Citation: *S. K. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 32

Tribunal File Number: GE-15-2693

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Gate Gourmet Canada Inc

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alyssa Yufe

HEARD ON: February 23, 2016

DATE OF DECISION: February 29, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The hearing was scheduled for February 23, 2016 by telephone conference. The Tribunal left the phone line open for approximately 45 minutes.

No one attended the hearing.

The Member of the Social Security Tribunal, General Division, Employment Insurance Section (the "Tribunal"), checked the Canada Post confirmations in the file and saw that the Appellant and the Employer had received the Notice of Hearing.

The Appellant failed to attend the original hearing initially on November 13, 2015. The Appellant only came on the telephone to request an adjournment after the case management officer (the "CMO") contacted the Appellant by telephone.

Following the adjournment, a new Notice of Hearing dated December 18, 2015, was sent to the parties. The Employer signed for and received the Notice of Hearing. The Appellant's copy was returned to the Social Security Tribunal.

On January 18, 2016, the CMO then contacted the Appellant on the Tribunal's instructions. The CMO confirmed the Appellant's address with the Appellant and reminded the Appellant to submit the authorization to disclose form. The Appellant advised that he would be available on February 23, 2016 for the hearing by telephone conference.

The Notice of Hearing was then resent on January 19, 2016.

On February 2, 2016, when the Tribunal noticed that the authorization to disclose form was still outstanding, the Tribunal instructed the CMO to telephone the Appellant again. The Appellant confirmed that he received the Notice of Hearing and that he would be available. The CMO also reminded the Appellant to submit the authorization to disclose form, which the Tribunal had still not received.

The Tribunal checked the file and saw that the Canada Post confirmation in the file shows that the Notice of Hearing was delivered and signed for by the Appellant on February 1, 2016.

To date the authorization to disclose form is still outstanding.

On this basis, the Tribunal was satisfied that the parties received the Notice of Hearing and it proceeded in absence of the parties and pursuant to subsection 12(1) of the *Social Security Tribunal Regulations* SOR/2013-60 (the "SST Regulations").

DECISION

[1] The Tribunal finds that the Commission has proven on a balance of probabilities that the Appellant lost his employment because of his own misconduct. The appeal is, accordingly, dismissed.

INTRODUCTION

[2] The Appellant filed an initial claim for benefits on May 22, 2015 (GD3-16). His claim was established effective May 17, 2015 (GD4-1).

[3] The Canada Employment Insurance Commission (the "Commission") decided on June 22, 2015, that the hours, which the Appellant worked were being used to establish a claim for benefits and that the Employer did not provide enough information to prove that the Appellant lost his employment because of his own misconduct (GD3-19).

[4] The Employer filed a request for reconsideration. On August 12, 2015, the Commission reconsidered its original decision and rendered a new decision. It determined that the Appellant did not qualify for benefits because he lost his employment due to misconduct. A notice of debt was issued on August 15, 2015 in the amount of $4,329.00 (GD3-51 and 53).

[5] The Appellant filed an appeal to the Tribunal on August 19, 2015 (GD-2) and a copy of the reconsideration decision shortly thereafter on September 15, 2015 (GD2A).

[6] On September 29, 2015, the Tribunal added the Employer as a party to the appeal on its own initiative pursuant to section 10 (1) of the *Social Security Tribunal Regulations* SOR/2013-60 (GD7).

[7] On October 9, 2015, the Employer's lawyer wrote to the Tribunal and advised that it wanted to be added as a party to the appeal.

[8] On October 14, 2015, the Employer's lawyer wrote to the Tribunal and advised that the Employer would not be participating at the hearing (GD9).

[9] The Appellant attended the hearing on November 13, 2015 and an adjournment was granted on the basis that the Appellant had just retained a lawyer and required additional time to prepare (GD11).

FORM OF HEARING

[10] The hearing was heard by teleconference for the reasons indicated in the Notices of Hearing dated October 6, 2015 and December 15, 2015.

ISSUE

[11] Whether or not the Appellant lost his employment by reason of his own misconduct pursuant to subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act")?

THE LAW

[12] According to subsection 30(1) of the Act, a claimant is disqualified from receiving benefits if the claimant lost any employment because of their misconduct. It provides as follows:

> **30.** (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.

[13] Subsection 30(2) provides that "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.

EVIDENCE

Employer's Evidence in the File

[14] According to the record of employment from the Employer dated May 20, 2015 (the "ROE") the Appellant worked from June 8, 2013 to April 16, 2015 as a "cleaner". The reason for issuing the ROE was listed as Code "M". He had also been paid $2,195.00 as vacation pay because he was no longer working (GD3-16).

Disciplinary File:

[15] By letter dated June 26, 2015, the Employer provided a copy of the Appellant's disciplinary record (GD3-20 to 38).

[16] A corrective action form (written warning) dated September 24, 2014 was provided. It provides that the Appellant had an unjustified absence when he called in sick 3 hours into his shift, which started at 6:00. Missing a cleaner has a big impact because of cleanliness and leaves a big mess, which can lead to accidents. The Appellant needs to provide a phone number where he can be reached and also needs to advise operations as soon as possible when he is sick. The form is signed by the Manager, HR and the Union (GD3-24). GD3-26 is a timecard for the Appellant, which shows that on September 23, 2014, he was sick with no pay.

