



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *SG v Canada Employment Insurance Commission*, 2019 SST 1698

Tribunal File Number: GE-19-78

BETWEEN:

S. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: February 20, 2019

DATE OF DECISION: March 6, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] S. G. (Appellant) had worked as a driver for X (employer) for several years. On October 12, 2018, he was dismissed for misconduct.

[3] According to the employer, the Appellant was warned on several occasions about his inappropriate behaviour toward staff members and clients. He received verbal and written warnings.

[4] On September 26, 2018, he behaved inappropriately again. The employer decided to dismiss him.

[5] The Commission denied the Appellant Employment Insurance benefits because he had lost his job due to his misconduct.

[6] According to the Commission, the Appellant behaved inappropriately toward staff members and clients. The Appellant's employer warned him that he would be dismissed if he behaved inappropriately toward staff or a client again. However, on September 26, 2018, the Appellant behaved inappropriately toward a client, and he was dismissed. The Appellant knew or should have known that he would be dismissed for his inappropriate behaviour. The employer had warned the Appellant about this on September 20, 2018.

[7] According to the Appellant, he had been accused of aggressive and impolite behaviour since the arrival of a new owner. In fact, there was no misconduct on his part. He filed a complaint for a dismissal not made for good and sufficient cause with the Commission des normes, de l'équité, de la santé et de la sécurité du travail [Quebec's labour standards commission] (CNESST), and an agreement was reached with the employer.

ISSUES

What are the Appellant's alleged acts?

Did the Appellant commit the alleged acts?

Do the alleged acts constitute misconduct?

ANALYSIS

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

[9] The Tribunal's role is not to determine whether the dismissal was justified or was the appropriate action.¹

[10] The Tribunal must determine what the Appellant's alleged acts are, whether the Appellant committed these acts, and whether they constitute misconduct under the Act.

[11] It is up to the Commission to prove misconduct.²

What are the Appellant's alleged acts?

[12] The Tribunal is of the view that the Appellant is alleged to have behaved inappropriately toward staff members and clients.

[13] The Tribunal notes that the Appellant received verbal and written warnings from the employer because of his inappropriate behaviour.

[14] On May 22, 2018, the Appellant shouted at the dispatcher while he was with a client. He was suspended for 24 hours.

[15] On June 7, 2018, he shouted at the dispatcher again. He was suspended again.

¹ *Canada (Attorney General) v Caul*, 2006 FCA 251.

² *Bartone*, A-369-88; and *Canada (Attorney General) v Larivée*, 2007 FCA 321 (CanLII).

[16] On September 20, 2018, the Appellant received a final warning for inappropriate behaviour. The Appellant had behaved inappropriately on a number of occasions. He had shouted at a dispatcher and at a delivery person. He received a final warning.

[17] On September 26, 2018, the Appellant shouted at and disturbed the staff of one of the employer's clients. The client complained to the employer.

[18] The Appellant admitted that these are the acts alleged against him by the employer and that led to his dismissal.

Did the Appellant commit the alleged acts?

[19] The Tribunal notes that, first, the Appellant denies committing the acts described by his employer.

[20] About the events of May 22, 2018, and June 7, 2018, he was not talking to a dispatcher, but to a friend he has known for 30 years. He admits to using vulgar language, but with his friend and not with the dispatcher.

[21] About the events of September 26, 2018, he denies acting that way with the client. He invited those involved to look at the security cameras to show that he did not commit the alleged acts.

[22] The Appellant admits that he can raise his voice. He has two dogs, and he has to shout when they are around. He does not understand the employer's attitude.

[23] According to the Appellant, it was the employer who put pressure on him to shout at staff. If someone was shouting, it was the dispatcher. The first time, it is true that he shouted at the dispatcher. The second time, he shouted at and said vulgar words to a friend and not to the dispatcher.

[24] According to the Appellant, the client helped his employer dismiss him. He does not have to prove that he committed the acts. The Appellant questions the employer's evidence.

[25] The Appellant denies disturbing the staff on September 26, 2018. He admits that he may have unplugged the computer keyboards and covered employees with plastic wrap, but these were jokes. He has always made jokes at his work.

[26] According to the employer, the Appellant was told on several occasions to change his inappropriate behaviour; otherwise, he could be suspended. Therefore, he was suspended a first time on May 22, 2018. On June 7, 2018, he was suspended again.

[27] On September 20, 2018, the Appellant received a final warning about his inappropriate behaviour. The Appellant made disrespectful comments on September 6, 11, and 19, 2018. He was warned that he would be dismissed if it happened again.

