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

[TRANSLATION]

Citation: *D. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 39

Tribunal File Number: GE-13-981

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: December 15, 2015

DATE OF DECISION: March 11, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, D. L., attended the hearing in person in Quebec City, Quebec, on December 15, 2015.

I INTRODUCTION

[2] On June 21, 2013, the Appellant made an initial claim for benefits effective June 16, 2013. The Appellant reported that he had worked for the employer, Service Canada, until June 19, 2013 inclusive, and had stopped working for that employer because of a dismissal or suspension (Exhibits GD3-3 to GD3-16).

[3] On July 22, 2013, the Respondent, the *Canada Employment Insurance Commission* (the "Commission"), notified the Appellant that it could not pay him Employment Insurance benefits starting on June 16, 2013 because he had been suspended from his employment with his employer, Service Canada, since March 1, 2013 by reason of his own misconduct (Exhibits GD3-24 and GD3-25).

[4] On July 23, 2013, the Appellant filed a Request for Reconsideration of an Employment Insurance decision (Exhibits GD3-26 to GD3-28 and GD3-138 to GD3-140).

[5] On September 6, 2013, the Commission notified the Appellant that it was upholding its decision of July 22, 2013 (Exhibit GD3-179).

[6] On September 13, 2013 and September 25, 2013 (second mail out), the Appellant filed a Notice of Appeal to the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the “Tribunal”) (Exhibits GD2-1 to GD2-4 and GD5-1 to GD5-6).

[7] On December 6, 2013, the Tribunal informed the employer, the Department of Human Resources (Service Canada), that if it wished to be included as an Added Party to this case it would have to file the appropriate request no later than December 21, 2013. The employer did not follow-up on the letter.

[8] On March 21, 2014, the Tribunal asked the Appellant to provide his submissions and comments no later than April 28, 2014 concerning a decision to place the appeal file on hold (Exhibits GD6-1 and GD6-2).

[9] On March 26, 2014, the Appellant informed the Tribunal that the proceedings before this authority should be suspended (Exhibits GD7-1 to GD7-3, GD8-1 and GD8-2).

[10] On June 27, 2014, the Tribunal informed the Appellant that it had decided to suspend the case. The Tribunal explained that the Appellant had filed an application that was currently before the Federal Court, and that the outcome might affect the appeal filed by the Appellant with the said Tribunal. The Tribunal stated that the Appellant had forwarded it a complete copy of his file with the current decision.

[11] On January 12, 2016, the Appellant reminded the Tribunal that he was going to submit new documents, as he had mentioned at the December 15, 2015 hearing. The Appellant also asked the Tribunal for a copy of his appeal file. The Tribunal told him that it had sent him the requested documents (Exhibits GD14-1 and GD14-2).

[12] This appeal was conducted by personal appearance for the following reasons:

a) The information in the file, including the need for additional information;

b) This type of hearing meets the requirement of the *Social Security Tribunal Regulations* whereby the Tribunal must conduct proceedings as informally and as expediently as circumstances and the dictates of fairness and natural justice permit (Exhibits GD1-1 to GD1-4).

ISSUE

[13] The Tribunal must determine whether the Appellant lost his employment by reason of his own misconduct, pursuant to sections 29 and 30 of the Act.

THE LAW

[14] The provisions on misconduct are set out in sections 29 and 30 of the Act.

[15] Paragraphs 29(a) and (b) of the Act provide as follows with regard to “disqualification” from receiving employment insurance benefits or “disentitlement” to such benefits:

> […]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 […];

[16] Subsection 30(1) of the Act states the following about “disqualification” by reason of “misconduct” or “leaving without just cause”:

> […] 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.

[17] Subsection 30(2) of the Act states the following about the “length of disqualification”:

> […]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.

[18] With regard to "disentitlement" to Employment Insurance benefits because of a suspension for misconduct, Section 31 of the Act provides:

> A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves the employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

EVIDENCE

[19] The evidence on the record is as follows:

a) On November 29, 2012, the Appellant informed the employer about his situation of the previous three weeks. He said that since early November 2012 until about [translation] " the middle of last week" he had experienced a health-related "relapse" (i.e., inability to concentrate, sleeping problems, increased anxiety, lowered energy levels, fluctuating mood and irritability), (Exhibit GD3-72);

b) On December 20, 2012, the employer asked the Appellant to give his physician a letter (letter and questionnaire – Exhibits GD3-73 and GD3-75 to GD3-78) allowing the physician to confirm his fitness to return to work starting on December 27, 2012, and specifying the need for any temporary or permanent accommodation measures until he met with a specialist (Exhibits GD3-66, GD3-67, GD3-73 and GD3-75 to GD3-78);

c) On December 20, 2012, the Appellant informed the employer that he would be returning to work on December 26, 2012 (Exhibits GD3-66 and GD3-67);

d) On December 21, 2012, the employer explained to the Appellant that his medical certificate said he would be off work until December 23, 2012, but his physician had not said that he could return to work or that his condition was subject to functional limitations requiring specific accommodations. The employer informed the Appellant that he would be able to return to work when his physician provided clear instructions about his health, and authorized him to return to work on a specific date. The employer also said that the certificate (medical) would also have to specify the Appellant's functional limitations, if any, as well as any appropriate accommodation measures (Exhibits GD3-32 to GD3-36 or GD3-68);

e) On December 21, 2012, the Appellant informed the employer that he would not be returning to work [translation] "for medical and preventive reasons until further instructions" (Exhibits GD3- 70 and GD3-71);

