Citation: *E. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 134

Appeal #: GE-14-3203

BETWEEN:

E. G.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Teresa Jaenen
HEARING DATE:	November 5, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal is dismissed

PERSONS IN ATTENDANCE

Mr. E. G., the Claimant attended the in person hearing.

Mr. Garnet Boyd, the Claimant's representative attended the in person hearing.

Mr. Tadesse Yihdego, the Amharic Interpreter for the Claimant attended the in person hearing.

DECISION

[1] The Tribunal finds that a disqualification from receiving employment insurance benefits should be imposed because the Claimant lost his employment due to his own misconduct as per sections 29 and 30 of the *Employment Insurance Act* (the Act).

INTRODUCTION

[2] On June 6, 2014 the Claimant filed a renewal claim for employment insurance benefits. On June 23, 2014 the Canada Employment Insurance Commission (Commission) denied the Claimant benefits because he lost his job due to his own misconduct. On July 4, 2014 the Claimant made a request for reconsideration. On July 24, 2014 the Commission maintained their original decision and the Claimant appealed to the Tribunal.

FORM OF HEARING

[3] After reviewing the evidence and submissions made by the parties to the appeal the Tribunal decided on an in person hearing for the reasons provided in the Notice of Hearing dated October 6, 2014.

ISSUE

[4] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification pursuant to sections 29 and 30 of the Act because he lost his job due to his own misconduct.

THE LAW

[5] Paragraphs 29(a) and (b) states for the purposes of paragraph 30(a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period and: (b) loss of employment includes suspension from employment.

[6] Subsection 30(1) of the Act states a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.

EVIDENCE

[7] A record of employment indicates the Claimant was employed with Maple Leaf Foods from April 21, 2014 to June 2, 2014 and that he was dismissed (GD3-15).

[8] A letter dated April 23, 2014 from the employer to the Claimant indicate the Claimant was issued a cautionary letter informing him he had been placed on an attendance review and that this letter was a final letter notifying any further absenteeism may lead to termination. The letter was signed by the Claimant, Shop Steward and a Translator (GD3- 18).

[9] A letter dated June 26, 2014 designates a representative from the Brandon and District Worker Advocacy Center Inc. to represent the Claimant (GD2-6).

[10] A letter dated June 2, 2014 to the Claimant from the employer indicates the Claimant was terminated because he had been issued a cautionary letter on April 23, 2104 informing he had been placed on a final letter that stated "You are also required to submit medical documentation supporting any absence for the duration of this letter immediately upon your return to work, or within three work days of your first day absent if your absence lasts longer than three days" and he failed to do so. The letter was signed by a translator (GD2-7).

[11] In his "Questionnaire" for employment insurance the Claimant stated he was accused by his employer of absenteeism. He answered that he did not have permission to be absent but that he notified his employer by calling the telephone line and left a message because this was the way it was done. He stated the employer had a policy for absenteeism and if one was sick they were to call the number on the answering machine, then visit a doctor to get a note. He stated he was aware of the policy and had been given a written statement; however he did not understand

the written statement. He was never told the rules in his own language and his language is Ethiopia. He stated he never followed the policy because he thought he would be at work the next day and when he did return the next day showed his supervisor his leg, who was very surprised swollen it was. The next day he was terminated because he had been sick. He didn't go to the doctor because he thought he would be at work the next day. He stated he had no other occurrences in the previous six months. He stated he had spoken to his employer and union representative whom had filed a grievance on his behalf (GD3-6 to GD3-8).

[12] On June 6, 2014 a grievance was filed by the UFCW Local 832 on behalf of the Claimant (GD3-18).

[13] On June 20, 2014 the employer stated to the Commission the Claimant was aware of the final warning and it was not the first time the Claimant was dismissed for the same reason. She stated the Claimant had been dismissed before for attendance as well. It was noted the Claimant had been dismissed in 2011 due to being in jail and not showing up for work (GD3-20).

