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

Citation: *Uni-Tech Windows Mfrs Inc. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 102

Tribunal File Number: GE-16-3837

BETWEEN:

Uni-Tech Windows Mfrs Inc.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

R. G.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: May 2, 2017

DATE OF DECISION: June 30, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant - Uni-Tech Windows Mfrs. Inc. (Employer)

The Added Party – R. G. (Employee)

The Employee's lawyer, Mary Ellen McIntyre (Representative), accompanied by her articling student

A Spanish Interpreter

INTRODUCTION

[1] The Employer is appealing the Respondent's decision—following his request for a reconsideration under section 112 of *the Employment Insurance Act* (Act)—to maintain its original determination that the Employee did not lose his job due to his own misconduct, and is therefore not disqualified from receiving benefits, pursuant to section 30 of the Act.

[2] The Employee applied for benefits on July 5, 2016, and the Respondent found that he was not disqualified from receiving benefits. The Employer requested a reconsideration of this decision, arguing that the Employee should be disqualified because he lost his job because of misconduct. On October 13, 2016, the original decision was maintained. The Employer filed an appeal to the Tribunal on October 18, 2016.

[3] The hearing was held in person for the following reasons:

a) The complexity of the issue under appeal.

b) The fact that credibility might be a prevailing issue.

c) The fact that more than one party would be in attendance.

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

e) 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.

[4] At the hearing, both parties wished to provide the Tribunal with additional material: a written submission in the case of the Employee, and videotape evidence in the case of the Employer. Each party was given seven days to provide their material, with 30 days to respond to any additional material from the other party. On May 8, 2017, the Employee's submission was received by the Tribunal. The Employer did not send in the videotape evidence, and did not respond to the Employee's submission.

ISSUE

[5] The issue under appeal is whether the Employee lost his job because of his own misconduct, and should therefore be subject to a disqualification, pursuant to section 30 of the Act.

EVIDENCE

[6] The Employee lost his job on June 24, 2016, after more than five years with the company, and applied for benefits on July 5, 2016 (GD3-3 to GD3-14). A benefit period was established, effective June 26, 2016.

[7] The Employee described the incident that led to the end of his employment as a minor dispute with a co-worker that led to him "throwing a radio to the floor." He indicated on his application for benefits that he would have liked to return to this job, but he had been fired (GD3-7 to GD3-8).

[8] The Respondent tried to reach the Employer, leaving voice mail messages on August 5, 2016, and August 8, 2016, but received no response. On August 10, 2016, the Respondent proceeded with its decision that the Employee was not disqualified from receiving benefits (GD3-18).

[9] The Employer's request for a reconsideration of this decision was received by the Respondent on September 12, 2016 (GD3-19 to GD3-20). There were no reasons on the reconsideration request form explaining why the Employer disagreed with the decision.

[10] The Respondent tried to reach the Employer through correspondence dated October 5, 2016, by phone that same day, and twice on October 12, 2016 (GD3-22 to GD3-23). On October 13, 2016, the Respondent proceeded to make its reconsideration decision based on the information on file. The Employer submitted his personal notations to show that he had called back on October 13, 14 and 17, 2016 (GD7-5), which was after the decision was made.

[11] Through correspondence dated October 13, 2016, the Employer and the Employee were informed of the reconsideration decision, which maintained the original determination of the application for benefits (GD3-24 to GD3-27).

[12] In the Employer's appeal of the reconsideration decision, dated October 18, 2016, he stated, as found at GD2-3:

> [B]efore R. G. left, he had not been behaving well. He was aggressive and argumentative towards his co-workers and continued to be so even after warnings from Management.
>
> On June 24, 2016, after another fiery argument with his co-worker, he made durogatory [*sic*] racial condescending remarks and his bahaviour [*sic*] became of a violent rage…He physically picked up a radio, with both hands raised above his head and smashed it to the floor with all his force, in which plastic pieces scattered across the floor into several broken pieces, while profusely shouting "you see this, you see this"!
>
> [H]e made verbal physical threats to his fellow co-workers, by pointing his finger stating that "I will get you"!

[13] On February 21, 2017, the Employer wrote to the Respondent that the Employee had threatened to "return at 5.00 p.m. after work and wait in the parking lot" for the co-worker he had argued with, and he will 'get him and fix that guy'." The Employer further referred to the altercation as "a single incident where the claimant acted in a moment of frustration" (GD7-2 to GD7-3).

[14] The Employer appended its "Health and Safety Policy," with a section on "Workplace Violence and Harassment Policy," which gave the following definitions (GD7-5):

> **Workplace violence**: the exercise or attempt of physical force by a person against a worker in the workplace that causes or could cause injury. A threat or behaviour that is reasonable for a worker to interpret as a threat to exercise force that could cause physical injury.
>
> **Workplace harassment**: engaging in a course of vexatious comments or conduct against a worker in the workplace that is known or ought to be known to be unwelcome.

