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

Citation: *A. B. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 191

Tribunal File Number: GE-16-2597

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: April 13, 2017

DATE OF DECISION: August 11, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Claimant, A. B. was the only party in attendance at the hearing.

[2] The Claimant made an initial claim for employment insurance benefits on March 7, 2016 however; the Canada Employment Insurance Commission (Commission) disqualified him from receiving benefits finding that he lost his employment due to his own misconduct The employer had advised the Commission that the Claimant has failed a drugs and alcohol test on March 1, 2016 and as a result, was dismissed from his employment. The Claimant argued that the employer knew upon hire that he smoked marijuana and that this only became an issue after he returned from a work related accident. The Claimant submitted that he was targeted, set up to fail the test and dismissed without proper notice.

[3] The Claimant requested that the Commission reconsideration its decision however; on June 22, 2016 the Commission maintained its initial decision. On July 6, 2016, the Claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[4] The hearing was held by videoconference because (a) credibility may have been a prevailing issue (b) the fact that the Claimant was going to be the only party in attendance and (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.

[5] The Member had to decide whether an indefinite disqualification to benefits should be imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). Ultimately, for the reasons to follow, the Member decided that by consciously smoking marijuana, even if it was on his own time, the Claimant willfully disregarded the effects his actions would have on his job performance and obligations to his employer. The Claimant knew about the employer's zero tolerance policy and that he had to pass a drug test in order to return to work, and despite refraining from smoking during his suspension, he still failed the test. The Member found that the Claimant, on a balance of probabilities, lost his employment as result of his own misconduct.

PRELMINARY ISSUES

[6] A videoconference hearing was initially set for January 24, 2017 however, at the request of the Claimant, it was adjourned. The Claimant stated that could hear me but with difficulty because his hearing aid was broken. He stated that it takes 6 to 8 weeks to fix it.

[7] The hearing was adjourned to an agreed date of April 6, 2017 at 11:00 am provided that the same videoconference room was available. The Claimant confirmed his address is correct; he received the docket and had it with him. He was advised to bring it to the next hearing. If his hearing aid was not fixed, or there's a delay in fixing it, he was to contact the Tribunal. He was advised that a second adjournment can only be granted for exceptional circumstances. He heard and understood.

[8] The videoconference room was not available on April 6, 2017 so the present hearing was conducted on April 13, 2017. The Claimant received (signed for) the NOH on February 2, 2017.

[9] On July 12, 2017, the Tribunal invited the employer to participate as a party to this appeal however; a response was not received (GD5).

EVIDENCE

[10] The Claimant applied for employment insurance regular benefits after having been dismissed from his employment on March 1, 2016.

[11] The first record of employment (ROE) indicates that the Claimant was off work due to illness or injury on June 26, 2015 (GD3-15). The second ROE indicates that the Claimant returned to work on September 28, 2015 and was dismissed on March 1, 2016 (GD3-16).

[12] On March 29, 2016, the Commission determined that the Claimant lost his employment because of his own misconduct and therefore imposed an indefinite disqualification to benefits as of March 6, 2016 (GD3-37).

[13] The Claimant requested that the Commission reconsider its decision. After reviewing all the evidence provided below, the Commission maintained that the Claimant lost his employment

due to his own misconduct when he failed a drug test that violated the employer's alcohol and drugs in the workplace policy (GD3-95 to GD3-97).

Evidence from the Employer

[14] The Commission spoke with L. C. in HR who indicated that the Claimant returned from a 6 month WCB claim and had to go through random drug testing. She indicated that he was tested on February 23, 2016 and the test results were positive for two separate banned substances. He was suspended for one week and warned that next time he will be dismissed. The Commission was told that when he returned to work on March 1, 2016, he tested positive again and was dismissed. The Claimant's behaviour did not improve despite several warnings and suspensions. The employer advised that all employees are told at orientation that the employer has zero tolerance policy for drugs (GD3-17 and GD3-18).

[15] At the reconsideration review, the HR representative advised that the Claimant was tested on February 23, 2016 because on February 22, 2016, the Claimant was lewd and crude to another employee. She indicated that the employer had a right to administer a random drug and alcohol test if suspicious of use. The Claimant was tested when he returned to work after his injury on October 14, 2015, which he passed. The employer stated that the Claimant was given many chances because they were advised not to dismiss him while he was on a WCB program. She stated that it was the Claimant that was rude and mistreated others. She had several written complaints from other employees and supervisors because of his rude and abusive conduct (GD3-57 and GD3-58).

