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

Citation: *AT v Canada Employment Insurance Commission*, 2019 SST 1732

Tribunal File Number: GE-18-3872

BETWEEN:

A. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: March 11, 2019

DATE OF DECISION: March 13, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] A. T. (the "Appellant") was working as a camp cook. He was dismissed from his employment on November 7, 2016 for being verbally abusive towards the relief cook who had come to replace him. The Appellant applied for Employment Insurance (EI) benefits. He was paid sickness benefits from December 19, 2016 to January 4, 2017. The Canada Employment Insurance Commission (the "Respondent") disqualified the Appellant from regular benefits subsequent to the completion of his sickness benefits for reason that he lost his employment due to his own misconduct. The Appellant asserts he did not engage in misconduct. His position is that the relief cook had caused him to suffer a burn related to the lighting of a gas stove at another camp. The Appellant thought the relief cook had been fired because of that incident and was upset when she arrived to be his relief. He admits he engaged in "small" words with her but no more.

PRELIMINARY MATTERS

[3] A General Division hearing was scheduled for July 3, 2018. The Appellant did not attend that hearing. The General Division was satisfied the Appellant received the Notice of Hearing so proceeded in his absence and issued a decision on July 6, 2018. The Appellant requested Leave to Appeal the decision to the Appeal Division on grounds that he had misplaced his paperwork and thought the hearing was on July 23, 2019. Leave was granted and the Appeal Division rendered a decision on December 20, 2018 determining that the Appellant provided a reasonable explanation for having missed his scheduled hearing date but the Tribunal had not given the Appellant an opportunity to explain his failure to appear or to provide submissions in support of the substantive issues on appeal. The Appeal Division returned the matter to the General Division for rehearing.

[4] A new teleconference hearing was then scheduled by the General Division for February 19, 2019. No parties attended the hearing. The Tribunal tried to contact the Appellant by phone to determine if he was having any trouble connecting with the teleconference and to advise that

he would have to request an adjournment if he could not attend. No response was received to that message. The Notice of Hearing had been sent to the Appellant on January 31, 2019 by Express Post. Documentation on file from Canada Post shows that the Appellant was left a notice card on February 5, 2019 advising him to pick up the documentation at a Canada Post location. The information showed the documentation was not picked up. I adjourned the matter on my own initiative as I was not satisfied the Appellant had received the Notice of Hearing.

[5] The General Division hearing was then rescheduled for March 11, 2019. Neither party to the appeal attended the teleconference hearing. This time the Notice of Hearing was sent on February 22, 2019 both by Express post and by regular mail to the Appellant. Canada Post left a notice card on February 26, 2019 at the Appellant's residence advising him to pick up the documentation at a Canada Post location. As of Canada Post's last update on March 5, 2019 the documentation had not been picked up by the Appellant.

[6] Sections 19(1)(a) and 19(2) of the *Social Security Tribunal Regulations* (SST Regulations) together deem documents sent by ordinary mail to be deemed communicated to a party within 10 days after the day on which it is mailed to a party. The Notice of Hearing sent by ordinary mail to the Appellant's address on February 22, 2019 has not been returned to the Tribunal. As such, I am satisfied the Appellant received the Notice of Hearing that was sent to him by mail on February 22, 2019. As I am satisfied the Appellant received the Notice of Hearing, I proceeded with the hearing in the absence of the parties, pursuant to section 12(1) of the SST Regulations.

ISSUES

[7] Issue 1: Why was the Appellant dismissed from his employment?

[8] Issue 2: Did the Appellant commit the conduct which led to his dismissal?

[9] Issue 3: Does the reason for dismissal constitute misconduct under the Act?

ANALYSIS

[10] Section 30 of the Act disqualifies a claimant from receiving benefits where a claimant loses his or her employment as a result of misconduct or where the claimant has voluntarily left any employment without just cause.

[11] The burden of proof rests with the Respondent to demonstrate that the employee lost his or her employment due to her misconduct. The Tribunal must be satisfied that the misconduct was the reason for the dismissal and not an excuse for the dismissal. This requirement necessitates a factual determination after weighing all of the evidence (*Minister of Employment and Immigration v. Bartone*, A-369-88; *Davlut v. Attorney General of Canada*, A-241-82).

Issue 1: Why was the Appellant dismissed from his employment?

