[TRANSLATION]

Citation: *C. T. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 90

Appeal #: GE-14-3244

BETWEEN:

C. T.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Charline Bourque
HEARING DATE:	March 10, 2015
TYPE OF HEARING:	Videoconference
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

[1] C. T., the claimant, participated in the videoconference hearing. She was accompanied by Dany Pascazio, a union advisor at the CSN, who acted as her representative, and by E. F., an outlet manager at the SAQ and the union representative when she was dismissed, who acted as a witness.

DECISION

[2] The Tribunal finds that the claimant did not lose her employment by reason of her misconduct under sections 29 and 30 of the *Employment Insurance Act* (the Act) because her act was not deliberate, as required by the Act.

INTRODUCTION

[3] The claimant submitted an Employment Insurance benefit claim effective April 6, 2014. On May 16, 2014, the Canada Employment Insurance Commission (the Commission) informed the claimant that she was not entitled to receive regular Employment Insurance benefits because she stopped working for the Société des Alcools du Québec (the SAQ) on March 4, 2014, by reason of her misconduct. The Commission added that, given that the benefit period started on April 6, 2014, the claimant was not entitled to receive benefits as of that date only. On August 1, 2014, following the claimant's request for reconsideration, the Commission informed her that the decision made on May 16, 2014, regarding the misconduct was upheld. The claimant filed a Notice of Appeal with the Social Security Tribunal (the Tribunal) on August 25, 2014.

TYPE OF HEARING

[4] This appeal was heard by videoconference for the reasons set out in the Notice of Hearing dated November 13, 2014. The videoconference hearing scheduled for January 20, 2015, was postponed at the claimant's request. The hearing was held on March 10, 2015.

ISSUE

[5] Did the claimant lose her employment by reason of her misconduct under sections 29 and 30 of the Act?

APPLICABLE LAW

[6] Section 29 of the Act stipulates the following:

> For the purposes of sections 30 to 33,
>
> (*a*) "employment" refers to any employment of the claimant within their qualifying period or their benefit period;
>
> (*b*) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;
> …

[7] Section 30 of the Act stipulates the following:

> (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless
>
> (*a*) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or
>
> (*b*) the claimant is disentitled under sections 31 to 33 in relation to the employment.
>
> (2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.
>
> (3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.
> …

EVIDENCE

[8] The letter of dismissal dated April 4, 2014, states that the investigation established that the claimant took, without any right or authorization, approximately $106.85 from her cash drawer. She made fraudulent transactions by cancelling sales several times during her shift on February 22, 2014. As a result of her alleged acts, the relationship of trust necessary to maintain the employment was permanently severed and the claimant was dismissed (GD3-18).

[9] On May 15, 2014, the Commission contacted the claimant, who stated that she saw a doctor but that the doctor did not order her to stop working. She confirmed that she committed the theft, but explained that she only vaguely remembers the incident because she had consumed medication and alcohol.

[10] On April 1, 2014, Dr. Lamoureux stated that the claimant committed a wrongful act at work on February 22, 2014. She explained that medication (antidepressants and Ativan) and alcohol is a very bad combination and causes blackouts. In other words, the person is not aware of their actions and is like a sleepwalker. She stated that she has known the claimant since 2002 and that the claimant would not have committed this act deliberately. She stated that the claimant suffers from partial amnesia and that she is still suffering from depression, which was exacerbated this winter. She is in treatment (GD3-25).

[11] On July 28, 2014, the Commission contacted the employer, and the employer confirmed that it could provide the video recording, that the claimant is a union member and that they are in a grievance process. The employer stated that sometimes new wines are offered to employees as part of their work, but that the procedure clearly states that the wine must be spat out. This procedure is explained and is followed by all employees (GD3-29).