[17] A corrective action form (for a one day suspension) dated October 10, 2014 was provided. It provides that the Appellant was suspended for unjustified lateness or absence or early leave. The Appellant was scheduled to start at 5:30. He only came in at 6:15 and was 45 minutes late. If operations had known that the Appellant would be late, it would have asked the night shift cleaner to stay until someone arrived. The Appellant must advise his supervisor in advance if he is ever to be late or absent. The form is signed by the Appellant, the manager, someone from HR and the union representative (GD3-27). There is a timecard showing a suspension for October 10, 2014 (GD3-29).

[18] By letter dated November 25, 2014 (five day suspension), the Employer confirmed its discussion with the Appellant and JF in which the Employer had reviewed a situation with respect to the Appellant's work schedule on the weekend of November 15 to 16, 2014. The Employer advised that on Saturday November 15, 2014, the Appellant was scheduled to work at 2:00pm. The Appellant called at 2:55pm to advise that he was sick and was unable to work on the upcoming night shift. The Appellant did not check his schedule properly and he had assumed that he was scheduled to work the night shift when he had been scheduled to work the evening shift (letter from the Employer, November 25, 2014, GD3-30).

[19] The letter also provided that on November 16, 2014, the Appellant was scheduled to work at 2:00pm and he did not show up. The Appellant showed up for work instead at 9:30pm and he assumed that he was scheduled to work on the night shift (letter from the Employer, November 25, 2014, GD3-30).

[20] The Appellant was scheduled to work at 2:00pm on Monday, November 17, 2014. The Appellant called in sick and said that he felt too tired to work since he had worked the previous night (letter from the Employer, November 25, 2014, GD3-30).

[21] During the Appellant's discussion with FD on November 20, 2014, the Appellant confirmed that he received a copy of the schedule and that he did not look to find out his shift for the 3 days and that the Appellant's had just assumed that he was working the night shift (letter from the Employer, November 25, 2014, GD3-30).

[22] During a prior discussion on October 10, 2014, which was followed by a 1 day suspension, the Appellant had already been warned that he was required to show up when he was scheduled to work and that the Appellant also had to verify his schedule on a daily basis (letter from the Employer, November 25, 2014, GD3-30).

[23] Due to the Appellant's non-attendance on those days, there was no other cleaner scheduled and one had to be called to replace the Appellant (letter from the Employer, November 25, 2014, GD3-30).

[24] The letter served as a 5 day suspension, which was to be served the week of December 1, 2014 (letter from the Employer, November 25, 2014, GD3-30).

[25] The Appellant was told that he was required to verify his schedule daily and to show up for work at all times on his schedule. If the Appellant was sick and unable to work, he had to advise his Employer at least 3 hours prior to the start of his shift. Following a sick day, the Appellant was required to advise his supervisor that he is able to go back to work on the next day at least 6 hours in advance (letter from the Employer, November 25, 2014, GD3-30).

[26] The Employer's concerns were serious and failure to comply with the directives or if the Appellant continues to engage in behavior of a similar nature, further disciplinary action could be taken, up to and including termination for cause. The Employer added that it wanted the Appellant to be successful and that it was prepared to provide him with all reasonable assistance to achieve his objectives. The letter was signed by FD, the Appellant, and a witness (GD3-31).

[27] GD3-32 and GD3-33 show timecards, which provide that on November 15, 16, 17, 2015, the Appellant was sick without pay (GD3-32 to 33).

[28] By letter dated March 30, 2015, FD of the Employer advised that the Appellant was absent from March 17 to 20, 2015 without justification. On Thursday, March 26, 2015, the Appellant was required to provide a proper justification. On March 30, 2015, the Appellant came to the HR office without the requested justification and advised that he had it at home. If the Appellant did not provide the Employer with a proper justification before March 31 at 2:00pm, it would take a decision on his unjustified absence based on information that it has on hand. The decision would include reviewing his employment with the Employer (GD3-34).

[29] There is a handwritten note, which provides: 17 and 20 March unjustified (4 days). 26 early leave. 27 at 2 April justified. 25 March unjustified (handwritten note GD3-36).

[30] The Employer wrote a letter dated April 16, 2015, seeking an attestation or official confirmation of the funeral, which the Appellant attended. The Employer asked to be provided with the date of death, the relationship between the deceased and the Appellant. The Appellant had until April 16, 2015, to submit the information (GD3-36).

[31] On April 16, 2015, the Rideau Funeral Home provided a proof of death certificate, which advised that the deceased "SK" was married and died on April 13, 2015 and was to be cremated on April 23, 2016(GD3-37).

Termination Letter:

[32] By letter dated April 30, 2015, the Employer advised that it was writing following its investigation during the Appellant's suspension for his absences on April 14 and 15, 2015 (GD3-38).

[33] On or about September 15, 2014, the Appellant was informed by FD that his 6 non-justified absences (between August 4, 2014 and September 12, 2014), impacted negatively the operations and department and a disciplinary measure was imposed.