[12] I find that the Appellant was dismissed on November 7, 2016, for initiating a verbal confrontation with another staff member on November 2, 2016.

[13] The Record of Employment (ROE), dated November 10, 2016, lists the Appellant's last day paid as November 2, 2016, and lists the reason for issuance as "dismissal".

[14] The Respondent's notes of February 7, 2017 indicate that the employer advised the Respondent that the reason for dismissal was that the Appellant was abusive to another staff member. The employer advised the Appellant was swearing and yelling at the relief cook who had come to replace him when he was scheduled to be off. The relief cook was in good standing and had not been dismissed. There was never a documented case against her. The employer advised that the Appellant was going home at the time. His behaviour was uncalled for. The Appellant could have called the Human Resources department on-call number if he felt unsafe. The employer advised they had received a written complaint from the relief cook and two witness statements as to what happened.

[15] The employer also provided the Respondent with notes of the November 7, 2016 telephone conversation between the Appellant and the Vice-President and Placement Coordinator in which the Appellant was advised of his termination. The notes provide that the Appellant was advised by the employer that they had statements as to what had occurred at the

camp and that he would not longer be on rotation. The notes provide that the Appellant confirmed that he had "yelled" at the relief cook, as he was surprised to see her there. He related to the employer that the relief cook had tried to blow him up at another camp. The employer advised the Appellant that they had the report from that incident and there was nothing about the relief cook trying to blow him up. The notes of the conversation provide that the employer advised the Respondent that because of his behaviour on November 1, 2016 he would no longer be employed with the employer.

[16] Although the notes from the Vice-President and the Placement Coordinator of the employer indicate the date of the incident as November 1, 2017, it is clear, from the information provided by the Appellant and the witness statements that the incident actually occurred on November 2, 2016.

[17] The Appellant confirmed to the Respondent on February 13, 2017 that he was dismissed from his employment for having words with another employee. He asserted it was a wrongful dismissal. The Appellant told the Respondent that he did not use inappropriate language. He told the Respondent that he asked the other employee what she was doing at the work site as she had been fired a year ago. He also stated she had better wear gloves due to the safety incident that happened a year ago. The Appellant also told the Respondent that he was alarmed at seeing the employee as she had tried to blow him up a year ago so he felt threated upon seeing her and acted accordingly. The Appellant stated that a year ago the employee had purposely asked him to light a gas stove pilot light that she knew would blowback in his face and he ended up burning his hair off.

[18] The information from the Appellant, and his employer are consistent that the Appellant was dismissed because of the November 2, 2016 verbal incident between the Appellant and the relief cook. While the Appellant disagrees as to the degree he engaged in the verbal interaction with the relief cook, he does agree that this incident led to his termination. I find this was the reason for dismissal. No evidence has been provided by the Appellant of any other reason for the dismissal.

Issue 2: Did the Appellant commit the conduct which led to his dismissal?

[19] Yes. I am satisfied the Appellant acted in a verbally abusive manner toward the relief cook on November 2, 2016.

[20] The Appellant agrees he exchanged in "small words" with the relief cook. He denied to the Respondent that he used inappropriate language. The Appellant notes in his reconsideration request that he had "words" with the other employee. He also provided a written statement to the Tribunal in which he noted that the relief cook had previously purposely lit a pilot light she knew was going to flash burn him and his hair and face were burnt. He said that when this individual was sent to his camp in the spring "I was floored and there were small words were exchanged." (GD5-4).

[21] I do not find the Appellant's information that he only engaged in "small words" to be credible. Other documentation on file suggests that there were more than "small words" exchanged. The employer provided notes from the telephone call the Vice-President and the Placement Coordinator had with the Appellant on November 7, 2016 to advise him of his termination. These notes indicate that the Appellant confirmed to the employer he had "yelled" at the relief cook (GD3-18). The Appellant did not provide any information to the Tribunal suggesting those notes were not an accurate reflection of the conversation between himself and his employer.

[22] As well, documentation the Appellant provided from his social worker confirms that he told his social worker that he got into a verbal "confrontation" with the other staff member. In that regard, the report dated March 28, 2018 from the social worker notes: "A. T. wrote up an incident report on one of the female staff. The report was ignored .(2) This same staff person set up a situation where A. T. tried to fix the pilot light and got burned in the process. The female staff thought it was funny and laughed. The female staff was eventually fired but later was hired as A. T.'s relief cook. A. T. was understandably upset and got into a verbal confrontation with the staff person. A. T. and his wife were let go." (GD10-1)

[23] The Appellant's employer submitted several witness statements to the Respondent in addition to the statement from the relief cook who was purportedly yelled at by the Appellant.

