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

[TRANSLATION]

Citation: *FH v Canada Employment Insurance Commission*, 2019 SST 1694

Tribunal File Number: GE-18-3383

BETWEEN:

F. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Yoan Marier

HEARD ON: January 3, 2019

DATE OF DECISION: January 7, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant worked for the company X as a garbage collector until November 3, 2017, when he was dismissed from his job. The employer accuses him of making inappropriate and offensive comments toward another employee.

[3] After reviewing the claim for benefits, the Canada Employment Insurance Commission (Commission) determined that the Appellant had lost his job because of his misconduct. The Appellant was therefore disqualified from receiving benefits for this reason.

[4] The Appellant now disputes the Commission's decision. He acknowledges that his comments were inappropriate, but he submits that he is not a misogynist, that he had no disciplinary history with that employer, and that he could not have expected to be dismissed for his actions.

ISSUE

[5] Did the Appellant lose his job at X because of his misconduct?

ANALYSIS

Did the Appellant lose his job at X because of his misconduct?

[6] The Tribunal finds that the Appellant lost his job because of his misconduct for the following reasons.

<u>Concerning the concept of misconduct</u>

[7] A claimant is disqualified from receiving Employment Insurance benefits if they lost their job because of their misconduct. (Section 30 of the *Employment Insurance Act* (Act))

[8] Misconduct is not defined in the Act or in 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 a claimant is accused of must satisfy certain criteria for a loss of employment because of misconduct to be established:

a) The claimant must have actually committed the act they are accused of. *(Attorney General of Canada v Crichlow*, 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 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 employment. In other words, the act or the misconduct in question must be the actual cause of the dismissal, not just an excuse. (*Canada (Attorney General) v Nolet*, A-517-91; *Canada (Attorney General) v Brissette*, A-1342-92)

[9] In matters of misconduct, the Commission must prove, on a balance of probabilities, that a claimant lost their job because of their misconduct. (*Minister of Employment and Immigration v Bartone*, A-369-88; *Attorney General of Canada v Davlut*, A-241-82)

[10] Naturally, even before determining whether certain acts or actions constitute misconduct and whether there was a loss of employment for that reason, it must first be determined whether is was proven that the Appellant actually committed the alleged acts.

Did the Appellant commit the acts alleged by the employer?

[11] The answer to that question must be based on clear evidence and not merely on speculation and suppositions. In addition, the Commission must prove the existence of such

evidence, independent of the employer's opinion. (*Attorney General of Canada v Crichlow*, A-562-97)

[12] In this file, the employer alleges that the Appellant, on October 30, 2017, made an inappropriate and offensive comment toward another company employee. According to the employer, while the Appellant and that employee were working at a landfill site, the Appellant allegedly said [translation] "Hey, bitch from Lac Beauport" (GD3-71). The employee filed a complaint after that incident (GD3-81), and the Appellant was suspended. According to the employer, when it met with the Appellant to hear his explanation a few days later, he did not seem willing to make amends or to recognize the gravity of his comment, because he stated during that meeting [translation] "a bitch is a bitch," referring to the employee in question. As a result, the Appellant was dismissed (GD-71 [*sic*] and 72).

[13] The Appellant acknowledges that he used inappropriate language toward his co-worker. He submits that he said to her [translation] "go fuck yourself" on October 30 (GD2-6), and he argues that these words were the result of built-up frustration with that employee, who was not helping him with his tasks, and who he did not get along with. He also acknowledges that he told the employer that a [translation] "bitch is a bitch" during a disciplinary meeting a few days later. The Appellant submits, however, that he is not a misogynist, that he did not mean what he said, and that he could not reasonably expect to be dismissed for his actions because he had no disciplinary history with that employer. Furthermore, he argues that he wrote a letter of apology after the incident of October 30 (GD3-62 to 64).

[14] The Tribunal notes that the employer's version and the Appellant's version of the incident on October 30 differ slightly. At the hearing, the Tribunal asked the Appellant if, as the employer alleges, he had in fact said [translation] "Hey, bitch from Lac Beauport." He simply responded to the Tribunal that there was no evidence that he had in fact made that comment to his co-worker. Yet, he did not deny making that comment.

[15] However, the employer's version of the facts is supported by a letter of complaint from the employee in question, which clearly describes the incident and the Appellant's comment

(GD3-81). Furthermore, the company inspector wrote a statement in which he notes that the Appellant himself confirmed that he had made that comment the day of the incident (GD3-80).

[16] The Tribunal finds that the Appellant did make the comments alleged by the employer on October 30 and during the disciplinary meeting after the incident.