f) In a letter to Health Canada on February 25, 2013, the employer requested a "Fitness-to-Work Evaluation" of the Appellant. Copies of medical assessments and relevant correspondence were attached to this mail out (Exhibits GD3-60, GD3-78 and GD3-82 to GD3-87);

g) In a letter dated March 1, 2013 (medical status), the employer informed the Appellant that despite his refusal to cooperate, a Health Canada medical evaluation was necessary and he was obliged to comply. The employer informed the Appellant that it was taking administrative action in his case, namely, sending him home without pay. The Appellant was told that he could return to work only once the employer was able to make decisions concerning his state of health and functional limitations following receipt of the Health Canada report concerning his medical condition (Exhibits GD3-64, GD3-65, GD3-121, GD3-143 and GD3-144);

h) In a letter dated March 8, 2013, the employer (Service Canada) asked the Appellant to provide a consent to disclosure in order to assess his fitness to work (Exhibits GD3-62 and GD3-63, GD3-145 and GD3-146);

i) In a letter dated March 8, 2013, the employer asked Health Canada to conduct a Fitness-to-Work Evaluation of the Appellant. In this letter, the employer said it had appended the following documents:

   i. Medical assessments (Appendix 1) and relevant correspondence (Appendix 2), (Exhibits GD3-74 to GD3-78);

   ii. Work description (Appendix 3). The documents grouped together in a second section entitled, [translation] "Appendix 3 – Work Description," describe the Appellant's position with his employer as a program and service delivery officer (Exhibits GD3-37 to GD3-42);

   iii. Paid and unpaid sick leave used during the period from January 2012 to February 28, 2013 ([translation]"Appendix 4 –paid and unpaid sick leave used since January 2012," (Exhibits GD3-43 and GD3-44);

iv. Mr. D. L.'s performance expectations (Appendix 5). The documents grouped together into a section entitled [translation] "Appendix 5 – Performance expectations for Mr. D. L.," describe the employer's and the Appellant's expectations in relation to his work performance (Exhibits GD3-45 to GD3-51);

v. Medical certificate dated November 21, 2012 (Appendix 6). A copy of the medical certificate ([translation]"Appendix – Medical certificate mentioning exacerbated anxiety from November 5 to 21, 2012") issued by the Clinique médicale Des Promenades de Beauport (Quebec), on November 30, 2012, states that the Appellant experienced heightened anxiety from November 5 to 21, 2010, and presented functional limitations that could have diminished his performance (Exhibits GD3-52 and GD3-53);

vi. Medical certificate from December 6 to 23, 2012 (Appendix 7). A copy of a medical certificate ([translation] "Appendix 7 – Medical certificate indicating sick leave from December 6 to 23, 2012, with no further details," issued by Clinique médicale Des Promenades de Beauport (Quebec), on December 14, 2012, stating that the Appellant is on sick leave from December 6 to 23, 2012 (Exhibits GD3-54 and GD3-55), (Exhibits GD3-88 to GD3-95 and GD3-152 to GD3-160);

j) On March 15, 2013, the Appellant informed the Commission that he was fit and available for work, but had asked that his sick leave be renewed because his employer had forced him to take leave without pay in order to "get treatment." He said that he returned to work in January (2013) with a few remaining medical restrictions. He stated the employer had put him on leave without pay because it no longer wanted to accommodate him by adjusting his duties (Exhibits GD3-56 and GD3-57);

k) In a letter dated March 19, 2013, the employer (Human Resources and Skills Development Canada) informed the Appellant of his options and responsibilities in relation to his benefits and deductions during his period of unpaid leave effective March 1, 2012 (Exhibits GD3-96 to GD3-100);

l) On April 4, 2013, the employer reported sending the Appellant home, without pay, after taking administrative action because he claimed to have restrictions, but such these restrictions were unclear based on his medical certificates. The employer asked the Appellant to undergo a medical assessment by Health Canada, but he refused and did not want Health Canada to contact his physicians. The employer underscored that the Appellant had discussed his health problems, but the information was insufficient (Exhibit GD3-58);

m) On April 8, 2013, the Commission stated that the Appellant had forwarded medical certificates that specified his limitations and a copy of the employer's request to have Health Canada perform an evaluation to determine his work-related limitations (Exhibit GD3-59);

n) Copies of email messages sent back and forth between the Appellant, his union representative and the employer during the period from April 5, 2013 to April 11, 2013, indicate that the Appellant submitted a request to have the employer cease all communication with the Employment Insurance office concerning his application for benefits (Exhibits GD3-108 to GD3-117);

o) On April 11, 2013, the Appellant informed the Commission that he had been suspended on March 1, 2013 for refusing to undergo a Health Canada medical evaluation as his employer requested. He explained that he refused the request because he considered the procedure unfair (Exhibits GD3-118 and GD3-119);

p) On April 12, 2013, the Commission notified the Appellant that it could no longer pay him Employment Insurance benefits commencing on March 3, 2013 because he had been suspended from his employment with Service Canada since March 3, 2013 for misconduct (Exhibits GD15-3 and GD15-4);

q) On April 14, 2013, a message from Service Canada (web page) stated that the Appellant was not entitled to Employment Insurance benefits because he had been suspended from his employment for misconduct (Exhibit GD3-120);

r) On April 14, 15 and 21, 2013, the Appellant asked Service Canada for information concerning the status of his Employment Insurance application (Exhibits GD3-79 to GD3-81 and GD3-122 to GD3-128);