[34] On September 24, 2014, the Appellant received a written notice of an unjustified absence from his shift on September 23, 2014.

[35] On October 10, 2014, the Appellant received a short one day suspension for his lateness of 45 minutes, without warning from his shift on October 10, 2014.

[36] On November 25, 2014, the Appellant received a long suspension of 5 days after his unjustified absence of November 15 and 16, 2014.

[37] On April 14 and 15, 2014, the Appellant was absent without being in a position to furnish an adequate justification. The Appellant furnished a death certificate and later admitted that the person was not related to him. Pursuant to article 18.05 of the collective agreement, the Appellant's absence was not justified (GD3-38).

[38] The Appellant's actions jeopardized the Employer operations and caused extra work, stress and overtime of his colleagues and supervisors (GD3-38).

[39] The Employer decided to terminate his employment retroactively to April 17, 2015. According to the Normes du Travail du Quebec, the Appellant is not eligible for notice of termination. The Appellant will receive all vacation money, which he accumulated by mail. All amounts will be subject to federal and provincial taxes (Dismissal letter, signed by FD April 30, 2015, GD3-38).

Employer's Conversations with the Commission:

[40] F confirmed that the Appellant was dismissed with cause. The Appellant had a progressive disciplinary record regarding his lateness. The Employer asked that the Commission fax a request for information because the documents were confidential (Commission notes, Conversation with "F", June 17, 2015) (GD3-17).

[41] The Appellant did not give any reasons for his late arrivals or absences. According to the collective agreement, after 3 days of absence, the employee must give a written justification. In the Appellant's case because it was repetitive, the Employer could ask him in each case. The Appellant never furnished the written justifications. He had many suspensions. The last event occurred on April 14 and 15, 2015, when the Appellant asked his supervisor if he could be absent to assist in dealing with the death in his family. The collective agreement permits absence in this case. The Employer learned, however, that the person had no blood relation to the Appellant. The Employer had a doubt and they asked the funeral home to send the death certificate. They realized that the person who died did not have the same family name as the Appellant so they confronted him. The Appellant admitted to his supervisor that the person was not in a blood relationship with him and then he was dismissed. To her knowledge, a complaint or grievance was not filed following his dismissal (Commission notes, Conversation with "FB" August 6 or 12, 2015, GD3-40).

[42] The Commission advised the Employer that the Appellant claimed that he asked his supervisor and union representative for permission to be absent on April 14 and 15, 2015 because his uncle died and that he told them that he was not related to him and that they authorized the absence on that basis. The Employer advised that because there was no blood relationship, the Appellant did not have a right to be absent and she advised that she would send a copy of the collective agreement (Commission notes, FB, August 11, 2015, GD3-46).

[43] It is not possible that there was a misunderstanding in the circumstances or that the Appellant had the right to be absent. The Appellant already had other warnings for absences and he admitted that he lied regarding the relationship. All employees have a copy of the collective agreement and they are current regarding it. The Appellant knew that he did not have the right to be absent for the reason provided. The Employer confirmed that if it had any medical certificates that these were for absences in 2012. The Employer explained that the Appellant had numerous unjustified absences (Commission notes, FB, August 11, 2015, GD3-47).

[44] By letter dated August 10, 2015, FB of the Employer sent the Commission a copy of article 18.05 of the collective agreement. In addition, FB is including the request to terminate the Appellant's employment, which was sent from the Employer, which confirms the investigation that the deceased is not someone who is in the Appellant's family and the Appellant admitted this in front of his superior and HR (GD3-43).

Article 18.05 of the Collective Agreement:

[45] Article 18.05 of the collective agreement provides for leave in the event of a death of a spouse or child of 7 days, and 3 days in the event of the death of a father, mother, sister or brother or father in law or sister in law, mother in law, brother in law or grandparents. There is also a provision for an extra day where the person has to drive more than 600 kilometers. There is a handwritten note, which provides: "l'oncle n'est pas couvert" (GD3-44).

Employer's Internal Communications:

[46] By way of email dated April 24, 2015, SLT wrote to FS and FJ and advised that it was looking for approval for a progressive discipline case of absenteeism. This is a case of an employee who the Employer suspects may have another job or undeclared occupation ("religious maybe-he told [the Employer] he is in a Mosque community"). SLT summarized the Appellant's disciplinary record and advised with respect to the unjustified absences on April 14 and 15, 2015, that the Appellant admitted to HR and his supervisor that it was a person from his "community" and not an uncle who had died as per his first declaration. The Employer had until May 1, 2015 to announce its discipline decision (Email from SLT, April 24, 2015, GD3-45).