[12] On July 31, 2014, the Commission contacted the claimant and her representative. The claimant stated she was suffering from depression, which had grown worse since December as a result of her separation. She was taking prescription medication, including antidepressants, Synthroid for her thyroid gland and Ativan for stress. On February 22, 2014, she worked

from 5:00 p.m. to 10:00 p.m. She took an Ativan in the morning and a second one at around 3:00 p.m., and reported to work on an empty stomach. She should not have reported to work, but she needed money. She was a bit groggy from the two Ativan and she was not her normal self. There was an open bottle, and she stated that she drank 7/8 of the bottle by regularly going to the back to have a glass. She stated that she knew that she could not drink in the outlet, but that her pain was too great and she had to alleviate it. She stated that the combination of Ativan and alcohol made her lose her mind and that she no longer knew what she was doing. She allegedly never said to herself [translation] "I will steal." She stated that she had a total blackout. She acted without realizing it. She is 53 years old and she had always been an exemplary employee. She would not have stolen money deliberately if she had been her normal self. She stated that she knew that she should not take Ativan with alcohol, but that she did not know that a blackout was a side effect. Her doctor removed the Ativan from her medication. She regularly drank wine with her antidepressants without any problems. Nobody has the same side effects when combining alcohol and medication. Regarding the employer's statement that they could not drink alcohol during their shift, she indicated that it was true on paper that they had to spit out the wine, but in reality, nobody spat out the wine and there were no spittoons in the outlets. It was normal to have open bottles in the back for clients and for all employees to drink the wine without spitting it out. The representative and the claimant referred to *Tucker* (GD3-31/32).

[13] Mr. E. F. testified at the hearing and stated that he had been working at the SAQ for 16 years in six to seven different outlets. He is currently the manager of the X outlet in X. During the events of February 2014, he was also the regional union representative. He was a representative for 13 years. He represented 25 outlets, for a total of 300 members. He stated that the SAQ has a number of policies, but that their content is generally mentioned in flash meetings, or for some policies, during training sessions. He stated that there is a policy for spitting wine during a tasting, but that the policy is not strictly enforced, except in the case of a zealous manager. He does not know whether a disciplinary notice has ever been issued in the case of a person who does not spit the wine out. He stated that he has never seen any spittoons except in training sessions. He personally does not spit out wine, and nor do the employees in his outlet. Budgets are established for employees to have wine tastings. Representatives also

offer tastings when new products are available and for clients. It is also permitted to open a bottle for clients to taste. In a normal week, there may be about ten tastings. There are often bottles open in the outlets, and no supervision is necessary for tastings. If there are bottles in the back and the person goes there for work purposes and has not tasted the wine, the person can do so without permission. [Translation] “The bottles are there for that.” Lastly, regarding the video evidence, he stated that he had not seen it and that the SAQ rarely shows such evidence. The SAQ keeps it for arbitration cases.

[14] The claimant stated that the events took place on a Saturday. Tastings are more frequent on weekends because they are busier. She stated that she was depressed. She reported to work despite the fact that she did not feel well. There was a tasting, and she thought that by drinking wine, she would lower her anxiety and alleviate her stress. She stated that she remembers going several times to have a drink, but she could not confirm the number of glasses. She stated that she had never experienced this type of blackout. She had combined alcohol with her antidepressants before, but she had been taking Ativan for only a few months. She stated that she has not seen the employer’s video evidence. She remembers having wine and the fact that there were many clients during her shift, but she does not remember taking money or leaving the store after her shift. She stated that she had a blackout and that she was working on [translation] “autopilot.” She remembers handling money and making deposits, but she does not remember taking money. She stated that she did not know that combining Ativan and alcohol could have this effect, that she is not sure whether the prescription bottle provided any instruction not to take the medication with alcohol, and that she does not believe that the pharmacist warned her about it. She had had alcohol with her antidepressants before and she had never had any problems.

SUBMISSIONS OF THE PARTIES

[15] The claimant stated the following:

> (a) The decision is not founded in fact and in law. The Commission based its decision on an erroneous finding of fact without regard for the material before it.

(b) The claimant argued that she committed the theft when she was not her normal self, and that the theft was not deliberate. The claimant was suffering from depression, a recognized illness.

