



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JT v Canada Employment Insurance Commission*, 2019 SST 1754

Tribunal File Number: GE-19-1972

BETWEEN:

J. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Solange Losier

HEARD ON: July 9, 2019

DATE OF DECISION: July 16, 2019

DECISION

[1] The appeal is allowed. The Respondent has failed to demonstrate that the Appellant lost his employment as a result of his misconduct, but rather it was only an excuse for his dismissal.

OVERVIEW

[2] The Appellant worked for a company for approximately nine years. The Appellant's grandmother became ill in August 2017 and passed away in July 2018, which has had a significant impact on his mental well-being. The Appellant took a medical leave of absence in March 2018 and received 15 weeks of employment insurance sickness benefits. The Appellant returned to work July 23, 2018, but was dismissed from his employment on August 10, 2018 because he was allegedly late for work, insubordinate and aggressive manner towards his manager.

[3] On August 12, 2018, the Appellant asked to convert his claim from employment insurance sickness benefits to employment insurance regular benefits. However, the Canada Employment Insurance Commission (Respondent) determined that the Appellant was not entitled to receive employment insurance regular benefits deciding that he lost his employment due to his own misconduct. The Appellant appealed to the Social Security Tribunal (Tribunal) maintaining that he was dismissed for other reasons, and not for misconduct.

ISSUES

[4] Issue 1: What is the reason for separation from employment?

[5] Issue 2: Did the Appellant commit the conduct? Was he late for work on August 9, 2018 and insubordinate and aggressive towards his manager?

[6] Issue 3: Is this misconduct under the *Employment Insurance Act* (Act)?

ANALYSIS

[7] Claimants are disqualified from receiving benefits where they lose their employment because of misconduct.¹ Misconduct is not defined in the Act, however misconduct must “be conscious, deliberate or intentional”.² The Respondent must prove that the Appellant lost his employment due to his own misconduct.³ The Tribunal must be satisfied that the misconduct was the reason for the dismissal not the excuse for it.⁴

Issue 1: What is the reason for separation from employment?

[8] I find that the Appellant was dismissed from his employment on August 10, 2018 and that dismissing him for being to work late and the confrontation with his manager on August 9, 2018 was only an excuse for his dismissal.

[9] The parties dispute the reason for the dismissal from employment.

[10] The Respondent submits that the Appellant was dismissed because of a confrontation with his manager and was late for work on August 9, 2018 (GD4-2).

[11] The Respondent relied on the employer’s statements made to them (GD3-27; GD3-55; GD3-60 to GD3-61). The employer told the Respondent that the Appellant had just returned from a medically supported leave of absence and was dismissed due to his own misconduct because he was late work on August 9, 2018 and aggressive with his manager. It was reported that the manager approached the Appellant to advise him that they would be documenting the tardiness in his file, that the Appellant became irritated and was verbally and almost physically aggressive with his manager. The following day, on August 10, 2018, the Appellant was dismissed from his employment for his behaviour as it was not the first incident of questionable behaviour with documented incidents on his file from 2004.

[12] The Respondent also relied on a statement from the employer’s insurer, a third party company (GD3-61). The insurance agent noted that there was no medical note provided to say

¹ Section 30 of the Act

² *Canada (Attorney General) v. Lemire*, 2010 FCA 314

³ *Minister of Employment and Immigration v. Bartone*, A-369-88

⁴ *Dalvut v. Canada (Attorney General)*, A-241-82

that the Appellant had to remain off from work. She said he was encouraged him to come back to work. His return to work was progressive to help him acclimatize to him to starting work earlier in the day. This meant that he would work 1 week for only four hours per day, then the following week for 5 hours per day, followed by 6 hours per day the following week until he returned to normal working hours.

[13] The Appellant testified that he used to be friends with his manager because they used to go out after work with other colleagues which included social drinking. However, the Appellant stopped drinking and therefore was not part of the social “club” anymore.

[14] The Appellant noted that he used to occupy a supervisor’s position at the company in another department, which he excelled in. However, when he started getting ill, he requested a demotion into another role that he found less challenging for him.