s) On April 29, 2013, the Appellant notified the Commission that his physician considered him fit to return to work, but his employer did not. He said he could not return to work at the present time and applied for regular Employment Insurance benefits. He said he had a functional limitation and would be unable to perform approximately 5% of his former duties. He said he had never truly had a work stoppage, because the decision that he was unfit for work for medical reasons was made by his employer. He said he would like his benefit payments to take effect on March 3, 2013 as "regular benefits" and not "sick leave benefits" (special benefits) because he had never truly been on a work stoppage. He said he was not looking for other work because he already had a job (Exhibits GD3-106 and GD3-107);

t) On May 15, 2013, the employer explained to the Commission that the Appellant had been sent home following administrative action because he refused to comply with the employer's request that he sign a consent form authorizing a Health Canada evaluation. The employer specified that this action had nothing to do with the harassment complaint filed by the Appellant against his team leader and manager. He said that the Appellant had refused to perform some of the duties included in his regular workload for several months (Exhibits GD3-101 and GD3-102);

u) On May 15, 2013, the employer said it had taken "administrative action without pay" against the Appellant, but not disciplinary action. The employer said that it required a Health Canada medical evaluation but the Appellant had refused to comply. The employer said that the Appellant had two options: to see his physician again with an explanation of his situation or to contact Health Canada for the evaluation (Exhibit GD3-105);

v) On May 24, 2013, the Appellant said that from 5% to 10% of his duties placed him in a dilemma and caused him anxiety (anxiety and ethical dilemma). He said he was ready to comply with his employer's request and hand in the requested documents subject to the

two following conditions: that Health Canada contact his attending physicians and that the employer protect his record and personal information (Exhibits GD3-103 and GD3-104);

w) In a letter dated June 3, 2013, Service Canada (employer) notified the Appellant that it (employer) had informed the Appellant that it considered him fit to perform all of the duties included in his work description as of that day, including all types of options, for which he had been trained. The employer told the Appellant that he would return to the same position in the same field of activity as before his departure on March 1, 2013 (Exhibits GD3-17 to GD3-19);

x) On June 6, 2013, the Commission informed the Appellant that the decision in his case on April 12, 2013 had been overturned in his favour (Exhibits GD15-5 and GD15-6);

y) In a letter dated June 19, 2013, Service Canada (employer) notified the Appellant that it considered a Health Canada medical evaluation necessary, and that he would have to comply. If he refused to cooperate with such medical evaluation, he could face administrative action. The employer told the Appellant that starting on June 19, 2013 and during the fitness-to-work evaluation process, he would no longer be allowed access to the computer systems or the building in which his office was located. The employer told the Appellant that he would not be able to return to work until decisions could be made concerning his state of health after receiving the Health Canada report on his medical condition (Exhibits GD3-20 and GD3-21);

z) A record of employment dated June 26, 2013 indicates that the Appellant worked in a "clerical and regulatory" position for the Department of Human Resources and Skills Development Canada (Service Canada), from June 6, 2013 to June 26, 2013 inclusive, and that he stopped working for this employer due to illness or injury (Code D – illness or injury), (Exhibits GD3-22 and GD3-23);

aa) The Appellant completed and signed a copy of an occupational health evaluation procedure (including fitness to work) – consent to a fitness-to-work evaluation form dated July 10, 2013. The Appellant said that the Health Canada Public Service Health

Program physician had to take the necessary time to assess him, and contact three health professionals identified by the said Appellant (Exhibit GD3-133);

bb) Emails were sent back and forth between the Appellant, his union representative and the employer between July 3, 2013 and July 19, 2013, concerning follow-up to the Health Canada fitness-to-work evaluation procedure (Exhibits GD3-134 to GD3-137);

cc) On July 10, 2013, the employer informed the Appellant that its letter to him on June 19, 2013 mentions that starting immediately and until the fitness-to-work evaluation procedure required of him ended, he was not authorized to return to work. The employer informed the Appellant that although his medical appointment with his psychiatrist had been postponed until July 26, 2013, it would not require a new medical certificate for the period between July 10, 2013 (date of his initial appointment with the psychiatrist and July 26, 2013 (Exhibits GD3-129 and GD3-130);

dd) On July 12, 2013, the Appellant informed the employer that the Health Canada Public Service Health Program had received his fitness-to-work evaluation consent forms (Exhibits GD3-129 to GD3-131);

ee) On July 18, 2013, the employer (sic) (Health Canada [Service Canada]) asked the Appellant to sign and return the consent forms for his fitness-to-work evaluation no later than July 19, 2013 (Exhibit GD3-132);

ff) On July 25, 2013, the Appellant said he was unable to work for medical reasons, on June 12, 13 and 14, but he was fit to work for his employer starting on June 17, 2013 in a different position. He said he had met with his physician who would provide another medical certificate stating that he was able to work but not in his current position (Exhibits GD3-31 and GD3-142);

gg) On July 26, 2013, the Appellant informed the Commission that he would be submitting another medical certificate stating that he is fit to work provided he is assigned to different duties (Exhibits GD3-30 and GD3-141);

hh) A medical certificate, issued by Dr. Fabbro, psychiatrist (Clinique médicale Giffard), on July 26, 2013, states that the Appellant was not fit to work for an unspecified period of time (Exhibit GD3-29);

ii) On August 8, 2013, the employer (Service Canada) notified the Appellant that it was dismissing him for disciplinary reasons (Exhibits GD3-161 to GD3-168);

jj) On September 3, 2013, the Appellant asked the employer to provide details of its allegations and support them based on the list of any evidence in its possession (Exhibits GD3-169 to GD3-178);

kk) On February 10, 2016, the Appellant forwarded a copy of the following documents:

