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

Citation: *J. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 152

Tribunal File Number: GE-16-1280

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: September 14, 2016

DATE OF DECISION: December 14, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Mr. J. M. and his representative, Ms. Dayanira Benavides, attended the hearing together by teleconference.

INTRODUCTION

[1] On December 30, 2013, the Claimant applied for employment insurance sickness benefits and Workplace Safety and Insurance benefits (WSIB) and was expecting to return to his employer. The Claimant was dismissed from his employment on February 18, 2014 for not notifying his employer of his absence prior to the start of his missed shifts and not providing medical documentation to support his absenteeism.

[2] On May 21, 2014, the Commission determined that the Claimant did not lose his employment by reason of his own misconduct and allowed his claim for sickness benefits. On June 16, 2014, the employer requested a reconsideration of its decision. On November 17, 2014, the Commission determined that the Claimant lost his employment due to his own misconduct, reversed its initial decision and retroactively imposed an indefinite disqualification. This decision resulted in an overpayment of $8,846.00.

[3] On January 16, 2015, the Claimant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal).

[4] On June 29, 2015, the employer was invited by the Tribunal to request to be added as a party to this appeal. The Tribunal did not receive a response to its letter (GD5). The Claimant did not attend his hearing on January 6, 2016 and on January 8, 2016; his appeal was dismissed based on information from the record.

[5] On February 22, 2016, the Claimant appealed to the Appeal Division of the Tribunal. On March 24, 2016, his appeal was allowed and returned to the General Division for a new hearing.

[6] The present hearing was held by teleconference for the following reasons:

a) The complexity of the issue(s) under appeal.
b) The fact that the credibility is not anticipated to be a prevailing issue.

c) 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

[7] The Member must decide whether the Claimant lost his employment by reason of his own misconduct and whether an indefinite disqualification should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

EVIDENCE

[8] On January 13, 2013, the Claimant sustained a work related injury (GD3-19).

[9] On December 30, 2013 the Claimant applied for employment insurance sickness benefits on (GD3-3 to GD3-14).

[10] Two months later, the Claimant was subsequently dismissed on February 18, 2014 (GD3- 27). The Record of Employment (ROE) indicates that his last day of work was on January 13, 2014 (GD3-28).

[11] The Claimant indicated that he was dismissed when he told his **e**mployer that he was going to have surgery in March 2014 which the WSIB approved. The next day, he was emailed and sent 8 warning letters that he had never seen before and was dismissed. He noted that he did provide all the required medical documentation and that he emailed his supervisor each day in January and February. He provided the Commission with evidence of his union grievance; Human Rights Appeal and WSIB reports (GD3-16 to GD3-25 and GD3-63).

[12] The employer stated to the Commission that the Claimant was obligated to participate in a WSIB modified work program however, he refused. He did not report to work or provide medical documentation for January 24, 27, 28, 30, and 31, 2014 and February 5, 6, and 7, 2014. The employer indicated to the Commission that the Claimant was dismissed because despite warnings, he did not call in prior to his shift when he was unable to go to work and he did not

[13] The termination letter dated February 18, 2014 states that the Claimant was warned about his responsibility to notify the company of any absence prior to the start of a shift and

provide documentation for his absenteeism. He was warned verbally on September 4, 2013. He was then off September 5, 2013 until December 10, 2013. He was warned by letter on January 23, 2014. He was then off January 24, 27, 28, 30, and 31, 2014 and February 5, 6, and 7, 2014. He was warned by letter again on February 10, 2014. The Claimant did not pick up the courier package but responded to the email indicating that he will respond to long messages from the company on company time once he's at work. The Claimant was terminated for breach of company policy (GD3-27).

[14] The employer provided a copy of the WSIB letter indicating that they have fulfilled their reemployment obligations under the *Workplace Safety and Insurance Act* (WSIA) (GD3-29 to GD3-35).