[14] In continuance with the conversation of June 20, 2014 the employer stated to the Commission if the Claimant didn't understand the language that didn't make sense. The Claimant was asked to provide the medical note when he returned to work, but he said he didn't want to pay $10.00 for a medical note. She continued stating the incident took place on May 28, 2014 and the Claimant had a few more days to provide the note. If he had of provided the note by June 2, 2014 he would still have a job (GD3-20).

[15] On July 4, 2014 the Claimant filed a Request for Reconsideration with submissions by the Claimant's representative (GD3-23 to 25)

[16] On July 16, 2014 Commission contacted the Claimant to review his request for reconsideration. At which time the Claimant stated to the Commission the employer had verbally explained the warning letter to him but he did not fully understand it. He stated the employer told him to sign it because absenteeism was a problem and if he was sick he will need to bring in another paper. The Claimant stated to the Commission he was sick on May 28, 2014 and when he returned the next day, the employer asked him for a medical note but the Claimant stated he did not want to go to his doctor because his doctor would book him off for a week or two and the

Claimant did not want to miss any work. He only needed to be off work for one day. He stated the employer did not tell him if he didn't supply the note he would be fired. The Claimant requested the Commission to contact the interpreter so he could explain how little English he understands. The Claimant provided a contact telephone number. The Commission did not think this would be necessary (GD3-31).

[17] On July 16, 2014 the Commission contacted the Claimant's representative (GD3- 32).

[18] On July 16, 2014 the Commission contacted the Claimant again regarding the reconsideration decision; the Claimant provided the Commission with new information that after he signed the warning letter of April 23, 2014 he returned to work for 30 minutes and then went back to his employer's office and told him he didn't want to sign the paper after all because he didn't understand it. The Claimant stated his supervisor told him it was too late and he had already sent it to Human Resources. The Claimant requested the Commission to contact the sanitation supervisor and confirm this before making the decision (GD3-33).

[19] On July 16, 2014 the Commission attempted to contact the sanitation supervisor and then again July 18, 2014 unsuccessfully (GD3-34).

[20] On July 23, 2014 the Commission contacted the Claimant and advised they were maintaining their original decision and the Claimant has 30 days to appeal to the Social Security Tribunal in writing (GD3-35).

SUBMISSIONS

[21] The Claimant's representative made the following submissions as the Claimant did not speak English very well:

a) He stated the Claimant works in sanitation at the Maple Leaf Hog processing plant and is on his feet for his full night shift from 11:30 PM to 7:30 PM;

b) The Claimant's mother tongue is Amharic, he speaks some English, but cannot reads English;

c) The Clamant has sustained an unrelated leg injury four years ago and still has trouble with it. He had been off work in March 2014 for a different medical issue and since his return to work, he continued to have problem with his leg swelling, pain and it being difficult to walk after being on his feet for several hours. When this would happen or the Claimant was off for less than three days the policy is for the Claimant to phone in and leave a voice mail requesting the shift off to allow the swelling in his leg to reside so he can return to work the following shift. This was the policy the Claimant followed;

d) Upon returning to work from receiving employment insurance sickness benefits, the Claimant was given a cautionary letter from his employer that he had been placed on a final letter and he was to submit medical documentation supporting any absence. The employer provided a fellow employee as an interpreter when presenting the letter, however this interpreter could not read English either, therefore losing a lot in the translation of the letter;

e) On May 28, 2014 the Claimant called in sick the same as he always did and on June 2, 2014 he was called into the office and given a termination letter. The Claimant's actions were not of such careless or negligent nature that one could say he wilfully disregarded the effects his actions would have on job performance. The Claimant was scared to see a doctor as he or she would take him off work for an extended period of time and he needed to work;

f) The employer just used this as an opportunity to get rid of an employee and his actions do not meet the legal test of misconduct as per the Act;

g) The record of employment was questionable as it stated the Claimant was employed for Maple Leaf from April 21, 2014 to June 2, 2014 which is in error because the Claimant worked for the employer for 19 months. If this was the case the Claimant would not have sufficient hours to qualify;

h) In March 2014 the Claimant was off work on medical employment insurance benefits for six weeks. Shortly after returning to work was issued a final letter dated April 23, 2104 with the employer stating they were concerned with his absenteeism had gone up from