The Appellant's Evidence in the File:

Application for Benefits:

[47] The Appellant filed a claim for regular benefits on September 6, 2013. The Appellant worked at "Gat" (the "Employer") from September 27, 2004 to March 13, 2015. The Appellant reported that he was dismissed or suspended because of lateness or absenteeism. The primary reason for his dismissal was absenteeism. The Appellant had asked for permission to be absent. He asked the supervisor on the phone and was told that it was alright. The Appellant also wrote a letter to the union on March 14, 2015, which advised as to why he would not be coming in on March 14 and 15, 2015. The Appellant called the supervisor at 9.30 on March 13, 2015. The Appellant received permission to be absent. The Appellant is only fired temporarily at the moment because the Employer advised that it did not receive full details as to why he did not attend. The Employer does not have a practice or policy with respect to absenteeism. There was no other occurrence of absence within the 6 months prior to his dismissal/suspension. When he was dismissed, the Appellant spoke to his Employer and union representative PJ, and the labour relations board equivalent. The union representative advised that he will bring the Employer to court and the case is still going on. A labour worker (G. A.) advised that the Employer was lying to him and she gave him hope (Application for Benefits, May 22, 2015, GD3-2 to 14).

Evidence from the Notice of Appeal:

[48] On April 13, 2015, the Appellant phoned at 9:30pm. The following day, the supervisor acknowledged by phone and reconfirmed the Appellant's requirement for days off on April 14 and 15, 2015 by 7:30am (GD2).

[49] The union advised the Appellant that it had instituted his case (GD2-3).

[50] The Appellant worked at the Employer since 2004. In July 2014, the person who prepared the work schedule was "C". C often gave the Appellant the wrong schedule and they would get into an argument. Sometimes, he was given the morning schedule and sometimes the night schedule, which was not good for him. Whenever there was a problem, Mr. G would send him back home and the Appellant would show him the schedule and he would apologize. This

happened many times. The Appellant spoke to PJ about it. PJ spoke to G and warned him not to say or talk to the Appellant without the presence of a union member (GD2-9).

[51] The Appellant suspected that G wanted him out of the job. Since August 2014, every week was the same issue due to the schedule. The Appellant agreed that he was 45 minutes late for work on October 10, 2014 and he was sent back home (GD2-9).

[52] On November 25, 2014, the Appellant thought that he was scheduled at night. When the Appellant went to work at 9:30, Mr. G told the Appellant that his schedule was in the afternoon. When the Appellant said sorry, I "mistook my schedule", Mr. G pleaded with him to stay and said that he needed 1 more employee. The Appellant advised that he had a shift the next morning, Mr. G advised that he would take care of it. So the Appellant worked from 9.30pm to 6am and then went home. Then, the Appellant called the company at 10am the same day and told them to schedule someone else in his place because he did the night shift. At 10:15 am. J called to ask the Appellant to come to work. The Appellant advised that he finished at 6am and did not want to do overtime. J said okay. When the Appellant went to work the next day, F called the Appellant into her office. J was there. J explained why the Appellant did not work and F said that she understood that the schedules had been mixed up.

[53] Five days later, on November 25, 2014, F called the Appellant in her office and Mr. G was there and they told him to sign a form, which provided that he would be suspended for 5 days because he did not show up to work. That day, Mr. N told the Appellant to sign the form because F was very angry and he would lose his job if he did not sign the form.

[54] The Appellant signed the form because he was forced to and he was warned that he had to be careful because he would not get another chance next time.

[55] On March 1, 2015, the Appellant was sick so he called to say that he could not come into work. The Appellant was prescribed medicine and got a medical note.

[56] Around 9.30 pm, the Appellant went to the Employer and gave the medical note to the supervisor and he got a copy of it. After 3 days, S called the Appellant into the office and FD was there and they said that he did not give the medical note so he signed the letter and they will decide if he would work there or not. The Appellant told her that he gave the medical note to the

supervisor and could get a copy for her. She said that now he could not give the medical note and he forced him to sign the paper. The Appellant advised that he had the receipt showing that he gave the medical note at home. She told the Appellant to go home and that another employee would work in his place and that he could provide the proof by 200pm. The Appellant punched his card and went home.

[57] The next day, the Appellant arrived around 1pm and met with S anf F in the office and he gave them the medical note copy and receipt. S then said that she would confirm with the supervisor that the Appellant was not lying and she texted him. She advised that someone would call the Appellant the next day.

[58] The next day, J called the Appellant and asked him to come in.

[59] A few days later, the Appellant felt sick again at work and he went to speak to F and she told him to go to the hospital. The Appellant went to the hospital and was there from 8 to 4 pm. The Appellant had not eaten and was hungry. The staff told him that they did not know when his turn would come. Then, the Appellant called a taxi at 4pm and came back to the Employer. N asked him if he had a medical note from the hospital. The Appellant advised that the doctor did not even come to see him.

[60] Mr. N and F called a meeting with the Appellant and said that they will verify whether or not he went to the hospital. The Appellant requested that they let him go home and they would not. He said that he was hungry and had a really bad headache. N called every hospital nearby to verify. The hospital said yes that the Appellant came in around 8.15 and sat there until 4:00pm and that the doctor was very busy. The Appellant was sick and their behavior was very rude. Then, after verification, they said ok you were right and then the Appellant left and said that he would go to the family doctor the next day.