i. Letter from the Commission, dated April 12, 2013, notifying the Appellant that it could not pay him Employment Insurance benefits, commencing March 3, 2013 because he had been suspended from his employment with Service Canada since March 3, 2013, by reason of misconduct (Exhibits GD15-3 and GD15-4);

ii. Letter from the Commission (reconsideration review decision) to the Appellant, dated June 6, 2013, stating that the decision in his case on April 12, (sic) 2103 (2013) had been overturned in his favour (Exhibits GD15-5 and GD15-6);

iii. Emails from Guylaine Bourbeau, grievance and arbitration officer, and Wesnaey Duclervil, regional representative of the Public Service Alliance of Canada (PSAC – Quebec), to the Appellant, dated March 31, 2014, stating the terms and conditions of the hearing before the *Commission des lésions professionnelles* (CLP) concerning his psychological harassment case. These messages indicate that Dr. Édouard Beltrami, psychiatrist, had prepared a medical report concerning the Appellant (Exhibits GD15-7 to GD15-9);

iv. The medical report by Dr. Beltrami, psychiatrist, concerning the Appellant is dated March 11, 2014. It mentions a causal tie between events that took place while he was performing his duties at work and the re-emergence of a previously existing depressive mood adjustment disorder (Exhibits GD15-10 to GD15-34).

[20] The following evidence was presented at the hearing:

a) He stated that he had been psychologically harassed in his workplace while he was employed by Service Canada, and that this situation had caused his psychological problems. He said that these problems had been confirmed by physicians (ex. family physician and psychiatrist) and by a psychologist;

b) The Appellant explained that he had first turned to the informal conflict management system existing at his place of employment to foster a discussion with his supervisor and manager, and to address the atmosphere at work, but his request was denied. He said that he then filed complaints in November 2012 and early 2013 for workplace violence under the Canada Labour Code. The Appellant said that the purpose of these complaints was to end the various forms of violence he confronted in his work place (mental harassment). He said that after filing these complaints, an investigator was appointed and the relevant preliminary report was completed concerning two of the people named in his complaints: his manager and his supervisor. The Appellant said that the preliminary report did not reach a conclusion. He explained that the investigation process was then put on hold for a time after his dismissal in August 2013. However, the Appellant said that no final report was completed in any of these cases, and that a grievance settlement procedure had been instituted. He contended that he had been psychologically harassed, although the investigator had not reached a decision on the matter;

c) The Appellant explained that the psychological harassment he experienced in his workplace affected him negatively and caused the breakdown he experienced. He explained that his mental state in 2013 until the time of his dismissal in August 2013, was affected by the psychological harassment he confronted in the workplace and its attendant consequences. The Appellant said that he had a workplace adjustment disorder, depressed mood for fleeting or extended periods and generalized anxiety (exacerbated heightened), all of which altered his judgement. He said that when he wrote his comments concerning his Employment Insurance benefit application, he was unaware of the full extent of what he was going through in his employer’s workplace

and that it took several months for him to return to normal, after working at locations where he could see first-hand what a healthy workplace was like;

d) He explained that in the spring and summer of 2013, prior to his dismissal, his reactions were not normal. He said that symptoms and their consequences are easier to describe in the case of a head cold, for example, than a depression (ex.: heightened anxiety, anxiety disorder). The Appellant said that the medical certificates completed by the physicians he consulted and the answers by health professionals to the employer's questionnaires attest to the health problems he was confronting (Exhibits GD3-53 to GD3-55 and GD15-10 to GD15-34);

e) The Appellant said that the medical report completed by his psychiatrist (Dr. Beltrami) indicated that his workplace adjustment disorder related to the situation at work with his manager and supervisor and the duties imposed on him (Exhibits GD15-10 to GD15-34). He underscored that the adjustment disorder (situational workplace adjustment disorder) was his major problem. The Appellant explained that in the summer of 2013, his state of mind prevented him from thinking normally and led him to make mistakes or errors in judgement. He said that he was essentially a man of principle determined to protect his rights. The Appellant said that when he was placed in stressful situations, he would cling all the more to the essence of his personality. The Appellant stated that given his adjustment disorder and anxiety, or depression, he was sometimes less flexible, which occasionally made it more difficult for him to make the right decisions, leading him into situations where he may have committed certain missteps;

f) He argued that his mental state was basically the result of the employer's actions (ex., his manager and supervisor). He argued that the psychological harassment he experienced led to his adjustment disorder. He explained that at this point, he dug in his heels. He said he received a flood of medical evaluation requests, resulting in stress that only worsened his psychological situation. He explained that the vicious circle continued to worsen, fuelled by the employer;

g) He said he did not go and see Health Canada, but tried to cooperate with his employer on this matter repeatedly. The employer, however, was never satisfied because it wanted a different response. The Appellant said that in about December 2012 or early 2013, the employer started sending him letters containing questions for his family physician, to find out what he was going through. He said that after that (from March to May 2013), he received official requests to go to Health Canada. The Appellant disagrees with the employer's statement that he refused the request to meet with Health Canada physicians eight times (Exhibit GD3-161). He said he reached an agreement with his employer that he would go and see his family physician, which was initially accepted. According to the Appellant, the employer did not refuse to allow him to see his family physician in response to its request until about the summer of 2013, when it insisted he see Health Canada physicians instead. He underscored that he had reached agreements with his employer concerning the initial requests made to him in this matter. The Appellant said he met with his family physician, his psychiatrist and his psychologist. He said that these health professionals had each completed two reports, explaining what he was going through and describing the accommodation measures he required at work. According to the Appellant, what the employer wanted to hear was that he had no psychological problems at all and required no accommodation. He argued that every time the employer asked more questions, he provided confirmation that the problems he was experiencing required accommodation. The Appellant contended that his family physician, psychiatrist and psychologist had already determined the nature of his functional limitations, but the employer was still not satisfied. He explained that he had shown flexibility, in the summer of 2013, when the employer asked him to meet with Health Canada representatives. The Appellant stated that Health Canada did not have to see him in person to make its recommendations. He argued that the Health Canada evaluating physician could rely entirely on information provided by the employer. The Appellant said that the employer had sent Health Canada a letter "filled with nonsense" about him;

