



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. M. v Canada Employment Insurance Commission*, 2019 SST 454

Tribunal File Number: GE-19-339

BETWEEN:

R. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: March 7, 2019

DATE OF DECISION: March 13, 2019

DECISION

[1] The appeal is allowed. The Tribunal finds that the Appellant did not stop working because of his own misconduct.

OVERVIEW

[2] The Appellant was a day labourer at X. He was dismissed because he was incarcerated from May 7, 2018, to September 21, 2018. The Appellant argues that he was dismissed on September 28, 2018, and he states that he had an agreement with the employer concerning his absence but that the employer changed its mind while he was detained. The Commission found that the Appellant had stopped working because of his own misconduct. The Tribunal must determine whether the Appellant stopped working because of his own misconduct.

ISSUES

[3] Did the Appellant commit the acts the employer alleges?

[4] If so, do the Appellant's acts constitute misconduct?

ANALYSIS

Did the Appellant commit the acts the employer alleges?

[5] The employer's head of human resources told the Commission that the Appellant had been dismissed because he could not go to work as a result of his imprisonment. That is also what the Record of Employment, dated October 3, 2018, shows (GD3-25).

[6] The Appellant stated that he had committed an indictable offence and that he had received a sentence of four months to be served in prison. On May 7, 2018, he contacted the employer from the detention centre to inform it. He wanted to resume working after his four-month stay in prison, but, in the interim, the employer found a new employee to replace him, and he was dismissed on September 28, 2018.

[7] Because he was incarcerated, the Appellant was absent from work from May 7, 2018, to September 28, 2018. The Tribunal finds that the Appellant committed the acts the employer alleges.

Do the Appellant's acts constitute misconduct?

[8] The Tribunal must determine whether the Appellant's acts constitute misconduct within the meaning of the *Employment Insurance Act* (Act), and the Commission has the onus of proving that those acts constitute misconduct (*Canada (Attorney General) v Larivée*, 2007 FCA 312 (CanLII)).

[9] Following a charge of harassment from his former spouse, the Appellant received a sentence of four months to be served in prison. On May 7, 2018, the day of his imprisonment, he contacted the employer from the detention centre and informed it that he would not be able to go to work for the next four months. The Appellant submits that the employer accepted his absence during his incarceration.

[10] The employer's head of human resources told the Commission that someone else had filled the Appellant's position because of his absence. The employer explained that it had been informed on May 7, 2018, that the Appellant could not go to work and that, one week later, the Appellant had contacted it again to obtain his "4%," namely, his vacation pay.

[11] The Appellant's representative told the Commission that the employer had been informed that the Appellant had filed a guilty plea after a criminal charge was filed against him. The employer had been informed, but it decided to dismiss him on his return. In that respect, the Appellant's representative argued at the hearing that the Appellant was dismissed on September 28, 2018, when he contacted the employer to return to his employment and that, if he requested his vacation pay in May 2018, it was not to leave his employment but because he needed money while he was in prison. The Appellant's representative submits that, if the Appellant had been dismissed on May 7, 2018, he would not have called back a week later for his vacation pay because it would have been issued to him automatically. He stated that the employer also did not issue the Record of Employment until October 3, 2018.

[12] Furthermore, the Appellant's representative argues that the Appellant has mental health issues and that they must be considered when determining whether misconduct was committed. He submits that the Appellant's mental health issues cannot be the cause of his misconduct. He explained that the employer was aware of the Appellant's condition and that it had been tolerated for a number of months. The employer even helped the Appellant go to the hospital at one point.

[13] The Commission submits that, because of his imprisonment, the Appellant could not abide by his employment contract and that the situation constitutes misconduct. It states that the Appellant was found guilty of the act he committed and that extenuating circumstances cannot be assessed.

[14] The Tribunal specifies that the inability to meet a condition of employment is the result of the misconduct and that this misconduct resulted in the loss of employment (*Brissette*, A-1342-92).

[15] First, it is true that the Appellant could not go to work and do his work because he was incarcerated. If the Appellant had been dismissed on May 7, 2018, this absence from work would constitute misconduct because it is a breach of an express or implied duty resulting from the Appellant's contract of employment (*Canada (Attorney General) v Lemire*, 2010 FCA 314).