(c) The Commission's position is based on the fact that the claimant drank alcohol, but the dismissal is related to the theft of money and not the consumption of alcohol. As a result, there is no direct and immediate link between the misconduct and the dismissal.

(d) The representative argued that the claimant's situation is indistinguishable from *Tucker*, as maintained by the Commission. He stated that there was nothing wilful, intentional or deliberate in the claimant's alleged act (the theft), and that as a result, there was no misconduct under the *Employment Insurance Act*.

(e) The representative submitted CUB38274, CUB60421 and CUB57010. CUB38274 indicates that the action was caused by alcoholism and was not planned. CUB60421 concerns the effects of taking a first drink on job performance. CUB57010 states that the act of falsifying medical certificates was not intentional and was caused by the illness.

[16] The Respondent stated the following:

(a) The Commission argued that the evidence clearly shows that the claimant's dismissal is the direct result of her cancellation of several sales transactions during her shift on February 22, 2014. The employer kept the video recordings as evidence because the claimant filed a grievance against her dismissal.

(b) In addition, when she submitted her claim, the claimant completed a questionnaire in which she admitted to committing the wrongful acts and acknowledged twice that she committed theft. The facts established that she went to work even though she was

in no condition to do so and that, for some reason, she drank alcohol during her shift when she knew that it was prohibited.

(c) The Commission found that even if the act was not deliberate, it was certainly "conduct so reckless as to approach wilfulness," as stated by the Federal Court of Appeal in *Tucker*. The claimant provided a letter from her doctor confirming that antidepressants, Ativan and alcohol make a very bad combination and cause blackouts. The Commission argued that the claimant was monitored by a doctor and took medication prescribed by him, and that all people who take medication are informed of dangerous combinations and side effects by their doctor and pharmacist. The contra-indications are also usually clearly indicated on the prescription bottle. It is well known that a combination of medication and alcohol can cause health problems and affect judgment. It is reasonable to believe that the claimant knew these facts when she decided to drink wine during her shift.

(d) The claimant argued that she was in psychological distress and that she drank 7/8 of a wine bottle to alleviate her inner suffering. The fact that she was in major psychological distress cannot justify her acts. The Commission referred to CUB55850, which is supported by the Federal Court of Appeal decision in A-33-03.

(e) This case is easily distinguished from *Tucker* (A-381-85) in which the claimant, a flight attendant with C.P. Air, took medication that was not prescribed for her, which prevented her from performing her duties on board the airplane. The result of the decision found that she had become impaired unintentionally and that therefore there could be no misconduct.

(f) The Commission found that cancelling the sales transactions and taking the money constituted misconduct under the Act because, while the claimant stated that she did not act deliberately, she knowingly became intoxicated. The Commission referred to *Mishibinijima v. Canada (A.G.)*, 2007 FCA 36; and *Canada (A.G.) v. Lemire*, 2010 FCA 314, to make a finding of misconduct.

ANALYSIS

[17] The claimant stated that the decision is erroneous in fact and in law. She argued that she was not her normal self and that, as a result, the theft was not deliberate. She stated that she was taking medication for depression, and that Ativan, which was prescribed two months before, was added to the medication to lower her anxiety. Since she did not feel well, she stated that she drank several glasses of wine during her shift and that she had a blackout and remembered very little of her shift. Her employer allegedly told her that she supposedly took money from the cash, which she did not question, given that she had a blackout and remembered little of her shift.

[18] The Commission argued that cancelling the sales transactions and taking the money constituted misconduct under the Act because, while the claimant stated that she did not act deliberately, she knowingly became intoxicated.

[19] The employer dismissed the claimant because she [translation] "took, without any right or authorization, approximately $106.85 from your cash drawer" (GD3-18). She made fraudulent transactions by cancelling sales several times during her shift on February 22, 2014 (GD3-17).