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

[17] To constitute misconduct, the alleged act must be wilful, deliberate, or so careless or reckless as to approach wilfulness. (*Attorney General of Canada v Tucker*, A-381-85)

[18] The Appellant submits that he did not get along with his co-worker, mainly because she did not help him with leaf collection. Furthermore, she allegedly made a rude comment earlier in the day (she allegedly told the Appellant that he [translation] "had no class"). As a result, the Appellant says he made the alleged comment out of frustration, and that it was not wilful or deliberate.

[19] The Tribunal does not accept the Appellant's argument. Taking such a position would be to condone verbal abuse in the workplace when it is caused by anger or frustration. Such an interpretation of the principles established in *Tucker* would be not only wrong, but also senseless.

[20] The Tribunal is of the view that the Appellant's conduct was wilful and deliberate. The evidence shows that the Appellant made an inappropriate comment toward a co-worker and that he essentially repeated that same comment when he met with his employer to talk about the complaint filed against him. Even if the Appellant was angry with his co-worker and was unhappy about receiving a complaint, the fact remains that the Appellant himself, wilfully and on his own initiative, said those words. If he did not like working with that co-worker, or if he was unhappy in his interactions with her, the Appellant certainly had other options available for dealing with it instead of using insults like that.

Did the Appellant know or should he have known that he could be dismissed for his acts?

[21] The Federal Court of Appeal has established that there will be misconduct where 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, 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 Commission, Attorney General of Canada*, A-130-96)

[22] The Appellant submits that he performed very well at this employer and that he had no disciplinary record. Furthermore, he argues that the employer had no policy about the acts he is accused of. As a result, the Appellant considers that he could not have expected to be dismissed for saying those words. The Appellant also notes that he wrote a letter of apology shortly after the incident of October 30.

[23] The Tribunal does not consider that it was necessary for the employer to issue a warning or disciplinary measures to the Appellant for his behaviour to be considered misconduct.

[24] The Tribunal recognizes that the use of colourful language between co-workers is more common in some jobs, like garbage collection (GD2-7). However, in this case, it is not just a question of colourful language: The Appellant's words constitute verbal abuse toward a co-worker. For the Tribunal, the Appellant's conduct toward his co-worker was clearly unacceptable, regardless of the job or workplace.

[25] It goes without saying that certain behaviours are always likely to compromise the continuity of a job or impair the performance of the duties an employee owes to their employer, whether the employer has an official policy or not. Examples include the use of verbal, physical, or psychological violence, theft, breach of trust, etc.

[26] The Tribunal considers that the Appellant knew or should have known that his words were serious and that, by acting as he did, he breached a basic principle necessary for keeping any job, which dictates that this type of behaviour should not exist in the workplace.

[27] Regarding the letter of apology, the Tribunal gives it little weight. The letter is dated November 1, 2018 (GD3-62). The Appellant, however, met with the employer on November 3 to explain the comment he made on October 30, and it was during that meeting that the Appellant

stated [translation] “a bitch is a bitch.” This seems to show that the content of the letter written a few days before was not sincere.

[28] The Tribunal finds that the Appellant knew or should have known that, by saying those words, he ran the risk of being dismissed.

Is there a causal relationship between the Appellant’s alleged acts and his dismissal? In other words, are the acts in question the real cause of the dismissal, and not just an excuse?

[29] The last criterion the Tribunal must consider is whether there is a causal relationship between the alleged act and the loss of employment. The act or conduct in question must be the real cause of the dismissal, and not just an excuse. (*Canada (Attorney General) v Nolet*, A-517-91; *Attorney General of Canada v Brissette*, A-1342-92)

[30] On this aspect, the Appellant submits that he lost his job because he took the brunt of a reduction in staff carried out by the employer after it lost a big contract. However, the Appellant does not have any other evidence to support his argument.

[31] In the Tribunal’s view, the sequence of events and the evidence on file clearly show that the Appellant was dismissed on November 3, 2017, because of the alleged acts.

CONCLUSION

[32] In summary, after reviewing the circumstances surrounding the Appellant's dismissal, the Tribunal finds that he lost his job at X because of his misconduct. By uttering inappropriate words to a co-worker, and by repeating those words during a meeting with the employer, the Appellant committed a wilful and deliberate act of such scope that he knew or should have known that dismissal was a real possibility. Furthermore, the Tribunal finds that there is no doubt that the Appellant lost his job for that reason.

[33] The appeal is dismissed.

Yoan Marier
Member, General Division – Employment Insurance Section

HEARD ON:	January 3, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	F. H., Appellant Philippe Thériault (counsel), Representative for the Appellant