[15] The policy included a commitment, as found at GD7-5, to ensure that "all employees and supervisors have information and instruction to help prevent workplace violence and harassment in the workplace." The Appellant also submitted photos showing placement on a noticeboard of this policy (GD7-6 and GD7-7). The photos themselves were not date stamped.

[16] On April 26, 2017, the Employer made a further submission, appending a decision from the Minister of Labour that found the Employee was not entitled to vacation pay, termination or severance pay because of "wilful misconduct, disobedience and wilful neglect," based on definitions in subsection 1(1) of the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009* (GD9-1 to GD9-5).

[17] At the hearing on May 2, 2016, the Employer asserted that he had witnessed the incident, but had not initially intervened: "I saw the dialogue between them. I didn't interject. I allowed them to have their dialogue." He confirmed his earlier description of the altercation, adding that the Employee threw the radio—which was only for his personal use—down to the floor with "all his force, smashing into a thousand pieces." The Employer maintained that all the electrical outlets were shared, five workbenches to four sockets, and no one worker had their own outlet.

[18] After the incident, the Employer explained that he walked the Employee to the door, because he was "worried that a physical altercation would take place, and he was "trying to prevent a violent outbreak." He maintained that the Employee had used derogatory "racial" and "condescending" remarks, and threatened the co-worker with physical harm. He told the Employee to get out, and not to return to the premises.

[19] The Employer maintained that the workplace had always been harmonious; there had never been any previous incidents like this with the Employee.

[20] The language spoken in the workplace was English, although all the workers except the one allegedly threatened by the Employee were Spanish-speaking, and spoke Spanish amongst themselves. The Employer maintained that the derogatory and threatening comments by the Employee were made in English, just as the Employer had reported them.

[21] The Employee described the incident from his perspective. He had plugged his radio and clock into the same socket, "my outlet," for more than four years; everybody in his section used the radio. There was another socket at floor level available for the workers to use for company equipment, but on the day in question, his co-worker had insisted on repeatedly unplugging the radio, and using the socket for this other equipment instead.

[22] The Employee explained that he had asked the other worker more than once not to do this, and the Employer had initially seemed supportive of the Employee continuing to use the socket for the radio. It was when the manager told the Employee that he could no longer use it for the radio that he lost his temper, and said: "If we're not going to use it, it might as well go in the garbage," and he threw it on the floor.

[23] He apologized to the Employer for this action at the hearing, but categorically denied that he had physically threatened the co-worker, or made comments about his race, contending that what he said was: "Look at what you did because of not understanding the way things should be," and "Look at the problem you brought me."

[24] The Employee stated that he had not been aware of any company policies on harassment and violence. He asserted that he did not know a lot of English, and so did not pay attention to documents on the noticeboard, and there had never been any meetings on the subject. He maintained that he had never experienced any problems with his co-workers before.

[25] The Employer offered to submit a videotape recording of the incident, should the tape still be available, to illustrate the placement of the work tables and the sockets, as well as what transpired on the day of the altercation, but he provided nothing further. The Tribunal therefore proceeded with its decision without the benefit of this evidence.

SUBMISSIONS

[26] The Employer made the following submissions:

a) Management had issued prior warnings to the Employee for being aggressive and argumentative towards his co-workers, but to no avail.

b) The electrical outlets were shared by all the workers in the area where the Employee's worktable was located; he had not been assigned one for his personal use of a radio.

c) On the day of the incident, the Employee threw the radio "with all his force" onto the floor, "smashing it to a thousand pieces." His actions were "totally deliberate, reckless and wilful without cause."

d) The Employee made "condescending" and" racial" remarks to another employee, threatening "he would fix him," and would return after 5pm to wait "to get him" in the parking lot.

e) The workplace had always been harmonious; there had never been previous incidents.

[27] The Respondent made the following submissions:

a) The Employer did not submit any evidence that it had issued previous warnings to the Employee for being aggressive and argumentative.

b) The Employer did not provide evidence to show that any established policy or practice was in place regarding hostile or disrespectful conduct.

c) There is insufficient evidence that the Employee threatened the other worker,

d) There is insufficient evidence that the Employee instigated the conflict.

e) The principles from CUB 76919 should apply to this appeal: the Employee could not have anticipated that his actions would lead to his dismissal.

f) The Respondent is solely "governed by the application of the Employment Insurance Act, and Regulations, and is not bound by any decision rendered by the Ministry of Labour" (GD12-1).