[16] The employer sent in the following documentary evidence:

> March 1, 2016 - meeting notes from L. C. indicate that she tested the Claimant twice but the results were inconclusive. She took the Claimant to Dynamic Testing Solutions in Calgary for a drug test which showed a positive result for cocaine and THC (GD3-20 to GD3-22).
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> February 22 & 23, 2016 - A written witness statement from another employee (R. S.) indicates that on February 22, 2016, the Claimant made a lewd gesture and comment to him and caused a work hazard by dragging a bag of insulation slowly by him when he

was using a wood saw (GD3-29). On February 23, 2016, the employer administered a drug test to the Claimant. The employer's drug test form shows that the Claimant's test results were inconclusive for THC and cocaine (GD3-23). The employer made a note that the Claimant stated he had a couple of puffs of marijuana the night before. The employer indicated that the test results are "presumed positive" GD3-24). The Claimant signed a written warning regarding the test results. He was given a 5 day unpaid suspension. He was advised to return to work on March 1, 2016; he must not be under the influence of narcotics and he must pass a drug test or he will be terminated. The employer noted that the Claimant admitted to marijuana use but not cocaine the day before (GD3-27). An incident report indicates that the Claimant was tested twice; the results were presumed positive; he complained of harassment and admitted to smoking marijuana the night before. On the employer's insistence, he took the paid cab home. He was advised that he has to pass a drug test when he returns on March 1, 2016 (GD3-28).

February 11, 2016 - The Claimant signed a written warning regarding "insubordination" for swearing at his supervisor. The Claimant was suspended for 5 unpaid days until February 22, 2016 (GD3-30). A written witness statement from another employee (R. S.) indicates that the Claimant made explicit sexual comments and gestures to him; that the Claimant went behind his work bench and drawers to get a knife; the Claimant touched his hands and other parts of his body (GD3-35).

January 21, 2016 - The Claimant signed a written warning regarding his rude behaviour (verging harassment). He was suspended for 1 unpaid day (GD3-31).

November 30, 2015 - The Claimant signed a written warning for being late 6 time in November. He noted that it was his ride to work that made him late (GD3-32).

November 10, 2015 - A copy of a note/email was provided (unaddressed and unsigned) regarding the Claimant's productivity and behaviour towards the company owner. It notes that the Claimant stated to the owner "put me on the press brake or lay me off". It notes that the Claimant does not want to install insulation. He was advised by the owner to increase his productivity to demonstrate improvement then, he would put the Claimant back on the press brake. The note indicates that the Claimant "flat out refused"; that he

had a bad attitude and was bringing the morale of the shop down; the Claimant stated that he didn't care; he performed at an unacceptable level; he was "straight out insubordinate and disrespectful" (GD3-34).

April 29, 2015 - The Claimant signed a written warning regarding him yelling at another employee which violated company policy. He was not to engage in confrontational behaviour. The employer noted that the Claimant denied swearing (GD3-33).

Employer's alcohol and drugs in the workplace policy - The policy indicates: "Employees reporting to work cannot be impaired by alcohol or drug use or by the after effects of such use." Employees are required to report to work in a manner fit to perform all their usual assigned duties. The policy indicates that an employee will be immediately dismissed if witnessed openly engaged in the consumption of alcohol or drugs in a public place, employer properties or work sites and/or during work hours. "Employees who are suspected of either being under the influence of alcohol or drugs or are suffering the after effects of use of these items will be asked to leave the jobsite immediately and will not be allowed to return until the symptoms of impairment are deemed to be dissipated and they must pass a drug and alcohol test. Transportation will be arranged for the employees. Employees that are sent home will be treated in the same manner as a suspension from duty without pay." (GD3-25 and GD3-26)

August 13, 2015 - text message from the Claimant to L. C. indicating that he gained 15 lbs. since he stopped smoking pot (GD3-63)

Safety Meetings from October 2013 to Feb 16, 22, 2016 - Memos from the employer to all employees reminded them that they cannot be hungover or under the influence of alcohol or drugs when working. They are to stay clean and sober on Sunday so it doesn't affect their work (GD3-65). They were told about the importance of the zero tolerance drug/alcohol policy and "what you do on your own time is your business - if you bring it or do it at work, it's our business - stop doing what you're doing on Sunday - the boys would rather you didn't do it period it's not a healthy lifestyle" (GD3-71). On July 30, 2014, when marijuana odour was notice in the shop, the employer reminded everyone of its zero tolerance to alcohol or drug use/possession/suffering the effects/impaired at work

