



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *F. A. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 146

Tribunal File Number: GE-15-2455

BETWEEN:

**F. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**Tricon Design Inc.**

Added Party

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

---

DECISION BY: Eleni Palantzas

HEARD ON: August 11, 2016

DATE OF DECISION: November 23, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

The Claimant, Mr. F. A. along with his parents, Mr. E. A. who acted as a witness and Mrs. A. A. who acted as an observer.

The Added Party, Tricon Design Inc. (Employer) was represented by Mrs. K. S., Administration, Manager, Human Resources. The owner, P. S. is her spouse.

Both parties attended by videoconference.

### **INTRODUCTION**

[1] The Claimant applied for regular benefits on March 6, 2015 after having been terminated by his employer due to misconduct on February 26, 2015.

[2] On May 12, 2015, the Canada Employment Insurance Commission (Commission) concluded that the Claimant lost his employment due to his own misconduct and imposed an indefinite disqualification. On May 19, 2015, the Claimant requested that the Commission reconsider its decision however; on July 8, 2015, the Commission upheld its decision.

[3] On November 6, 2016, the Claimant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). The Claimant's appeal was not considered to be late (GD5 and the Member added the Employer as a party (GD6)).

[4] The hearing was held by videoconference for the following reasons:

- a) The fact that the credibility may be a prevailing issue.
- b) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

### **ISSUE**

[5] The Member must decide whether the Claimant lost his employment due to his own misconduct and whether as a result, an indefinite disqualification to benefits should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

## **EVIDENCE**

[6] The Claimant applied for employment insurance regular benefits on March 6, 2015 after having been dismissed from his employment on February 26, 2015. The Claimant indicated on his application that he was dismissed when he went to his employer to politely speak to him about the reduction in his hourly rate. He was asked to leave the premises without doing anything wrong (GD3-3 to GD3-17).

[7] The Record of Employment (ROE) indicates that the Claimant was dismissed due to misconduct on February 26, 2015 (GD3-18).

[8] The Commission spoke with the Human Resources (HR) representative at the Employer on 4 occasions. The Employer representative advised the Commission that the Claimant was dismissed for two reasons. First, they had issues with the Claimant's poor production for quite some time. The Claimant and his father were dismissed for the same reason. Their production level was so low by piece work that they changed their pay structure to an hourly rate so that they can earn a minimum wage. This was discussed with them and they were advised that their wages would be reduced if there was no improvement. They were warned about their poor attitude and temper in the past. Secondly, they were terminated because of the final incident when the Employer finally reduced their hourly rate and they got upset, screamed and yelled loudly with their arms crossed at their supervisor (J. H.). She felt intimidated and threatened. She's 5 feet tall and the Claimant is over 6 feet tall. They wouldn't leave so the Employer called the RCMP to escort them off of their premises. The Employer does not tolerate violence in the workplace (GD3-19, GD3-21 to GD3-23).

### Documentary Evidence from the Employer

[9] A written statement (undated) signed by the owner, supervisor and HR/payroll representative, indicates that the reason for termination was initially poor production by both the Claimant and his father that did not improve despite several warnings. Their salaries were therefore reduced. In the Claimant's case it was reduced from \$19/hour to \$17/hour. They refused to accept their first reduced pay cheques and did not address the issue with the owner as advised. When the supervisor attempted to give them their prior and next pay cheques, they got very angry and became verbally abusive to her and left the building. Upon return for their next

shift, the owner and supervisor advised them of their dismissal. They got very angry and because they refused to leave, the police were called to escort them off the premises (GD3-20).

[10] In her written statement, the supervisor, J. H., indicates that the Claimant and his father were not motivate and could not work unsupervised as they had to be constantly retrained. They responded with elevated voices and were verbally confrontational. She could not babysit two grown men who were verbally abusive to her. She therefore went the owner, who agreed, that they must be dismissed. They were dismissed for poor production and for being verbally abusive and abrasive about the situation (GD3-25).

[11] The Employer's Violence, Discrimination and Harassment Policy stipulates a zero tolerance to violence, harassment and discrimination in the workplace. Violation of the policy will be subject to discipline and could result in termination (GD3-26 to GD3-30).

[12] On May 12, 2015, the Commission advised the Claimant that it has imposed an indefinite disqualification to regular benefits as of March 1, 2015 because he lost his employment as a result of his own misconduct (GD3-31).

