



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *M. V. v Canada Employment Insurance Commission*, 2018 SST 1333

Tribunal File Number: GE-18-415

BETWEEN:

**M. V.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Manon Sauvé

HEARD ON: June 26, 2018

DATE OF DECISION: August 2, 2018

## **DECISION**

[1] The appeal is dismissed.

## **OVERVIEW**

[2] The Appellant worked as an X for X (employer) at X Airport (X Airport) starting in March 2014. On July 7, 2017, the Appellant was dismissed because of his misconduct.

[3] On July 7, 2017, the Appellant finished his shift at 3:30 p.m. Around 6:00 p.m., he went, dressed in his uniform, to a restricted area near Gate X. He wanted to speak to his roommate, who was to be deported from Canada. A Canada Border Services Agency officer stopped him. The Appellant stated that he worked at X Airport.

[4] According to the employer, the Appellant violated the *Canadian Aviation Security Regulations*, the employer's hiring conditions, and the access card issuance conditions. He was dismissed for committing serious misconduct.

[5] The Appellant admits that he spoke to a tenant who was to be deported from Canada. However, the events did not occur exactly as the employer suggests.

[6] He believes his employer severely punished him because he paid a fine and had his access card suspended. In fact, the employer used a pretext to dismiss him because he was involved in union activities. He was the local union president.

[7] In the Commission's view, the Appellant knew or should have known that he would be dismissed for not following the *Canadian Aviation Security Regulations* and the conditions of his hiring. The Appellant acted deliberately when he decided to enter a restricted area without authorization.

[8] The Commission therefore refuses to pay the Appellant Employment Insurance benefits on the basis that he lost his employment because of his misconduct. As a result, the Appellant is disqualified from receiving benefits.

## **PRELIMINARY MATTERS**

[9] During the hearing, the Appellant raised an apprehension of bias based on the facts on file related by the Tribunal and his perception of the member.

[10] The Tribunal member explained to the Appellant that she shared the information on file and the Commission's arguments. She reminded the Appellant that the Tribunal is not bound by the Commission's decision and that it acts independently.

[11] After assessing the merits of the Appellant's perception, the member continued the hearing. The Appellant agreed to continue the hearing.

## **ISSUES**

[12] What is the Appellant alleged to have done?

[13] Did the Appellant commit the alleged act?

[14] Does the alleged act constitute misconduct?

## **ANALYSIS**

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

[16] The Tribunal must decide whether the Appellant lost his employment because of his misconduct and should therefore be disqualified from receiving benefits within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

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

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

[19] The onus is on the Commission to prove misconduct (*Bartone*, A-369-88).

**What is the Appellant alleged to have done?**

[20] The Tribunal accepts that the Appellant worked as X at X Airport. On July 7, 2017, the Appellant finished his shift at 3:30 p.m. He remained at the airport. Around 6:00 p.m., he went, dressed in his uniform, to Gate X to speak to a tenant who was being deported from Canada. The tenant owed him money, and he wanted to come to an agreement before the tenant's departure.

[21] A Canada Border Services officer asked the Appellant whether he was authorized to be in the area. The Appellant was not allowed to be in a secure area after his work hours.

[22] The Tribunal is of the view that the Appellant is alleged to have been in a secure area without authorization.

**Did the Appellant commit the alleged act?**

[23] The Appellant admits that he was in a secure area after his shift without authorization.

[24] The Tribunal is of the view that the Appellant committed the alleged act.

**Does the Appellant's act constitute misconduct?**

[25] The concept of misconduct is not defined by the Act and must be considered based on principles drawn from case law. The Act requires "for disqualification [from receiving benefits] a mental element of willfulness, or conduct so reckless as to approach willfulness" (*Canada v Tucker*, A-381-85).

[26] The Federal Court of Appeal defined the legal concept of misconduct, for the application of section 30(1) of the Act, as wilful misconduct, where the claimant knew or should have known that their misconduct was such that would result in dismissal (*Mishibinijima v Canada*, 2007 FCA 36).

[27] In the Commission's view, the Appellant entered a secure area at X Airport when he was not allowed to do so. He lied so that he could speak to a tenant who was to be deported from Canada. He breached the obligations in his employment contract. It was not an error made in

good faith; he failed to follow the directives set by his employer. He broke the relationship of trust with his employer.

[28] In the Commission's view, the Appellant's act was deliberate, conscious, or intentional. The Appellant knew or should have known that his act would result in his dismissal.

[29] The Tribunal notes that the Appellant uses the fact that the tenant owed him more than \$8,000 to justify his act. He was trying to reach an agreement with the tenant.

[30] The Tribunal is of the view that it does not need to determine whether the Appellant's act was justified. The Tribunal must determine whether the act the Appellant committed constitutes misconduct within the meaning of the Act.

[31] In the Appellant's view, he did commit an error, but it was not misconduct. He did not act criminally or intentionally. Furthermore, he paid for his error by being suspended for 45 days by X Airport, paying a fine, and having his access card suspended for 10 days. He considers the dismissal to be a step too far in the circumstances.

[32] The Tribunal does not need to determine whether the dismissal or penalties were justified. It must instead determine whether the Appellant's act constitutes misconduct within the meaning of the Act (*Canada v Marion*, 2002 FCA 185).

[33] The Tribunal is of the view that the act the Appellant committed constitutes misconduct. After his workday, he stayed in uniform at X Airport so that he could enter a secure area.

[34] The Appellant knew at that time that he was not following X Airport's security standards. Whether he lied to the Canada Border Services officer when he was intercepted is secondary. The fact remains that he was not authorized to enter that area to speak to a tenant who was to be deported from Canada.

[35] The Tribunal finds that the Appellant should have known that he would be dismissed for committing this act. He acted so recklessly that he had to have known that he would be dismissed for his act (*Canada v Tucker*, A-381-85).

[36] The Appellant maintains that the employer took advantage of the situation to dismiss him because of his union involvement.

[37] Proof of misconduct does not automatically entail disqualification under the Act. There must be a causal relationship between this misconduct and the Appellant's dismissal. The misconduct must be the cause of the dismissal and not simply a pretext to dismiss an employee (*Attorney General of Canada v Brissette*, A-1342-92).

[38] The Tribunal finds that the Appellant was dismissed because of his misconduct and that it was not merely a pretext on the employer's part because of his union activities. On July 7, 2017, the Appellant violated a security rule for personal purposes. He used his status as X to access an area he was prohibited from accessing to speak with his tenant who was to be deported from Canada.

[39] The Tribunal notes that the Appellant did not comply with section 166(1) of the *Canadian Aviation Security Regulations*, which states that individuals are forbidden from entering a restricted area unless they are acting in the course of their employment. He failed to comply with condition n) of the issuance conditions for access card holders: he was in a secure area when he was not working. And, he failed to adhere to condition 6 of his hiring conditions, which states that wearing the uniform outside of work hours is forbidden.

[40] In this context, the Tribunal is of the view that the Commission has proven, on a balance of probabilities, that the Appellant lost [*sic*] because of his misconduct.

## **CONCLUSION**

[41] The Tribunal finds that the Appellant must be disqualified from receiving benefits because he lost his employment due to his misconduct within the meaning of sections 29 and 30 of the Act.

[42] The appeal is dismissed.

Manon Sauvé  
Member, General Division – Employment Insurance Section

HEARD ON:	June 26, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. V., 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.