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

[TRANSLATION]

Citation: *G. L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 188

Tribunal File Number: GE-16-174

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: October 24, 2016

DATE OF DECISION: ~~February 9, 2017~~

DATE OF CORRIGENDUM: February 28, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. G. L., the claimant, participated in the videoconference hearing.

INTRODUCTION

[1] The Appellant filed an Employment Insurance claim starting on September 20, 2015. In November 2015, the Canada Employment Insurance Commission (Commission) informed the claimant that it could not pay him Employment Insurance benefits as of September 20, 2015, because he had been suspended from his employment with Health Canada on September 22, 2015, due to misconduct.

[2] On December 14, 2015, following his request for reconsideration, the Commission informed the claimant that the decision had been replaced. The Commission indicated that for the suspension without pay period, the claimant was disentitled to benefits between September 21 and November 2, 2015, because his suspension was the result of his own misconduct. As of November 3, 2015, the claimant was disentitled to benefits because his dismissal was the result of his own misconduct. The claimant appealed this decision before the Social Security Tribunal of Canada (Tribunal) on January 13, 2016.

[3] The appeal was heard by the videoconference hearing for the following reasons:

a) The complexity of the issue or issues.

b) The fact that credibility may be a determinative factor.

c) The information in the file, including the need for additional information.

d) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The claimant is appealing the decision regarding a disentitlement imposed on him under section 31 of the *Employment Insurance Act* (Act) because he was suspended from his duties between September 21 and November 2, 2015, due to his own misconduct.

[5] The claimant is appealing the decision regarding the loss of his employment by reason of his own misconduct as of November 3, 2015, under sections 29 and 30 of the Act.

EVIDENCE

[6] The evidence in the file is as follows:

a) A letter dated November 7, 2013, indicating that Mr. C. had filed a harassment complaint against the claimant. The letter indicates that the complaint was unfounded (GD6-15).

b) A final investigation report (Quintet report) dated September 16, 2013 (GD6-16 to GD6-51).

c) The claim for benefits dated September 28, 2015. The claimant said that he had filed a complaint with the Deputy Minister against his employer for non-compliance with the harassment policy. He demanded that the recommendations of his attending physician following the investigation report, stating that he had been a victim of sexual harassment, be taken into account. The work environment had deteriorated and he had had an issue with a co-worker, which had led to a loud argument (GD3-3 to GD3-15).

d) The record of employment showing the last day of work as September 21, 2015, and the reason "other." The employer indicates that it was a suspension without pay awaiting a disciplinary hearing (GD3-16).

e) On September 22, 2015, the claimant sent an email to the Deputy Health Minister, Mr. S. K., indicating that if he did not intervene immediately, something serious was going to happen and that he was no longer able to tolerate [translation] "this monster R. B." (GD3-17).

f) A letter from the employer dated September 22, 2015. The employer indicated that the claimant, following the email sent to the Deputy Minister of Health Canada, S. K., indicating that [translation] "something serious was going to happen at FNIHB-QC" was [translation] "suspended indefinitely without pay as of September 22, 2015, awaiting the results of a disciplinary hearing." The claimant noted that he could contact Mr. R. B., "the aggressor" and that the letter was signed by Ms. V. G., "the aggressor's personal friend" (GD3-18).

g) On October 22, 2015, the Director of Operations at FNIHB-QC indicated that the claimant had been suspended without pay. An investigation report had been issued but a decision regarding the claimant's suspension had not been made. Ms. J. D. affirmed that she had not witnessed the events alleged by the claimant concerning two employees, but stated that the claimant had yelled at another employee who then began to cry. Following that incident, the claimant had sent an email to the Deputy Minister. Ms. J. D. stated that the details of the event were confidential and that Health Canada would not be providing a copy of the investigation report or details regarding the incidents. She mentioned that the values and ethics policies as well as those policies concerning disciplinary measures are written in a general way. She noted that the policies do not necessarily describe the employee's particular case. Disciplinary measures are decided on a case-by-case basis based on the general policies, but also based on the seriousness of the situation as well as other factors such as witness statements, for example. She stated that the claimant refused to participate in the investigation and therefore did not give testimony concerning the alleged facts of his altercation with the other employee. Ms. J. D. confirmed that the reason for the claimant's suspension was the threatening email he sent to the Deputy Minister following his altercation with another employee (GD3-26).

h) Disciplinary guidelines (GD3-27 to GD3-35).

i) On October 26, 2015, the claimant said that he had filed a sexual harassment complaint on October 5, 2012, against his manager. The manager accused him of being a troublemaker, of inventing things to undermine management, that his complaint was frivolous, etc. He then filed a complaint against the claimant. The claimant was then

