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

[TRANSLATION]

Citation: *X v. Canada Employment Insurance Commission and B. C.*, 2018 SST 1340

Tribunal File Number: GE-18-3175

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

B. C.

Claimant/Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: December 4, 2018

DATE OF DECISION: December 14, 2018

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] After losing his employment at X, the Claimant filed a claim for Employment Insurance benefits. The Canada Employment Insurance Commission (Commission) reviewed the file and determined that the Claimant had not lost his employment because of his misconduct. This decision was maintained after the employer requested an administrative review of the file.

[3] The employer now appeals the Commission's decision to the Tribunal. It argues that the Claimant lost his employment because of theft and insubordination, that his actions were deliberate, and that his actions do indeed constitute misconduct.

ISSUE

[4] Did the Claimant lose his employment because of his misconduct?

ANALYSIS

Did the Claimant lose his employment at Centre Flavie-Laurent because of his misconduct?

[5] The Tribunal considers that the Claimant lost his employment because of his misconduct for the following reasons.

Concerning the concept of misconduct

[6] 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).

[7] 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. They show that the claimant's alleged conduct or actions must meet certain criteria for there to be loss of employment because of misconduct:

a) The claimant must have 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 (*Attorney General of Canada v Tucker*, A-381-85).

c) 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 (*Mishibinijima v Canada (Attorney General),* 2007 FCA 36).

d) There must be a causal relationship between the claimant's alleged act and the loss of their employment. In other words, the act or misconduct in question must be the real cause of the dismissal, not just an excuse (*Canada (Attorney General) v Nolet*, A-517-91; *Canada (Attorney General) v Brissette*, A-1342-92).

[8] Because the employer is the appellant in this case, it is responsible for proving, based on the balance of probabilities, that the Claimant lost his employment because of his misconduct (*Minister of Employment and Immigration v Bartone*, A-369-88 and *Davlut v Canada (Attorney General),* A-241-82).

Did the Claimant commit the alleged acts?

[9] Naturally, before it can be determined whether certain actions or acts constitute misconduct and whether there was a loss of employment because of misconduct, it must be determined whether it has been proven that the Claimant actually committed the alleged acts.

[10] The answer to such a question must be based on clear evidence and not on mere speculation and suppositions (*Crichlow v Canada (Attorney General),* A-562-97).

[11] X (Centre) is a charity that gives people with low incomes furniture, clothing, and other donated items. The Claimant worked for this organization as a truck driver for 12 years.

[12] According to the employer, the Claimant was dismissed for taking bird-shaped garden ornaments from the organization's premises without authorization. The employer alleges that the Claimant loaded the ornaments into the delivery truck and delivered them to his home without authorization and in violation of the organization's policies that require employees to get approval, and sometimes to pay a minimal fee, before taking an item donated to the Centre. Furthermore, the employer alleges that the Claimant used the organization's delivery truck for personal purposes to drop the ornaments off at his home, although it was forbidden by the policies in effect.

[13] The Claimant acknowledges that he took the ornaments from the organization's premises and loaded them into the delivery truck to take them home, but he argues that he never expected to lose his employment because of it. He believes that the employer was looking for a reason to get rid of him.

[14] In light of his acknowledgement, the Tribunal considers that the Claimant actually committed the acts of which the employer accuses him.

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

[15] Given the nature and complexity of the Claimant's alleged acts, the Tribunal finds that there is no doubt that the Claimant acted wilfully and deliberately when taking items in the Centre's possession and loading them into a truck for delivery to his home. The acts the Claimant committed were not accidental or unconscious; the Claimant committed them on his own initiative while he was working for his employer in its workplace (*Canada (Attorney General) v Tucker*, A-381-85).

[16] The Tribunal believes that the Claimant is sincere when he states that he made a mistake and that he had no ill intent when he committed the acts. However, on this issue, the Federal Court of Appeal has established that wrongful intent is not necessary for behaviour to amount to misconduct under the Act. It is sufficient that the alleged wrongdoing or omission be wilful, that is to say, conscious, deliberate, or intentional, which is indeed the case in this situation (*Canada (Attorney General) v Secours*, A-352-94).

Were the actions in question such that the Claimant knew or should have known that they were such as to impair the performance of the duties owed to his employer and likely to result in his dismissal?