[28] On October 12, 2018, the Appellant was finally dismissed for inappropriate behaviour. According to the employer, on September 26, 2016, he went to see a client. He used impolite and aggressive language toward the employees. In fact, the client complained about the Appellant's behaviour to the employer.

[29] The Tribunal is of the view that the Appellant committed the acts alleged by the employer. To reach this conclusion, the Tribunal considered the information the Commission obtained from the employer, from one of the employer's clients, and from the Appellant's testimony.

[30] The Tribunal notes that the Appellant admits that he sometimes raises his voice. He can also use inappropriate language toward a "friend" at work. The Appellant also admitted to receiving written warnings from his employer.

[31] The Tribunal also notes that the Appellant admitted to [translation] "playing tricks" on a client's employees. These were jokes, and he never meant to hurt the employees.

[32] With this in mind, the Tribunal finds that it is more likely that the Appellant committed the alleged acts. The Tribunal does not accept the possible plot by a client. The Tribunal does not accept the Appellant's explanations for his acts. In fact, the Tribunal finds that the Appellant's explanations lack credibility.

[33] Now, it remains to be determined whether the Appellant's alleged acts constitute misconduct under the Act.

Do the alleged acts constitute misconduct?

[34] 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 wilfulness, or conduct so reckless as to approach wilfulness.”³

[35] The Federal Court of Appeal defined the legal concept of misconduct, for the purposes 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.”⁴

[36] The Federal Court of Appeal has set out that, “[t]o determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment.”⁵

[37] According to the Appellant, it is not misconduct because there was a settlement agreement after a complaint was filed for a dismissal not made for good and sufficient cause.

[38] According to the Commission, the Appellant knew that he had to watch his behaviour. He had received several warnings before he was dismissed.

[39] The Tribunal notes that the employer and the Appellant did sign an agreement to settle the Appellant's complaint.

[40] The Tribunal notes from the agreement that the Appellant received \$4,500 in exchange for his right to reinstatement. The employer also gave the Appellant a letter of recommendation.

³ *Canada v Tucker*, A-381-85.

⁴ *Mishibinijima v Canada*, 2007 FCA 36.

⁵ *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[41] The Federal Court of Appeal has set out that the Tribunal is not bound by the transaction between the parties about the complaint the Appellant filed with CNESST, and it does not disprove the misconduct. However, the Tribunal has to consider it when assessing the evidence.⁶

[42] The Tribunal notes that the employer did not change its position about the Appellant's alleged acts in that agreement.

[43] The Tribunal notes that the Appellant received written warnings for inappropriate behaviour toward staff or clients. He received a final warning on September 20, 2018, that he would be dismissed if he behaved inappropriately again.

[44] The Tribunal notes that, on September 26, 2018, the Appellant behaved inappropriately again toward one of the employer's clients. The Tribunal does not accept the Appellant's explanations, which lack credibility.

[45] Therefore, the Tribunal gives more weight to the statements made by the representative for the employer's client. It was the representative who contacted the employer to make a complaint against the Appellant.

[46] According to the representative, the Appellant showed up at the wrong place and would not stop complaining to the staff. The employees had difficulty answering calls because the Appellant was shouting. The representative informed the Appellant that the order was ready and that he had to go to the second warehouse. The Appellant was complaining that it was the dispatcher's error and that he was paid by the hour.

[47] The Tribunal is of the view that, after his inappropriate behaviour toward one of the employer's clients, he could expect to be dismissed. The Appellant received verbal and written warnings, two suspensions, and a final warning. By behaving inappropriately, in spite of the employer's warnings, the Appellant acted so carelessly as to approach wilfulness.

[48] The Tribunal is of the view that the Appellant was dismissed because of his inappropriate behaviour toward one of the employer's clients. The Appellant is required to behave

⁶ *Canada (Attorney General) v Morrow*, 1999 CanLII 7750 (FCA).

appropriately when he is with his employer's clients. This is especially true given that the Appellant was warned several times to change his inappropriate behaviour.

[49] The Tribunal is also of the view that the Appellant could expect to be dismissed after his inappropriate behaviour. He cannot trivialize, justify, or minimize his behaviour.

[50] With this in mind, the Tribunal finds that the Commission has proven, on a balance of probabilities, that the Appellant lost his job because of his misconduct.

CONCLUSION

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

[52] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	February 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	S. G., Appellant