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

[TRANSLATION]

Citation: *JB v Canada Employment Insurance Commission and X*, 2018 SST 1426

Tribunal File Number: GE-17-3288

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: May 1, 2018

DATE OF DECISION: May 18, 2018

Canada

DECISION

[1] The appeal is dismissed. The Tribunal finds that the Claimant lost his employment because of his misconduct.

OVERVIEW

[2] The Appellant has worked as a technician at X for several years. He lost his job on May 24, 2017. As the reason for the dismissal, the employer alleges that the Appellant gave his manager a formal notice in which he discredited the company executives and tried to damage their reputation. According to the employer, the Appellant's actions and behaviour violated the obligations of loyalty, diligence, and respect arising from his work contract.

[3] After reviewing the Appellant's claim for benefits, the Canada Employment Insurance Commission (Commission) determined that he had lost his job because of his misconduct, which disqualified him from receiving Employment Insurance benefits. The Appellant argues that he was dismissed in retaliation for reporting a wrongdoing by the company's management.

ISSUE

[4] Did the Appellant lose his job at X because of his misconduct?

ANALYSIS

[5] The relevant statutory provisions appear in the annex of this decision.

Summary of the Facts

[6] To understand the subject of this appeal, the Tribunal believes it is necessary to provide a chronological summary of the facts that led to this appeal. This summary is based on the information on file and the Appellant's testimony at the hearing.

[7] In 2012, the Appellant participated in a staffing process to obtain a promotion at X. As part of this process, he underwent a psychometric test administered by an external firm with a

mandate to assess candidates. The Appellant failed the selection process and pursued legal action against the external firm at the Small Claims Court.

[8] End of August/September 2015: The Appellant directly addressed X's CEO during a visit and shared with him his observations about the operation and management of the company. He also sent a letter by registered mail to the president of the company's board of directors. That letter is not in the file, but the Appellant submits that it was intended to inform senior management that some of the company's managers would soon be receiving subpoenas to testify before the Small Claims Court in connection with his lawsuit against the external firm. According to the Appellant, that letter was also intended to note his desire to be part of the company's board of directors. After those two events, the Appellant was suspended for 10 days for insubordination. The suspension letter referred to an event that occurred in 2014, where the Appellant was allegedly warned a first time not to correspond directly with upper management. (GD3-55 and 56)

[9] End of 2015: The Appellant's case was heard before the Small Claims Court. The judge of that court ruled in his favour at the beginning of 2016.

[10] July 2016: The Appellant corresponded with X's CEO to tell him that he wished to sit on the company's board of directors. (GD3-57)

[11] March 2017: The Appellant corresponded with X's CEO in connection with his lawsuit before the Small Claims Court. He submits that X contradicted himself in an affidavit summited to that court. He asked for an internal investigation. The Appellant also outlined the difficulties he experienced as an employee after his last suspension and repeated his desire to be part of the company's board of directors. (GD3-59 et 60)

[12] April 2017: The Appellant was suspended for 30 days for insubordination. He was accused of failing to respect the chain of command and to show loyalty and respect towards his employer by questioning the integrity of management. (GD3-31)

[13] May 23, 2017: When he returned from his suspension, the Appellant met with the employer. It reminded him of its expectations of him. It asked him, in particular, to respect the

company's decisions (that he was [translation] "not to return to the staffing process" from 2012), not to directly address upper management, and not to make accusations against management. (GD3-30)

[14] The same day, the Appellant gave his employer a formal notice. In that document, he alleged that the company illegally intervened in his small claims trial and submitted that some of the company's managers perjured themselves. He alleges that X and its managers breached the code of ethics and the rules that govern the company's operation. The Appellant also submits that he was a victim of retaliation for reporting the wrongdoings and asks that X stop all forms of intimidation towards him. He urged the company's CEO to speak out publicly about his case. The Appellant also told the employer that, in the event of any other measure towards him, he would file a complaint with the Sûreté du Québec [Quebec's provincial police] for harassment and collusion. He also reserved the right to inform the Unité permanente anticorruption [permanent anti-corruption unit] (UPAC). (GD3-40 to 42)

[15] The next day, the Appellant was suspended for an indeterminate period. On June 8, the employer sent him a dismissal letter retroactive to May 24, 2017. (GD3-54) He was accused of giving his manger a formal notice in which he again questioned the professionalism and integrity of representatives of the company's management, despite several past warnings to that effect. (GD3-54)

Concerning the Concept of Misconduct

[16] The *Employment Insurance Act* (Act) allows a claimant to be disqualified from receiving Employment Insurance benefits when they lose their employment because of their misconduct. (Section 30 of the Act).

