no evidence that conclusively points to willful or reckless behaviour on the part of the Appellant when he inadvertently failed to show up for work on April

6, 2018. He therefore cannot be disqualified from receipt of EI benefits for having lost his employment due to his own misconduct.

CONCLUSION

[34] The Commission has not proven that, on a balance of probabilities, the Appellant lost his employment because of his own misconduct.

[35] The Tribunal therefore finds that the Appellant is not subject to disqualification from EI benefits pursuant to section 30 of the EI Act.

[36] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section

HEARD ON:	September 30, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. M., Appellant