[20] Misconduct as such is not defined in the Act. Nevertheless, the case law has established that, "in order to constitute misconduct the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance" (*Canada (Attorney General) v. Tucker*, A‑381-85).

[21] The claimant referred to *Tucker* and stated that the theft did not have the deliberate nature required to constitute misconduct. The Commission argued that the claimant's situation was different from the situation in *Tucker* in which the claimant, a flight attendant, took medication that was not prescribed for her, which prevented her from performing her duties on

board the airplane. The result of the decision found that she had become impaired unintentionally and that therefore there could be no misconduct.

[22] The Federal Court of Appeal has also specified the following with respect to misconduct: "Thus, there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, 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" (*Mishibinijima v. Canada (Attorney General),* 2007 FCA 36).

[23] The first question that the Tribunal must answer in this appeal is whether the theft committed by the claimant was deliberate. In other words, the Tribunal must consider whether the theft was conscious, deliberate and intentional and therefore constituted misconduct.

[24] The claimant did not dispute that money was stolen. She stated that she trusts the information received from her employer since her memories are vague. However, she maintained that the theft was not deliberate because she took medication with alcohol and had a blackout.

[25] The claimant confirmed that she drank several glasses of red wine in a tasting format, but was not able to establish the exact number. On July 3, 2014, she told the Commission that she drank 7/8 of a wine bottle. At the hearing, she stated that she took several trips back and forth without remembering the exact number of drinks consumed. The combination of alcohol and medication to treat her depression and anxiety, taken over the course of a day on an empty stomach, allegedly contributed to her having a blackout and caused her to steal money from the cash drawer, of which she has little or no memory. She stated that she took medication to treat her depression and that she took two Ativan before her shift to help lower her anxiety. She had been taking the new medication for two months. Since she did not feel very well and since a wine tasting was offered at her workplace, she decided to drink red wine because

alcohol lowered her anxiety. She stated that she had already combined alcohol with her antidepressants (without Ativan) and that she did not have any side effects.

[26] The claimant also submitted a letter from her doctor stating that medication (antidepressants and Ativan) and alcohol [translation] "is a very bad combination and causes blackouts, i.e. the person is not aware of their actions and is like a sleepwalker." The doctor added that the claimant "suffers from partial amnesia" (GD3-25). The claimant added that the Ativan was removed from her medication and that she had been monitored by a psychologist since the events.

[27] According to the testimonies of the claimant and the witness, alcohol consumption is allowed by the employer at the workplace and is part of the work itself. Alcohol tastings are frequent and regular and the alcohol remains easily accessible to employees for tasting purposes. There is a policy indicating that the alcohol must be spat out, but the policy is rarely or never enforced depending on the different outlets. Lastly, the Tribunal notes that the employer did not fault the claimant at all for her alcohol consumption, since the letter of dismissal is based only on the theft of $106.85 from the cash drawer.

[28] The Court in *Pearson* stated the principle that "wrongful intent was not a necessary element of misconduct. He indicated that to the extent that the act or omission, relied upon by the employer in dismissing an employee, is willful, i.e. a conscious, deliberate or intentional act or omission, misconduct has been shown" (*Canada (Attorney General) v. Pearson*, 2006 FCA 199).

[29] Even though the claimant cannot explain certain elements because of her blackout, the Tribunal does not question her credibility. The claimant delivered consistent testimony through her various communications with the Commission and at her hearing before the Tribunal. She does not deny stealing, since her employer stated that it had video evidence, but only vaguely remembers the events. She stated that she lost her sense of time and control of her actions. The claimant had combined alcohol with her antidepressants before, but did not have side effects. With the addition of Ativan to her medication, she did not think that she

would have different effects. She does not believe that she was informed by her pharmacist that she could have side effects if the alcohol was combined with her medication or that this information was indicated on the bottle. She stated that she drank several glasses of alcohol (tasting size), but she could not give the exact number. She worked her entire shift and did not remember how she went home.

[30] The doctor's letter also confirms the possibility of a blackout from the combination of medication and alcohol and states that the claimant had partial amnesia with regard to the events.