[15] The Commission was provided with copies of warnings. On January 23, 2014, he was reminded in writing of his obligation, as discussed on September 4, 2013, that as per their policy, he is to contact his supervisor prior to his shift if he is unable to attend and provide medical documentation. He is also to advise his supervisor if he has to leave early (GD3-37). On February 10, 2014, the employer responded to the Claimant's email of February 9, 2014 requesting a flexible start time. He was advised that their accommodation was in compliance with the WSIB program and letter of January 7, 2014. He was reminded again of his obligation and attached 8 discipline notes for the said dates above for failing to notify his supervisor of his absences prior to his shifts (GD3-36 to GD3-61).

[16] On May 21, 2014, based on all this information, the Commission concluded that the Claimant did not lose his employment by reason of his own misconduct (GD3-64).

[17] On June 10, 2014, the employer requested that the Commission reconsider its decision and provided further documentary evidence (GD3-65 to GD3-68).

[18] The Claimant advised the Commission that the employer was just being vindictive because he was pursuing wrongful dismissal, a grievance and a human rights complaint. Plus, once he told them that he was going to have surgery, he was sent 8 warnings that he had never seen before and was immediately dismissed (GD3-103 and GD3-104).

[19] The employer on the other hand, advised the Commission that the Claimant was going to be terminated back in January however; they waited until the WSIB confirmed that the

Claimant was able to return to work, that they fulfilled their obligations to accommodate him. He was fully aware he was in violation of the company policy and was especially warned at their meeting of September 4, 2013. He was given the policy again and was told that texting and faxing were not sufficient especially because he sent them after his shift had started. She stated that the Claimant put up barriers to returning to work, had unreasonable demands and refused to abide by the rules of the company, so he was terminated (GD3-105). The employer advised that they offered the Claimant modified work according to his medical restrictions. He however, failed to return to work and follow the policy of calling in before not attending a shift. He would send in emails after his shift started. The Claimant stated to them that his reports were not timely because of the medication he was taking. The employer however, stated that the WSIB had indicated to them that the Claimant was able to work and that he was able to work the designated hours/schedule. In September 2013, it was made very clear to the Claimant, by both the union and the employer, that he was required to call in before the start of his shift if could not attend. The September 3, 2013 WSIB return to work intervention report also indicates that the Claimant was warned about the policy. The employer also advised that the grievance was dropped by the union (GD3-112 and GD3-121).

[20] The Commission was sent copies of emails between the Claimant and his supervisor dated from January 5 to the 28, 2014 to show that the Claimant consistently (on at least 8 occasions) emailed his supervisor after the start of his shift. Only on January 29, 2014 did the Claimant email his supervisor at 2:12 am to advise he is unable to work that day. On January 13, 2014 (his last day) he indicated that he left early because he was unable to stay warm despite the 3 heaters provided (GD3-106 to GD3-110).

[21] The WSIB Appeals resolution decision (GD3-117 to GD3-120) indicates that although it found that there was a lack of medical evidence to support driving restriction and absences, it did note that the Claimant's reported reasons for the absences was due to a lack of sleep and the medication he was taking which caused him to sleep through his alarm and to feel tired by mid-day (GD3-119).

[22] A copy of the policy indicates that all employees are subject to immediate discharge (in addition to other violations) for consistently coming to work late or leaving early, not showing up or not calling the supervisor prior to a shift when unable to come to work (GD3-135).

[23] Three WSIB medical reports were provided to the Commission. The first indicated that the Claimant was examined December 27, 2013 and notes that he was absence from work December 9, 2013 to January 6, 2014. The second report was based on an examination of January 17, 2014 noting the Claimant was off work on January 14, 15 and 17, 2014. The third report was based on an examination of January 24, 2014 indicating that he was off work on January 20 to 24, 2014 - all due to anxiety, panic attack, depression, not able to sleep, night mares and palpitations (GD3-123 to GD3-125).

[24] The Commission was unable to contact the Claimant (GD3-117 and GD3-125).