7.57% to 19.52%. The Claimant's absenteeism went up because he was on medical leave for six weeks not because he was abusing sick time;

i) The terminology used in the letter of April 23, 2104 was one that neither the Claimant nor the translator understood therefore he was unable to fully translate, i.e.: "a culpable absenteeism event occurring within twelve months may lead to immediate termination". The representative submits the interpreters are workers who speak the language and the employer pull them off their shift to interpret and even if they could understand the statement reads "it may lead to termination "it does not state would result in termination";

j) After the Claimant signed the final letter and discussed further with his interpreter he went back to his supervisor and requested to have the letter back as he did no longer wanted to sign it because he didn't understand what he signed. The employers said it was too late, and the employer never offered to translate the letter again so that the Claimant fully understood the conditions;

k) The Claimant was a front line work who is an immigrant and here to make money, he has a language barrier and as most workers do as they are requested of their employer and do not ask questions;

l) The Claimant called in sick and when he returned the following day his supervisor never once mentioned to him that he needed to supply a medical note or he would be fired;

m) The Claimant did not make the comment that he did not want to pay $10.00 for a medical note and that is why he did not supply one, these are the words of the employer. His words were he wants and needs to work to support his family and fears that if he goes to a doctor with a swollen leg the doctor will take him off work for an extended period of time, which means days off with no pay;

n) In the Commission representation they state the employer provided the Claimant with additional time to complete the request and save his position by complying thus showing concept of a wilful or deliberate act. This was taken from the employer's statement where the incident took place on Mya 28, 2014 and had the Claimant provided the note before June 2, 2014 he would still be employed. The representative further states the Claimant

did not know he was going to be called into the office on June 2, 2014 and be fired. If he had of been told on May 29th, 2014 that he was being called into a meeting on June 2, 2014 and that if he provided a medical note prior to the meeting and it would save his job, he would have done so. He did not understand that he needed a note for being absent for one day and would be fired as the company policy was phone in and leave a message on a the answering machine for less than a three day absence;

o) The employer infers that the Claimant was aware of the final warning as he had been dismissed before for absenteeism. He further states the incident happened in 2011 and he was dismissed from his employment without a final warning letter. In June 2012 the employer rehired the Claimant, so if the Claimant was such a terrible employee with absenteeism problems why would they hire him back; and

p) The Claimant's actions do not meet the test of Misconduct under the Act and the Claimant should be eligible for benefits.

[21] The Claimant provided the following submissions:

a) He believed if he was sick less than three days he was only required to call in, he did not know he needed a medical note;

b) He was never asked to produce a letter (medical), when he returned to work, he showed the supervisor his leg and was told to get back to work;

c) He was never told that if he didn't provide a medical note that he would be fired;

d) If the employer had of asked for a letter he would have gotten one;

e) He denies that he refused to provide a medical note because of the cost of $10.00;

f) He didn't know what he was signing when he signed the final letter and he had asked for the letter back however the employer told him it was too late;

g) After a few days back to work his supervisor brought him a letter and told him he was fired. The supervisor did not explain and because he has a language barrier he did not

understand. He went outside and was called a cab. It was the next day, the union lady Brenda told him again he was fired;

h) He denies that he told the Commission he was asked for a medical note;

i) He has filed a grievance with his union that his still pending; and

j) He never had any warnings between April 23, 2104 and May 28, 2014.