[31] The Tribunal notes that the testimonies of the claimant and witness are consistent regarding the employer's tolerance for alcohol consumption in the outlet despite the existing policy.

[32] The Tribunal notes that the claimant was treated for depression, but that she continued to work. Her medication had been changed approximately two months beforehand by the addition of Ativan to help her manage her anxiety. The Tribunal finds that the claimant did not expect to have this type of reaction when combining alcohol and her medication. Regardless, the Tribunal finds that she should have obtained information on the subject before the consumption, in particular since her work gave her opportunities to combine medication and alcohol. The Tribunal does not question the fact that her employer allowed alcohol consumption or that the alcohol is not always spat out. However, the Tribunal finds that the employer tolerates limited consumption as part of product tasting since the employee must be able to perform the duties she was hired to perform. The fact that the claimant drank several glasses of alcohol may therefore be contrary to her employer's expectations. Nevertheless, as indicated, her employer did not fault her for these acts and they did not cause her dismissal.

[33] The Tribunal notes that the Court clearly indicated that consuming alcohol or drugs cannot excuse a claimant's acts when the claimant commits misconduct. Nevertheless, to constitute misconduct, the act must have been deliberate and conscious.

[34] According to the medical letter, the combination of the medication that the claimant was taking and alcohol can cause a blackout. The letter states that the claimant suffers from partial amnesia with regard to the events. As mentioned previously, the Tribunal found the claimant credible. Since the video of the events was not submitted, the Tribunal is unable to determine for itself the claimant's attitude, condition and reaction when the events occurred. Since the employer did not address the claimant's alcohol consumption, the Tribunal finds that she was not faulted for it and it did not lead to her dismissal. The employer stated that the claimant made fraudulent transactions by cancelling sales several times during her shift, but did not provide details on the subject. Therefore, it is impossible to determine whether these transactions were made, for example, at the start or end of her shift, which would have helped establish whether the claimant was able to perform her work. Lastly, it is surprising that no employee or supervisor noticed the claimant's condition during the shift and that she was able to take several trips back and forth to drink a glass of wine without attracting attention.

[35] Nevertheless, the Tribunal wondered whether the claimant consciously put herself in a situation in which she would be unable to perform her duties. It wondered whether she could have expected to experience effects that would impede her work if she combined alcohol with her medication. It is true that the claimant's pharmacist is responsible for informing her of possible side effects, and that the claimant is responsible for obtaining this type of information. However, the fact that the claimant occasionally had a glass of wine despite taking medication likely reinforced her belief that she could drink without side effects. Regardless, it is general knowledge that alcohol and medication must not be combined.

[36] In *Mishibinijima*, the Court stated that "the Umpire then went on to consider the events which gave rise to the applicant's dismissal and examined that evidence in the light of this Court's jurisprudence … His review of the jurisprudence led him to conclude that alcoholism could not excuse a claimant's acts and omissions where they constituted misconduct. As a result, he concluded in the following terms, at page 5 of his Reasons, that the applicant had lost his employment by reason of his misconduct: I find that the Board erred in fact and in law in its decision. The evidence clearly established that the claimant lost his employment due to his misconduct resulting from his persistent absenteeism and his failure to abide by the terms

of his agreement with his employer." (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36).

[37] In *Pearson*, the Court stated that "it would be fundamentally altering the nature and principles of the employment insurance scheme and Act if employees, who lose their employment as a result of abusing impairing substances such as alcohol or drugs, could be entitled to receive regular unemployment benefits. Section 21 of the *Employment Insurance Act* and 40 of the *Employment Insurance Regulations* already provide for sickness benefits and the respondent has been the recipient of such benefits" (Canada (*Attorney General) v. Pearson*, 2006 FCA 199).