(GD3-81). Employees were reminded to treat each other with respect and courtesy; about their 3 strikes policy (GD3-93 and GD3-94); their zero drug and alcohol policy; zero tolerance for violence, harassment, intimidation and sexual gestures and comments and what is an unacceptable behaviour at work (GD3-88). Signature of the Claimant indicates that he was at the meetings (GD3-65 to GD3-94)

Evidence from the Claimant

[17] The Commission also spoke to the Claimant who indicated that ever since he returned to work from a work-related accident to an accommodated position in September 2016, his coworkers started picking on him. The Claimant reiterated the events that happened as per the warning letters noted above. The Claimant indicated to the Commission that he feels that he was set up and that someone spiked his water bottle with cocaine. A coworker, T., stated "haha I got you" and that a text message from T. after he was dismissed said "haha, last day". He advised that he does not do drugs so there is no way he can test positive. He advised that he smokes marijuana from time to time but, so does everyone else who works there. He stated that he did not use marijuana from February 23, 2016 to March 1, 2016. The test on March 1, 2016 picked up the same drugs that were previously in his system because they stay there for 30 days. The Claimant stated to the Commission that when he was hired, the employer told him that they do not care what they do in their spare time, but he should not show up under the influence. The Claimant stated that he never did (GD3-36).

[18] The Claimant requested that the Commission reconsider its decision. He noted that the employer is not being truthful with the information provided. He indicated that he had a work-related accident severing his fingers. After being off work for 6 months, he returned gradually to full-time employment in January 2016 and finished the program in February 2016. During that month he was suspended 3 times for things he didn't do or what others did. He was never given the chance to return to his prior brake press job as promised. He feels he was being set up by other employees. He questioned why he was provided letters that his employer stated he was an outstanding employee one week, and then fired him the next week (GD3-41).

[19] In his letter dated May 18, 2016, the Claimant advised that while he was on light duties in another department, the other employees did not like him because he continued to be paid his

higher wage. He indicated that they made false accusations; he was mistreated, made fun of because of his hearing impairment, bullied, yelled and sworn at by other employees who were friends of the HR person L. C.. He was suspended for a day for mocking another employee but she however, was not suspended for swearing at him. He also sent proof of another employee A. who was saying awful things about his deceased mother (GD3-51 and GD3-52).

[20] He provided the following documentary evidence:

> A text message dated March 11, 2016 (after his dismissal) from T. states: "Last pay day ha ha ha" (GD3-43).
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> Text messages dated March 12, 2016 (after his dismissal) from A. - the Claimant indicated that A. was offering him crack cocaine that he doesn't do and noted that A. made defamatory remarks regarding his deceased mother (GD3-53 to GD3-56).
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> WCB Letter dated February 22, 2016 to the Claimant confirming he was cleared to return to his full-time pre-accident job as a brake press operator (GD3-44). The Claimant provided a copy of the 'WCB return to work plan' aimed at returning him to a brake press operator. It indicates that his employer wanted him back regardless of his restrictions because he was a valued employee (GD3-46 to GD3-48).

Testimony at the hearing

[21] The Claimant reiterated much of what he had stated in his letters to the Commission (GD3-41 and GD3-51) regarding the events during the last month before his dismissal; the other employees not liking him and setting him up.

[22] The Claimant testified that L. C. stated to them just one month before his termination, as she indicated on GD3-71, that what they did on their own time is their business and don't do drugs on Sundays. The "boys" refers to the two owners of the company (M. And R.). She brought this up because others were smoking marijuana in the parking lot; L. C. however, did not test those employees because they were her friends. The Claimant stated that L. C. is a 'pot smoker' and that he did it with her. The Claimant testified that he smokes pot to ease his pain for 20 years so he feels that it was condoned by L. C. to smoke at home but don't bring it to

work. The Claimant testified that he never smoked at work and swears that he never showed up to work impaired. He stated that L. C.'s credibility should be drawn into question because she told the Commission that she did not say it was ok to smoke on their own time. The Claimant stated that he brought this up to the Commission. He stated that nobody believed him that the employer told them repeatedly "what you do on your own time is your own business" but now GD3-71 is proof of his position/statements.