h) The Appellant explained that given his problem, he had shown unusual psychological rigidness and was thus unable to exercise sound judgement. He said that the doctor

had diagnosed him and established his functional limitations. The Appellant explained that his medical condition had caused him to react negatively to the employer's request that he meet with Health Canada physicians because his state of mind was "not normal." He said that he did not understand the reason for the employer's request. The Appellant said he viewed the request as an attack and abuse of process by the employer since it already had all of the information it needed about him;

i) Today, he has no problem with the idea that the employer would want an opinion, or the thought of going to see Health Canada, but he still believes that employer did not make its request at the time in the right way. The Appellant explained that the employer had asked Health Canada for an opinion about him. However, he said that Health Canada did not want to commit to meet with him before issuing an opinion. The Appellant explained that he was willing to consent to a Health Canada evaluation, but only if Health Canada would agree to see him or speak with him to gather his version of the facts, or take account of documents that he submitted to it. He said that the employer was unwilling to accept this condition. He mentioned that the union representing him went to see Health Canada in early August 2013. He explained that the purpose of the meeting was to request an extension in order to study the terms and conditions of the Health Canada procedure, but it was too late, since the employer already had him in its sights. He explained that a procedure was about to begin but that he was dismissed first. He contended that nothing in the Health Canada process suggested to he would be able to have a hearing;

j) The Appellant clarified that the last medical evidence he provided to the employer dated back to July 2013 (appointment with Dr. Fabbro on July 26, 2013). This document indicates that the Appellant was unfit to work until an unspecified date (Exhibit GD3-29);

k) The Appellant said that he would send the Tribunal medical documents indicating that his dismissal had resulted in whole or in part from a problem he was experiencing at the time of his dismissal and in the months leading up to it (Exhibits GD15- 10 to GD15-34).

PARTIES' ARGUMENTS

[21] The Appellant made the following submissions and arguments:

a) He affirmed that the psychological situation existing prior to his dismissal was a factor that the Commission overlooked in reaching its decision. He said that the Commission was unwilling to analyze the psychological harassment matter, even though he had tried to make it understand his mental state prior to his dismissal. He said that his mental state was characterized by an adjustment disorder. According to the Appellant, the Commission did not consider his problem at the time of his dismissal, and should have used it as a marker. He argued that he did not lose her employment because of his misconduct;

b) The Appellant argued that a person cannot be penalized for a mental problem. The Appellant said this matter is governed by the Canadian Charter of Rights and Freedoms (Charter). He stated that such an issue must receive consideration in applying the *Employment Insurance Act* and the notion of misconduct, in order to determine whether or not misconduct occurred. He argued that any misconduct he committed resulted from a deficiency, and that such deficiency to some extent excuses the alleged misconduct;

c) He pointed out that the terms used to apply the *Employment Insurance Act* must comply with the Charter of Rights and Freedoms, specifically with respect to equality rights. He argued that the concept of misconduct is defined in more detail in the jurisprudence and not by the Act itself (***M. G. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 133**), (Exhibits GD13-40 to GD13-59);

d) He said that guidance was missing with respect to the concept of misconduct in relation to the Charter of Rights and Freedoms. The Appellant said he did not find guidance in the case law where misconduct was linked to a deficiency. He argued that a person should not be penalized if misconduct results from a deficiency, such as the psychological deficiency in his case;

e) The Appellant pointed out that recent Court decisions (the Federal Court, Federal Court of Appeal) on workplace violence show a recent ground swell of support for giving more consideration not only to physical violence, but also psychological violence (psychological harassment), when interpreting labour law (***Public Service alliance of Canada,* 2014 CF 1066** and ***Public Service Alliance of Canada,* 2015 FCA 273**), (Exhibits GD13-1 to GD13-39);

f) He contended that the concept of psychological harassment must truly be considered when interpreting the *Employment Insurance Act*, particularly with respect to the concept of misconduct;

g) The Appellant pointed out, in connection with the harmful effects of the psychological harassment he experienced in his workplace, that various studies show and disseminate in plain language the consequences of psychological harassment (ex.: adjustment disorder, etc.), (Anne-Marie Laflamme, *La protection de la santé mentale au travail : Le nécessaire passage d'un régime fondé sur la réparation des atteintes vers un régime de gestion préventive des risques psychosociaux (tome I)*, (excerpts), thesis submitted to the Faculty of Graduate Studies at the Université Laval under a doctor of law program leading to a doctoral degree in law (LL. D.), Faculty of Law, Université Laval, Quebec City, 2008 (Exhibits GD13-60 to GD13-92), Jennifer Nadeau, *Le psychological harassment en milieu de travail : l'accès difficile à l'indemnisation* (excerpts), brief, Master of Law, Université Laval, Quebec City, 2014 (Exhibits GD13-93 to GD13-120), Lucie France Dagenais Ph. D. in collaboration with France Boily (Commission des droits de la personne et des droits de la jeunesse, research and planning branch), (excerpts), *Études sur la dimension psychologique dans les plaintes de harcèlement au travail – Rapport de recherche sur les plaintes résolues par la Commission des droits de la personne et de la jeunesse*, December 2000 (Exhibits GD13-121 to GD13-150). He said that the harassment he endured had caused him physical effects;

h) He explained that the Commission reached a decision in his case on April 12, 2013, stating that he was not entitled to benefits because he had been suspended since March