[13] On May 19, 2015, the Claimant submitted a request for reconsideration indicating that he disagrees with the Employer's statements about him. He indicated that he has witnesses to prove his position. The Claimant indicated that he was not given notice (letter) and his wages were reduced without notice. He asked politely about his pay cheque but he was not provided with good reason. He never disrespected anybody; he was a good worker, nice and polite to everyone (GD3-32 to GD3-34).

[14] The Employer advised the Commission that the Claimant and his father were dismissed at the same time for the same reason: for harassment and intimidation of the supervisor (GD3-35).

[15] A witness statement dated June 30, 2015, from another co-worker, A. H., indicates that she heard the Claimant and his father yelling at the supervisor (J. H.) in a back room about 100 feet away. She got up to see what was happening and saw that "he" was yelling about "his" pay cheque. Ms. A. H. also indicated that on several occasions they yelled at both their supervisors and the accountant and once, threw their belongings on the floor in anger when talking about

their pay. The day they were dismissed, they refused to leave so the police came to remove them (GD3-37).

[16] The Claimant advised the Commission that he went to speak with the Employer about his reduced pay. His Employer was not nice to work for and treated him badly. He stated that he did not speak to his supervisor in a threatening and intimidating way. He confirmed that the police were called to remove him from the premises (GD3-36).

[17] On July 8, 2015, the Commission maintained its decision (GD3-39 and GD3-41).

### Testimonies at the Hearing

[18] The Claimant testified that when he saw the reduction in his pay rate the first time, he and his father went to J. H. (supervisor) first to ask for an explanation. He stated that he was polite and did not argue. She referred them to P. S. (owner) so they stated that they will not accept the pay cheque and will come in the next day to see P. S. They didn't say anything to J. H. as they expected P. S. to solve the problem. For two weeks, the supervisor told them that P. S. was away travelling but in fact, he was on another site. When they were given the second cheque, nothing was corrected. The Claimant testified that twice he asked the supervisor politely about the problem with the pay cheque and wanted an explanation. The supervisor told him that he has to go see P. S., but he wasn't there. P. S. agreed to come to the office so they left both (first and second) pay cheques there that night and came back the next day. The Claimant testified that the next day, they saw P. S. come in, he came to the bench where they were working and threw the pay cheques on the bench and started leaving. The Claimant stated that they were confused and that they tried to plead with him. He told them to leave the building. The Claimant stated that the supervisor told them that she didn't like the way P. S. was treating them. The Claimant stated that they decided to stay and explain to the police; that they didn't refuse to leave but stayed to explain to the police and ask for advice. When they escorted them off the premises, the police gave them their card and advised them to go to EI and to the Human Rights [Commission].

[19] The Claimant testified that they were gentlemen, polite, and never had problems until the issue with the pay cheques. He testified that he was not loud, did not yell and did not speak in a manner that was disrespectful towards his supervisor. He stated that it was not her fault his

rate was decreased because she's only his supervisor but he had to speak to her first then go to the boss/owner.

[20] The Claimant was referred to the statement of the supervisor, owner and HR person (GD3-20). He stated that this was not the case and that he was not given a letter regarding his production level.

[21] The Claimant was referred to the supervisor's statement (GD3-25). He testified that the supervisor works for the Employer and is protecting herself. He doesn't know why the supervisor would say what she did in the written statement when she told them, that P. S. did not treat them well. The Claimant stated emphatically that he did not yell or say anything. He stated "I swear" "I am not that kind of person".

[22] The Claimant was referred to the co-worker's statement (GD3-37). He testified that nobody came over/around when they were speaking with the supervisor. He didn't see anyone there; he probably knows the co-worker (A. H.) but he stated that "it's something I didn't do" and "I didn't yell".

[23] Regarding the warnings, the Claimant stated that he was not provided with any written notice about work production. Verbally the supervisor only told them about the piece work; because if they can finish early, they can be sent home as work was slowing down. The Claimant testified that he was not warned about his behaviour because he did not misbehave towards the supervisor. The Claimant stated again that he did not do it; he was just trying to find out why he was dismissed and the police can see that he didn't do anything wrong.