[17] Misconduct is not defined in the Act or the *Employment Insurance Regulations* (Regulations). Rather, the Federal Court of Appeal has defined and clarified this concept in numerous decisions in recent decades. The act or conduct of which a claimant is accused must satisfy certain criteria for a loss of employment because of misconduct to be established:

a) The claimant must have committed the act of which they are accused.

b) That act must constitute misconduct. In other words:

(1) The act must be wilful, deliberate, or so careless or reckless as to approach wilfulness; and

(2) The act must be such that the claimant knew or should have known that their conduct was such as to impair the performance of the duties owed to their employer and that it would be likely to result in their dismissal.

c) There must be a causal relationship between the alleged act and the dismissal. In other words, the act or the misconduct in question must be the true cause of the dismissal, and not a simple pretext.

[18] In matters of misconduct, the Commission must prove, on a balance of probabilities, that a claimant lost their employment because of their misconduct. (*Minister of Employment and Immigration v Bartone,* A-369-88; and *Canada (Attorney General) v Davlut,* A-241-82)

Did the Appellant commit the alleged acts?

[19] Naturally, before I can determine whether certain actions or acts constitute misconduct, I must first determine whether it has been proven that the Claimant actually committed the alleged acts.

[20] The answer to that question must be based on clear evidence and not merely on speculation and suppositions. Furthermore, the Commission must prove that such evidence exists independently of the employer's opinion. (*Canada (Attorney General) v Crichlow,* A-562-97)

[21] The dismissal letter on file indicates that the act that allegedly caused the termination of the Appellant's employment is the formal notice he gave to his manager after he returned from his suspension on May 23, 2017. The Appellant acknowledges that he gave this document to his employer; he was the one who told the Commission and the Tribunal about the chain of events that led to him submitting this formal notice. The Tribunal finds that the Appellant did commit the act the employer alleges.

Does it constitute misconduct?

Were the Appellant's actions wilful, deliberate, or so careless or reckless as to approach wilfulness?

[22] To constitute misconduct, the alleged act must have been wilful or deliberate or so negligent as to approach wilfulness. (*Canada (Attorney General) v Tucker*, A-381-85)

[23] The Appellant acknowledged that he chose to give his manager a formal notice to point out what he considered to be a wrongdoing by the company's management and a harassment and retaliation problem at the employer. The Tribunal finds that there is no doubt that the Appellant acted wilfully by giving his manager this document.

Did the Appellant know (or should he have known) that his conduct was such as to impair the performance of the duties owed to his employer and that it would be likely to result in his dismissal?

[24] The Federal Court of Appeal has established that misconduct occurs when a claimant knew or should have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility. (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36) Similarly, the Federal Court of Appeal established in another decision that misconduct is a breach of such scope that its author could normally expect that it would be likely to result in dismissal. (*Meunier v Canada (Employment and Immigration Commission*, A-130-96)

[25] The Tribunal finds that the Appellant knew that his conduct was likely to result in his dismissal.

[26] The evidence on file clearly indicates that the Appellant was warned more than once that he had to respect the chain of command and stop questioning the integrity of members of upper management. He was suspended for that same reason twice in recent years—in September 2015 and in May 2017.

[27] After returning from his last 30-day suspension for insubordination, at the end of May 2017, the Appellant met with his manager, and his manager reminded him of what the employer expected of him. The list of expectations in the document entitled [translation] "Reminder of

what is expected of you" is clear; he was asked specifically to stop making allegations against management and not to return to the staffing process of 2012. The suspension letter and the reminder of expectations letter also mention that the Appellant could expect more severe disciplinary measures if he did not correct his behaviour.

[28] The Appellant then responded by giving his manger a formal notice. At the hearing, the Appellant submitted that this formal notice was well intentioned and that it was intended only to [translation] "set things straight" so that the employer would leave him alone. The Tribunal finds, however, that the tone the Appellant used in the wording of his letter is severe and accusatory. He repeats, in particular, various allegations against management and threatens to file a complaint with police.