[15] The Appellant argues that he was dismissed for other reasons and not because of what happened on August 9, 2018, or that he was late for work or the confrontation with his manager. He argued that he was dismissed for a combination of the following reasons:

- He was dismissed because his manager threatened him during their confrontation on August 9, 2018 and the Appellant sent him a text message after work advising him of his inappropriate conduct
- He was pressured by the employer and third party insurer to return to work during his medical absence. He states he receiving multiple calls on a weekly basis continuously asking him to return to work
- His family doctor told him and submitted documentation to the employer on or around mid July 2018 that stated he was not capable of returning to work
- His employer assured him that if he returned to work, they would accommodate a noon start time at work because they knew he was still experiencing medical issues, including sleeplessness, which made it difficult to sleep and wake up for work early
- When he returned to work on July 23, 2018, he was starting work at noon, but then the employer told him he had to start work the following week at 11:00am or 11:30am, for which he did not agree
- His employer did not want to pay out company shares due the following month

- His employer refused to accommodate him by transferring him to his previous role because the role he was occupying had become too difficult for him

[16] I was persuaded by the Appellant's testimony that he was dismissed for other reasons and not for the misconduct that allegedly occurred on August 9, 2018. The Appellant submitted a copy of a medical note dated on June 14, 2018 and addressed to the third party insurer which states that "he is currently not fit to return to any type of employment and that he was scheduled to see a psychologist for an assessment on July 10, 2018" (RGD2-2). The medical note also provides specific details about his diagnosis and limitations.

[17] The Appellant testified that on July 10, 2018, he went to the appointment with the psychologist, but found out that his grandmother died immediately prior to the appointment. He broke down emotionally and was distressed during the assessment appointment. He states that he was not reassessed by his own doctor, or any other doctor to return to work, but made the decision to return to work on July 23, 2018 because of the constant calls and pressure from the third party and his employer. He says that he still struggling with sleeping and was not ready to return to work, even on a part-time basis.

[18] The Appellant testified that while he agreed to return to work despite his doctor's advice, the employer told him that he could commence work at noon. During the second week of his employment, he was told that he had to start work at 11am. He expressed his concerns to his employer, specifically that he would have challenges starting at an earlier time. His employer told him that they would accommodate him and that they could test it out. However, when he arrived five minutes late on August 9, 2018, his manager told him it would be documented in his employee file. This resulted in a heated confrontation where the manager said to him "are you trying to flex on me, you better back the [swear word] up". He left work and sent the manager a text message advising him that his conduct was inappropriate and they would discuss it the following day. The Appellant felt that he was being bullied and targeted by this manager, who was previously a friend.

[19] I find that it was more likely that not, that the employer dismissed the Appellant after pressuring him to return to work while he was still on a medical leave of absence. The medical note submitted shows that the Appellant was dealing with several medical issues and unable to

return to work as of June 14, 2018. The Appellant did not see any other doctor and was not assessed as capable of returning to work, nor was there any evidence from the employer to suggest that they were advised by a medical professional that he was capable of returning to work.

[20] I note that the employer told the Respondent that there was no medical note saying that he could remain off from work, however this contrary to the medical note provided by the Appellant which specifically states that he was not capable of returning to work indefinitely as of June 14, 2018.

[21] I acknowledge that the Appellant agreed to return to work on July 23, 2018, however I find that he was led to believe that the employer would accommodate him as needed and by starting work at noon. But, the employer scheduled him the second week of work at 11am despite his concerns and told him that they would work with him if there was an issue with the start time. When the Appellant arrived to work late, whether it was 5 minutes as claimed, or 15 minutes as claimed by the employer, they did not honour their agreement to work with him or accommodate him, but instead his manager was going to document his tardiness for being late on August 9, 2018.

[22] I preferred the Appellant's testimony over the employer's statements because the manager who was involved in the confrontation on August 9, 2018 did not provide any direct or written statements to the Respondent outlining his version of events, instead it was summarized by another manager.

[23] I was also persuaded by the Appellant's version of events because I find it more probable. While I accept that things got heated, I find that that the manager more likely than not, provoked the Appellant and threatened him when he told him to "back up". I also accept that the manager may have known his own conduct was not acceptable, so he may have been motivated to dismiss him the following day. In any event, I would not characterize the Appellant's conduct as wilful or deliberate because there was no mental intent. The medical note states that he struggles with situational anxiety which is increased by interpersonal stress, which I find likely contributed to confrontation with his manager and the Appellant could not have known he would be dismissed for being late because his employer said they would accommodate his start times.

[24] For these reasons, I find that the Appellant was not dismissed for being late or the confrontation with his manager. I find that this was an excuse for the dismissal. Therefore, I find it more likely than not, that the employer pressured him to return to work when he was not capable of working. He was not accommodated despite being assured that if he returned to work, they would work with him, instead they penalized him for being to work late while he was still transitioning his return to work and dismissed him.

[25] As a result, it is not necessary to assess whether he committed the conduct, or if it was misconduct under the Act because the employer has failed to prove that the Appellant was dismissed from his employment by reason of his own misconduct.

CONCLUSION

[26] The appeal is allowed.

Solange Losier
Member, General Division - Employment Insurance Section

| | |
|-----------------------|------------------|
| HEARD ON: | July 9, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | J. T., Appellant |