removed from his team for 14 months. He was moved to another team until January 2, 2014. After the 14 months, an investigation report dated September 16, 2013, determined that the complaint was unfounded and that the claimant was being treated differently than his co-workers. The report contained no recommendations. The executive director allegedly took her time returning the claimant to his substantive position following this investigation report. The claimant was unaware that he was being returned to his position until November 21, 2013. When he did return to his position, his employer told him that he should quit, because he had won by default, due to a lack of evidence, but his story was made up. On January 9, 2014, his director mentioned to him that he had insulted her and had claimed that she was no good. He received a seven-month expulsion, because the employer said that he was spreading rumours that the director in question had taken her time returning him to his position, that he had made offensive remarks towards her, etc. At that time, the employer told him to deal with his psychological issues before returning to work. He was expelled for psychiatric dangerousness from January 10 to July 25, 2014. A first attending physician produced a report on January 27, 2014, stating that the claimant had acted normally in an abnormal situation. The employer did not accept this report and called for a second assessment from the Institut Philippe-Pinel. The second physician produced a report confirming that the claimant was not dangerous. The physician recommended mediation. The employer again refused to take the medical report into consideration and asked the claimant to return to the physician with new facts. On May 16, 2014, the employer disclosed information about the claimant's personal life to the physician, including that he had killed cats, eaten live insects, etc. The claimant became aware of this following an access to information request. During this third assessment, by the same physician (the second one), the physician made recommendations to the employer given that the allegations were contradicted by certain documents, which gave the impression that the physician felt that the employer was lying about the employee. He therefore maintained his initial verdict that Mr. G. L. was a sane person who had acted normally in an abnormal environment. He was paid with his medical and vacation leave. On January 10, 2014, when he was removed from his position, the claimant was told that he was crazy and should seek treatment. His employer had forced him to sign a written document and because he had been angry, he had signed

the document. A second report by a Health Canada physician was issued by the employer on July 16, 2014. Amendments were requested by the Department because the initial report had been falsified. Despite that, given that the claimant had proven that he did not have mental health issues, he returned to work on July 25, 2014, with disciplinary measures. The employer gave him a one-week suspension for having claimed that the director had taken her time returning him to his position. When he returned to work, he was told to keep quiet and to stay in his area. He then filed harassment complaints against four managers on August 28, 2014. Two of these complaints, against M. K. and D. D., were retained. The other two, against J. D. and C. B., were not retained, but it was specified that despite the fact that these two people were applying orders received, sound management had not been applied. The claimant still has not received the final report regarding these two complaints, because Ms. M. K. asked the investigator, Ms. D. L., for an extension. Moreover, the claimant indicated that Ms. M. K. received a promotion to EX-03—the position directly below the Assistant Deputy Minister, Ms. V. G. In the two complaints that were retained, it was noted that the claimant had been a victim of abuse of authority as well as psychological violence. Mr. R. B. who replaced Ms. M. K. was, according to the claimant, a friend of hers. Mr. R. B. had refused to meet with the claimant for a mediation process in order to restore the employment relationship. He had also refused to apply the accommodating measures with respect to his request to be reinstated following the recommendations of the attending physician. He also wanted his reputation restored. Since his appointment, Mr. R. B. has refused to hire a mediator or industrial psychologist to resolve the situation. He proposed that the claimant hire a mental health coach, which the claimant refused given that he found it illogical that the employer wanted him to accept the fact that he had been a victim of sexual harassment. Mr. R. B. had insulted him and showed a lack of respect on a number of occasions. The claimant complained about the appointments of Ms. M. K. and Mr. R. B., who did not go through a competition to obtain their positions. He filed a complaint with the Deputy Minister, Mr. S. K., on June 23, 2015. A woman named Ms. G. was mandated to assess the situation regarding the appointments, his treatment by management, and the fact that his employer refused to implement the measures reintegrating him into his position. He said that Ms. G. had forwarded the emails he had sent her to Mr. R. B. and that the two

were in collusion with one another. Ms. G. had issued a report on September 4, 2015, stating that she saw no issue with the situation involving the claimant and his supervisors. On September 18, 2015, the claimant sent an email to Ms. G. with his objections to the conclusions of her report. According to the report, management had respected the government's guidelines and policies. During this period, he had been summoned for stupid reasons by Mr. R. B. Mr. R. B. had spoken to him in an authoritarian manner and threatened him. He had received written notice that he would be summoned to be dismissed. The work environment was hostile. He had contacted his union, but was advised that it would be preferable to come to an agreement with his supervisors on his own. He had received two threats, on September 21 and 22, 2015, from Mr. R. B. that he would be dismissed. He said he had filed a grievance with his union concerning his suspension without pay. He had contacted human resources, but had not heard from his employer since his suspension and his employer had not responded to his union. On October 7, 2015, he went to a hearing with Ms. V. G., Mr. R. B., an investigator, etc. He submitted a written document containing his version of the facts. He said that the meeting did not last long and that the employer had simply asked what the mitigating circumstances were and whether he had written documents. He had sent an email to Deputy Minister S. K. on September 18, 2015, to find out whether he had accepted the conclusions of Ms. G.'s report. He also asked his employer for a transfer to another team because he was no longer able to work there and wanted to work in a harassment-free environment. He said that his employer had serious prejudices against him. He said that in May 2015, he had had a verbal altercation with a co-worker, who had not been involved in the situation, and that he had been in mediation with her since then. After Labour Day, there had been a meeting scheduled with his co-worker on the Thursday, but his employer had cancelled the meeting the previous Tuesday and launched an internal investigation. He noted that the other employee had not complained about the situation and that it had been a management decision intended to undermine him. He had hung up on the investigator, Mr. Q., because he had refused to tell the claimant what his mandate was. The claimant confirmed that he had given a document containing his version of the facts to his employer on October 7, 2015. In this document, he specified that in re-reading his email, he realized that he had perhaps poorly expressed himself, because he did not

want to cause harm for anyone. He said that he had discussed the situation with the Montreal police and that they had sent a report to Health Canada stating that there was nothing criminal in the email that he had sent to the Deputy Minister. He said that since 2014, he has experienced anxiety attacks and takes medication for that reason. He used to take Xanax, which enabled him to overcome his attacks within five minutes. However, his physician noted a possible addiction and therefore prescribed him another medication and gradually increased its dose. The claimant said that he had experienced a number of anxiety attacks, including on September 22, 2015, when he had sent the email to the Deputy Minister. He noted that his physician did not sign a work stoppage and that in any case, he would not be paid insurance because his attacks were temporary. He attends weekly or bi-weekly therapy sessions. The claimant does not have access to his work emails so he does not have a copy of Mr. R. B.'s threatening emails. He said he would provide the Commission with copies of the investigation reports as well as his version of the facts from October 7, 2015, and the medical reports, by the following day. He stated that in his email of September 22, 2015, he feared for his safety, because his employer did not want to apply any of the recommendations following the reports (GD3-36/37).