[23] The Claimant testified that L. C. always knew he smoked marijuana. He was referred to the text he sent L. C. about gaining weight since he stopped smoking pot at GD3-62. The Claimant testified that L. C. had told him to stop smoking in August 2016 so that he doesn't have anything in his system when he came back to work in October because he had to pass the test.

[24] Regarding the drug test on February 23, 2016, the Claimant noted that the employer's drug test is a mouth swab that was inconclusive (GD3-23). The Claimant testified that he did not say to the employer that he 'had a couple of puff of marijuana last night' on GD3-24. The Claimant testified that he had said he smoked marijuana a couple of weeks before. The Claimant stated that the L. C. knew when she hired him that he smoked marijuana and didn't care; everyone knew and they still let him work there.

[25] Regarding the final test on March 1, 2016 (GD3-21 and GD3-22), the Claimant confirmed that he was tested by the employer then at Dynamic. He testified that the employer never brought anyone to Dynamic except him. After he was tested, he was asked to go to the car; L. C. was up there (Dynamic offices) for 10-15 minutes, then came to the car and told him that he tested positive for both cocaine and marijuana. He testified that he immediately denied doing cocaine. It really bothered him and he questioned how that was possible since he never does cocaine. The Claimant stated that all he does is marijuana for 30 years.

[26] Regarding the warnings he received for behavioural issues, the Claimant testified that the complaints and warnings all happened one after the other by L. C.'s group of friends (that she brought over from another company and whom she never tested for drugs). The Claimant was referred to the warnings (GD3-29 to GD3-35). The Claimant denied the allegations made by others for instance, he denied creating a safety hazard - he stated he had to drag heavy bags because of his severe fingers and because his co-worker was cutting wood (GD3-29). He denied

swearing at his supervisor (GD3-30). He admitted to mocking L. C.'s friend S., but L. C. did not suspend S. and her husband for swearing at him (GD3-31). He was being harassed and suspended continuously then; on February 23, 2016 they tested him for drugs. The Claimant stated that he told the owner (GD3-34) to just lay him off so that he can go to school (through WCB) because he wouldn't put him back to his brake press position (since his fingers were severed) as per the WCB plan/goal. The owner however, told him "no we're not going to do that".

[27] The Claimant stated that the employer was looking to find a reason to fire him because the accident cost them a lot of money. The Claimant stated that there were 30 employees at the employer and only the same 5 friends picked on him. Others told him to be careful because "they are setting you up".

[28] The Claimant testified that he knew about the employer's policy regarding drugs and alcohol. The Claimant stated that he thought he may be suspended but not fired. The employer never tested him in the 2-3 years prior to his accident even though they knew upon hire that he smoked pot. They only wanted to test him after the accident (WCB claim). The Claimant was asked whether he knew he'd be fired for smoking pot at home. The Claimant testified that prior to the accident; he didn't think he'd get fired because the employer knew he smoked pot at home. After the accident however, they told him that they wanted to fire him and get him in trouble.

[29] The Claimant testified that he also was not provided "3 strikes" as per the policy. He was tested only once on February 23, 2016 and then was given only a week until March 1, 2016 before he was tested again and had "one strike". The Claimant testified that he knew he had to pass the drug test when he came back from suspension on March 1, 2016 so he didn't smoke anything the week he was suspended. L. C. knew that even though he didn't smoke anything while he was off, it was not possible for the THC to clear his system because it takes 30 days to do so. They gave him only 7 days to get the marijuana out of his system, which doesn't make sense. The Claimant testified that, unlike him, another employee was tested three times; he was suspended twice then fired him after the third test.

[30] They wanted to fire me because they didn't want him to be retrained (through the WCB) so they were looking to fire him. They didn't want him to improve his life. He has to deal with

having severed fingers for the rest of his life. He can only work part-time now because of his severed fingers. It is not his style to act in the way the employer stated noting that his past and present employers would attest to that fact.

SUBMISSIONS

[31] The Claimant submitted that the information provided by his employer is false and shows that they set him up to fail a drug test because they wanted to dismiss him after a costly WCB claim. The Claimant submitted that he never used cocaine and was falsely accused and/or set up. The employer knew he smoked marijuana upon hire and for 3 years prior to his dismissal and didn't have problem with it. The Claimant submitted that he knew of the employer's zero tolerance drug policy however; it was not enforced and in his case, neither was their 3 strike policy. The employer's (L. C.'s) credibility should be brought into question given the documentary evidence (GD3-71) that shows that the employer didn't care what they did at home.