3, 2013 by reason of his own misconduct (Exhibits GD15-3 and GD15-4). The Appellant argued that this decision had later been reconsidered in his favour on June 6, 2013 (Exhibits GD15-5 and GD15-6), even though he had received a letter of suspension from his employer on March 1, 2013 for refusing to go see Health Canada (Exhibits GD15-3 to GD15-6);

i) The Appellant argued that his suspension was not the outcome of any misconduct on his part. He said that certain basic principles of justice had been flouted: administrative consistency and insufficient reasons for the decision (Exhibit GD2-2).

[22] The Commission made the following observations and submissions:

a) It explained that, for the alleged act to constitute misconduct within the meaning of subsection 30(1) of the Act, it must be wilful or deliberate or reckless enough to approach wilfulness. It stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-4);

b) It argued that the Appellant was suspended from his duties because he refused to sign the consent forms needed for a Health Canada medical evaluation report, as requested by his employer. The Commission underscored that the employer had explained that the Appellant had cited his medical conditions several times to ensure that steps were taken to assist him at work. It mentioned that the Appellant had provided several medical certificates, but still refused to cooperate with the Health Canada fitness-to-work evaluation. The Commission explained that the employer had indicated that the information in the medical documents submitted by the Appellant did not support his statement concerning the portion of his duties that he refused to perform. It said that the employer therefore sought a Health Canada evaluation so that it could take the necessary steps to assist the Appellant. The Commission determined that the Appellant had refused to comply with the employer's request on the ground that the process was unfair, because he was not given assurance that the Health Canada physician would contact his attending physician before answering the employer's questionnaire (Exhibit GD4-4);

c) The Commission argued that the employer's request was reasonable and was intended to help the Appellant with his work. According to the Commission, the Appellant and the employer clearly had a troubled work relationship. However, it pointed out that the issue concerns the Appellant's capacity and functional limitation in performing his regular duties. The Commission determined that the Appellant was unjustified in refusing to comply with the employer's request, and that his refusal to cooperate without good cause constitutes misconduct (Exhibit GD4-4);

d) It contended that the Appellant's actions constituted misconduct pursuant to subsection 30(1) of the Act, given that he refused to perform all of his assigned duties or undergo a medical evaluation to support his refusal (Exhibit GD4-4);

e) Therefore, the Commission determined that the Appellant was not entitled to Employment Insurance benefits starting on June 16, 2013 since a disentitlement had been imposed on him on the same date (Exhibits GD3-24 and GD3-25). It then stated that the Appellant had been dismissed from his employment on August 8, 2013; the suspension had been cancelled and replaced with a dismissal (Exhibits GD3-24, GD3-25, GD4-3 and GD4-5).

ANALYSIS

[23] Although the Act does not define the term "misconduct", the case law, in ***Tucker* (A-381-85)**, indicates the following:

> [I]n order to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance.

[24] In the same decision (***Tucker,* A-381-85**), the Federal Court of Appeal (the « Court ») recalled the remarks by Reed, J. that:

> […]Dishonesty aside, the courts seem to be prepared to accept that employees are human; they may-get ill and be unable to fulfill their obligations and they may make mistakes under pressure or through inexperience […]Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of

> behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent […].

[25] In ***Mishibinijima* (2007 FCA 36)**, the Court provided the following reminder:

> Thus, there will be misconduct where the conduct of a claimant was wilful, 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.

[26] In ***McKay-Eden* (A-402-96)**, the Court provided the following clarification: "In our view, for conduct to be considered "misconduct" under the Unemployment Insurance Act, it must be wilful or so reckless as to approach wilfulness."

[27] In ***Jewell* (A-236-94)**, the Court found:

> The jurisprudence of this Court as to what constitutes misconduct is set out in ***Canada v. Bedell***, (1985) 60 N.R. 116 (F.C.A.), [***Canada (Attorney General) v. Tucker***, [19860 2 F.C. 329] ***Canada v. Brissette***, [1994] 1 F.C. 684. Collectively these cases stand for the proposition that if the necessary mental element is absent the conduct complained of will not be characterized as misconduct within the contemplation of section 28 of the Act.

[28] The Court has 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 his or her conduct was such that it would result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged misconduct and the loss of employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (***Lemire*, 2010 FCA 314**).

[29] The decisions in ***Cartier* (A-168-00)** and ***MacDonald* (A-152-96)** confirm the principle established in ***Namaro* (A-834-82)** that it must also be established that the misconduct was the cause of the claimant's dismissal.

[30] The Court has reaffirmed the principle that the onus lies on the employer or the Commission to establish that the loss of employment by the claimant resulted from the claimant's own misconduct (***Lepretre*, 2011 FCA 30, Granstrom, 2003 FCA 485**).

[31] In ***Murray* (2013 FC 49)**, the Court listed the relevant criteria to apply in order to admit evidence after the close of a hearing in the following terms:

> [...] to quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006.