j) Timeline written by the claimant (GD3-40 to GD3-54).

k) Final investigation report dated September 16, 2013. Mr. C. complaint against the claimant (GD3-21 to GD3-25; GD6-20 to GD6-51).

l) Psychiatrist’s expert report dated May 26, 2014 (GD3-56 to GD3-69; GD6-71 to GD6-84).

m) Supplement to the psychiatrist's expert report dated July 4, 2014 (GD3-70 to GD3-73; GD6-85 to GD6-88).

n) Articles on adjustment disorder and post-traumatic stress (GD3-74 to GD3-84; GD6-92 to GD6-99).

o) Correspondence (GD3-86 to GD3-136; GD6-100 to GD6-151).

p) Medical certificate from Bagdadi Dental Centre Inc. (GD3-138/139; GD6-154/155).

q) On October 28, 2015, the claimant indicated that he had realized, after sending the email, that it could be misinterpreted. He said that he feared for his safety given that he had received two emails from Mr. R. B. threatening dismissal, on September 21 and 22, 2015. He said he had had an anxiety attack and then sent the email in question to Deputy Minister S. K. as a result of Mr. R. B.'s threats. He mentioned that he did not have Mr. R. B.'s emails because they had been sent to his work email. He confirmed, however, that during that time, he had worked from home following Ms. G.'s report. He sometimes had to go to work to attend meetings. Mr. R. B. had not verbally threatened him with dismissal, but by email only. The claimant noted that there was history to all this and that the Montreal police had not found his email to be criminal in nature because his comments were vague (GD3-140).

r) A letter of termination dated November 3, 2015 (GD3-145 to GD3-147).

s) Preliminary report dated November 3, 2014, from December 4, 2015 (GD3-148 to 209; GD6-160 to GD6-224).

t) On December 7, 2015, the claimant said that grievances had been filed against his employer and that there would be a hearing on December 14. He wanted both decisions against him (suspension and dismissal) to be revised. In both cases, they took effect on September 22, 2015. He noted threats by R. B., the acting regional executive director. He said that he received emails from the director calling him to a hearing concerning a suspension or dismissal. There was no date specified for these meetings. He states that these were threats. The claimant does not have access to these emails, because they were sent to his work email. He said that the employer did not take the Quintet report into consideration in processing his file. The preliminary report that was produced is not impartial. Management failed to consider the matters raised in the Quintet report. He was a victim of harassment and the director did not implement the guidelines concerning harassment in the workplace. The client had to undergo a psychiatric evaluation, because his employer accused him of having mental health problems. He said that he worked in a hostile and toxic work environment. He was a victim of harassment on the part of his supervisor, L. C., and the employer failed to acknowledge it. The Commission notes that

the final incident leading to his suspension and dismissal was the email sent to S. K. The claimant said that the email had been sent while he was temporarily working from home. A contract had been signed to allow him to work from home during the investigation period. The investigation was following an altercation between the claimant and a co-worker in May 2015. The claimant had gone to see his co-worker, R., to tell her that he was planning to take vacation. During their conversation, he said that his co-worker had made inappropriate comments about his homosexuality. He said he had used an aggressive tone towards her because he wanted her to apologize. That day, he had then received an email from R. asking him to apologize. He said he became very angry, he raised his voice and his co-worker began to cry. Following that incident, a mediation request had been made to D. D. Mr. D. D. was to mediate in order to resolve the dispute between the claimant and his co-worker. But when he returned from vacation, the claimant learned that the mediation had been cancelled and an investigator had been hired to evaluate his behaviour toward R. The claimant is still waiting for the final report. He has been a victim of harassment for four years. His employer accused him of harassing directors in June and July 2015. However, he says it was not harassment but rather email correspondence. When asked why he had sent the email to Mr. S. K., he said it was due to the accumulation of incidents. He said that his anger was the result of his employer crossing a line (GD3-210).

u) Suspension letter dated September 22, 2015 (GD3-212).

v) Warning letter dated January 14, 2015 (GD3-213/214).

w) Letter of reprimand dated January 18, 2013 (GD3-215).

x) Case law: *Public Service alliance of Canada v. Canada*, 2014 FC 1066 (GD6-226 to GD6-240); and *Canada (Attorney General) v. Public Service Alliance of Canada*, 2015 FCA 273 (GD6-241 to GD6-260).

y) Letter dated August 12, 2016, indicating that the conclusions of the investigation had been accepted (GD7-6/7).

z) Final investigation report dated March 10, 2016. Claimant's complaint against Ms. M. K. (GD7-7 to 7-96).

aa) Final investigation report dated March 15, 2016. Claimant's complaint against Mr. D. D. (GD7-99 to 7-126).

bb) Memorandum recommending the claimant's dismissal for disciplinary reasons (GD7-127 to GD7-131).

cc) Service de police de la Ville de Montreal (SPVM) [Montreal police service] incident report dated September 23, 2015, regarding a threatening email sent to the Department of Health on September 22, 2015 (GD7-142/143). The complaint was considered unfounded on September 29, 2015 (GD7-144/145).