ANALYSIS

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

[29] According to subsection 30(1) of the Act, a claimant is disqualified from receiving benefits if the claimant "lost any employment because of their misconduct." The Act does not define "misconduct," nor is it defined as such in the case law, so the determination is largely a question of the circumstances of each case (*Attorney General of Canada v. Bedell*, A-1716-83).

[30] According to the jurisprudence, the legal concept of misconduct encompasses acts that are willful, that is, "conscious, deliberate or intentional." (*Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85).

[31] There must be a causal link between the claimant's misconduct and the claimant's loss of employment (*Attorney General of Canada v. Cartier*, 2001 FCA 274; *Attorney General of Canada v. Nolet*, A-517-91). The claimant would have to know, or ought to have known, that his or her conduct would result in dismissal *(Locke v. Attorney General of Canada*, 2003 FCA 262; *Attorney General of Canada v. Langlois*, A-94-95).

[32] The onus, on a balance of probabilities, rests on the Employer—the Appellant in this case—to establish that the Employee's loss of employment was due to misconduct (*Minister of Employment and Immigration v. Bartone*, A-369-88). The fact that an employer deems that a behaviour warrants dismissal does not satisfy the onus of proof needed to establish that it constitutes misconduct within the meaning of the Act *(Choinière v. Canada Employment Insurance Commission and Deputy Attorney General of Canada***,** A-471-95; *Fakhari v. Attorney General of Canada*, A-732-95).

[33] It would be an error for the Tribunal to determine whether the Employee's dismissal was justified, or whether his conduct was a valid ground for dismissal. Its only role is to determine

whether his conduct amounted to misconduct within the meaning of the Act (*Attorney General of Canada v. Marion*, 2002 FCA185; *Langlois, supra)*.

[34] The Tribunal is mindful of the fact that a finding of misconduct under the Act carries with it grave consequences for the Employee—the loss of benefits already granted, and a substantial overpayment—and that decisions of this nature can only be made on the basis of clear evidence, and not just the opinion of the Employer (*Crichlow v. Attorney General of Canada*, A-562-97).

[35] In essence, there are two versions of what transpired on the Employee's last day of work: the evidence of the Employer, and that of the Employee. Either version could be a reasonable account of what transpired from each party's perspective. The Tribunal notes that neither party brought witnesses, so although the Employer said there were numerous witnesses to support his position—including the worker allegedly threatened by the Employee—none appeared, or provided testimony by means of an affidavit. The Tribunal must rely solely on the parties themselves.

[36] The conflict between their divergent perspectives can only be resolved, therefore, by giving greater weight to the evidence that is the most relevant and reliable, having regard to all the circumstances.

[37] The Tribunal notes that certain facts are not in dispute: an altercation occurred between the Employee and a co-worker, and after the manager intervened in support of the other worker, the Employee threw his radio onto the floor, where it shattered. Here, however, the narratives of the parties diverge.

[38] The Employee conceded that he threw down his radio in a fit of temper and frustration, but maintained that he never threatened the other worker, or made the derogatory comments, as the Employer has alleged. It was his own radio, although everyone listened to it, and breaking it caused no harm to any person or to company property. The Employer, on the other hand, saw his actions as a threat of physical violence against the other worker.

[39] There are further issues in dispute. The Employer initially claimed that the Employee had a history of aggressive and argumentative behaviour, and had been given many warnings, while

the Employee maintained that he had never had any trouble with other workers in the more than five years that he had worked there. The Employer asserted that the relevant policies on violence and harassment were all properly posted, while the Employee contended that he would never have taken notice of such postings because of his limited English.

[40] The Tribunal finds that these disputed facts cannot be established, on a balance of probabilities, from the evidence before it. The onus is on the Employer to show that sufficient evidence exists to prove that the Employee's actions constitute "misconduct" within the meaning of the Act. However, the Tribunal has identified a core inconsistency in the evidence that has cast doubt on its overall reliability.

[41] This inconsistency relates to the earlier pattern of aggressive and argumentative behaviour that the Employer cited, which continued, he stated in his appeal, "even after warnings from Management." The Employee, on the other hand, maintained that he had never had any difficulties with his co-workers; his version of events seems to be borne out by the Employer's own statement, in a later submission, where he described the altercation as "a single incident where the claimant acted in a moment of frustration." At the hearing, too, the Employer maintained that the workplace had always been harmonious, with no previous incidents. This testimony contradicts his own prior negative evidence about the Employee's work history.

[42] The Tribunal notes that the Employer had also asserted on his notice of appeal to the Tribunal that the altercation took place "after another fiery argument with his co-worker." And yet, he stated at the hearing that he had seen the dialogue between his employees leading up to its denouement, but "I didn't interject. I allowed them to have their dialogue." The Tribunal finds it more probable than not, that if the argument had indeed been "fiery," the Employer would have intervened earlier.