[25] On November 17, 2014, the Commission determined that the Claimant lost his employment due to his own misconduct, reversed its initial decision and retroactively imposed an indefinite disqualification (GD3-127 to GD3-130). This decision resulted in an overpayment of $8, 846.00 (GD3-131).

Documentary Evidence to the Tribunal

[26] For his present appeal, the Claimant and his representative requested from the psychologist the following medical reports:

[27] After the Claimant's dismissal, the medical evidence from the Claimant's psychologist dated February 8, 2016, indicates that he has been diagnosed with Posttraumatic Stress Disorder (PTSD) since March 2013 and notes that he struggles with problems related to memory and concentration and that he has become very forgetful since the accident January 11, 2013 (AD1-21).

[28] He also provided a report dated December 7, 2015, which indicates that the Claimant was diagnosed with PTSD and that he has ongoing difficulties managing stress and anxiety at work requiring accommodation. He displays psychological and cognitive symptoms such as frequent panic attacks, severe phobic reactions, high driving anxiety and neglect of personal hygiene (AD1-22 to AD1-24). Discharge report of December 2015 indicates the need for ongoing treatment (AD1-72 to AD1-75).

[29] The psychologist's progress reports and treatment plan August 11, 2015 covers 12 sessions with the Claimant from April 11, 2015 - July 25, 2015 and indicates that although the

Claimant has return to work he continues to require treatment due to a decline of psychological functioning since the accident of January 11, 2013. He continues to experience and requires treatment for emotional problems including anxiety, depression and posttraumatic stress symptoms that interfere with his everyday life (AD1-25 to AD1-36).

[30] Dated April and June 2014 the psychologist's reports (AD1-37 to AD1- 42) indicate that the Claimant stated he has

> "…made every effort to return to work despite his physical and psychological symptoms; however, he was unable to attend work on days that he was not able to sleep and he felt overwhelmed with anxiety and stress… He stated that even though he made every effort to contact his employer and notify them that he is unable to come to work, on some occasions, severity of his depressive and anxiety related symptoms made it impossible for him to contact his employer. He indicated that when he feels highly anxious and depressed, he remains in his bed for long hours and cannot bring himself to make phone calls. It should be noted that Mr. J. M.'s mood and anxiety related symptoms have improved since he was dismissed from his job. His job was a significant source of stress and anxiety for him …" (AD1-41 and AD1-42).

[31] Reports prior to the Claimant's dismissal, the medical report dated January 6, 2014, indicated that he would benefit from psychological treatment during his return to work planning and return to work attempt. The psychologist noted that the Claimant had contacted him regarding his fears of returning to work prior to his planned surgery given his continued significant anxiety and strong emotional reactions to thoughts about the hazards, putting others at risk and construction sites (AD1-46 to AD1-51).

[32] Reports prior to his dismissal from the psychologist in March, May, June, July, August, November 2013 indicate the Claimant's inability to work was due to sleep disruption, anxiety and panic attacks; there was continued anxiety and memories of the accident at the workplace; he had become very forgetful, anxious and unable to concentrate. In the latter, November 25, 2013, report addressed to the company supervisor (AD1-56), the psychologist indicated that the Claimant reported significant problems with his memory, concentration, ability to maintain focus for more than a few minutes, and has become forgetful since his accident on January 11, 2013. The psychologist indicated that he recommended that the Claimant communicate in written format (letters, emails and text messages) as a work around to prevent possible memory and attention problems and so that he had a record of his communications (AD1-52 to AD1-71).

Testimony at the Hearing

[33] The Claimant confirmed that he was dismissed on February 18, 2014 and that indeed he did not go to work on January 24, 27, 28, 30, 31, 2014, and February 5, 6, 7, 2014 and that these are the days he was issued 8 warnings which he received from the employer by email, all at once, on February 13 or 18, 2014. The employer did not follow their own disciplinary program and just sent these all to him by mail and email. The Claimant testified that he found out he was terminated by the Commission (he was on sickness benefits) so he did not know about these warnings.