[7] Following the hearing, the claimant sent the following evidence:

a) Analysis of the document entitled [translation] "Events Related to Employee G. L." who had been the subject of harassment complaints (GD8-1 to GD8-103).

b) Analysis of correspondence between the occupational health physician, Dr. Élisabeth Czyziw, and the human resources advisor, C. B. (GD8-105 to GD8-118 to GD8-172).

c) Analysis of the response and documents obtained on January 14, 2016, following an access to information request (GD8-174 to GD8-208).

d) Analysis of the Laurin report of March 10, 2016 (GD9-3; GD10-1 to GD10-83).

e) Reasons why my dismissal was unjust (GD9-6 to GD9-10).

f) Analysis of the briefing note of November 3, 2015 (GD11-2 to GD11-70).

[8] The evidence submitted at the hearing through the Appellant's testimony revealed the following:

a) He was a business analyst at Health Canada.

b) Following an organizational change, L. C. became his manager. L. C. did not have experience in the health field, but he wanted to make his mark by taking the acting position. The claimant challenged him in his decisions. Mr. C. began to act rudely toward anyone who challenged him and he would touch himself inappropriately in front of them. The claimant tolerated the situation to a certain point and then asked to be moved to another team. Then another organization change put Ms. M. K. in a management position.

c) On September 26, 2012, Mr. L. C. touched himself for an hour. The claimant sent an email to Ms. M. K. to complain, but she did not believe him. On October 22, he was removed from his position and told he had a mental health problem and that there was concern for his health. He said that he had been removed for 14 months due to harassment despite the fact that he himself had launched a complaint three days earlier. Mr. L. C. filed a complaint against the claimant three days later on October 25, 2012.

d) During those 14 months, he was in an EC-04 position, but continued to be paid as a business analyst. In this position, he continued to sit on a committee of which he was the chair. He was approached by L. who asked him for help with a file on which he had worked in the past. He said that he had received conflicting directions and suggested that they speak to Ms. M. K. and Ms. J. D. Three weeks later, Ms. J. D. indicated that he had used an inappropriate tone and made inappropriate comments. He was summoned for disciplinary measures for having sent an email and using an inappropriate tone and was found guilty of insubordination. This was the first incident used in his letter of termination.

e) He spoke to Ms. C. in January 2013 and proposed doing a presentation. She pointed out that he no longer worked in Mr. L. C. s' team, but he responded that it was not L. C.s' business what file he was working on because he worked for Ms. A. Three weeks later,

he was summoned for having said that [translation] "if Ms. A. removed him from the file, she would regret it." He wanted to condemn himself by talking about her. He said that he received disciplinary measures from Ms. A., who had arbitrated this dispute. He said that the case had been built on pretexts and unsubstantiated small talk.

f) He received the Quintet report in November 2013. It was published on September 16, 2013. He learned that he was not the only one who had complained about the situation with his supervisor. His manager, D. D., had made inappropriate comments, not all of which were cited in the report. Ms. M. K. and the other managers had a selective memory in order to protect themselves (perjury).

g) His union recommended that he stay with Ms. A. In December, he was approached by Ms. A. to extend his time with her team until March 31 and he was given a contract. He refused to sign it because there had never been one before and because his reputation was ruined and he wanted it to be restored. He indicated that the reasons for his complaints were confidential and that he was unable to discuss them. He said that restoring his reputation came before restoring the *status quo ante bellum*. He requested the presence of a witness during the meeting with his supervisor to avoid inappropriate gestures. Ms. A. told him he could remain in her team or [translation] "go look for happiness elsewhere." He told his union about this, but did not receive a response.

h) He said he had been a victim of sexual harassment, that he had a report confirming this, and that he had been accused of having mental health problems but that he had been told to go look for happiness elsewhere.

i) On December 31, he sent an email to his union demanding an apology from Ms. A. and asking why Ms. M. K. had taken so long to implement the recommendations of the Quintet report.

j) He was summoned on January 9, 2014, for making a complaint about a manager and for having insulted Ms. M. K. without respecting the directives regarding complaints against a manager. Ms. M. K. had sent him an email outlining her expectations because he had asked to return to his position. Her requirements of him were that he not complain

about his supervisor or any harassment. He said that Ms. M. K. repeated these expectations despite the Quintet report. He said that she was both judge and jury and told her that the she had been blamed in the Quintet report. Ms. M. K. was accompanied by Ms. C. B. from human resources. He noted that he had maintained his version of this event, while Ms. M. K.'s version had changed. She said that she was afraid. He went to see her in her office to tell her he wanted to resolve the situation but, according to her, he had followed her. The following day, he was removed for psychiatric dangerousness. The Laurin report judged her on his, but contrary to the report, she had no reason to be afraid.