[32] The Commission submitted that the Claimant's admission to drug use and the employer's evidence (warnings, suspension and safety meetings) prove that the Claimant knew his wilful and deliberate actions would result in his dismissal thus, his actions amounted to misconduct. The Commission submitted that the employer could have dismissed the Claimant for workplace conduct and attendance issues for which he had been warned, but did not because he was on a WCB gradual return to work program. The Claimant was dismissed instead for failing a drug test on March 1, 2016 upon returning from a 5 day suspension for failing a drug test on February 23, 2016 which violated the employer's zero tolerance to alcohol and drug policy.

ANALYSIS

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

[34] Section 30 of the EI Act provides for an indefinite disqualification of benefits when a claimant is dismissed by reason of his/her own misconduct. The onus is on the employer and the Commission to show that the Claimant, on a balance of probabilities, lost his employment due to his own misconduct (Larivee A-473-06), Falardeau A-396-85).

[35] The Member notes that it must first be established that the Claimant's actions were the cause of his dismissal from employment (Luc Cartier A-168-00, Brisette A-1342-92). In this case, the employer advised the Commission that although they had provided the Claimant with several warnings regarding his behaviour and other issues, he was ultimately dismissed on March 1, 2016 because he failed a drug test by testing positive for cocaine and marijuana (THC).

Did the Claimant commit the alleged offence?

[36] The Member notes that the employer had warned the Claimant for behavioural issues (lewd, rude gestures, yelling, swearing, ultimatum to the owner, reduced productivity) during the weeks leading up to his dismissal however, did not dismiss him for violating their workplace policies regarding such issues.

[37] The employer indicated to the Commission that on February 22, 2016, another employee put forth a complaint that the Claimant made a lewd gesture and comment to him and caused a work hazard. The employer indicated that according to their workplace policy, since the Claimant's behaviour raised suspicion of drug use, they administered a drug test to the Claimant. The employer's drug test form shows that the Claimant's test results were inconclusive for THC and cocaine (GD3-23). The employer indicated on its form that the results are "presumed positive" so the Claimant was suspended for 5 days and advised that he must pass another drug test when he returns on March 1, 2016. The evidence shows that on March 1, 2016, he was tested at Dynamic Testing Solutions and that the Claimant tested positive for marijuana (THC) and cocaine (GD3-22). The Claimant was dismissed because he did not pass the drug test. The Commission indicated that the Claimant was dismissed because the Claimant failed the drug test which violates the employer's alcohol and drugs in the workplace policy (GD3-95).

[38] The Claimant, on the other hand, denies making lewd gestures and causing a workplace hazard as his co-worker alleged on February 22, 2016. The Claimant also denied that he admitted to the employer that he had smoked marijuana the night prior to being tested by the employer on February 23, 2016 (GD3-24). The Claimant testified that he had said he smoked marijuana a couple of weeks before. The Claimant consistently denied that he ever did cocaine and therefore is very upset that the test showed a positive result. It is the Claimant's position that he was set up by his employer and/or co-worker i.e. that cocaine was put in his water bottle. The

Claimant testified that he never smoked at work and swears that he never showed up to work impaired. The Claimant testified that he did not smoke marijuana during his 5 day suspension and for two weeks prior to February 23, 2016. He submitted that since it takes about 30 days for drugs to clear one's system, being tested just 7 days later meant that he was set up to fail the test.

[39] The Member also considered the employer's workplace alcohol and drug policy. The Member notes that there is no evidence that the Claimant engaged in the use of drugs at work and/or during work hours which would have led to an immediate dismissal. The policy indicates that employees are expected to report to work fit to perform their usual duties. If the employer however suspects that an employee is under the influence, or is suffering the after effects of use of either alcohol or drugs, the employee will be asked to leave the jobsite immediately and will not be allowed to return until the symptoms of impairment are deemed to be dissipated and he/she must pass a drug and alcohol test (GD3-25 and GD3-26).