[22] The Respondent submitted that:

a) The representative states he finds parallels with CUB 49180, however offers no specifics. As is stated in the decision, this is "unusual case because the issue was not whether a normal or usual standard of care owed to the employer was breached. Rather the question is where the terms of the claimant's Memorandum of Settlement (the agreement) breached. This is not the case here, the Claimant failed to comply with a reasonable request from his employer which was to provide medical proof to support his absences after his absenteeism rate had increased and he was warned. This umpire in this case also advised the case should be re-heard before a new board of referees as the board had failed to determine whether the breach of policy constituted misconduct;

b) The Claimant's decision to work until he could no longer, and then take a day off sick, was not an arrangement he organized with the employer. It was the Claimant's decision to set his own schedule. He was warned on January 2, 2014 that he was being placed on an attendance review. He was then issued a follow up letter on April 23, 2014 outlining the employer's concern. The employer requested the Claimant to provide a medical note following any absence as the Claimant's absenteeism had increased dramatically from 7.57% to 19.52% since January and advised that failure to do so may lead to dismissal;

c) The Claimant refused to provide a medical note as he was afraid the doctor may require him to take more time off, however this may have been necessary to ensure the Claimant's health and in turn, his ability to perform his job;

d) The Claimant made no efforts to discuss a modified schedule or make arrangements with his employer in light of his condition. He willfully disregarded how his absences impacted the employers ability to run the business;

e) The Claimant's refusal to provide medical support for his absence after previously been warned constituted misconduct because the Claimant knew or ought to have known that by not providing the medical note, he risked dismissal;

f) If the Claimant did not understand the content of the warning, it was up to him to seek clarification and to ensure he knew what was expected of him in order to retain his employment; and

g) The Claimant stated that he did not understand the information in the last chance letter however this is not viewed as credible as he has stated himself that his employer asked him to get a medical note and he refused to do this because he didn't want his doctor to book him off work for a week or two. It is clear he was aware that medical note was required and he deliberately chose not to provide it, disregarding the consequences.

ANALYSIS

[23] The Tribunal must decide whether the Claimant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

[24] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct, where the claimant knew or ought to have known that her misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment. *Canada (AG) v. Lemire*, 2012 FCA 314.

[25] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the 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 employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[26] As Justice Nadon wrote in *Mishibinijima v. Canada* 2007 FCA 36, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[27] As cited in *Tucker* A-381-85, misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Wilful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere "carelessness" does not meet the standard of willfulness required to support a finding of misconduct.

[28] The Tribunal must first identify if the alleged act constituted misconduct and if the Claimant's conduct complained of was the cause of the dismissal.

[29] Absenteeism and failure to comply with a condition of employment has been deemed to be misconduct. In this case the Claimant failed to provide the employer with a medical document as per his final warning letter and he does not dispute this. Therefore the Tribunal finds the alleged act would constitute misconduct within the meaning of the Act.

[30] The relevant facts are not in dispute. Prior to his dismissal on June 2, 2014, the Claimant was given a number of warnings by his employer to the effect that his repeated absences from work was becoming a problem and that this situation had to be corrected. Further, in April 23, 2014, his employer specifically met with him to discuss his absences and inform him that he was being given a final warning letter based on that he had been given a cautionary letter on January 2, 2014 and that he had been placed on an Attendance Review at that at that time and since that time the Claimant's absenteeism rate had increased to 19.52% from 7.57%.At this meeting the Union Shop Steward was present as well the employer provided an interpreter for the Claimant.

[31] The letter of April 23, 2014 outlines the final warning and serves as a notification that further absenteeism may lead to termination of employment based on the frustration of the Absenteeism Policy signed upon hiring. Further he was advised that a culpable absenteeism event occurring within twelve months may lead to immediate termination. And he would be required to submit medical documentation supporting any absence for the duration of this letter immediately upon your return to work, or within three work days of your first day absent if your absence lasts longer than three days. This letter will remain on your employee file for a period of twelve months.

[32] The letter further states that should the Claimant have concerns about your ability to meet the terms and conditions of this letter please notify the Production Supervisor immediately. If the Claimant felt he was in need of counselling or support he was encouraged to access the Employee Assistance Program at 1-800-387-4765.

[33] This letter of April 23, 2014 was signed by the employer, Claimant, the Shop Steward and a Translator for the Claimant (GD3-16).