k) He underwent a medical assessment with his attending physician. He was diagnosed with anxiety adjustment disorder. He requested mediation. He informed ~~Dr Shizi~~ **[Dr Czyziw]**, a Health Canada physician. ~~Dr Shizi~~ **[Dr Czyziw]** sent information to Ms. C. B., who asked for amendments to ~~Dr Shizi~~ **[Dr Czyziw]**'s report. He indicated that ~~Dr Shizi~~ **[Dr Czyziw]** wanted a psychiatric assessment, which his own physician had refused. ~~Dr Shizi~~ **[Dr Czyziw]** had then invented a reason to send him to a psychiatrist and told him that his physician had requested it, which was not true (March). ~~Dr Shizi~~ **[Dr Czyziw]** met with Ms. M. K. and Mr. D. D. on February 20, 2014. They had made delusional statements in the Laurin report. ~~Dr Shizi~~ **[Dr Czyziw]** said that the claimant's physician wanted a psychiatric assessment, which his physician did not provide him with. He was therefore referred to a psychiatrist by a physician who had never seen him before. His union asked the employer to pay him under section 51 of the collective agreement because he had no more sick leave.

l) He met with psychiatrist Dr. Lafleur for psychiatric dangerousness. Dr. Lafleur wrote a harsh report to the employer in which he said that the claimant's assessment was not justified.

m) Ms. M. K. compromised herself several times and the events were blown out of proportion by Ms. C. B. The employer sent an additional document describing other incidents in detail. Among other things, the claimant had deprived his cat of care.

n) The claimant made access to information requests and received his medical file in May. He noted the seriousness of the situation. The document that investigator Ms. L. had found to be untrue and exaggerated was contained in his medical file.

o) Dr. Lafleur said that the document was not credible and that it had been set aside by the Laurin report. Regarding the accusation, that he had told Ms. A. that she would regret it if she removed him from the file he was working on, the Laurin and Quentin reports indicate that it was not credible.

p) ~~Dr Shizi~~ **[Dr Czyziw]** received the second report from Dr. Lafleur and consulted Dr. Aubin, his physician, who indicated that he had requested mediation with an industrial psychologist. The Laurin report noted the situation and indicated that Dr. Aubin and Dr. Lafleur wanted mediation.

q) He made access to information requests to obtain information. He filed a harassment complaint in August 2014, but did not receive the reports until August 2016, two years later.

r) Ms. C. B. and ~~Dr Shizi~~ **[Dr Czyziw]** exchanged emails. ~~Dr Shizi~~ **[Dr Czyziw]** sent his medical report to Ms. C. B., who asked for amendments to his medical report. In the July 17, 2014, version of the report, ~~Dr Shizi~~ **[Dr Czyziw]** indicated that mediation was necessary and that the employer must respect its own harassment policies. On July 22, after three amendments were requested by Ms. C. B., there was no longer reference to the industrial psychologist, to mediation or to what the claimant had experienced, but the employer was invited to implement administrative measures.

s) The claimant said he went from being a victim to a "bastard." This was the period preceding his return to work following seven months of suspension for psychiatric dangerousness.

t) Ms. J. D. met with him regarding his return to work and told him that Mr. L. C. had been ruined by the situation. She then said that she was not aware of the nature of the complaint he had filed against Mr. L. C. She told him she had hired someone in

ontological coaching, Ms. F., to correct his behaviour. The claimant said that his physician had recommended mediation, but Ms. J. D. denied this.

u) He met with Ms. F., who told him that she had been told that he had behavioural issues, that he was violent and that she was there to correct the problem. He noted that she was not a professional. She eventually called to say that she no longer wanted the contract. Ms. J. D. said that he had refused the coaching and that he still had behavioural issues.

v) He received several documents following his access to information requests. On August 28, 2014, he filed a harassment complaint. He then became ill. He said he had often been sick during that period and that he had had several anxiety attacks.

w) On September 2, he saw a physician again. He was having a panic attack. The physician found that the dose of his medication was not appropriate. He had apparently telephoned his union representative, but did not remember. He allegedly said [translation] "that they were going to get it and that Ms. M. K. was going to get smacked." He stated that he did not deny what he had said but that he had no memory of it.

x) Ms. M. K. called him to discuss the December 31, 2013, letter in which he said that she had taken her time taking remedial action. Finally, the Deputy Minister said that Ms. J. D. would take over the case. He met with them again, but they refused to take the doctor's note. However, they referred to the doctor's note in his termination letter despite having refused the evidence. He was suspended for five days for these incidents.

y) His physician requested an accommodation since mediation had not happened. This request was refused for being unjustified and for not being credible.

z) A gap analysis was conducted and accused Ms. V. G. of failing to meet the harassment policy requirements. The claimant learned that Mr. B. had been permanently appointed to his position. He sent a confidential email stating that Ms. M. K. had been appointed, without a competition, while under investigation. He did the same with Mr. B. He alerted the senior public service to this non-conformity. They responded with this letter mocking him.

aa) He said that his termination began as soon as he complained about his supervisor, Mr. L. C. He stated that this manager had serious prejudices against him. He was removed twice from his position.

bb) There was the incident with R. Then he was summoned repeatedly by Mr. B. He ended up sending an email to Mr. S. K. stating that if he did not do something, something bad was going to happen. He noted that during that period, he was told to stop working by his dentist. He was not in a normal state of health. He was therefore dismissed.

cc) Ms. L. initially noted in her report that four of the five allegations against Ms. M. K. had been retained. Then, following a requested amendment, two of the five allegations were retained. The claimant noted that the amendments were due to incorrect dates.