[34] The Claimant testified that he is medicated and had problems sleeping from the time of injury until present so when he could, he went in to work and when he couldn't, he emailed his supervisor. He testified that he did participate in the WSIB approved modified work program for a year in Bolton. The Claimant testified that he provided his employer with medical reports throughout this period. The employer was aware of his psychological issues and his appointments with the psychologist because they had initially accommodated those appointments in the mornings but then requested that he attend his appointments after work. He also testified that he provided the employer with medical notes for his absences December 9, 2013 to January 6, 2014 (GD3-123) and January 14,15, 16,17, 2013 (GD3-124) which are not in the times in dispute/reason for dismissal. The Claimant testified that he does not believe he ever returned to work after that to give his employer the note for January 20-24, 2014 (GD3-125). The Claimant stated that he did not given his employer anything after January 24, 2014. The Claimant stated that if he was not terminated, he would have return to work and provided a note to his employer. The Claimant stated "had I not received those 8 warnings and I was able to return to work, I would have provided them with medical documentation to show why I was off, like I had always shown". The Claimant stated that he was off January 13, 14, 15 and that January 16, 2014 was his last day. He did not speak to his employer after January 16, 2014 so medical reports were not requested from him either verbally or in writing after that date.

[35] The Claimant stated that he had signed several papers when he started his employment and does not remember the policy or employer's expectation that he has to call the employer prior to a missed shift and provide medical. The Claimant testified that initially sent his supervisor texts and then switched to emails. He knew to do this because of his experience at

prior places of employment and because he had been a supervisor and workers would inform him of absences as well. The Claimant indicated on September 13, 2014, the employer provided him with a letter and he explained his medical situation at the time.

[36] The Claimant testified and provided information about how the employer did not accommodate his medical restrictions (e.g. flexible start time because he had to be up at 4:00am to be at work by 7:00am). The Claimant stated that the employer knew of his medical situation including his psychological state and requirement for more surgery. The employer looked for a reason to terminate him in order to reduce their liability with the WSIB (they were paying $3000/week to get him to work, his salary, and he would soon be off on surgery again).

SUBMISSIONS

[37] The Claimant submitted that he has been suffering from severe physical and psychological (PTSD) disability as a result of a workplace injury on January 13, 2013 that resulted in significant problems related to his memory and concentration. The Claimant submitted that the employer terminated his employment to mitigate ongoing WSIB costs and not because he acted in a manner that amounted to misconduct under the EI Act (AD1-9).

[38] The Claimant submitted that he emailed (not called) his supervisor as per the psychologist's recommendation (AD1-56) to the supervisor since November 2013 as a work around to avoid problems due to his memory and attention issues and so that he had a record of his communications.

[39] The Claimant submitted that he provided medical reports to his employer from the date of accident until his termination to justify his absences from work. He submitted and testified he would have provided the last report if he was allowed to return to work and not terminated. He also submitted that his employer was well aware of both his physical and psychological issues. The medical evidence confirms his psychological condition, how medication affects his mood, anxiety in work environment, his depression, panic attacks and significant relapses. This evidence demonstrates that his conduct was not a wilful act that would lead to a conclusion of misconduct.

[40] The Claimant submitted that the Commission had medical evidence before it (GD3-123,124,125) to justify that he was sick and unable to work and therefore granted sick benefits

at the same time from January 9, 2014 until April 20, 2014. He submitted he didn't know about the warnings he received all at once or the termination until the Commission advised him of such.

[41] The Commission submitted that the Claimant failed to adhere to the employer's policy regarding calling in before the start of his shift when he was unable to attend work. The Claimant was aware of the requirement as per the employer's documented warnings and his emails to the employer after his 7:00 am start time. The Commission submitted therefore that the Claimant's actions were wilful, deliberate and negligent and he was aware that his actions could result in his dismissal from employment.