[43] The Employer further explained that after the altercation, he had walked the Employee to the door, because he was "worried that a physical altercation would take place," and that he "tried to prevent a violent outbreak." His testimony therefore established that there had not been "physical force" against the other worker as per the definition of "violence" in the company policy. The Employer repeated many times that the Employee had thrown the radio onto the

floor—as confirmed by the Employee—but never alleged that it had been thrown at the other worker, or that the Employee had threatened to do that.

[44] Given the absence of any evidence of prior warnings, the Employer has also not shown that there had been a prior pattern of harassment leading up to the altercation, as he had initially asserted, even under the company's definition. The Tribunal must assume that, had there been, in the words of the policy, "a course of vexatious comments or conduct," there would have been evidence of steps that the Employer had taken to address it, such as verbal and written warnings.

[45] Since the Employer's statements about the Employee's past behaviour were contradictory, the Tribunal cannot consider his evidence on this issue to be credible. Given this credibility finding, the Tribunal gives less weight also to the Employer's evidence about the derogatory comments and threats of violence. The Tribunal accepts, on a balance of probabilities, that there were harsh words between the Employee and his co-worker—the Employee admitted that he loudly berated him for costing him his job—but the Tribunal cannot determine what these words were, based solely on the evidence from the Employer, and from no other impartial source.

[46] Furthermore, the Tribunal agrees with the Respondent that there is insufficient evidence to determine who instigated the conflict. The Employee asserted that he had been using the same socket for his radio for four years. The Employer did not dispute this, describing it as a privilege accorded to the Employee. The manager's decision to, in effect, take that privilege away following the initial argument between the Employee and his co-worker, might well have been justified, since—according to the Employer's testimony—the outlet in question was not for any single worker's exclusive use. However, the change was by all accounts sudden, and could well have been interpreted by the Employee as an intrusion into his workspace. The Employer has not proven, therefore, his assertion that the Employee's actions were "deliberate…without cause."

[47] The Tribunal accepts the photographic evidence the Employer provided to show that the company's policies were posted on the noticeboard, with the caveat that the photos were not date-stamped to prove definitively that they were on display when the Employee was still with the company. However, it also accepts as reasonable the Employee's submission that since his

English was poor, he would not have taken notice of postings in English. He further submitted that there were no meetings to highlight these policies, a fact that the Employer did not refute.

[48] Since company policy mandated that "all employees and supervisors have information and instruction to help prevent workplace violence and harassment in the workplace," on this issue, too, the Employer has not met his burden of showing that the Employee would—or should—have been aware that his actions would cost him his job. The Tribunal is therefore not satisfied, on a balance of probabilities, that the Employee was conscious that his actions would lead to dismissal (*Locke, supra*), an awareness that would be necessary to meet the legal test for misconduct within the meaning of the Act.

[49] To sum up, while not condoning in any way the actions of the Employee, the Tribunal has placed less weight on the testimony of the Employer for the following reasons. First, there is the issue of the Employer's allegation that the Employee had a previous history of aggression and engaging in "fiery" arguments. As noted above, the Tribunal finds that insufficient evidence has been provided to prove this claim.

[50] Secondly, while the Employer had stated in evidence he provided to the Tribunal on appeal, that the radio, once hurled to the ground, was scattered into "several broken pieces," this claim has escalated by the hearing date: the radio was smashed into "a thousand pieces." This type of exaggeration leads the Tribunal to assign less weight to the Employer's memory of the incident, which was, after all, over ten months after an altercation that—while highly disturbing—he had earlier characterized as "a single incident where the claimant [Employee] acted in a moment of frustration."

[51] In coming to its decision, the Tribunal is mindful of the principle that its only role in this appeal is to make a finding on whether the Employee's conduct fell within the meaning of "misconduct" under the Act, as consistently interpreted by the jurisprudence. The Tribunal has, as well, given significant weight to the Respondent's submission that it is not bound by the findings of the Ministry of Labour, but only by its own governing legislation. This legislation is thus the only yardstick for adjudicating the merits of this case.

[52] Guided by this principle, and after reviewing the evidence and the submissions of both parties, the Tribunal concludes that the Employer did not meet his burden of proving that the Employee lost his job due to his misconduct, within the meaning of the Act. As per the legal test set out above, there was no misconduct, because the Employee's behaviour was an isolated incident; it was not willful in the sense that it was conscious, deliberate, or intentional. Furthermore, it has not been proven that he knew, or ought to have known, that it would result in his dismissal.

[53] The Tribunal finds, therefore, that the Respondent acted appropriately by not imposing a disqualification on the Employee.

CONCLUSION

[54] The appeal is dismissed

Lilian Klein

Member, General Division - Employment Insurance Section

ANNEX

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

(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.

Employment Insurance Regulations