[29] In addition to being clearly explained to the Appellant during his meeting with a manager on May 23, it is worth noting that the employer's expectations are also explained in X's employee code of conduct. It notes, in particular, the obligation to act with loyalty and diligence, which includes respecting instructions, avoiding causing harm to the employer through actions or words that could hurt its image, and avoiding insubordination. (GD3-72 and 73)

[30] In short, considering the warnings and disciplinary measures the Appellant received in the past, the Tribunal does not see how the Appellant could expect anything other than dismissal by giving his employer a formal notice nearly immediately after his return to work, following a 30-day suspension.

Are the Appellant's alleged acts the real cause of his dismissal?

[31] The Federal Court of Appeal has established that there must be a casual relationship between the act considered misconduct and the dismissal. In other words, the act in question must be the actual cause for the dismissal, not just an excuse. (*Canada (Attorney General) v Nolet*, A-517-91)

[32] The core of the Appellant's defence is based on this last factor. The Appellant alleges that he was not dismissed for the reason cited by his employer, but rather in retaliation after he reported what he considered was a wrongdoing on the part of certain members of the company's

management. He submits that his dismissal was part of his employer's harassment measures towards him.

[33] According to the Appellant, the actions in question occurred at the end of 2015, at the hearing of a lawsuit that he filed before the Small Claims Court against a supplier for X, which made him undergo a psychometric assessment as part of a staffing process in 2012. He submits that X allegedly interfered illegally in his trial, first by breaking the subpoenas that had been sent to the company's management, then by submitting an affidavit, which, according to the Appellant, contained perjury. The Appellant eventually lost his case before the Small Claims Court, and he attributes his loss mainly to the employer's interference.

[34] It goes without saying that an employee who is dismissed for another reason for having reported a wrongdoing by their employer will generally not be considered to have lost their job because of their misconduct. First, because such a dismissal would have difficulty meeting the criteria that apply to misconduct, particularly the causal relationship between the misconduct and alleged act and the dismissal, but also because the disclosure of wrongdoings is an act protected under certain laws.

[35] However, in this case, the Tribunal finds that the Appellant was not dismissed for reporting a wrongdoing. He was dismissed for the reasons the employer cited—that is, for failing to respect the code of conduct and for insubordination.

[36] It is not the Tribunal's responsibility to address in detail the employer's actions in this file. As set out by the Federal Court of Appeal, courts must focus on the claimant's conduct and not on the employer's conduct. 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 him losing his employment. (*Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Canada (Attorney General) v Fleming*, 2006 FCA 16)

[37] Despite the Appellant's serious allegations against his employer, the Tribunal finds that the documentary evidence does not support the existence of a wrongdoing by the employer that would be likely to justify the actions taken by the Appellant on May 23, 2017, or show that the

Appellant was dismissed in retaliation. On the contrary, the evidence on file, particularly the Appellant's disciplinary history, shows rather that Appellant was subject to a series of disciplinary measures for various violations of the code of conduct and the employer's expectations, ultimately resulting in his dismissal. The Tribunal gives significant weight to this documentary evidence, which is quite extensive, and which summarizes well the history of the dispute between the Appellant and his employer in recent years.

[38] The Appellant also submits that his dismissal was part of a series of harassment measures by the employer. When invited to specify what he meant by harassment, the Appellant mentioned the various disciplinary measures taken against him by the employer in the past, the fact that the employer did not support him before the Small Claims Court, and the fact that he had not taken the expected career path.

[39] Since this case concerns the Appellant's misconduct, it is irrelevant for the Tribunal to determine whether the factors the Appellant mentioned constitute harassment. The Tribunal is limited to saying that the factors the Appellant provided are not enough to contradict the rest of the evidence showing that he was dismissed for the reasons the employer cited. The same goes for the Appellant's argument that he was the victim of a scheme by the employer.

[40] Contrary to what the Appellant submits, the Tribunal does not find that the fact that the employer was a few weeks late giving him his Record of Employment shows harassment. The evidence shows that the Appellant stopped working on May 24, the decision to dismiss him was made on June 8, the dismissal was recorded by the company's human resources on June 19 (GD7-3), and the Record of Employment was issued on June 30 (GD3-23). These are long delays, but they are certainly not uncommon in Employment Insurance.

[41] The Tribunal finds that the Appellant lost his job for the reasons cited by the employer.

CONCLUSION

[42] The Tribunal finds that the Appellant did lose his job for giving his employer a formal notice. All indications are that this act was wilful and deliberate, and it has been shown that, given the company's code of conduct and his disciplinary history, the Appellant knew or should

have known that his actions could lead to his dismissal. The Appellant therefore lost his employment because of his misconduct.

[43] The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	May 1, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	J. B., Appellant

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.