[61] The next day, the doctor gave the Appellant a medical note, which provided that he had to rest for 1 week. Around 2pm, S called and he told her that he was sick and that he had to take off 1 week and that he was at his friend’s house in X. S asked why he was not home if he was sick. The Appellant advised that he was not at home because he lives alone and his friend was helping him. Then, S asked to speak to his friend and the Appellant advised that she could not

speak to his friend because he did not speak English and only spoke Punjabi. S then said that she would speak to the friend. The friend was confused because he was 75 years of age. She asked for his address, the relationship and she spoke to the Appellant and asked him to fax the medical note. The Appellant went home and sent the fax. 15 minutes later, F called and said that it was not clear and asked him to bring the original note in.

[62] On March 26, 2015, after 1 week, the Appellant went into work on the morning break time and he gave F the medical note.

[63] Three days later, F and S called the Appellant in the office and F was there for a meeting and they showed him some paper work to sign and they said that they wanted to fire him and said that he did not give the original medical note. The Appellant advised that he had sent the fax and F lied and said that she did not receive it. The Appellant told them to check the camera recording from March 26 and that it would show that he brought in the original medical note. N said “what camera? What camera?”. Then he advised S that he gave her all of the proof and that he has them at home. F said okay bring it tomorrow and now you can go home. He said, if you do not bring it by 10am, we will not give you more time. They will give their decision.

[64] The next day, the Appellant brought in all of the proof and he gave it to PJ and he asked them why these 5 people always created problems for him. He complained that F, N, S and F and G played a game with him and wanted to fire him. PJ told the Appellant not to panic and he went in to show them the proof. He came back after 1 hour and apologized to the Appellant and said that no one in the office cares and that he could not do anything. The Appellant was very angry with their behavior. They acted as though he had killed someone.

[65] The next day, PJ gave the Appellant the schedule and advised that he could start the next day.

[66] A few days later, on April 13, 2015 around 5pm, the Appellant got the news that his uncle died. The Appellant went to the hospital and the doctor gave him the report that his uncle died. At 9:30pm, the Appellant called the Employer and spoke with R and said that he could not go in the next day because his uncle died. R said ok, no problem, I will send F an email.

[67] On April 14, 2015, at 7:30am. Mr. G called the Appellant and said that the Appellant did not work that day. The Appellant said that he did not go to work the next day because his uncle died and that he needed 2 days off. He said ok, no problem, take care.

[68] The next day, the Appellant went to the Employer and saw Mr. R and he gave him a copy of the report, which said that he died. R said that he would send it to F. Then he said, when you come to work, please call before.

[69] On April 15, 2015, at 9:30 pm, the Appellant called and said that he would go to work the next morning. They said okay, no problem. On April 16, he next morning, the Appellant went to work and G asked him "who told you to come to work"? Then the Appellant advised that he called last night and had the schedule. G told the Appellant to go and see F. F said okay, I see the person's hospital note but I don't believe that your uncle died, I need to see the death certificate. The Appellant offered to go home and get it and F said that he should finish work and then go home and bring it the next day.

[70] F also made the Appellant sign a form because he did not show up for work for 2 days. The Appellant said that he will bring proof and that he spoke to his supervisor and sought 2 days off of work. F suddenly told him that he should leave right away and that he had 48 hours to bring the death certificate.

[71] The Appellant left work and the next day, he brought the death certificate. When the Appellant went inside the Employer, he punched his card and G said that if he went inside, he would call the cops. The Appellant said, ok no problem, call the cops. The Appellant went inside to see PJ and he was not there. F and G and PJ went to see him. PJ said that if they are asking for the death certificate, them give it to them and your blood relation to your uncle and they will pay you. The Appellant advised that he does not have a blood relation with the deceased but that he was from his city back home and is a family friend of his so the Appellant calls him "uncle".

[72] PJ said ok no problem, go to the office and see F. F was very rude. The Appellant gave her the death certificate photocopy and after 5 minutes, they called the Appellant and she said, I see the death certificate but there is no relationship of you and your uncle. The Appellant advised

that he already told PJ that he did not have a blood relation but a "heart relation". PJ said "yes he told me:. Then S came and said ok, go home and we will call you for the decision.

[73] On April 29, 2015, the Employer told the Appellant to come to the office at 12pm and he went there the next day on April 30 to see S, F, and PJ and they gave him the termination letter and told him to empty his locker.

[74] The Appellant worked at the Employer for 12 years. What the Employer did to him was unfair. The Employer lied and said that he did not give proof and he gave proof. In the last 2 years, these 5 people started working there and they are rude and may be because of racism because he is Indian (GD2-11).

[75] The Commission noted that it attempted to leave a voice mail message for the Appellant on June 17, 2015 and that his mailbox was full (GD3-18).

Letters from the Appellant:

[76] A handwritten letter dated April 14, 2015 provides: "Hi [PJ], my uncle died. I ask for 2 day off to make funeral arrangement to send body to India thanks 14, 15 off" (GD2- 7).

[77] There is another handwritten note, which shows a fax number. It is addressed to LC of the Commission and provides: "1) I did call April 13, 2015 at 9:30pm to ask day off and talk Mr. R; 2) Next morning. April 14, 2015, Mr. Z talk to me at 7:30am; 3) my super call me for 7:30am then I ask him give me April 14, 2015 off" (GD2-8).

