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

[TRANSLATION]

Citation: *A. B. v Canada Employment Insurance Commission*, 2018 SST 1162

Tribunal File Number: GE-17-2723

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: June 7, 2018

DATE OF DECISION: June 7, 2018

Canada

DECISION

[1] The appeal is dismissed. The Tribunal finds that the Appellant stopped working because of his own misconduct.

OVERVIEW

[2] The Appellant was a construction labourer for X. He stopped working on August 12, 2016, because he had failed a drug and alcohol test his employer had him take. The Commission refused the Appellant's claim because it found that he had stopped working because of his own misconduct. The Appellant admits that he failed the employer's drug test, but he submits that he should be entitled to Employment Insurance benefits because he did not smoke weed on the premises. He smoked it at his home when he was on leave. The Tribunal must determine whether the Appellant stopped working because of his own misconduct.

ISSUES

[3] Did the Appellant commit the acts the employer alleges?

[4] If so, do the Appellant's acts constitute misconduct?

PRELIMINARY MATTERS

[5] At the very end of the hearing on May 4, 2017, the Appellant raised the ground that the Commission discriminated against him when assessing his file because of his ethnic origin. The Appellant indicated that the Commission had rendered a racist decision because he has a name of African origin. The Tribunal adjourned the hearing, and it resumed on June 7, 2018. The Appellant suspected that the Commission rendered a racist decision because his claim for benefits was approved at first, and then the Commission rendered a decision disqualifying him from receiving benefits. The Tribunal clarifies that the Appellant stated on his renewal claim for benefits that he stopped working because of a lack of work, but the employer stated that the Appellant had been dismissed. Although the Appellant's grounds are based on the *Canadian Charter of Rights and Freedoms*, the Tribunal believed it could analyze the Appellant's file by following the Tribunal's regular General Division process because the Appellant did not raise the

discrimination grounds in relation to the employer and the alleged misconduct, but in relation to the Commission's assessment of his file. The Tribunal told the Appellant that it is independent of the Commission that rendered the decision he is appealing and that it will render an impartial decision based on the evidence and arguments presented by both parties.

ANALYSIS

[6] The relevant statutory provisions are included in the annex to this decision.

Did the Appellant commit the acts the employer alleges?

[7] The employer told the Commission that there was an incident on the worksite and that, when an incident happens, the process requires that employees automatically take an alcohol and drug test. The employer stated that the company has a zero-tolerance policy for drugs and alcohol and that employees are informed of this policy when they are hired.

[8] The Appellant stated that an incident that was not his fault happened on the worksite and that he was still subjected to a drug test. The Appellant stated that he failed the alcohol and drug test the employer imposed and that he was aware of the employer's zero-tolerance policy. The Appellant admits to smoking weed but at his home when he was on leave. He does not understand why he could not receive Employment Insurance benefits because he did not smoke weed at his place of work.

[9] The evidence shows that the Appellant failed the drug and alcohol test the employer subjected him to and that he was aware of the employer's policy on this matter.

[10] The Tribunal finds that the Appellant committed the acts the employer alleges.

Do the Appellant's acts constitute misconduct?

[11] The Tribunal must determine whether the Appellant's actions constitute misconduct within the meaning of the *Employment Insurance Act* (Act), and the Commission has the onus of proving that the actions constitute misconduct (*Canada (Attorney General) v Larivée*, 2007 FCA 312 (CanLII)).

[12] The Commission states that using drugs, even during his leave, constitutes misconduct on the Appellant's part because he was aware of the employer's policy regarding alcohol and drug use and still decided to use drugs during his leave. The Commission maintains that the Appellant did not consider the repercussions this act could have on the conditions of his employment. It also states that, while the incident on the worksite was not considered the Appellant's fault, he tested positive after the incident. The act of using drugs is a clear breach of the contract of employment and constitutes misconduct within the meaning of the Act.

[13] The Tribunal states that, to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on job performance (*Tucker*, A-381-85).