ANALYSIS

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

[43] 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 his/her conduct was such as to impair the performance of the duties owed to his/her employer and that, as a result, dismissal was a real possibility (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[44] 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/her employment due to his/her own misconduct (Larivee A-473-06), Falardeau A-396-85).

[45] 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 because he allegedly violated the employer's policy that required him to call his supervisor of any absence prior to the start of his shift and to provide medical documentation for his absenteeism. The Member finds that the Claimant was dismissed on February 18, 2014 because he violated the employer's policy by being absent from work, not calling his supervisor prior to missing shifts on January 24, 27, 28, 30, and 31,

2014 and February 5, 6, and 7, 2014, and not providing medical documentation for his absenteeism.

Did the Claimant commit the alleged offence?

[46] Before a finding of misconduct could be made, the onus is on the Commission and the employer to demonstrate that the Claimant first committed the alleged offence.

[47] In this case, the employer indicated in its termination letter that the Claimant was dismissed because despite being warned on September 4, 2013, January 23, 2014 and February 10, 2014, he breached the company absenteeism policy. The Claimant did not call the employer prior to the start of his missed shifts and he did not provide medical documentation for his absence from work on January 24, 27, 28, 30, and 31, 2014 and February 5, 6, and 7, 2014 (GD3- 27, GD3-62 and GD3-105). The company policy indicates that employees are subject to immediate discharge for consistently coming to work late or leaving early, not showing up or not calling the supervisor prior to a shift when unable to come to work (GD3-135). Copies of emails between the Claimant and supervisor dated from January 5 to the 28, 2014 show that the Claimant consistently emailed his supervisor after the 7:00 am start time of his shift. On relevant the dates of January 24, 25 and 27, 2014, the Claimant emailed his supervisor after the 7:00 am start time (GD3-106 to GD3-110). Further, medical reports provided to the Commission account for various absences only from December 9, 2013 up to January 24, 2014 (GD3-123 to GD3-125).

[48] On the other hand, the Claimant does not dispute, and testified, that indeed he was absent from work on the said dates. The Member noted that there is no evidence that the Claimant called his supervisor prior to his shift on any days that he was absent from work. The Claimant testified that he used to text his supervisor and then switched to emailing him as per his psychologist's recommendation (AD1-56). Regarding the provision of medical documentation for the same days, the Claimant submitted that the employer was well aware of both his physical and psychological issues, from the date of his accident on January 13, 2013 onward having provided the employer with several medical reports. The Claimant testified that since his last day of work on January 16, 2014, he did not speak with his employer and medical reports were not requested from him either verbally or in writing after that date.

[49] The Member finds that despite the Claimant's reasons (although considered below), the Claimant was absent for several days specifically on January 24, 27, 28, 30, and 31, 2014 and February 5, 6, and 7, 2014, he did not call his employer prior to his shifts, and he did not provide the employer with medical documentation for these missed days. The Member finds therefore, that the Claimant committed the alleged offense, that is, he violated the employer's absenteeism policy, and as result, he was subject to immediate dismissal.

Does the Claimant's conduct constitute misconduct?

[50] In order for the Claimant to be disqualified from receiving benefits however, the Member must consider whether these actions that lead to his dismissal constitute misconduct pursuant to the EI Act. Accordingly, in order for misconduct to exist, the employer and the Commission must show that the Claimant willfully, consciously and deliberately disregarded the effects his actions would have on the performance of his job, and he knew or ought to have known, that as a result, dismissal was a real possibility.

[51] In this case, the Member finds that the employer and the Commission did not meet that onus. The Member finds that, for the reasons to follow the Claimant did not wilfully and intentionally disregard the employer's policy because for medical (psychological) reasons, he was on many occasions, unable to attend work, unable to report his absent until after his shift started, he emailed instead of calling, and he could not provide the last medical documentation until after he returned to work. Further, the Member finds that although the Claimant knew of the policy and the repercussions, he did not expect to be terminated when he did.

