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

[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and J. M.*, 2018 SST 1063

Tribunal File Number: GE-17-2453

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

J. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: April 24, 2018

DATE OF DECISION: June 24, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Added Party worked as a mechanic for the Appellant for more than a year.

[3] In spring 2017, C. the cat decided to live in the Appellant's garage. The Added Party complained to the Appellant that the cat had damaged his toolbox's fabric. On March 16, 2017, the two parties argued about the cat's presence and the damage it had allegedly caused. The Added Party asked the Appellant to pay him for the damage.

[4] According to the Appellant, the Added Party hit [the manager of the Appellant] and refused to apologize, so the Appellant decided to dismiss him.

[5] However, the Appellant issued an initial Record of Employment stating that the Added Party had voluntarily left his employment. On March 22, 2017, it changed its mind and stated that the Added Party had been dismissed for committing a violent act against the manager. He was therefore dismissed because of his misconduct.

[6] The Added Party says C. the cat damaged his toolbox's fabric on multiple occasions. It was not the first time that he had asked the manager to address the issue. On March 16, 2017, he asked the manager to reimburse him for his toolbox's fabric. There was a heated discussion, and he was dismissed. He denies hitting or pushing the manager's arm. He argues that the Appellant was looking for a reason not to pay him his two-week's notice after dismissing him.

[7] According to the Commission, the Added Party did not lose his employment because of his misconduct. The evidence the Appellant submitted is ambiguous, and the main witness to the aggression is a shareholder in the company. The Commission assigned more weight to the Added Party's version of events than to the Appellant's.

ISSUES

[8] What is the Added Party alleged to have done?

[9] Did the Added Party commit the alleged act?

[10] Does the alleged act constitute misconduct within the meaning of the *Employment Insurance Act* [(EI Act)]?

ANALYSIS

[11] The relevant legislative provisions are reproduced in the annex to this decision.

[12] The Tribunal must decide whether the Added Party lost his employment because of his misconduct and must therefore be disqualified from receiving benefits under sections 29 and 30 of the EI Act.

[13] The Tribunal's role is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Canada v Caul*, 2006 FCA 251).

[14] The Tribunal must determine what the Added Party is alleged to have done, whether the Added Party committed that act, and whether that act constitutes misconduct within the meaning of the EI Act.

[15] In this case, the Appellant bears the burden to prove, on a balance of probabilities, that the Added Party lost his employment by reason of his own misconduct (*Bartone*, A-369-88; *Davlut*, A-241-82).

[16] **What is the Added Party alleged to have done?**

[17] The Tribunal accepts, first, that the Appellant has alleged that the Added Party committed a violent act against the manager. According to the Appellant, the Added Party hit the manager. Second, the Appellant alleged at the hearing that the Added Party did not apologize afterward. It decided to dismiss him as a result.

[18] The Tribunal is of the opinion that the Added Party is alleged to have committed the violent act during the altercation with the manager.

[19] The Tribunal also accepts the Added Party's testimony that he is alleged to have committed the act, although he denies having committed it.

[20] In this context, the Tribunal finds that the Added Party is alleged to have hit the manager of the Appellant.

Did the Added Party commit the alleged act?

[21] The Tribunal is of the view that the Appellant has failed to prove, on the balance of probabilities, that the Added Party committed the alleged act. To reach this conclusion, the Tribunal referred to the evidence on file and the various testimonies.

[22] The Tribunal accepts that, early in the morning on March 16, 2017, the Added Party spoke to the manager of the Appellant to complain about C. the cat. According to the Added Party, the cat damaged the fabric of his toolbox. Upset by the situation, he interrupted the manager during a conversation to complain. The manager told him to go in the garage so they could talk about it later. The Added Party left the premises.

[23] The Appellant submits that the Added Party is hot-tempered. He received a number of warnings about this. The Added Party submits that he did not receive warnings. Furthermore, he did not sign them. The Appellant submits that he refused to sign them.

