



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. L. v Canada Employment Insurance Commission*, 2018 SST 1166

Tribunal File Number: GE-18-1105

BETWEEN:

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: August 17, 2018

DATE OF DECISION: August 24, 2018

DECISION

[1] The Appellant was not suspended from his employment because of his misconduct. The appeal is allowed, and the disqualification imposed by the Commission is rescinded.

OVERVIEW

[2] The Appellant has worked for X for a number of years. On October 6, 2017, he was suspended from his employment for six weeks. The employer alleged that he subjected a co-worker to psychological harassment.

[3] The Appellant in turn denies committing the acts alleged by the employer. He states that the employer has no proof and that the investigation was not conducted impartially.

[4] After reviewing the Appellant's claim for benefits, the Canada Employment Insurance Commission (Commission) disentitled him from receiving benefits as of October 8, 2017, after it determined that he had been suspended from his employment because of his misconduct.

PRELIMINARY MATTERS

[5] The Appellant stated at the hearing that he had new documents that were likely to support his case. He promised to send them electronically to the Tribunal soon after the hearing. Seven days have elapsed, and the Tribunal still has not received any correspondence from the Appellant, even after granting him a reasonable period to submit his documents. The Tribunal finds that the Appellant has no intention of submitting these new documents. This decision is therefore made based on the evidence on file to date and the Appellant's testimony at the hearing.

ISSUE

[6] Was the Appellant suspended from his employment with X because of his misconduct?

ANALYSIS

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

Was the Appellant suspended from his employment with X because of his misconduct?

[8] The Tribunal does not consider the Appellant to have been suspended from his employment because of his misconduct for the following reasons.

[9] Section 30(1) of the *Employment Insurance Act* (Act) states that a claimant is disqualified from receiving Employment Insurance benefits if they lost any employment because of their misconduct. However, under section 30(1)(b) and section 31 of the Act, a claimant who is suspended from their employment because of their misconduct will not be disqualified from receiving benefits; instead, they will be not be entitled to receive benefits during the suspension.

[10] 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 (or suspension) of employment because of misconduct to be established:

- a) The claimant must have actually committed the act of which they are accused.
(*Crichlow v Canada (Attorney General)*, A-562-97).
- b) The act must be wilful, deliberate, or so careless or reckless as to approach wilfulness
(*Canada (Attorney General) v Tucker*, A-381-85).
- c) The act must be such that the claimant knew or should have known that it was such as to impair the performance of the duties owed to their employer and would be likely to result in their dismissal (or suspension) (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36).
- d) There must be a causal link between the alleged act and the action the employer took (the suspension). In other words, the act or conduct in question must be the real cause of the dismissal and not merely an excuse (*Canada (Attorney General) v Nolet*, A-517-91).

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

Did the Appellant actually commit the alleged acts?

[12] Naturally, before I determine whether certain acts or actions constitute misconduct and whether there was a suspension for that reason, I must first determine whether it has been proven that the Appellant actually committed the alleged acts.

[13] 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 (*Crichlow v Canada (Attorney General)*, A-562-97).

[14] In this file, the employer alleges that the Appellant committed three acts that led to a psychological harassment complaint that one of his co-workers lodged against him. The employer argues that an investigation was conducted after the complaint was received and that the suspension was the appropriate step based on the investigation's findings (GD3-31).

[15] The acts in question are the following (GD3-21 and 32):

- 1- The Appellant filed a baseless criminal charge concerning a co-worker ("WL") to harm the co-worker and prejudice him, leading to serious consequences for him.
- 2- He chased that same co-worker in his car on the highway, following him closely, cutting him off, and risking his safety.
- 3- He made racist remarks regarding his co-worker.

[16] The Appellant denies having committed the alleged acts. During the hearing and his conversations with the Commission, the Appellant argued that he did not chase his co-worker on the highway and that it was actually the co-worker who chased him, that he never made racist remarks, and that the criminal complaint he filed against his co-worker was well founded, but the

police dropped it for lack of evidence. In the Appellant's view, the employer has no evidence to support its claims (GD3-29, 56, and 57).

[17] It seems that this situation was an unfortunate, and rather mundane, work dispute between co-workers that degenerated. In summary, the Appellant and some of his co-workers allegedly sent a complaint to X because their supervisor appointed an employee, WL, to replace him without following the seniority list (GD3-37). The Appellant submits that, after the complaint letter was received, the supervisor's superiors took him to task. However, this situation created a considerable conflict with WL.

[18] The Tribunal considers the Appellant credible. He testified with conviction and assurance at the hearing. Furthermore, he has maintained the same version of facts since the beginning of this process.