[52] The Member agrees with the Commission's submission that the Claimant violated the employer's absenteeism policy and that the employer provided evidence to support that finding (noted above). Further, the Member agrees with the Commission that the evidence shows that the Claimant was aware of the policy requirements and the repercussions. It noted the employer's documented warnings (GD3-78 to GD3-81, GE3-90 and GD3-91) and the Claimant's emails to the employer after his scheduled start time (GD3-106 to GD3-110). The Member adds that although the Claimant testified that he does not remember getting the policy upon hire, the Claimant also testified that he knew to advise his supervisor of his absences given his past experiences. Further, he testified that he received the September 13, 2013 letter

from his employer that warned/reminded him of his obligations and the employer's expectations.

[53] The Member disagrees however, with the Commission's conclusion that since the Claimant was aware of the policy and he violated it, he did so wilfully and deliberately knowing that his actions could result in his dismissal. The Member finds that given the documented evidence from the date of his work related accidence on January 13, 2013 until his dismissal on February 18, 2014, the Claimant's psychological diagnosis of PTSD, the consequential symptoms and the effects of the required medication, the Claimant did not consciously and deliberately violate the employer's policy.

[54] Both the Commission and the employer did not comment or consider the Claimant's psychological condition referenced in several reports they were provided. In the case of the Commission, it submitted (GD4-1) that it initially decided that the Claimant was unable to work based on the WSIB reports he provided, and that it accepted, as medical documentation (GD3-29 to GD38 and GD3-39 to GD3-64). The Commission did not comment on the 3 medical reports it was subsequently provided regarding why the Claimant was off of work from December 9, 2013 to January 24, 2014 (GD3-123 to GD3-125) and since it was unable to contact the Claimant (GD3-117 and GD3-125), it overturned its initial decision and retroactively imposed a disqualification (GD3-127). The Claimant submitted that the Commission had this latter medical evidence before it to justify that he was sick and unable to work and therefore granted sick benefits at the time from January 9, 2014 until April 20, 2014. It is understandable therefore; that the Claimant would not have thought he'd be terminated during this period when the Commission had accepted that he was sick and unable to work and was in receipt of sickness benefits. On the other hand, the Member acknowledges that according to the WSIB reports, the Claimant was fit for modified work noting that there was lack of medical evidence to support the Claimant's absences (GD3-119). In the case of the employer therefore, the Member acknowledges their position that they were obligated to accommodate, offer modified work according to the provided medical restrictions and adhered to the WSIB return to work plan (GD3-105, GD3-83 to GD3- 92). As a result, the WSIB found that the employer had met its reemployment obligations under the WSIA. The Member finds however, that although this may be the case, the medical reports from the Claimant's psychologist that

were provided to the employer, the WSIB and now the Tribunal, are a relevant consideration in the determination of whether there was a conscious and deliberate disregard of the employer's policy and the effects that would have on the duties owed to his employer. The Member finds therefore that the psychologist's reports are a relevant consideration of whether the Claimant was dismissed from his employment due to his own misconduct under the EI Act.