[17] 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 (Attorney General)*, A-130-96).

[18] On this topic, the employer argues that the Centre's policy has always been the same: employees are not allowed to take objects left at or donated to the Centre without authorization from management, and they are not allowed to use the delivery truck for personal purposes without authorization.

[19] The employer provided the Commission and the Tribunal with a copy of the policy, and the following excerpts are relevant to this case:

> [translation] Volunteers and staff members are strictly forbidden from taking items donated to the [Centre] without filling out a request form. Requests must be approved by the Director. Failure to follow this rule will result in the Director taking the necessary actions. (GD3-62)
>
> [translation] The [Centre's] trucks must be used solely for [Centre] business, unless specifically authorized by the Director. (GD3-72)

[20] The employer acknowledges that the policy had not been applied consistently in recent years, which is why it issued a written directive on April 26 to remind employees that the policy existed (GD3-40).

[21] The Claimant submits that he took items donated to the Centre for his personal use more than once and that it was never a problem. He claims that the employer had always tolerated this practice. The situation was the same for using the delivery truck for personal deliveries; it was allowed as long as the delivery in question did not deviate too much from the normal route

(GD3-77). He submits that the employer tightened its policy just four days before dismissing him and that he did not have time to read the document before his employment was terminated. Furthermore, the ornaments he picked up had been in the cafeteria for more than a week with no one showing any interest in them. He states the objects were damaged, had no value, and were going to be thrown out anyway. Finally, the Claimant submits that he loaded the ornaments into the delivery truck in full view of everyone, including a supervisor, and that no one tried to stop him.

[22] The Commission found that the Claimant had made an oversight by taking the lawn ornaments, but that he could not have known that his acts would lead to his dismissal.

[23] After considering the facts on file and hearing the parties on the issues, the Tribunal finds that the Claimant knew or should have known that he was compromising his employment by acting as he did, for the following reasons.

[24] **First,** it is doubtful that the Claimant was unaware of the employer's policy and its reinforcement. The policy in question is clear, and the employer was firm on the new directive about the policy's reinforcement being visibly posted in a number of areas on the organization's premises and that word of it spread among the employees. Additionally, the Claimant admits that he had noticed the document in the cafeteria a few days before his termination, but he states that he did not take the time to read it because he finds reading taxing.

[25] The directive the employer issued on April 26 reads as follows (GD3-40):

> [translation] Volunteers and staff members are strictly forbidden from taking items donated to the [Centre] without filling out a request form. Requests must be approved by the Director. Failure to follow this rule will result in the Director taking the necessary actions. Please note that these rules will be followed closely from now on, including the need to submit a form for each request.

[26] The Tribunal finds the notice clear and simple, that the employer made it available to the employees in a satisfactory manner, and that the Claimant had a duty to make the effort to read it.

[27] In any event, it seems that the Claimant was already quite familiar with the policy in place because he had a history of complying with it. In fact, he had submitted a request to the employer for a television (GD3-78) and a flag (GD2-9) shortly before losing his employment.

[28] **Second**, the Claimant had already received warnings from the employer about following rules and policies:

a) On February 6, 2018, he received a warning and a reminder about the employer's expectations after he had left work before the end of his shift (GD3-36).

b) On April 3, 2018, the employer informed the Claimant of his termination with six months' notice because of "employment fit considerations." More specifically, the employer submits that the Claimant disobeyed and ignored clear instructions, notably when he had moved a piano on his own and injured his back. The letter clearly states that the employer expected the Claimant to follow all of the organization's policies and procedures during his notice period and that failure to do so could result in the immediate termination of his employment (GD3-37 and 38).

[29] In the eyes of the Tribunal, the Claimant should have known, given the warnings, that his conduct needed to be impeccable if he wanted to keep his employment until the end of the notice period. Yet, one month after receiving the letter, the Claimant deliberately acted in a manner that was clearly contrary to a known policy the employer had recently reinforced.

[30] The Claimant maintains that he loaded the ornaments in front of one of his supervisors and that that person did nothing to stop him. The employer submits that a supervisor was not present when the Claimant loaded the ornaments into the truck. The Tribunal finds that, even if it can be presumed that what the Claimant says is true and a supervisor had seen him load the ornaments into the truck, it does not invalidate the acts in question in this case. The acts do not automatically become acceptable because they were committed within sight of a supervisor, especially in light of the evidence considered earlier about the reinforcement of the organization's policies and the Claimant's situation. Furthermore, there could be numerous reasons why the supervisor did not intervene at that precise moment.