dd) The briefing note from human resources justifying his termination (GD7-127) indicates incidents even though he had been cleared from those incidents in the Quintet report. According to the termination letter, he had been found guilty of insubordination, which resulted in his first disciplinary notice (GD11-29). He then allegedly threatened Ms. A., but Dr. Lafleur and Ms. L. said that this incident was unfounded. Furthermore, it was Ms. A. who found that the incident was unfair at the procedural level.

ee) Then, Ms. M. K. made him aware of her expectations and told him that she did not tolerate unfounded harassment complaints when he had already filed a complaint. He stated that she was talking to a victim of harassment and that this was one of the reasons for his dismissal.

ff) On November 7, he was informed that the complaint was unfounded, but Ms. V. G. called for an assessment of the working environment, which never happened.

gg) The fourth reason for his termination was his letter of December 31, following which he was told that he had to leave work because management was concerned for the health and safety of the other employees. He wanted to return to his substantive position. He said he had no problem calling out the director to take immediate remedial action. She told him that her expectations were clear but he complained about these directives. He said that he received a five-day suspension for insubordination for complaining about

management and failing to meet her expectations. He had followed ministerial policies and directives. It was a letter addressed to his union.

hh) Then, regarding the incidents that took place on January 9 and 10, the claimant referred to the Laurin and Quintet reports.

ii) On October 17, he was summoned by Ms. J. D. The claimant's suspension took place while Ms. J. D. was under investigation. She had refused to accept his doctor's note.

jj) Then, he was informed that the recommendation by his physician for him to see an industrial psychologist had been rejected. The claimant noted that Ms. L. and Ms. G. had called for an assessment of the working environment. Everything had been refused. The claimant stated that the employer did not do what was required to restore the working environment. He sent an email to the employer explaining his efforts to seek medical help, but he was told that he had not cooperated (GD3-10 and GD2-122).

kk) His physician said that he was able to work, but that he suffered from anxiety. But they had removed this from ~~Dr Shizi~~ **[Dr Czyziw]**'s report and indicated that he did not present a risk of violence in the workplace because he was conscious of his actions. They had refused to provide for accommodations.

ll) In its arguments, the Commission stated that the Tribunal is tasked with interpreting the Act and cannot address the *Labour Relations Act*.

mm) Furthermore, the Commission stated that nothing justifies sending a threatening email. The claimant asked whether the Commission had considered that the policies had not been taken into consideration, nor the conclusions of the report and the fact that he had been subject to harassment.

nn) The Commission stated that being unhappy with the outcome of a complaint does not give someone the right to threaten others. An employer must take threats made by an employee seriously. The claimant said that he had not been unhappy with the results of a complaint, but rather with how he had been treated. The claimant had been the subject of

a complaint in January even though he had been told not to contravene the policy and not to make a complaint when he was a victim of harassment.

oo) He said that at some point, the hat had come off. He had been asked to comply with the expectations of his supervisor even if his supervisor was doing the same thing. He was called a liar. He was removed from his team. He was suspended for psychiatric dangerousness. He was threatened and told he would no longer be paid unless he signed the consent form. He was made to see a coaching consultant to correct his behaviour and his perception of the situation. He said that he lost his temper.

pp) The Court of Appeal has indicated that misconduct occurs when the act is conscious, deliberate or intentional.

qq) The report indicates that the claimant, although appreciated for the quality of his work, became, in management's view, a danger to himself and his team. Two physicians confirmed that he was able to work and that his anxiety was due to his treatment by management.

rr) Case law indicates that harassment is one of the worst forms of violence that can be inflicted on a person.

ss) The claimant stated that he had shown anger at times of deep stress. He said he had responded to the situation, but had not been insubordinate.

tt) He had not realized that his situation could lead to dismissal.

uu) His dismissal was unjust. He was refused Employment Insurance based on the denial of a toxic work environment, the denial of management and serious prejudices against him. The employer was negligent. It had refused to address his sexual harassment complaint, refused to consider the Quintet report and refused to apply the guidelines in practice. The employer was responsible for the deterioration of the work environment. It had refused to implement his physician's recommendations and to proceed with mediation. It had refused to evaluate the workplace environment. The claimant's case had

been treated differently even though Dr. Lafleur had said that the employee had behaved normally in an abnormal environment. Anger and anxiety are normal reactions.

vv) Regarding the email sent to Mr. S. K., the claimant explained that he had suffered an anxiety attack. Mr. B. refused to meet with him and denied his harassment complaint. To this date, all of the facts relating to the Laurin investigation occurred prior to that. He had sent the email out of desperation. He was a victim of sexual harassment and no measures were taken. He feared for himself when he had sent the email. He was not at work, he was working from home, he was in therapy, he was having anxiety attacks, but no one would help him because they refused to provide accommodations.

ww) A complaint was filed with the SPVM. The complaint was not retained because it did not contain anything criminal.