[32] In that decision (***Murray*, 2013 FC 49**), the Court set out, in the following terms, the components of the test to be applied to receive evidence adduced after the completion of the hearing:

> [...] The parties agreed that the three-part test summarized in Whyte v Canadian National Railway, 2010 CHRT 6 [Whyte], which followed that used in Vermette v Canadian Broadcasting Corporation, [1994] CHRD 14, should be used. The test is the following: 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial; 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[33] In this regard, the Tribunal accepts, in its analysis, the evidence adduced by the Appellant on February 10, 2016 after the hearing held December 15, 2015 (Exhibits GD15-1 to GD15-34), because these documents have a decisive impact in this case and contain information likely to influence the Tribunal's decision (***Murray*, 2013 FC 49**).

[34] This new information essentially confirms the causal tie between the events that occurred in the course of the Appellant's employment and the signs of an adjustment disorder mentioned by the Appellant at the hearing (Exhibits GD15-10 to GD15-34).

[35] For the alleged act 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. There must also be a causal link between the misconduct and the dismissal.

[36] Determining whether an employee's misconduct that results in the loss of that person's employment constitutes misconduct is a question of fact to be decided based on the circumstances of each case.

[37] Herein, the actions alleged against the Appellant, namely, that he repeatedly refused to undergo a Health Canada fitness-to-work evaluation at the official request of his employer does not constitute misconduct within the meaning of the Act.

[38] In the letter of dismissal sent to the Appellant on August 8, 2013, the employer gave him the following explanation:

> [translation] Between March and May 2013, the employer asked you 8 times to participate in a Health Canada evaluation, but you declined all of these requests. In response to these refusals, management suggested an alternative: that you have the fitness-to-work questionnaire filled out by your health professionals. […] management asked you to agree to the disclosure of medical information and to undergo a fitness-to-work (FTW) evaluation by Health Canada. Although you completed the forms as requested, you took the liberty of adding new conditions to the FTW form, rendering it invalid in the opinion of Health Canada, which could not perform an evaluation until the proper consent was provided. […] you refused once again to comply with this request, explaining the changes you made to the FTW consent form in an email sent to management. This refusal to comply with instructions given by Health Canada and management is also considered insubordination. […] you are hereby dismissed for disciplinary reasons and the decision takes effect immediately" (Exhibits GD3- 161 to GD3-164).

[39] The employer also states the following reasons in this letter to explain the Appellant's dismissal:

a) Acts of insubordination: unauthorized absences from the workplace; non-compliance with the employer's instructions by failing to submit a work schedule in accordance with the specified instructions; non-compliance with the employer's instructions by reporting with a union representative assistant, without prior authorization, to a meeting with the manager of his service and his team leader;

b) Acts of misconduct: unauthorized attempt to record a conversation with his team leader (Exhibits GD3-161 to GD3-168).

[40] Based on statements made by the employer and the letter of dismissal that it sent to the Appellant, the fact that the Appellant refused to cooperate with the fitness-to-work evaluation clearly seems to be the cause of his dismissal.

Non-deliberate nature of acts complained of

[41] Taking into account the specific context in which the acts alleged against the Appellant occurred, namely, his repeated refusal to take the Health Canada fitness for work evaluation, the Tribunal finds such acts were not deliberate or intentional (***Mishibinijima*, 2007 FCA 36, *McKay-Eden*, A-402-96, *Tucker*, A-381-85**).

[42] The Appellant does not dispute the facts surrounding the request for a fitness-to-work evaluation. He admitted that he had repeatedly refused his employer's request to undergo such an evaluation by Health Canada.

[43] The Tribunal finds that the Appellant's credible testimony during the hearing yielded a comprehensive and highly detailed picture of the events leading to his dismissal. The Appellant's testimony was detailed and free of contradictions. His testimony put the actions alleged against him and that led to his dismissal into context.

[44] Although possibly wrongful, the actions alleged against the Appellant do not entail the psychological element required to establish an association with misconduct within the meaning of the Act (***Jewell*, A-236-94, *McKay-Eden*, A-402-96, *Tucker*, A-381-85**).

[45] In the Tribunal's opinion, the acts alleged against the Appellant relate to his psychological condition in the spring or summer of 2013, before he was suspended again on June 19, 2013, and then dismissed on August 8, 2013.

[46] The Appellant explained how his adjustment disorder and the psychological deficiencies he exhibited had led him to refuse his employer's repeated requests to undergo a fitness-to-work evaluation by Health Canada.

[47] At the hearing, the Appellant also underscored that in the spring and fall of 2013, his state of mind was "not normal." He said that this situation had prevented him from being able to

think in his usual way, or make sound decisions, and that he may therefore have made mistakes or erred in his judgement.

Medical evidence

[48] The Appellant explained that the medical certificates completed by the physicians he saw (ex., doctor, psychiatrists) and the responses by his health professionals to the questionnaires sent to the employer attest to his adjustment disorder and psychological deficiency (ex., exacerbated anxiety and depression).

[49] The Tribunal considers that the medical evidence submitted by the Appellant sheds light on his psychological state (medical condition) in the months leading up to his dismissal.

[50] In the Tribunal's opinion, the medical evidence submitted shows that the psychological factor required to associate the Appellant's behaviour with misconduct is absent from the case at bar (***Jewell*, A-236-94, *McKay-Eden*, A-402-96, *Tucker*, A-381- 85**).

[51] The report concerning the Appellant by Dr. Édouard Beltrami, psychiatrist, on March 11, 2014 reaches the following conclusion: [translation] "A causal tie exists between the events that occurred in the course of his duties at work and the re-emergence of a previously existing adjustment disorder with depressive mood" (Exhibit GD15-33 and GD15-34).

[52] A medical certificate written on July 26, 2013 by Dr. Fabbro, psychiatrist at the Clinique médicale Giffard, indicates that the Appellant would be unable to resume his duties for an unspecified period of time (Exhibit GD3-29).