[24] The Tribunal accepts that most of the warnings note that the Added Party is not solely responsible for the situation. The Tribunal understands that the Added Party has a fiery temper. However, the question remains—did the Added Party hit the manager on March 16, 2017?

[25] The Appellant had staff members testify to prove that the Added Party hit the manager.

[26] Ju., the receptionist, testified for the Appellant. She explained that she heard a noise in the garage but did not see what happened. She did not see the Added Party knock over a bolt bin. The only thing that she could say was that the manager and the Added Party discussed the damage C. the cat did to the toolbox's fabric.

[27] Furthermore, she explained that C. the cat had since been placed with a foster family. The animal protection agency Société protectrice des animaux even came to the garage to make sure the cat was being treated properly.

[28] The Tribunal is of the opinion that Ju.'s testimony, although credible, does not allow the Tribunal to find that the Added Party committed the alleged act.

[29] F., a young apprentice mechanic, said that he saw the Added Party knock over the bolt bin. When the Added Party asked him where he had stood to see the scene, he answered that he was in front of door 6. According to the Added Party, it is impossible that F. could have seen the scene.

[30] The Added Party explains that he heard a loud noise while closing the garage door. He did not knock over the bolt bin deliberately.

[31] The Tribunal assigns more weight to the Added Party's version of events than to F.'s. In fact, the Tribunal told the Appellant a number of times not to include the answers in the questions asked. This method colours witnesses' statements, which is what happened in this case.

[32] As a result, the Tribunal assigns little value to the testimony of F., who partly repeated the Appellant's question-answer. Furthermore, the Tribunal finds that F. hesitated when giving some of his answers. Once again, this witness did not see the Added Party hit the manager.

[33] Jo., the Appellant's shareholder and mechanic, is the only direct witness to the scene. The Tribunal notes that he had an altercation with the Added Party in November 2016.

[34] Jo. explained that he saw and heard the Added Party and the manager discussing the damage done by C. the cat. They were talking and gesticulating very close to one another. The manager had a can of paint and a paintbrush in his hands. According to Jo., the Added Party might have been scared by one of the manager's gestures and pushed his arm. He could not say that he saw the Added Party hit the manager.

[35] The Tribunal accepts that Jo. was unable to determine whether the Added Party hit the manager. The Tribunal assigns little weight to this testimony because, on one hand, Jo. had an

altercation with the Added Party in November 2016, and, on the other hand, he is one of the Appellant's shareholders.

[36] The manager says the Added Party hit him. Even if he just brushed against him, it is assault. He did not file a complaint with the police because the Added Party has a family. He is not afraid of punches. He can take them. He decided to dismiss the Added Party because he refused to apologize.

[37] He admitted that he laughed at the Added Party because he asked the manager to pay for the damage C. the cat did to his toolbox's fabric.

[38] The Tribunal is of the view that the manager's version of the facts lacks credibility. He completed a Record of Employment indicating that the Added Party voluntarily left his employment. He then issued a second Record of Employment indicating that the Added Party was dismissed for serious misconduct. To explain the change to the Record of Employment, the manager told the Commission that the secretary made a mistake.

[39] During his testimony before the Tribunal, he stated that the Added Party contacted the secretary to have the Record of Employment changed.

[40] The Tribunal also accepts the manager's testimony that he adjusted his words based on the witnesses' statements and the questions the Added Party asked.

[41] In this context, the Tribunal finds that the Appellant has failed to prove, on a balance of probabilities, that the Added Party hit the manager of the Appellant. There was a heated discussion between the parties, but the Tribunal cannot find, based on the evidence on file and the testimonies, that the Added Party hit the manager.

[42] As a result, the Tribunal does not have to decide whether the Added Party's act constitutes misconduct because it has not been proven that he committed that act.

CONCLUSION

[43] The Tribunal finds that the Appellant failed to prove that the Added Party had lost his employment by reason of his misconduct within the meaning of sections 29 and 30 of the EI Act.

[44] As a result, the Added Party is not disqualified from receiving benefits.

[45] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	April 24, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	X, Appellant J. E. (manager), Representative for the Appellant J. Meloche, Added Party

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.