[38] The claimant submitted CUB38274, in which alcoholism was described as an illness and in which the repeated absences did not constitute misconduct because they were not planned. She also submitted CUB60421, in which the Umpire ruled in favour of the claimant with respect to his disregard for the effects that the taking of that first drink would have on job performance. She also referred to CUB57010, in which the claimant falsified his medical certificates when he was suffering from sleep apnea and in which the Umpire dismissed the Commission's appeal, considering that there was no misconduct. The Tribunal finds that the claimant's situation is different from the CUBs submitted since her alleged acts were not repeated (CUB38274) and were not related to her absence from work (CUB38274, CUB57010 and CUB60421).

[39] The Commission referred to CUB55850 (supported by the FCA decision in A-33-03) and stated that a claimant's psychological condition cannot be an excuse for having Employment Insurance support the loss of employment. The Tribunal also notes that this decision stipulates that misconduct must always be accompanied by a deliberate act or a conscious act. The Tribunal finds that the claimant's situation is different because that case involved addiction and substance abuse, which is not the issue for the claimant.

[40] The Tribunal finds that, on the basis of the case law, alcohol consumption cannot excuse wrongful acts such as theft. Nevertheless, the claimant was not faulted for the alcohol

consumption. In addition, the Tribunal finds that the claimant could not have expected to have a blackout while drinking wine with her new medication. The Tribunal believes that the claimant's situation is similar to the situation in *Tucker* in which the claimant took medication that was not prescribed for her and she was not able to perform her duties.

[41] In the claimant's case, the Tribunal finds that, while she took medication prescribed for her, the fact that it was recently added to her medication supports the argument that she was unable to clearly determine the side effects. Given the fact that the claimant drank alcohol provided by her employer at the workplace as part of an authorized practice, and given her anxiety and belief that the alcohol would alleviate her stress without producing any side effects, the Tribunal finds that the claimant could not have expected the combination to result in a blackout that would leave her no longer able to correctly perform her work duties and cause her to unknowingly cancel sales transactions and even take money, according to the medical letter.

[42] The Tribunal is not able to determine as of when the claimant was no longer her "normal" self or the exact sequence of events and cancelled transactions. Was it at the start of her shift when she had drunk only one glass of wine or at the end of her shift when she was likely no longer in any condition to perform her duties? While the claimant does not deny that she drank several glasses of wine, it was not demonstrated that a single glass could have been enough to cause the blackout. As a result, the Tribunal finds that the claimant did not act deliberately or consciously by cancelling transactions during her shift.

[43] Based on the evidence and the submissions, in particular the doctor's letter, the Tribunal finds that it cannot establish that the claimant consciously and deliberately took the money in the cash drawer. The fact that she had one or more glasses of alcohol is not in itself the cause of the claimant's reaction, but the combination of the alcohol with her recent medication led to the reaction and caused the blackout.

[44] Lastly, to constitute misconduct, there must be a direct relationship between the act committed and the dismissal. It must be established that the claimant knew or ought to have

known that the conduct was such as to impair the performance of the duties owed to the employer and could result in her dismissal.

[45] The Tribunal notes that the claimant was not faulted for drinking alcohol in the workplace, and that the employer did not mention it at all in the letter of dismissal. This act therefore cannot be the cause of her dismissal. The claimant was faulted only for the theft, and the theft must be the cause of the dismissal to show the direct relationship between the act committed and the dismissal to constitute misconduct. It is clear that stealing can impair the performance of the duties owed to her employer. However, in this case, the Tribunal finds that the fact that she drank alcohol, which caused her blackout, cannot be attributable to her dismissal because her employer did not fault her for this act and it did not cause her dismissal. The Tribunal therefore cannot establish that combining alcohol with her medications was the direct cause of her dismissal.

[46] Therefore, based on the evidence submitted, the Tribunal finds that while the theft was a wrongful act, the claimant did not commit it deliberately or consciously. As a result, the theft cannot be considered misconduct under the *Employment Insurance Act*.

CONCLUSION

[47] The appeal is allowed.

Charline Bourque
Member, General Division

DATE OF REASONS: May 20, 2015