[31] In terms of the personal use of the organization's truck, the written policy stipulates that employees cannot use the truck for personal reasons without authorization (GD3-72). The employer submits that this policy has always been consistently applied. However, the Claimant submits that the employer let employees use the truck for personal reasons when the drop-off point was close to the regular work delivery route (GD3-77).

[32] The Tribunal finds that the employer's policy was sufficiently clear and that the Claimant knew (or should have known) that he needed to comply with it because he had been instructed in writing to comply with the policies one month before (GD3-37). And even if it were true that the employer let employees use the organization's truck for delivering objects they had taken from the Centre with permission, the fact remains that the Claimant did not have authorization in the first place to take the ornaments he delivered to his home in the truck.

[33] As a result, the Tribunal considers that the Claimant knew or at least should have known that his conduct was such as to impair the performance of his duties owed to his employer and that he was putting his employment in peril by acting as he did.

Is there a causal link between the alleged acts and the employer's actions? In other words, are the acts or conduct in question the real cause of the dismissal?

[34] The last criterion the Tribunal must consider is whether there is a causal link between the alleged act and the loss of employment. As the Federal Court of Appeal established, there must be a causal link between the alleged act and the loss of employment. 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; *Canada (Attorney General) v Brissette*, A-1342-92).

[35] The Claimant submits that the employer had wanted to get rid of him for some time. He argues that he had the impression that the employer was setting him up when it reinforced its policy on employees using items donated to the Centre. Furthermore, the Claimant submits that, in addition to appealing the Commission's decision to the Tribunal, the employer intervened with the Workers Compensation Board of Manitoba (GD6-8) and with his chiropractor so that the assessment of his physical condition and the decision to pay him benefits for his workplace injury were overturned. He claims the employer also made comments he described as defamatory

on the chiropractor's Facebook page. And, at the end of the hearing, the Claimant stated that the employer had recently intimidated him by parking one of the organization's trucks near his home. In the Claimant's view, all of this shows that the employer acted in bad faith and was looking for reasons to terminate his employment.

[36] In response, the employer submitted that it had intervened with the Tribunal, Workers Compensation Board of Manitoba, and the chiropractor to correct inaccurate information and incorrect decisions. It acknowledged posting comments on the chiropractor's Facebook page but argued that they were in no way defamatory. Furthermore, it denies using intimidation techniques on the Claimant. The employer confirmed that it had dismissed the Claimant for the acts he committed.

[37] Despite these allegations, the Tribunal notes that there is nothing before it that could explain why the employer would want the Claimant to leave the organization before the end of the six months' notice period it had already given him or that would allow the Tribunal to establish conclusively that the Claimant was dismissed for a reason other than the alleged acts. As a result, in the eyes of the Tribunal, the fact remains that there is clearly a causal link between the Claimant's alleged acts (which he acknowledges) and the termination of his employment: he committed acts breaching one of the employer's policies and was dismissed immediately after.

[38] Furthermore, it has been established that the 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 because it dismissed the Claimant, which would constitute unjust dismissal, but whether the Claimant was guilty of misconduct and whether this misconduct resulted in the loss of his employment (*Canada (Attorney General) v McNamara*, 2007 FCA 107 and *Fleming v Canada (Attorney General)*, 2006 FCA 16).

CONCLUSION

[39] In summary, after analyzing the circumstances surrounding the Claimant's dismissal, the Tribunal finds that he lost his employment at the Centre because of his misconduct. By taking garden ornaments without his employer's authorization and using the organization's truck for personal reasons, the Claimant committed wilful and deliberate acts of such scope that he knew

or should have known that dismissal was a real possibility. Furthermore, all of the evidence shows that the Claimant lost his employment for this reason.

[40] The Tribunal finds that the Claimant lost his employment as a result of his misconduct. The appeal is allowed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	December 4, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. V. for X, Appellant B. C., Claimant Erin Lyle, Representative for the Claimant Daniel Fournier, Interpreter