Other Correspondence in the File:

[78] By way of letter dated September 2, 2015, the Social Security Tribunal wrote to the Appellant and requested that he provide a copy of the reconsideration decision.

[79] The Appellant also signed a form dated September 3, 2015, which provided a member of parliament with authorization to inquire into his file.

[80] The Appellant wrote a letter to the "Canada Enquiry Centre" on September 15, 2015. In it, the Appellant accused the Social Security Tribunal of delaying his case and denying him justice (GD2A). The Appellant attached the reconsideration decision.

[81] The member of parliament wrote a letter inquiring regarding the Appellant's file on September 23, 2015 (GD6-1).

Appellant's Communications with the Commission:

[82] The Commission attempted to contact the Appellant several times and his phone line did not appear to have been working (Commission notes, August 12, 2015, GD3-48).

[83] The Appellant confirmed his absence on April 14 and 15, 2015 to attend a funeral for his uncle. The Appellant's supervisor gave him permission to take 1 week. The Appellant advised his supervisor that he only needed 2 days. Since no one from the union was there, the Appellant wrote a letter to the union with whom he spoke the next day. The Appellant was responsible for his uncle's funeral since no one else from the family was here in Canada. The absence was permitted by the collective agreement. The Appellant provided the Employer with a death certificate. Although he is not an uncle with a blood relationship, the Appellant had called him "uncle". The Appellant advised that he always told his supervisor and the union that this was the case. The Appellant's Employer said that he lied but the Employer was just trying to hire someone for less money to replace the Appellant. The Appellant insisted that he did not lie. The Appellant paid for the funeral because no one else was there. The Appellant can provide a copy of the letter, which he gave to the union. He would only send it the next day because he was at temple at the moment (GD3-39).

[84] When the Commission asked the Appellant about his absence from March 17 to 20, 2015, the Appellant stated that he was told by the union to just stay home. When the Commission asked the Appellant why they would tell him not to go to work, the Appellant advised that he did not know (GD3-39).

[85] When the Commission asked the Appellant regarding his absence from November 15 to 17, 2014, and his suspension in December, the Appellant explained that his shifts vary. The Appellant called in sick at 3:00pm on the 15th but he had misunderstood his schedule. The

Appellant went for the night shift the next day at 6:00. The Employer told the Appellant to stay because they needed him. The next day, he could not work because he was feeling sick and he had just worked all night. The Appellant's supervisor told him that it was okay and that it was not his fault. The Appellant always provided medical certificates when absent for sickness. The Appellant was late on October 10, 2014 because he was stuck in traffic. Throughout the conversation, the Commission agent had difficulty understanding the Appellant and she had to repeat questions to ensure that he understood (Commission notes, August 6, 2015, GD3-39).

Testimony at the Hearing:

[86] No one attended the hearing. No testimony was provided.

SUBMISSIONS

[87] **The Appellant** submitted that he did not lose his employment by reason of his own misconduct for the following reasons:

a) The Appellant followed all ethical procedures of availing a day off for his family matter (GD2);

b) The Appellant applied to the supervisor for days off and sent the information to the union (GD2); and,

c) The union made the Appellant understand that he should institute his case (GD2).

[88] The **Employer** submitted that the Appellant lost his employment by reason of his own misconduct for the following reasons:

a) The Employer provided the Commission with sufficient information to make a decision in its favour; and,

b) The Appellant was dismissed because he did not follow rules, his poor attendance, he did not call to justify his absences and on more than one occasion, he falsified information in order to get paid one day for the death of an acquaintance and stated that it was a family member (GD3-20).

[89] The **Respondent** submitted that the Appellant lost his employment by reason of his own misconduct for the following reasons:

a) Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant loses his employment by reason of her own misconduct. For the conduct in question to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or so reckless as to approach willfulness (*Mishibinijima* 2007 FCA 36). There must also be a causal relationship between the misconduct and the dismissal and it must constitute a breach of an express or implied duty of the contract of employment (*Lemire* 2010 FCA 314) (GD4-3 and 4-4);

b) Conflicting evidence should be resolved by accepting the evidence which is reasonable reliable and credible. If the evidence on each side of the issue is equally balanced, the Commission shall give the benefit of doubt to the claimant (GD4-3);

c) In the case at hand, credibility is granted to the Employer, as it is highly unlikely that a supervisor and member of the union would grant authorization for leave against guidelines in the collective agreement and even more so to an employee who had received warnings and suspensions in the past for poor attendance and unjustified absences (GD4-3);

d) In this case, the Appellant's unjustified absences of April 14 and 15, 2015 constituted misconduct because the Appellant provided a false pretext for his absence (the deceased was not blood-related), despite that he had received warnings and suspensions in the past for unjustified absences (GD4-4);

e) The Appellant submitted that the Employer acted unfairly but the Appellant did not demonstrate that he had been careful or honest with his Employer. After so many years as an employee and especially after being aware of the collective agreement, the Appellant knew or ought to have known his actions could lead in dismissal (GD4-4);

f) The Appellant's actions constituted misconduct within the meaning of the Act because he should have followed the collective agreement and should not have requested permission to have been absent under a false pretext (GD4-4);

ANALYSIS

Defining Misconduct:

"Misconduct" is not defined in the Act. The test for misconduct is whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee willfully disregarded the effects his or her actions would have on job performance (*Tucker* A-381-85) or of a standard that an employer has a right to expect (*Brisette* A-1342-92, [1994] 1 FC 684 ("Brisette")). For conduct to be considered "misconduct" under the Act, it must be so willful or so reckless so as to approach willfulness. (*Mackay-Eden* A-402-96; *Tucker* A-381-85).