[40] The Member finds that in this case, the employer suspected that the Claimant may have been under the influence of drugs and/or suffering the side effects of drugs on February 22, 2016. Although, the policy stipulates that the employee is then asked to leave the jobsite immediately, the employer tested the Claimant on February 23, 2016 before sending him home. Even though their test was inconclusive, the results were presumed to be positive, and the Claimant was suspended for 5 days. The Member notes that whether the Claimant was/wasn't impaired on February 23, 2016, and whether the employer should have suspended the Claimant for 5 days or not, is not what is under consideration herein because the Claimant was not dismissed on February 23, 2016.

[41] The policy then stipulates that an employee would not be allowed to return until the symptoms of impairment are deemed to be dissipated and he/she must pass a drug and alcohol test. The Member finds that the Claimant was dismissed on March 1, 2016, not because he may/may not have shown symptoms of impairment, but because he tested positive on that day for cocaine and marijuana on tests performed by an independent laboratory.

[42] The Member understands that it is the Claimant's testimony that he never went to work impaired and never smoked marijuana at work. The Member also acknowledges that the Claimant testified that he did not smoke any marijuana during his 5 day suspension so he was not

impaired when he returned to work. The Member considered the Claimant's position that he smoked marijuana two weeks prior to being tested and since it takes 30 days for it to get out of his system, it would account for the positive marijuana test results. Further, he stated that the positive results for cocaine are suspect because he denies ever doing cocaine. The Claimant stated that he was set up by the employer and/or co-worker who must have put cocaine in his water bottle. In support of his suspicions, the Claimant provided copies of text messages from coworkers to show that he was not liked and who were glad to see him terminated. This evidence (texts) however, does not conclusively support the Claimant's explanation for the positive cocaine results. The Member therefore, placed more weight on the documentary evidence provided by the laboratory than on the Claimant's explanation and unsupported speculation for the positive drug results. The Member finds that the Claimant had drugs in his system and therefore did not pass a drug test, which in turn, violated the employer's policy and he was dismissed for this reason. Regardless of the Claimant's explanation for the positive results for the two drugs, he tested positive and as a result, according to the policy he could not be allowed to return to work on March 1, 2016.

[43] The Member finds therefore that the Claimant was dismissed for violating the employer's workplace alcohol and drug policy which stipulates that after being suspected of drug or alcohol impairment, the Claimant must pass a drug test. The Member finds that the Claimant committed the alleged offence of having both marijuana and cocaine in his system that resulted in him failing a drug test and which was the reason for his dismissal.

Do the Claimant's actions amount to misconduct?

[44] 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 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 (Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06).

[45] In this case, the Commission submitted that the Claimant's actions amounted to misconduct and it correctly imposed an indefinite disqualification to benefits. The Claimant's admission to drug use and the employer's evidence (warnings, a suspension and proof of the Claimant's attendance at safety meetings) show that the Claimant knew his wilful and deliberate actions, his use of drugs, would result in a failed drug test and thus, would result in his dismissal.

[46] The Claimant, on the other hand, disagrees that his action amounted to misconduct. He does not dispute that he knew about the employer's zero tolerance policy, and he knew that he had to pass a drug test in order to come back to work on March 1, 2016. Further, the Claimant testified and consistently admitted that he smoked marijuana on the weekends and has done so for several years. The Claimant testified however, that he did not smoke marijuana for two weeks prior to being suspended and during the week of his suspension. Plus, he adamantly denies ever doing cocaine. He testified that on the contrary, he consciously did not smoke marijuana during the 5 day suspension so that he would pass the drug test and thus meet the requirement of the policy and return to work. Further, the Claimant submitted that his employer was aware that he smoked marijuana when they hired him and for three years they had no problem with it.

[47] Having considered the parties submissions, evidence and case law, the Member finds that the Claimant, on a balance of probabilities, lost his employment as result of his own misconduct. The Member finds that the Claimant admittedly knew that the employer had a zero tolerance for alcohol and drugs policy and he knew that he must pass a drug test in order to return to work. The Member finds that the Claimant therefore knew, or ought to have known, that his conduct i.e. the voluntary and wilful taking of drugs and consequential failing of a drug test impeded the carrying out of his obligations to his employer and that as a result, termination was a real possibility.