[34] The evidence in the file is undisputed. The Claimant was absent from work on May 28, 2014. He provided both documentary evidence as well as oral evidence that he called his employer and left a voice mail on that day and that he returned to work the next day.

[35] The employer's evidence stated that the Claimant was asked to provide a medial note upon his return and the evidence given by the Claimant at the time of his application and to the Commission on a later date states the same. However the Claimant at the hearing provided contradictory evidence that he was never asked for a medical note the following day, even after he showed his swollen leg to his supervisor.

[36] The employer's evidence stated the Claimant did not provide the medical note because he did not want to pay $10.00 to have one, the Claimant on the other hand stated he didn't go to the doctor because he was only going to miss one day, and he feared had he gone to see a doctor he would have been put off work longer.

[37] A letter dated June 2, 2014 from the employer states the Claimant was being terminated for failing to demonstrate the ability to follow company policy and procedures by being

unwilling to demonstrate that he can attend work regularly. And as the April 23, 2014 final warning letter stated he was to provide a medical documentation for any absence, which when asked for the documentation replied you did not have one. This letter was signed by the Supervisor, Shop Steward and Translator (GD3-17).

[38] The employer provided documentary evidence that the Claimant was aware of the final warning and that he had been dismissed in 2011 when he did not show up for work. And in this instance, had the Claimant provided the medical note before June 2, 2014 he would still be employed.

[39] The Claimant's representative presents the argument that on May 28, 2014 the Claimant was absent from work due to medical issue and the Claimant followed the company policy by calling and leaving a voice mail. The Claimant believed this was all that was expected because he knew he would be off for only one day and the company policy was a medical note was to be provided should a person be off for more than three days.

[40] In this case, the Tribunal finds the company policy as it relates to the Claimant does not indicate a medical note is only required after a three day absence, but rather the documentation of the final warning letter dated April 23, 2014 clearly indicates that due to the increased rate of absenteeism by the Claimant from January 2014 until the date of the letter, the Claimant was placed on a final warning and any absence would require a medical note or it may result in termination. The Tribunal finds that it may be in the normal course of employment the employer policy may be that the requirement of a medical note was necessary after three days, but this is no longer the requirement for this employee as stated in the April 23, 2014 final warning letter. The Tribunal finds that after the Claimant received his final letter the policy was he was now required to provide a medical note for any absence and which he did not do.

[41] The Tribunal finds from the Claimant's initial statements made on the questionnaire that he was aware and understood the policy as it related to the date in question. The Claimant answered he did not have permission to be absent but that he notified his employer by calling the telephone line and left a message because this was the way it was done. He stated the employer had a policy for absenteeism and if one was sick they were to call the number on the answering machine, then visit a doctor to get a note. He further stated he never followed the policy and go

to the doctor because he thought he would be at work the next day. The Tribunal finds the Claimant made his own personal decision to not comply with the company policy.

[42] The Tribunal finds from the Claimant's initial statements made to the Commission that he was aware of the policy that he was to adhere to. The Claimant provided at this time that the employer had verbally explained the warning letter to him but he did not fully understand it. He stated the employer told him to sign it because absenteeism was a problem and if he was sick he will need to bring in another paper. The Claimant stated to the Commission he was sick on May 28, 2014 and when he returned the next day, the employer asked him for a medical note but the Claimant stated he did not want to go to his doctor because his doctor would book him off for a week or two and the Claimant did not want to miss any work. He only needed to be off work for one day.

[43] The Claimant presents the argument that English is not his first language and that although he can speak some English he is not able to read English. He provided oral evidence he did not understand the letter that he signed on April 23, 2014. He states that the interpreter who was present at the time he received his letter was another coworker who also did not speak or understand English either.

[44] The Tribunal finds the evidence supports that although the Claimant may not have been able to read the document but he stated he was provided verbally the context of the warning letter. The Tribunal finds the evidence of the warning letter also supports the Claimant was provided with an interpreter as well was represented by a union member during the discussion of the warning letter.