[90] The misconduct may manifest itself in a violation of the law, regulation or ethical rule and it should be shown that the impugned conduct constitutes a breach of an express or implied duty or condition included in the contract of employment of such scope that the employee would normally foresee that it would be likely to result in his or her dismissal (*Brisette; Nolet* A-517-91; *Langlois* A-94-95).

[91] It is also required to be established that the misconduct was the cause of the Appellant's dismissal from employment (*Cartier* A-168-00; *Namaro* A-834-82). In fact, the misconduct must be the operative cause for the dismissal and not merely an excuse to justify it (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398; *McNamara* A-239- 06, 2007 FCA 107; CUB 38905; 1997).

[92] In this regard, the Commission must prove on a balance of probabilities that the Appellant lost his or her employment due to his or her misconduct (*Larivee* 2007 FCA 312, *Falardeau* A-396-85).

[93] With respect to the question as to whether or not the termination of the Appellant's employment by the employer was the appropriate sanction, the Commission, the Tribunal and the Court are not in a position to evaluate or review the severity of the sanction. Rather, the sole

question with which the Tribunal must concern itself, is whether or not the impugned conduct amounts to “misconduct” within the meaning of section 30 of the Act (*Secours* A-352-94, [2002] FCJ. 711 (FED CA); *Marion* 2002 FCA 185, A-135-01; *Jolin* 2009 FCA 303; *Roberge* 2009 FCA 336; *Lemire* 2010 FCA 314).

[94] As such, the Tribunal must query whether or not it has been clearly established, on a balance of probabilities that the Appellant violated a rule or law, or a standard which was established by the employer or otherwise amounted to an express of implied condition of his employment (*Tucker* A-381-85).

Findings of Fact:

[95] The Appellant was accused of absence without notice or permission and of lying about his reasons for the absences. The Tribunal finds, that if the impugned conduct occurred, it would amount to a breach of the express or implied duties in the contract of employment of honesty and general respect for the Employer and the expectation of the Employer to have its reasonable instructions followed, including, its vacation and attendance policies, and the duty to respect the work hours, which have been set by the Employer, all of which are included in the contract of employment. The Tribunal finds that the conduct and breach would be of such scope that the Appellant would normally foresee that it would likely result in his dismissal *(Brisette; Caul* 2006 FCA 251; *Nolet* A- 517-91; *Langlois* A-94-95).

[96] There is a consistent body of case law/jurisprudence wherein claimants were found to have committed misconduct on account of their unauthorized absences (*Maher* 2014 CAF 22; *Okafor* A-648-94, affirming CUB 23724 (1993), *Locke* A-799-95; *Parsons* 2005 FCA 248; *Murray* A-245-96; *Mishibinijima* 2007 FCA 96; *Bigler* 2009 FCA 91; *Karelia* 2012 FCA 140; *Bergeron* 2011 FCA 284; CUB 78604(2011), CUB 75794 (2010), CUB 74073A(2010). Unauthorized absences amount to misconduct because they are tantamount to an absolute refusal or failure to perform the services for which an employee is hired. The Tribunal also finds that the refusal to follow the Employer’s vacation or absence scheduling policy also amounts to a form of insubordination (*Bedell* A-1716-83; *Morrow* A-170-98).

[97] The Tribunal finds that the Commission and the Employer have proven that the impugned conduct occurred on a balance of probabilities. The Appellant did not deny the absences recorded by the Employer. The Appellant argued instead that his final absences had been approved.

[98] Given that no one attended the hearing, the Tribunal had to decide the appeal on the basis of the evidence in the file. On the basis of the evidence presented in the file, the Tribunal was unable to find that the absences on April 14 and 15 had been approved by the Employer.

[99] The Tribunal finds that notwithstanding the Appellant's arguments in his written submissions at GD2, in his application for benefits at GD3-2 to 14 and in the Commission's notes at GD3-39, that he contacted the Employer by telephone to advise of his absence on the days when he was not coming into to work and that he then followed up by faxing a handwritten note, no confirmation of the facsimile transmission was provided and the Appellant's written hearsay statements were not sufficiently credible to prove this point on a balance of probabilities.

[100] Furthermore, the reason for the Appellant's final absences was not justified in accordance with the collective agreement. It is also not clear from even the Appellant's own written statements, which he submitted that he had been forthright and honest regarding his relationship with the deceased.

[101] Given that the Appellant's absence was not justified in accordance with the collective agreement and the Appellant's past poor work attendance and disciplinary record (GD2, GD3-20 to 38), the Appellant ought to have known that in the circumstances, he required actual and clear permission for the April absences.