[24] The Claimant's father, Mr. E. A., testified that they were both dismissed at the same time. He confirmed that he was there. He stated that he was the person who would go speak to the supervisor as he was the one who introduced the Claimant to the job. Mr. E. A. testified that the Claimant "did not raise his voice; he wouldn't do that in front of me". He stated that he was the one who went to the supervisor. He testified that the Claimant did not yell, did not raise his voice and the Claimant did not say anything. He stated that he was the one who was speaking to the supervisor. Mr. E. A. stated "we are not animals" "we did not misbehave". The police came, gave them his card and told them to go the Labour Board. Mr. E. A. stated that the Employer has people working there that are not being honest with him. The supervisor had told

them that she was not happy there and that they were family. When they had meet with P. S., he had to leave (his father passed away) and they didn't finish the meeting but said that they would fix everything. When nothing had been done on the next pay cheque, the supervisor stated that she would fix it but it was he (Mr. E. A., the father) that said to the supervisor "no, you have to fix it now".

[25] The Employer representative, Mrs. K. S., testified that she was not at work that day so the final incident is all "hearsay" to her. She stated that she has no reason to believe that the supervisor and co-worker (A. H.) were manipulated into making their (written) statements. She stated that the supervisor's level of frustration tells her that it did happen. Mrs. K. S. confirmed that there were no direct witnesses of the final interaction of the Claimant (and his father) with the supervisor. Mrs. K. S. stated however, that they have been dismissive of the supervisor in the past and have overridden her authority, crossed their arms, and have gone directly to P. S.

[26] Mrs. K. S. explained that they were hired on salary to do various labour jobs outside on construction sites. When the work slowed down for the winter, they were offered to come inside to the shop/manufacturing which was piece work. If they were not meeting the production rate they would not be achieving what they were getting in the field.

[27] Regarding the Employer's Violence policy, Mrs. K. S. stated that it is her understanding that when they started, the supervisor would go through these policies that were provided in a handbook. She however, was not sure whether these were reviewed with them when they started in the field in 2013. All present agreed.

[28] The Claimant testified that he was never given a policy on violence and harassment. The Claimant acknowledged however, that he knows (from other employment) that there are certain things one cannot do and he had "never done it and will never do it" - referring to harassment/violence.

## **SUBMISSIONS**

[29] The Claimant submitted that he still does not understand why his employer dismissed him. He submitted that he was discriminated against and was dismissed because of he was black. His employer reduced his (and not others') rate of pay (GD2A). The Claimant submitted that the Employer reduced his rate of pay without any notice and when he tried to

find out why, he was dismissed – he did nothing wrong. The Claimant submitted that he was polite, did not yell and he did not say anything to his supervisor. He submitted that he was never disrespectful to the supervisor and has never and will never harass/be violent to anyone. He never had problems at the Employer until the issue with the pay cheques arose.

[30] The Commission submitted that the Claimant's behaviour towards his supervisor was a breach of the Employer's Violence, Discrimination and Harassment Policy and despite being warned in the past, he continued to be verbally abusive toward his supervisor. The Claimant's actions therefore, constitute misconduct under the EI Act. The Commission submitted that it is unlikely the police would be called if the Claimant spoke to his supervisor in a polite manner and further, the statements of the supervisor, co-worker and owner lent more credibility to the position of the Employer than that of the Claimant. The Commission submitted that there is no evidence to support the Claimant's subsequent allegation that he was being discriminated against because he was black (GD4 and GD8).

[31] The Employer submitted that they originally had an issue with the Claimant and his father regarding ongoing poor performance that eventually resulted in a reduction of their pay rate. The Claimant and his father were dismissed after a final incident when they were given their pay cheques and they verbally abused the supervisor who felt threatened and intimidated. The Claimant and his father violated their zero tolerance Violence, Discrimination and Harassment Policy and thus, their actions warranted dismissal. The Employer had no further submissions other than the evidence already provided to the Commission (GD7).

## **ANALYSIS**

[32] The relevant legislative provisions are reproduced in the Annex to this decision.

[33] Section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by reason of his/her own misconduct.

[34] The Member recognizes that the legal test to be applied in cases of misconduct is whether the act under complaint was willful, or at least of such careless or negligent nature that one could determine that the employee willfully disregarded the effects his actions would have on job performance (McKay-Eden A-402-96, Tucker A-381-85). That is, the act that led to the dismissal was conscious, deliberate or intentional, where the claimant knew or ought to have



known that one's conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[35] Further, the Member recognizes that the onus is on the employer and the Commission to show that the Claimant, on a balance of probabilities, lost his employment due to his own misconduct (Larivee A-473-06), Falardeau A-396-85).