[14] The Appellant testified that he worked on the site for 14 days and then was on leave for 7 days. The Appellant admits that he smoked "weed," a soft drug, but he maintains that he is entitled to his private life and that he used it at his home when he was on leave. He explained that the employer has a zero-tolerance policy for drugs and alcohol and that all employees are subjected to an alcohol and drug test when an incident happens. The Appellant failed the test with a positive result. However, he maintains that he has the right to use the drug on his days off and when he is on leave because it is his private life, not his professional life, that is in question.

[15] There is misconduct 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 (CanLII)].

[16] The Appellant said he was aware of the employer's zero-tolerance policy on alcohol and drug use. Notably, this policy specifies that workers cannot use or possess drugs or alcohol at the place of work to ensure worksite safety. This policy also stipulates that workers cannot work under the influence of drugs or alcohol and that the employer reserves the right to subject employees to tests.

[17] The Appellant states that he was not accused of possessing drugs at work because the employer did not find any drugs when it searched his personal effects. However, the employer's

policy clearly states that workers cannot work under the influence of drugs or alcohol, and the Appellant was aware of this policy. While he submits that he did not use drugs at his place of work but only while on leave, the urine test showed that he was still under the influence of drugs or alcohol.

[18] The Tribunal notes that for a behaviour to amount to misconduct under the Act, it is not necessary that there be a wrongful intent. It is sufficient that the wrongdoing or omission complained of be "wilful," that is, conscious, deliberate or intentional (*Caul*, 2006 FCA 251; *Pearson*, 2006 FCA 199; *Bellavance*, 2005 FCA 87; *Johnson*, 2004 FCA 100; *Secours*, A-352-94; *Tucker*, A-381-85).

[19] The Appellant was aware of the employer's alcohol and drug policy (GD3-50) and knew that, by using weed, his dismissal was possible (*Canada (Attorney General) v Brissette*, A-1342-92). In addition, the Tribunal is of the opinion that the causal link between the misconduct alleged by the Commission and the Appellant's loss of employment has been established. It is precisely because the Appellant failed the alcohol and drug test that he was dismissed.

[20] The employer dismissed the Appellant, but he could have been rehired at another worksite after completing a rehabilitation program. If he completed this program, the Appellant would be able to apply for a position on another site the following year. However, although the employer allowed the Appellant this possibility, on August 12, 2016, the Appellant was dismissed, and his employment was terminated because he had failed the alcohol and drug test. To get a position at another worksite, the Appellant has to apply for an available position.

[21] Finally, the Tribunal heard the Appellant's arguments that he did not commit this act at work but during his leave and that he should not be disqualified from receiving benefits. However, the Tribunal is of the view that, although the Appellant was not at work when he used weed, it is not necessary for this misconduct to be committed at work, on the work premises, or as part of the employment relationship with the employer for it to be misconduct. There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. In this case, the employer's zero-tolerance policy for drugs and alcohol and the fact

that the Appellant failed the alcohol and drug test he was subjected to establishes the causal link (*Canada (Attorney General) v Brissette*, A-1342-92).

[22] The Tribunal is of the opinion that the Appellant's alcohol consumption was wilful and that he wilfully smoked weed during his leave. Knowing the employer's zero-tolerance policy, the Appellant could presume that there would be consequences if he used drugs. The Tribunal is of the opinion that the Appellant was able to understand the nature and consequences of his use, and it is in this sense that the drug use, and incidentally the failing of the alcohol and drug test, is considered a wilful act (*Canada (Attorney General) v Wasylka*, 2004 FCA 219 (CanLII)).

[23] The Tribunal is of the opinion that the Commission met its onus to prove, on the balance of probabilities, that the Appellant had lost his employment because of his misconduct (*Canada (Attorney General) v Larivée*, 2007 FCA 312 (CanLII)).

[24] The facts in this matter show that the dismissal is the direct consequence of the Appellant having failed the alcohol and drug test. The Tribunal is of the opinion that it can conclude, based on the evidence presented, that the Appellant could have presumed that drug use, even during his leave, was such as to impair the performance of the duties owed to his employer and that such an act could lead to his dismissal [(*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII)].

[25] The Tribunal sympathizes with the Appellant's situation, but it finds that the disqualification imposed on the Appellant is justified and that the acts constitute misconduct.

CONCLUSION

[26] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	June 7, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. 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.