[45] The Claimant presented the argument at the hearing that he was never asked for a medical note upon his return; however this is contradictory to the answers on the questionnaire and during the interview process with the Commission. The Tribunal finds the original statements made by the Claimant to be more accurate. The Tribunal is not satisfied with the Claimant's oral evidence that his employer did not request a medical note.

[46] The Claimant's representative presented the argument that had the Claimant known he was going to be called into the office on June 2, 2014 and terminated for failing to provide a medical note he would have.

[47] When the Claimant failed to follow through by refusing to supply a medical document upon the request of the employer the employer decided that he would dismiss him on June 2, 2104. The employer's documentary evidence states they allowed the Claimant the days to provide the note and had the Claimant provided it, he would still be employed. As the Claimant failed to provide the medical note, the employer dismissed him, without further notice, on June 2, 2014.

[48] The evidence in the file supports the employer chose to follow through with the last warning letter. The evidence in the file supports the employer had provided the Claimant with progressive discipline since January 2014. The employer provided the Claimant with a verbal and written warning on April 23, 2014. At that time the employer provided an interpreter as well as a union representative who witnessed the warning.

[49] Further the evidence in the file support the Claimant was asked for a medical document upon his return on May 29, 2014 to which the Claimant answered "no".

Subsequently on June 2, 2014 the employer made the decision to terminate the employee.

[50] The Tribunal finds the Claimant was dismissed because he failed to comply with the conditions that were placed on him as indicated in the final warning letter. The Tribunal finds the employer gave the Claimant ample warnings and when he failed to comply with the request to supply a medical note was terminated. The Tribunal does not find the employer was obligated to inform the Claimant if he did not bring in the note within 3 days he would be terminated. This had already been established in the final warnings letter that the Claimant provides a medical note for any absence.

[51] The Tribunal cites:

> *Under the circumstances, the respondent could not have been unaware that the breach of his obligations under his employment contract was of such scope that it was normally*

foreseeable that it would be likely to result in his dismissal: see Attorney General of Canada v. Langlois and Attorney General of Canada v. Edward [1996] S.C.J. No. 241, at paragraph 4.

[52] The Claimant's representative presented the argument the interpreters where employees who also work at Maple Leaf and were only pulled off the work floor and also do not understand English.

[53] The Tribunal finds there is no evidence to support this argument but that of the Claimant's representative. The documents of April 23, 2104 and June 2, 2014 are signed by interpreters and the union representatives but do not provide any details of credentials and as the employer did not attend the hearing there was no way to determine what their qualifications were in order to substantiate the argument that they were not qualified.

[54] The Claimant's representative presented the argument that he believed the employer used the Claimant's medical employment insurance benefits, his language barrier and intimidation to sign a Final Letter document that he did not understand as an opportunity to get rid of an employee "Constructive Dismissal". He states that in March 2014 the Claimant was off work on medical employment insurance benefits for six weeks. Shortly after returning to work was issued a final letter dated April 23, 2104 with the employer stating they were concerned with his absenteeism had gone up from 7.57% to 19.52%. The representative argues that the Claimant's absenteeism went up because he was on medical leave for six weeks not because he was abusing sick time.

[55] In the present matter, there is no evidence to support the Claimant was dismissed for other reasons. The Tribunal finds the Claimant was dismissed from his employment because he failed to provide a medical note after missing one day of work. The Tribunal is not tasked with determining if the punishment was harsh or inappropriate but rather did the Claimant know or ought to have known his actions would cause him to lose his job and was he wilful or negligent in doing so.

[56] The Tribunal does find any evidence to support the issue is of the Claimant abusing sick time, but rather the employer finding the Claimant's absenteeism to be the issue and that because

of the increase of time missed from work he would now be required as part of his employment to provide a medical note when he was absent. The Tribunal does not find any evidence to support the Claimant was being constructively dismissed. The evidence supports the Claimant was given appropriate warnings, both verbal and written. He was provided with an interpreter as well as having union representation at the meeting.