[36] The Member notes that it must first be established that the Claimant's actions were the cause of his dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). In this case, it is undisputed evidence that the Claimant was dismissed on February 26, 2015 for two expressed reasons by the Employer (a) for ongoing poor production/work level despite warnings and (b) a final incident whereby the Claimant (and his father) verbally abused, harassed and intimidated their supervisor (GD3-19 to GD3-25 and GD3-35). The Claimant's alleged behaviour was a violation of their Violence, Discrimination and Harassment Policy. The ROE confirms that the Claimant was dismissed (GD3-18). Although the Claimant submitted that he doesn't understand why he was terminated, and denies committing the alleged offence(s), he did not refute or rebut that this was the reason(s) that he was terminated.

[37] The Member notes that the Employer consistently indicated that for quite some time, the Claimant and his father had ongoing production issues for which they were warned. The Employer remedied the issue by first changing their pay structure from piece work to an hourly rate so that they can earn a minimum wage. When there was no improvement, the Employer did not dismiss the Claimant for that reason but instead, reduced the hourly rate from \$19/hour to \$17/hour (GD3-19). The Member finds therefore, that although the Claimant's level of production may have contributed to the Employer's decision to dismiss the Claimant, it was not the cause for dismissal. The Employer also indicated that the original issue was the lack of production however; the Claimant and his father were dismissed because they were verbally abusive to their supervisor when she attempted to give them their pay cheques.

[38] The Member finds that the Claimant's termination was the direct result of the final incident on February 26, 2015 when the supervisor attempted to give them their pay cheques and they were allegedly verbally abusive to her which violated their stated policy.

Did the Claimant commit the alleged offence?

[39] In order for misconduct to exist, the initial onus is on both the Commission and the Employer to demonstrate that the Claimant committed the alleged offence(s) for which he was dismissed. In this case, the Member finds that the Employer and the Commission did not discharge that onus for the reasons to follow and as a result, finds that, on a balance of probabilities, the Claimant did not commit the alleged offence of yelling and verbally abusing his supervisor at the time he was dismissed.

[40] The Member first considered the Commission's submission that the written statements of the supervisor, co-worker and owner lent more credibility to the position of the Employer than that of the Claimant. The Member finds however, that the Commission did not contact the Claimant at all before making its initial decision. It did however call the Employer several times and, it advised the Employer what evidence to provide/submit. The Commission agent requested that the Employer specifically provide witness statements "for the claimant's behaviour" and asked that the Employer to "have the claimant's supervisor J. H. write a statement regarding her concerns" (GD3-19 and GD3-21). Then, for two weeks, the agent followed up repeatedly with the Employer to submit the evidence (GD3-22 and GD3-23). Only after the Claimant requested that his claim be reconsidered did the Commission call him, once. The Commission did speak with the Claimant and advised him of the Employer's evidence, asked whether he spoke to his supervisor in a threatening and intimidating way which he denied, and further asked whether the police were called to escort him from the premises, which he confirmed (GD3-36). Interestingly, the Commission did not ask that the Claimant to provide any evidence despite the fact that he had indicated that he too had a witness in his request for reconsideration (GD3-32). The Employer, on the other hand, after speaking with the Commission again, sent in a "witness statement other than the supervisor who was involved" (GD3-35). The Commission therefore, had very little evidence (one verbal statement) from the Claimant upon which to rely when it weighed the evidence of both parties and came to its decision.

[41] The Member, on the other hand, was able to (also) rely on the observed, direct testimony of the Claimant, his father (as a witness) and the Employer's representative, Mrs. K. S. The Member agrees with the Commission that the indirect (verbal and documentary) evidence

provided by the Employer is relevant and therefore, also gave it careful consideration. The Member placed more weight however, on the observed direct testimony of the Claimant, his witness and the Employer at the hearing, than on the Employer's indirect, hearsay evidence provided to the Commission. At the hearing, the Member was able to ask probing questions regarding the Employer's documentary evidence and observe the responses. Plus, the parties in turn, had the opportunity to rebut each other's testimony if they were in disagreement. The Member found those present at the hearing all equally credible.