[48] The Member considered the Claimant's testimony that during the week of his suspension, he consciously avoided smoking marijuana thus, made an effort to comply with the policy. The Member also considered his contention that despite his abstinence; he was set up to fail the test because the drug would still be in his system. The Member understands that the employer knew that he smoked marijuana on his own time and that he had never been tested until he came under

scrutiny upon his return to work after his work-related accident. The Member notes that when he had to return to work in October 2015, he was advised by L. C. in August that he had to pass a drug test. The Claimant consciously stopped smoking marijuana (GD3-63), passed the test, and returned on a gradual return to work program as planned. The Claimant was well aware therefore, that if he resumed smoking marijuana, even if it was on his own time, he could be subject to drug testing by his employer. The Member finds that despite his employer's knowledge of his marijuana use, it does not absolve the Claimant from being responsible for his wilful actions i.e. the continued use of marijuana, or excuse him from his obligation to his employer.

[49] The Member's finding is supported by case law. The Federal Court of Appeal hoas found that, where a claimant, through their own actions, including the voluntary consumption of drugs or alcohol, can no longer perform the services required from them under the employment contract and as a result loses their employment, that claimant "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily" (Wasylka 2004 FCA 219; Lavallée 2003 FCA 255; Brissette A-1342-92). In this case, the Claimant admittedly knew he was under the employer's scrutiny and that he could be tested for drugs at any time. Yet, the Claimant continued to smoke marijuana, failed the test and as a result, was unable to return to work and perform the duties owed to his employer.

[50] The Member also considered the Claimant's adamant position that despite the employer's zero tolerance policy, they were also repeatedly told by the employer that they didn't care what employees did on their own time. The Member notes that the meeting notes provide by the employer do indicate that they were told "what you do on your own time is your business - if you bring it or do it at work, it's our business - stop doing what you're doing on Sunday - the boys would rather you didn't do it period it's not a healthy lifestyle" (GD3-71). The Member notes however, that the employees were also repeatedly reminded about the importance of the zero tolerance drug/alcohol policy and to stay clean and sober on Sunday so it doesn't affect their work (GD3-65). The Claimant interpreted this to mean that as long as he didn't bring or do drugs at work, which he did not do, the employer did not care what they did on their own time. The Member agrees that there is no evidence that the Claimant brought or consumed drugs at work and he was not dismissed for this reason. Further, it is obvious from the evidence, that the

employer was well aware that their employees were engaged in the consumption of drugs and alcohol both on and off their premises. The Member disagrees with the Claimant however, that being told they can do what they want on their own time, does not mean that the employer is condoning their behaviour or that their zero tolerance policy does not apply at work. In fact, the employer repeatedly advised their employees, including the Claimant, of their expectations i.e. zero tolerance at work. The Member also disagrees with the Claimant, that just because Liz was aware of his marijuana use and made the said statements at safety meetings, does not discredit or imply that she lied to the Commission. Again, the employer's awareness of the Claimant's use of marijuana, does not absolve him from his conscious decision to smoke marijuana or his responsibility to his employer.

[51] Finally, the Member considered the Claimant's testimony that he did not expect to be dismissed after only failing the test once. He noted that in his case, the employer did not implement their stated "3 strike" policy. He was subject to differential treatment and they just wanted to fire him. The Member acknowledges that although he was provided several warnings about him violating conduct policies, the employer did not follow its "3 strike" policy in his case (GD3-93). The fact that the employer decided to dismiss him immediately without any further opportunity to pass the drug test is a decision of the employer. The Tribunal's jurisdiction is not to comment on whether the sanctions of the employer were appropriate; nor can it comment on the manner or behaviour of the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (McNamara 2007 FCA 107; Fleming 2006 FCA 16). The conduct of the employer is not a relevant consideration under section 30 of the EI Act (Paradis, 2016 FC 1282).

[52] The Member finds that although he may have been surprised to be dismissed immediately, he admittedly knew of the employer's zero tolerance drug and alcohol policy. The Claimant had passed the drug test in October 2015 by abstaining from any drugs and alcohol for at least a month before in order to return to work after his accident. The Member finds that by not passing the drug test on March 1, 2016, the Claimant consciously used drugs and therefore willfully disregarded the effects his actions would have on job performance. Despite not being given the amount of warning(s) that he expected, the Claimant 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.

[53] The Member finds therefore that the Claimant, on a balance of probabilities, lost his employment as result of his own misconduct. The Claimant therefore must be disqualified from receiving employment insurance regular benefits pursuant to sections 29 and 30 of the EI Act.

CONCLUSION

[54] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

Section 29 stipulates that 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;

Subsection 30(1) 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) 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.

Subsection 30(3) stipulates that 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.