[55] The Member considered the medical reports from the Claimant's psychologist. The Member acknowledges that the reports provided are both prior to, and after, the Claimant's dismissal. The reports do however; support the Claimant's submissions and reasons for not complying with the employer's absenteeism policy and show consistency over time. For instance, the Claimant's submission that he was unable to go to work on the days in question just prior to his dismissal, is supported by a medical report just prior to his dismissal (January 6, 2014). It was recommended that given his PTSD that he be provided with psychological treatment during his return to work planning and return to work attempt given the Claimant's fears of returning to work because of his continued significant anxiety and strong emotional reactions to thoughts about the hazards, putting others at risk and construction sites (AD1-46 to AD1-51). This is consistent with the 3 subsequent medical reports up until January 24, 2014 (GD3-123, GD3-124, and GD3-125), other reports prior to his dismissal (AD1-52 to AD1-71) and those thereafter (AD1-41) that all indicate that he was unable to go to work due to overwhelming anxiety, panic attack, depression, not being able to sleep, night mares and palpitations. Similarly, the psychologist reports support the Claimant's reasons for not reporting his absence before the start of his shift (AD1-41 and AD1-42, AD1-52 to AD1-72). The Claimant testified that because of the medication he was taking, he was unable to call in before his shift (he would have to get up at 4:00 am to be at work at 7:00 am) which is consistent with his statements to the employer (GD3- 1120 and the WSIB (GD3-119). The medical reports indicate that the Claimant had become increasingly anxious and depressed which made it impossible for him to contact his employer, he remained in bed for long hours and he could not bring himself to make phone calls. Further, his reason for texting and not calling his employer is supported by the psychologist's report addressed to the supervisor on November 25, 2013 prior to the dismissal (AD1-56) where he recommended that the Claimant communicate with him (the supervisor) in written format in order to circumvent problems related to him having become very forgetful and unable to concentrate. The Claimant therefore was not deliberately

disregarding the employer's policy; instead he was acting on his doctor's recommendation. Finally, the Member notes that all the medical reports describe the effects of the Claimant's diagnosis of PTSD and resultant symptoms on his everyday life, decline of psychological functioning, emotional problems and ongoing requirement for treatment. The Member finds that the psychologist's reports demonstrate the Claimant's state of mental health at the time of the offences and support a finding that the Claimant did not consciously and deliberately disregard the effects his absences and breach of the employer's policy would have on the performance of duties owed to his employer.

[56] Finally, the Member finds that although the Claimant knew of the policy and the repercussions, he did not expect to be terminated when he did because of the established practices since his accident, that were contrary to the policy. The Member notes for instance, that the employer and/or the Commission were provided medical reports for the dates the Claimant missed prior to January 16, 2014 after he return to work (on January 17, 2016 - his last day). The employer did not dismiss him or provide warning notes for those dates. The employer did send him a warning on January 23, 2014 (GD3-78) but the Claimant went to see his doctor immediately on January 24, 2014 (GD3-125) and he was not dismissed for missing work prior to that date. This supports the Claimant's submission that, had he not been dismissed and allowed to return to work, he would have provided medical documentation 'as he always did' when he went back to work. The Member finds that the Claimant's explanation reasonable given the evidence. The Member also notes that although the employer objected to the Claimant sending texts or emails instead of calling prior to missed shifts, it had accepted emails for missed dates prior to the dismissal (January 7, 2014 to January 14, 2014) but then dismissed him for doing the same thereafter (January 24, 27, 28, 2014). Further, the employer did not address (accept or reject) the psychologist's letter of November 25, 2013 to the supervisor recommending that the Claimant use written format such as letters, emails and text messages, as a work around given his memory and attention problems (AD1-56). It is reasonable therefore, for the Claimant to continue to report by email and not expect to be terminated for this reason. At the time of termination, after the Claimant's last day at work on January 17, 2014, the employer, for the first time, created 8 warning notes for every day he missed (not signed by the Claimant) and mailed them to him all at once on February 10, 2014 and dismissed him on

February 18, 2014. The Claimant testified that he did not know he was terminated until the Commission told him as he was on sickness benefits at the time.

[57] The Member also considered relevant case law. The Member noted that in similar cases where the Claimant lost his/her employment because they missed a shift without advising their employer, such conduct was considered misconduct under the EI Act, especially if the Claimant had been previously warned (Caron, A-416-08 and Locke A-799-95). The Member finds however, that in this case, although the Claimant knew of his obligation to call his employer prior to the start of his shift, the mental element of deliberately and consciously not complying is absent due to his psycholFogical state at the time as evidenced in the medical documentation.

[58] The Member finds that, on a balance of probabilities, the Claimant did not lose his employment as result of his own misconduct and therefore should not be disqualified from receiving employment insurance regular benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[59] 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.