[16] However, in this particular case, the Tribunal is of the view that the employer had indeed permitted the Appellant's absence and that it did not dismiss him on May 7, 2018. The balance of the evidence shows that the employer took the time to check whether it could replace the Appellant appropriately.

[17] As the Appellant's representative argued, the Appellant filed a complaint for a dismissal not made for good and sufficient cause with the [labour board,] Commission des normes, de l'équité, de la santé et de la sécurité du travail, and the Appellant and employer reached an agreement. While the Tribunal is not bound by such an agreement, it is of the view that, based on the balance of the evidence, the employer did not dismiss the Appellant on May 7, 2018, because of his absence caused by his incarceration. When the Appellant contacted the employer on September 28, 2018, the employer had hired someone to fill his position, and he was dismissed as

a result. The employer waited until it was certain that it had filled the Appellant's position before dismissing him, and it issued the termination statement on October 3, 2018.

[18] The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment. In this case, the employer tolerated the Appellant's absence and did not dismiss him until it found someone who could replace him. Admittedly, the Appellant was incarcerated and the employer had no way of contacting him, but if it had dismissed him on May 7, 2018, as it first alleged and as the Commission submits, it seems obvious that the employer would have mailed the termination statement to the Appellant at his usual residence, especially as the employer had already issued the vacation pay after the Appellant requested it.

[19] Although the Commission submits that the employer terminated the Appellant's employment on May 4, 2018, the evidence shows that the employer did not issue the Record of Employment immediately. The Tribunal assigns appropriate weight to the Appellant's version, which states that the employer informed him on September 28, 2018, that he could not return to his position. The balance of the evidence shows that the employer did not dismiss the Appellant at the time of his absence on May 7, 2018, but that it waited until it had hired someone and made sure that that person was suitable for the job before informing the Appellant of his dismissal on September 28, 2018. The employer did not issue the Appellant's termination statement before September 28, 2018. The Appellant thought he would continue working for the employer because it had not informed him verbally or in writing that his employment was ending, and he thought the employer had tolerated his absence.

[20] Admittedly, an appellant whose employment ends following incarceration or another court order that makes them unable to go to work is disentitled to Employment Insurance benefits, whether the separation from employment is the result of a voluntary leaving or dismissal for misconduct. However, in this case, the balance of the evidence shows that the employer did not dismiss the Appellant for that reason because it did not issue the Record of Employment until October 3, 2018. The Tribunal shares the Appellant's view that, if he had been dismissed on May 7, 2018, he would not have called back a week later for his vacation pay because it would have been issued to him automatically. The employer told the Commission that it issued the

vacation pay because the Appellant asked for it a week after his absence began (*Borden*, 2004 FCA 176; *Lavallée*, A-720-01; *Easson*, A-1598-92; *Brissette*, A-1342-92).

[21] The Tribunal would like to state that it assessed the evidence submitted concerning the Appellant's mental health. The Tribunal understands the Appellant's arguments that the employer dismissed him because it wanted to get rid of him. However, if the employer had wanted to [translation] "get rid" of the Appellant, it would have dismissed him on May 7, 2018, because the Appellant could not do his work. The employer made sure to replace the Appellant before dismissing him. The Tribunal cannot find that the Appellant was dismissed because he was incarcerated as of May 7, 2018. It is in this sense that the Tribunal does not consider the alleged misconduct to be the real cause of the Appellant's dismissal (*Macdonald*, A-152-96).

[22] As the Commission clarifies in its additional written argument, the Tribunal must determine whether the Appellant lost his employment because of an act he committed and whether that act constitutes misconduct. On the balance of probabilities, the Tribunal finds that the Appellant did not stop working on May 7, 2018, because he was absent from work as a result of his incarceration.

[23] The Tribunal is of the view that the Appellant's employment did not end because he was away from work starting on May 7, 2018, since the employer tolerated the situation until it replaced the Appellant with another employee, did not inform him of his dismissal until September 28, 2018, and issued the termination statement on October 3, 2018. The Appellant was informed that he was dismissed because another person had filled his position and that the employer did not have another position to offer him.

[24] The Tribunal finds that the Appellant did not stop working because of his own misconduct.

CONCLUSION

[25] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section

HEARD ON:	March 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	Yvan Bousquet, Representative for the Appellant