PARTIES' ARGUMENTS

[9] The Appellant made the following submissions:

a) The claimant submits that the Commission made decisions without considering the history of harassment and without considering the rules that apply in the case of a suspected threat in the workplace. This history was completely ignored—denied even—by the employer in his termination letter. These rules, which are supported by recent case law, require the employer to conduct mediation and an independent investigation, not to proceed with dismissal.

b) The claimant indicates that the employer ignored the conclusions of the investigation, which found that he was a victim of sexual harassment.

c) He submits that the employer incurred responsibility by refusing to implement the Harassment Prevention and Resolution Policy and the Manager's Guide to the Restoration of the Workplace.

d) The claimant submits that the employer failed to provide for the accommodations requested by his attending physician following the harassment investigation report.

e) He submits that the employer failed to implement section XX of the Occupational Health and Safety Regulations at the time of the alleged threats, of which he was accused by the employer.

f) He states that the employer dismissed him for reasons that are the subject of ongoing harassment complaints against managers and for which the final report has been delayed by repeated requests for extensions on behalf of managers.

g) He says that he has a reasonable apprehension of bias on the part of the employer.

h) His termination was unjust. He has been refused Employment Insurance benefits based on the denial of a toxic work environment, the denial of management and serious prejudices against him. The employer was negligent. It refused to address his sexual harassment complaint, it refused to address the Quintet report and it refused to apply the guidelines in practice. It is responsible for the deterioration of the workplace environment. It refused to apply the physician's recommendations to carry out mediation. It refused to evaluate the workplace environment. His file was handled differently than others even though Dr. Lafleur said that the employee had behaved normally in an abnormal work environment. Anger and anxiety were a normal reaction.

[10] The Respondent made the following submissions:

a) A claimant who is suspended from their employment because of their misconduct is not entitled to receive Employment Insurance benefits until they meet one of the following provisions set out in section 31 of the Act:

a) the period of suspension expires;

b) the claimant loses or voluntarily leaves the employment;

c) after the beginning of the period of leave, accumulates with another employer the number of hours of insurable employment required by section 7.

b) For the alleged action to constitute misconduct under subsection 30(1) of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. There must also be a causal relationship between the misconduct and the suspension.

c) In this case, the employer has accused the claimant of sending a threatening email to the Deputy Minister of Health Canada on September 22, 2015, of a bullying incident and disrespectful behaviour on May 15, 2015, and of sending disrespectful correspondence to management in June, July and September 2015.

d) The claimant alleges that the Commission made decisions without considering the history of harassment and without considering the rules that apply in the case of suspected threats in the workplace (GD2-1).

e) The Commission reminds the Tribunal that it is responsible for the administration of the Act and not the laws and regulations relating to labour relations. Therefore, the arguments put forward by the claimant in his request to appeal cannot be considered.

f) The claimant explains the threatening email sent to the Deputy Health Minister on September 22, 2015, by the fact that there had been an accumulation of incidents, and states that his anger was due to the fact that his employer had crossed a line (GD3-210).

g) The Commission finds that nothing justifies an employee sending threatening emails to their employer. Any employer must take seriously threats made by an employee and ensure that such a situation does not occur again. Dissatisfaction with a decision or with the result of a complaint does not excuse someone for making threats.

h) The evidence on file shows that the claimant had already been the subject of a letter of reprimand in January 2013, as well as a five-day suspension in January 2015 for similar incidents (GD3-213 to GD3-215).

i) The Commission finds that the evidence provided by the claimant would seem to indicate that he had been aware that his comments could be interpreted as threats or harassment toward his managers.

j) Such behaviour can certainly be considered as a lack of respect for the rules of conduct sanctioned by professional ethics, common sense, general use, or morals.

k) In this case, the Commission submits that the claimant's threats constitute misconduct under subsection 30(1) of the Act, because these acts have a negative effect on the relationship of trust between the parties.

l) Therefore, the claimant is not entitled to receive Employment Insurance benefits from September 22 to November 3, 2015, and after that date, based on paragraph 30(*b*) of the Act, because he was dismissed.

m) The Commission assessed the documents received on January 14, 2016, and did not amend the decision because no new facts were provided (GD6-1 to GD6-260).

n) The Commission submits that its decision is supported by the case law. The Federal Court of Appeal has confirmed the principle that 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 (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36).

o) In this case, the claimant had been warned at least two times that his conduct was not adequate.

p) The Federal Court of Appeal 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 their 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 misconduct and their employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Canada (Attorney General) v. Lemire*, 2010 FCA 314).

q) The incident that led to the dismissal was the threatening email sent to the Deputy Health Minister on September 22, 2015.

r) Case law has confirmed that a claimant who has been suspended from their employment for misconduct is not entitled to benefits during the period of suspension from their employment, as indicated in section 31 of the Act (CUB 78798).

s) In this case, the suspension period was from September 22 to November 3, 2015, and the dismissal for proven misconduct occurred at the end of the suspension.

ANALYSIS

The relevant legislative provisions are reproduced in an appendix to this decision.

[11] The claimant submits that the Commission failed to consider his history of harassment in the workplace when it made its decision. He submits that the employer dismissed the conclusions of the investigation report, which found that he was a victim of sexual harassment, and failed to provide for the accommodations requested by his attending physician following the harassment report. He states that the employer dismissed him for reasons that are the subject of ongoing harassment complaints against his managers and for which the final report has been delayed due to repeated requests for extensions by managers.

[12] The Commission finds that nothing justifies an employee sending threatening emails to their employer. Any employer must take seriously threats made by an employer and ensure that such a situation does not occur again. Dissatisfaction with a decision or with the result of a complaint does not excuse someone for making threats. The evidence on file shows that the claimant had already been the subject of a letter of reprimand in January 2013, as well as a five-day suspension in January 2015 for similar incidents (GD3-213 to GD3-215). The Commission finds that the evidence provided by the claimant would seem to indicate that he had been aware that his comments could potentially be interpreted as threats or harassment toward his managers. Such conduct may certainly be considered as a lack of respect for the rules of conduct sanctioned by professional ethics, common sense, general use, or morals.