[53] The Tribunal underscores that this document was completed less than two weeks before the Appellant was dismissed on August 8, 2013 (Exhibits GD3-29 and GD3-161 to GD3-164).

[54] The evidence in the record also indicates that the Appellant had previously stopped working for medical reasons during the period from December 6 to 23, 2012 (Exhibits GD3-54 and GD3-55).

[55] A medical certificate from the Clinique médicale Des Promenades de Beauport (Quebec), dated November 30, 2012, also mentions that the Appellant's anxiety was heightened from November 5 to 21, 2012, and that during this period, he presented functional limitations that might have detracted from his performance (Exhibits GD3-52 and GD3-53).

[56] Given his state of mind when he refused his employer's requests, the Tribunal believes that the Appellant may have "made mistakes" under stress that cost him his job, without necessarily committing misconduct within the meaning of the Act (***Tucker,* A-381-85**).

[57] In these circumstances, the Tribunal considers that the Appellant did not willfully or wantonly disregard the employer's interests or show wrongful intent (***Tucker,* A-381- 85**).

[58] However, the Tribunal cannot support the Appellant's analysis that the psychological harassment he experienced in the workplace caused his adjustment disorder and the psychological deficiencies he exhibited.

[59] Based on the medical evidence submitted by the Appellant, the Tribunal considers that the issue he raises concerning psychological harassment is immaterial herein. The Tribunal considers the medical evidence sufficiently explicit to illustrate the Appellant's psychological state several months prior to his dismissal (Exhibits GD3-29, GD3-52 to GD3-55, GD15-32 and GD15-33).

[60] In the Tribunal's opinion, there is no need to establish the possible source or more immediate causes of the adjustment disorder described by the Appellant or his psychological problems.

[61] The Tribunal considers that the Appellant clearly showed the fact that the Commission's analysis disregarded his psychological state before he was dismissed.

[62] The Tribunal also considers the arguments submitted by the Commission puzzling, given that, on June 6, 2013, it reversed its decision in the Appellant's favour after the employer had suspended him in March 2013 for reasons similar to the reason that led to another

suspension on June 19, 2013 and to his dismissal on August 8, 2013 (Exhibits GD15-5 and GD15-6).

[63] With this in mind, the Tribunal rejects the Commission's argument that the Appellant [translation] "was unjustified in refusing to comply with the employer's request, and that his refusal to cooperate without good cause constitutes misconduct" (Exhibit GD4-4).

[64] The Tribunal underscores that the same reason applied when the Commission gave its reconsideration on June 6, 2013, which rendered the Appellant eligible for benefits (Exhibits GD15-3 to GD15-6). The Tribunal believes that the Commission could have shown greater consistency in its position in order to allow the Appellant's entitlement to benefits.

Other reasons given by the employer

[65] In a letter of dismissal sent to the Appellant, the employer mentioned behaviour that it described as "acts of insubordination" and "acts of misconduct" by the Appellant (Exhibits GD3-161 to GD3-168).

[66] The "acts of insubordination" refer to the following: unauthorized absences from work; non-compliance with the employer's instructions by failing to submit a work schedule in accordance with the specified instruction; and non-compliance with the employer's instructions by attending a meeting with his service manager and team leader in the company of a union representative, without prior authorization.

[67] The "act of misconduct" mentioned by the employer concerns the attempt to record a conversation with his team leader without permission (Exhibits GD3-161 to GD3-168).

[68] The Tribunal considers that the evidence gathered from the employer does not establish how such acts might constitute misconduct within the meaning of the Act.

[69] In the Tribunal's opinion, these actions fit within the broader context of the Appellant's mental state in the period preceding his dismissal.

[70] Moreover, the Commission did not provide arguments on these facts. Its arguments essentially concern the fact that the Appellant refused to cooperate with the fitness-to-work evaluation requested by the employer.

[71] The Tribunal finds that the acts alleged against the Appellant were not of such scope that he could have normally expected them to lead to his dismissal. The Appellant could not know that his conduct was such as to impair the performance of the duties owed to his employer and that there was a real possibility he would be dismissed (***Tucker,* A-381-85*, Mishibinijima,* 2007 FCA 36**).

Evidence obtained by the Commission

[72] The Tribunal would draw attention to the fact that in cases of misconduct, the onus of proof is on the Commission or the employer, as the case may be (***Lepretre,* 2011 FCA 30*, Granstrom*, 2003 FCA 485**).

[73] In the Tribunal's view, the Commission did not discharge its onus of proof in this regard (***Lepretre,* 2011 FCA 30*, Granstrom*, 2003 FCA 485**).

Reason for dismissal

[74] The Tribunal considers that the evidence presented shows that the Appellant was not dismissed for wilful and deliberate acts (***Tucker,* A-381-85*, McKay-Eden,* A-402-96*, Mishibinijima,* 2007 FCA 36**).

[75] In the Tribunal's opinion, the alleged acts do not constitute misconduct within the meaning of the Act (***Tucker,* A-381-85*, McKay-Eden,* A-402-96*, Mishibinijima,* 2007 FCA 36**).

[76] Based on the case law referred to earlier and the evidence presented, the Tribunal finds that the Appellant did not lose his employment because of misconduct, as described in sections 29 and 30 of the Act (***Namaro,* A-834-82*, MacDonald,* A-152-96*, Cartier,* A-168-00**).

[77] The Tribunal finds that the appeal on this issue has merit.

CONCLUSION

[78] The appeal is allowed.

Normand Morin
Member, General Division - Employment Insurance Section