[42] The Member first considered the evidence of the Employer. In support of its allegation that the Claimant and his father got angry and verbally abused the supervisor, the Employer provided verbal and written statements to the Commission and Mrs. K. S. provided direct testimony at the hearing. The Member noted that the Employer representative that spoke to the Commission was not a witness to the final incident, she therefore provided double hearsay evidence about the final incident that occurred on the day prior to the Claimant's dismissal (GD3-19 to GD3-23). The co-worker's written statement indicates that she heard the Claimant and his father yelling at the supervisor in a back room 100 feet away. When she went to see what was happening, she saw that "he" was yelling about "his" pay cheque (GD3-37). She does not indicate who was yelling. In her written statements, the supervisor referred to both the Claimant and his father together noting that 'they' had responded with elevated voices and were verbally confrontational when she had spoken to them about their work in the past. She indicated that she would not "babysit" or tolerate their verbal abuse and noted that they were dismissed because of their poor production and for being verbally abusive and abrasive about the situation (GD3-25). At the hearing, Mrs. K. S. testified that the Claimant and his father have been dismissive of the supervisor in that past and have overridden her authority by going directly to the owner.

[43] The Member notes that the supervisor does not refer to the final incident per se, or the Claimant's behaviour specifically during that final incident so as to rebut the Claimant's testimony, and that of his father's, who stated that he did the talking and that the Claimant did not yell or say anything during the final meeting (see below). Further, the co-worker's statement does not indicate who it was that she saw yelling at the supervisor. Also, contrary to the co-worker's statement, Mrs. K. S.'s testified that there were no direct witnesses of the final interaction of the Claimant and his father with the supervisor. Finally, Mrs. K. S. admittedly

could only provide hearsay evidence as she was not there the day of the incident and can only speak to ‘their’ dismissive behaviour of the past.

[44] On the other hand, the Member finds that the Claimant’s position remained consistent throughout his claim and appeal. He indicated that that he doesn’t understand why he was dismissed having done nothing wrong; that he was polite, did not yell or speak to his supervisor in a threatening and intimidating manner (GD2A, GD3-9, GD3-34 and GD3-36). At the hearing, the Claimant testified that the day prior to his dismissal, when he was given a second pay cheque with a reduction in pay, he wanted an explanation and politely asked his supervisor why the problem had not been corrected. The Claimant was asked specifically by the Member about the final incident, the co-worker’s and supervisor’s statements. He testified that he was not loud, did not yell and did not speak in a manner that was disrespectful towards his supervisor as it was not her fault his rate was decreased. Regarding the supervisor’s statement, the Claimant testified that he doesn’t know why the supervisor would indicated what she did because she was sympathetic to the way the owner treated them. The Claimant adamantly stated that he did not yell or say anything. He insisted that he was not that kind of person and would never harass or be violent to anyone. The Claimant’s father, Mr. E. A., testified that the Claimant “did not raise his voice; he wouldn’t do that in front of me”. He also testified that he was the one who was speaking to the supervisor as he is the one who introduced the Claimant to the job. He testified that the Claimant did not yell, did not raise his voice and the Claimant did not say anything.

[45] The Member also considered the Commission’s submission that it is unlikely the police would be called if the Claimant spoke to his supervisor in a polite manner. The Member finds however, that the Claimant and his father were not escorted off of the Employer’s premises on the day of the final incident with the supervisor. It was the next day, when they were dismissed by the owner that the police were called because they wouldn’t leave, not because of he/they were yelling and/or being verbally abusive to anyone. The Member’s finding is supported by the Claimant testimony and the Employer’s written statements (GD3-36 and GD3-37).

[46] Finally, the Member agrees with the Commission, that there is no evidence, at the hearing or otherwise, to support the Claimant’s subsequent submission that he was being discriminated against because he was black.

[47] For all the reasons provided and for weighing the evidence accordingly, the Member finds that on a balance of probabilities, the Claimant did not commit the alleged offence of being verbally abusive, loud, threatening and intimidating towards his supervisor during the final incident that ultimately caused his dismissal. It follows therefore that there cannot be misconduct when the alleged conduct/behaviour was not shown to be committed.

[48] The Member finds therefore, that on a balance of probabilities, the Claimant did not lose his employment as result of his own misconduct and an indefinite disqualification should not be imposed pursuant to sections 29 and 30 of the EI Act.

### **CONCLUSION**

[49] The appeal is allowed.

Eleni Palantzas  
Member, General Division - Employment Insurance Section

## ANNEX

### THE LAW

**Subsection 29(a)** of the EI Act stipulates that for the purposes of sections 30 to 33, “employment” refers to any employment of the claimant within their qualifying period or their benefit period.

**Subsection 29(b)** of the EI Act stipulates that for the purposes of sections 30 to 33, “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.

**Subsection 30(1)** of the EI Act stipulates that 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.

**Subsection 30(2)** of the EI Act stipulates 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.