[102] The Appellant's notice to the Employer, if it was at all made, did not amount to a sufficient notice or to a request, which is capable of pre-authorization. It amounted to notice of a unilateral decision, which was being made in contravention of the Employer's policies and procedures and without prior authorization. This is especially the case because the Appellant's absence did not conform to the collective agreement.

[103] The Tribunal also did not find the Appellant's submissions credible. The Tribunal finds that any merit to the Appellant's submissions at GD2-7 that he only initialed or the signed the

documents, which stated that he was late or absent to preserve his employment. This was contradicted completely by his admission that he knew that he would lose his employment if he absented himself once again without authorization.

[104] The Appellant also stated in his application for benefits that there was no other occurrence of absence within the 6 months prior to his dismissal or suspension, when the disciplinary record submitted by the Employer at GD3-20 to 38, shows multiple suspensions and warnings for the unjustified absences and lateness from September 2014 to March 2015.

[105] The Tribunal also queried why the Appellant wrote at GD2-7 that he had to take 2 days off to make final funeral arrangements and "send the body back to India" when the "proof of death" certificate, which the Appellant submitted at GD3-37 shows that the deceased was to be cremated on April 23, 2015.

[106] The Tribunal finds, that through the Employer's more consistent, credible and hearsay evidence in the file (*Morris* A-291-98, leave to appeal to S.C.C. refused [1999] S.C.C.A No. 304; *Mills* A-1873-83), and the Appellant's statements in the file, which were not credible, the Commission has proven on a balance of probabilities that the Appellant breached the implied terms of his contract of employment and the express terms of the collective agreement and disciplinary letters and Employer policies when he did not show up to work on account of a person's death who was not a blood relative and was not a relative who was enumerated in article 18.05 of the collective agreement.

[107] The Appellant's decision frustrated the Employer's ability to carry out its day to day operations. The Appellant had to have known in advance that his final absence would amount to misconduct and result in his dismissal. This had to have been especially clear to the Appellant after he was warned in writing and verbally and after he had been suspended for the substantially the same conduct and was told that a further infraction could result in his dismissal (*Maher* 2014 CAF 22; *Okafor* A-648-94, affirming CUB 23724 (1993), *Locke* A-799-95; *Parsons* 2005 FCA 248; *Murray* A-245-96; *Mishibinijima* 2007 FCA 96; *Bigler* 2009 FCA 91; *Karelia* 2012 FCA 140; *Bergeron* 2011 FCA 284; CUB 78604(2011), CUB 75794 (2010), CUB 74073A(2010), *Lemire,* 2010 FCA 314).

[108] The Tribunal also finds that it has been proven on a balance of probabilities that the misconduct was the operative cause of the dismissal and not merely an excuse to justify it. In this regard, the Tribunal considered carefully the submissions of the Appellant that he was "being picked on" or harassed or discriminated against because of his race or culture or background. Absent more evidence or actual testimony from the Appellant on these points, the Tribunal does not find that the Appellant has proven on a balance of probabilities that any of the complaints regarding his conduct appeared to be based in racism or were made in bad faith (*Bartone* A-369-88; *Davlut* A-241-82, [1983] S.C.C.A 398; *McNamara* A-239-06, 2007 FCA 107; CUB 38905 (1997)).

[109] As such, notwithstanding the Appellant's arguments and the sympathy which he invoked regarding his years of service to the Employer, the Tribunal finds that at the end of the day, the Appellant knew that he was wrong and was acting against the Employer's rules and policy when he took the days off and that this would likely result in his dismissal (*Brisette* A-1342-92; *Mishibinijima* 2007 FCA 36; *Lemire* 2010 FCA 314).

[110] As explained above, the Tribunal is also not empowered to opine on whether the sanction was appropriate in the circumstances and it may only determine whether the conduct can be characterized as misconduct at law (*Secours* A-352-94, [2002] FCJ. 711 (FED CA); *Marion* 2002 FCA 185, A-135-01; *Jolin* 2009 FCA 303; *Roberge* 2009 FCA 336; *Lemire* 2010 FCA 314).

[111] In conclusion, the Tribunal finds that the Appellant's conduct in absenting himself from work when such absences were unauthorized and unjustified and amounted to a breach of the express or implied terms of the Appellant's contract of employment (*Maher* 2014 CAF 22; *Okafor* A-648-94, affirming CUB 23724 (1993), *Locke* A-799-95; *Parsons* 2005 FCA 248; *Murray* A-245-96; *Mishibinijima* 2007 FCA 96; *Bigler* 2009 FCA 91; *Karelia* 2012 FCA 140; *Bergeron* 2011 FCA 284). The conduct was foreseeable because the Appellant knew or ought to have known what was expected of him in the context of his employment and this was especially the case because of the warnings and suspensions, which he had received and because of the collective agreement. With respect to the element of causation, the Tribunal finds that the

conduct caused or contributed or ultimately lead to the dismissal and loss of employment (*Brisette* A-1342-92; *Nolet* A- 517-91; *Langlois* A-94-95).

CONCLUSION

[112] For the foregoing reasons, the appeal is dismissed.

Alyssa Yufe

Member, General Division - Employment Insurance Section