[13] Section 31 of the Act reads as follows:

> 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.

[14] Subsection 30(2) of the Act provides that an indefinite disqualification is imposed if it is established that the claimant lost the employment by reason of their own misconduct.

[15] The claimant made an Employment Insurance claim starting on September 20, 2015. The claimant was suspended due to misconduct before being dismissed on November 3, 2015, due to this misconduct.

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

[17] In *Mishibinijima*, the Federal Court of Appeal noted on the subject of misconduct: "[...] 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" (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36).

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

[19] The Tribunal finds that the specific incident that led to the claimant's dismissal was the email that he sent to Mr. S. K. on September 22, 2015. Nevertheless, the claimant's termination letter details a number of incidents that the employer had considered in making the decision to dismiss the claimant.

[20] First, in the email sent to Mr. S. K. on September 22, 2015, the claimant stated the following:

> [translation] "If you do not intervene immediately, something serious is going to happen at FNIHB-QC. I am no longer able to tolerate this monster R. B. Please get me out of this environment immediately" (GD11-85).

[21] The Tribunal takes into consideration that in *Marion*, the Federal Court of Appeal states:

> The role of the Board of Referees was to determine not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act (*Canada (Attorney General) v. Marion*, 2002 FCA 185).

[22] Thus, the Tribunal cannot evaluate or review the severity of the sanction imposed on the claimant by the employer. The Tribunal's role is limited to determining whether the claimant's conduct constitutes misconduct under the Act.

[23] The Tribunal finds that it is true that in itself, and as the Commission submits, it is difficult to justify a threatening email sent to an employer and that the employer must take action following receipt of such an email.

[24] However, the Tribunal is of the view that it must be considered within the context in which the claimant found himself and not by itself, without taking into account the situation that led to the email.

[25] The claimant experienced a particular situation, from 2013 up until his suspension in 2015. The claimant filed a sexual harassment complaint against his manager and was then himself the subject of a complaint on behalf of his manager. Finally, the claimant filed other

harassment complaints against his supervisors. In light of the investigation reports that were conducted, it was found that the claimant's report was not treated in the same way as the one that was filed by his manager against him.

[26] The Quintet report dated September 16, 2013, indicates that the complaint filed by Mr. L. C. against the claimant had been found to have no basis. Furthermore, the report indicates:

> [translation] It is worth mentioning that it is concerning to note the different treatment that Mr. G. L.'s October 5, 2012, complaint received when, at face value, it met the elements of the definition of harassment provided in the existing *Policy*, compared to that of Mr. L. C.'s complaint.
>
> Moreover, Mr. L. C.s' comment that he had never been made aware of Ms. M.'s complaints, not by her, nor by a member of the management, before reading this preliminary report is also disconcerting with respect to management, considering its responsibility to provide employees with a healthy work environment that is free of harassment.

[27] The Tribunal also finds that the claimant said that he was suspended from his employment on the basis that he was considered a risk when this view was contradicted by his physician who had requested accommodations through mediation. The employer refused to provide for these accommodations. The claimant detailed and provided several documents in support of his claims regarding the situation in the workplace.

[28] The claimant indicated that he was very anxious about the situation and that he had sent the email in question during an anxiety attack. He said that a complaint had been filed by the employer with police, but that no charges had been brought against him. As the claimant submits, and as the police had told him, the email could also have been interpreted as a call for help or as a threat toward himself rather than toward his employer.

[29] The Tribunal finds that the termination letter accuses the claimant of a number of incidents (GD3-146/147). However, the claimant indicates that some of these accusations are contradicted in the Laurin and Quintet reports, but still appear in the termination letter. The

claimant made a number of clarifications regarding the incidents, in both his testimony before the Tribunal and the documents he submitted.

[30] While the Tribunal is of the opinion that the claimant has a certain responsibility for his alleged actions, the fact remains that the situation in which he found himself was far from simple. The Tribunal accounts for the fact that the investigation reports show that his employer does not appear to have cooperated with him following the harassment complaints and that accusations had been made against management. Furthermore, combined with the claimant's detailed testimony before the Tribunal and the numerous documents he filed, the Tribunal gives more weight to the claimant's testimony.

[31] The Federal Court of Appeal has also defined the legal concept of misconduct within the meaning of subsection 30(1) of the Act as wilful misconduct where the claimant knew or ought to have known that their conduct was such that it could result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and their employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Canada (Attorney General) v. Lemire*, 2010 FCA 314).

[32] Thus, considering the evidence and the parties' submissions, the Tribunal finds that the numerous events the claimant experienced in his workplace and the inaction of his supervisors regarding a situation that was left to continue over time can explain the fact that the claimant was overwhelmed by the situation and felt both powerless and abandoned.

[33] The Tribunal finds that the claimant attempted to get help by all means and that the email was a demonstration of this. Without justifying the email, or rather the words he used in the email, the Tribunal finds that the claimant could not have known that it would lead to his dismissal. The claimant showed that he cooperated with his employer on this difficult situation. Faced with a situation in which he felt that his employer was violating its own policies and had refused to provide for the accommodations requested by his physician, and in which two investigation reports blamed management for the way the claimant's complaint was treated, the Tribunal finds that, on balance, the claimant's conduct, even if he is not entirely without responsibility, cannot constitute misconduct under the Act.

CONCLUSION

[34] The appeal is allowed.

Charline Bourque
Member, General Division—Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

29 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;

b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or employment; and

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(*a*), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.

31 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.