[19] As a result, the following discusses the evidence relating to the Appellant's alleged acts:

[20] **Baseless complaint:** The Appellant accused WL of trying to hit him with a truck, and he filed a complaint with the police afterward (GD3-56 and 57). In the Appellant's view, his complaint was dropped because of a lack of evidence. He maintains however that the complaint was justified.

[21] Apart from the general allegations in the suspension letter (which are repeated by the employer's HR advisor, GD3-32), the Tribunal notes that the employer did not provide a version of the facts or any evidence related to this event. The Appellant admits that he filed a complaint with the police, but the employer actually alleges that the complaint was baseless and intended to harm and prejudice WL (GD3-21).

[22] In the Tribunal's eyes, the fact that the police dropped the Appellant's complaint does not mean that it was baseless or that its purpose was to harm or unduly prejudice anyone. Surely, police officers receive many complaints that ultimately do not result in criminal charges for various reasons. This does not necessarily prove that the alleged acts were not committed or that the person who made the complaint acted in bad faith. It cannot be proven, based on the evidence

provided to the Tribunal, that the Appellant lodged a baseless complaint with the intention of harming and prejudicing WL.

[23] **Racist remarks:** The Appellant is accused of making racist remarks regarding WL after he was appointed the foreman's replacement (GD-21) The Appellant strongly denies making racist remarks about anyone and refutes the employer's allegations by stating that he would never use such language and that he did everything he could to avoid WL.

[24] Once again, the Tribunal finds that, apart from the allegations in the suspension letter, which were repeated by the employer's HR advisor, the employer has not provided a version of the facts or any evidence related to this event. The employer told the Commission that such evidence existed, including video recordings, but categorically refused to share them. Based on the conversation transcripts on file, the employer was uncooperative and was of little help to the Commission during its fact-finding.

[25] Therefore, there are no statements from witnesses or the alleged target of the remarks in the file. Furthermore, the Tribunal, the Commission, and the Appellant have not viewed or listened to the videos or the recordings that are supposed to prove the Appellant's act. In the absence of other evidence, the evidence provided to the Tribunal does not prove that the Appellant made racist remarks regarding WL.

[26] **Highway chase:** The employer alleges that the Appellant chased WL on the highway and cut him off with his vehicle (GD3-21). The Appellant completely denies acting in this way and submits that it was actually WL who cut him off on the road.

[27] After that event, WL filed a complaint with the police (GD3-36), but it did not lead to criminal charges against the Appellant. However, a [translation] "peace bond" ordering him to stay 100 metres away from WL's residence and place of study was imposed on the Appellant about one year later (GD3-33 and 34).

[28] As stated in section 810 of the *Criminal Code*, a peace bond is issued by a justice when they are convinced that the fears of the person who laid the information are based on reasonable grounds.

[29] This bond is relevant evidence in the file, but it is not accompanied by a reason and does not mention evidence or specific facts. The Tribunal does not know what specific fears invoked by WL led to the signing of the bond, and it obviously does not have the evidence the justice had when they issued the document.

[30] In fact, other than the suspension letter, all the Tribunal has is the complaint letter that WL submitted to the police. However, this complaint was made in August 2016, one year before the peace bond issued by the justice (signed in July 2017), and the document indicates only that the Appellant followed WL on the highway (GD3-36). There is little evidence to support the employer's allegation that the Appellant chased WL with his vehicle on the highway **following closely behind him, cutting him off deliberately, and risking his safety**, especially since the Appellant vehemently denies having acted in this way and submits that it was actually WL who chased him on the highway.

[31] As the Tribunal mentioned previously, it seems that this situation is a workplace dispute between co-workers that degenerated. It is likely that mistakes were made on both sides, but the Tribunal must focus on the events the employer invoked to suspend the Appellant.

[32] After reviewing the evidence on file about these allegations and hearing the Appellant's testimony at the hearing, the Tribunal must find, on a balance of probabilities, that the evidence the Commission filed is insufficient to persuade the Tribunal that the Appellant actually committed the alleged acts. In light of this finding, it is not pertinent for the Tribunal to continue analyzing the other criteria that apply to misconduct.

[33] The Tribunal must therefore find that the Commission has not met its burden to show that the Appellant was suspended from his employment because of his misconduct.

CONCLUSION

[34] The Appellant was not suspended from his employment because of his misconduct. The appeal is allowed, and the disqualification imposed by the Commission is rescinded.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	August 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. L., Appellant

ANNEX

THE LAW

Employment Insurance Act

31 A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

- (a) the period of suspension expires;
- (b) the claimant loses or voluntarily leaves the employment; or
- (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

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.