[57] As cited in *Fleming* 2006 FCA 16

> *"Even if we admit, as the applicant claims, that the employer was overzealous and always targeting him, this overzealousness or determination to watch out for the applicant's shortcomings does not do away with their existence and does not reduce their importance. Quite the contrary, even after being seriously warned on more than one occasion and knowing he was being watched, the applicant continued with his repeated misconduct. It is surprising that the Board of Referees dwelled on the employer's behavior rather than on that of the applicant, who was breaching his obligations under his employment contract. The question submitted to the Board of Referees was not whether the employer was guilty of misconduct by dismissing the applicant such that this would constitute unjust dismissal, but whether the applicant was guilty of misconduct and whether this misconduct resulted in his losing his employment. There is no doubt on this point, just as there is no doubt that there is a direct causal connection between the applicant's misconduct and the loss of his employment".*

[58] The representative presents the argument the Claimant was afraid to lose income because he could be placed on medical leave without pay by a doctor and not producing a medical note is not careless or negligent in nature that one could say he willfully disregarded his actions would have on his job performance.

[59] The Tribunal cannot determine the severity of the Claimant's illness to substantiate there would be reason for the Claimant to believe he would be placed on a long term medical leave when he knew he would be back to work the next day. The Tribunal finds the Claimant made a conscious choice not to go to the doctor and obtain a medical note that would be required of him and that he ought to have known his actions not to supply the medical note would have an effect on his job performance.

[60] The Claimant presented the argument that that after he signed the warning letter of April 23, 2014 he returned to work for 30 minutes and then went back to his employer's office and told him he didn't want to sign the paper after all because he didn't understand it. The Claimant stated his supervisor told him it was too late and he had already sent it to Human Resources. The Claimant requested the Commission to contact the sanitation supervisor and confirm this before making the decision The Claimant provided oral evidence to substantiate his claim to the Commission during the reconsideration process that 30 minutes after he signed the final warnings letter on April 23, 2014, he went back to his supervisor asking for the letter back as he had not understood what he had signed. He was told by his supervisor that it was too late; the letter had already been sent to Human Resources.

[61] The representative presents the argument that after the Claimant signed the warning letter he asked his supervisor for the letter back because he was unsure what he had signed. He stated the letter reads "If you have any concerns about the ability to meet the terms and conditions please notify immediately".

[62] The Tribunal finds from the evidence in the file the Claimant provided the Commission with this information at the end of the reconsideration process and requested the Commission to consult with his supervisor to verify before making their decision. The evidence supplied by the Commission states they made two attempts but were unsuccessful and maintained their original decision.

[63] The Tribunal finds from the Claimant's oral evidence he did request to have the letter returned because he didn't want to sign it, however there is no evidence to support that he made any further attempts to understand the letter or that he request he be provided with a qualified translator, or that he approached his union representative who also was at the meeting. The evidence shows the letter was dated on April 23,2 014 and the incident happened on May 28, 2014,which would have given the Claimant time to further inquire as to the final warning letter. The Tribunal finds the letter also provided the Claimant with an option that if the Claimant felt he was in need of counselling or support he was encouraged to access the Employee Assistance Program at 1-800-387-4765.

[64] The representative presents the argument that the employer infers that the Claimant was aware of the final warning as he had been dismissed before for absenteeism. He further states the incident happened in 2011 and he was dismissed from his employment without a final warning letter. In June 2012 the employer rehired the Claimant, so if the Claimant was such a terrible employee with absenteeism problems why would they hire him back.

[65] The Tribunal finds the issue before it is not based on the Claimant's job performance but rather that he did not comply with the company policy of supplying a medical note. The Tribunal finds from the evidence in the file that there was a history of absenteeism and the employer provided the Claimant with another employment opportunity and also since the rehire made attempts and provided the Claimant with opportunity to correct the issue with his current employment.

CONCLUSION

[66] The appeal is dismissed.

Teresa Jaenen
Member, General Division

DATED: November 28, 2014