All of these statements suggest the Appellant was yelling at the relief cook and acting in a verbally abusive manner towards her. The relief cook indicated in her statement that she arrived at the camp around 3 p.m. and the Appellant saw her and the fireworks started. Her statement notes the following: "He claims I am a slob, I pick my nose, I don't wash my hands, I never glove up. To top it off he informs us girls that I shouldn't be working for X because I am the worst person. F. T. jump in and agrees with A. T. and tells everyone I tried to blow A. T. up! A. T. says I am "Not" allowed in his camp. How dare they bring such a "B…ch" to his camp. What is X thinking? I better watch my back, A. T. says. To top all this off a client heard everything". (GD3-19). Two witnesses signed this document.

[24] These two witnesses also provided separate statements to the Appellant's employer. Both statements are consistent that the Appellant was verbally berating the relief cook and demanded she leave the work place. A statement from "G.F". notes that the Appellant said to the relief cook, "What the F… are you doing here." The statement notes that the Appellant was standing in the doorway screaming at the relief cook. He continued yelling at her saying things like, "Get out of my f…ing camp - You're are not welcome here! I thought X fired your sorry ass! You're the f…ing b…h who blew my face off." This individual stated that the relief cook was visibly upset so she stayed outside with her. The Appellant appeared at the doorway again and continued to yell at the relief cook. The witness told him to stop and the Appellant then went back inside. The witness conformed the relief cook never said a word to the Appellant. She relates she went inside to get the relief cook a coffee and when she went inside the Appellant was yelling to a medic that the relief cook was useless, that she had poisoned other clients, that she "was f...ing unsanitary, that she didn't wash her f…ing hands, and that she didn't wear f…ing gloves." The Witness related that the Appellant was walking down the hallway screaming and swearing. She took the relief cook to her room until someone else got the Appellant out of the camp. The witness pointed out that the relief cook was visibly upset and embarrassed but maintained her composure and did not respond back to the Appellant.

[25] The statement from "R.D." notes that as soon as the Appellant saw the relief cook he started saying she wasn't allowed in his camp and said some real mean stuff to the medic about her abilities and job ethic, such as she didn't thaw food properly, didn't wear gloves and how stupid the employer was to hire her back since supposedly she was let go. The witness notes that

another individual, “F”, was also saying that the relief cook tried to blow her husband up and she didn’t have her food safe. The witness noted that all this was said in front of guests.

[26] I find the relief cook’s statement along with the witness statements to be credible and attach significant weight to them. The statements are consistent with each other as to the essential facts that the Appellant initiated the situation and publically berated the relief cook.

[27] The Appellant provided several statements from other employees in support of his case. However, none of them refers to the incident in question on November 2, 2016. One statement is dated November 13, 2016 and relates to the blowback incident at the other camp but says nothing about the incident on November 2, 2016. The author of this letter also provided a separate undated reference letter. (GD5-5) The Appellant also provided an undated statement from another individual which is a testimonial as to the Appellant’s work performance. These statements do not provide any information as to the incident which occurred on November 2, 2016. As such, they are not relevant as to whether the Appellant engaged in the conduct in question and the Tribunal attaches no weight to them. The Appellant provided no witness statements specifically addressing the November 2, 2016 incident to contradict the information in the relief cook’s statement or in the two witness statements provided to the employer.

[28] I find the weight of evidence supports that the Appellant did commit the conduct that resulted in his loss of employment. I find as a fact that the Appellant initiated a verbal confrontation with the relief cook and was verbally abusive to her.

Issue 3: Does the reason for dismissal constitute misconduct under the Act?

[29] Yes. The reason for dismissal constitutes misconduct under the Act

[30] The onus lies on the Respondent to establish that the loss of employment by the Appellant resulted from the Appellant’s own misconduct.

[31] The Act does not define misconduct. There will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed

to his employer and that, as a result, dismissal was a real possibility (*Mishibinijma v. Attorney General of Canada*, 2007 FCA 36).

[32] The Federal Court of Appeal has said that for misconduct to be found, the act must have been wilful, or at least of such a careless or negligent nature that one might say that the employee wilfully disregarded the effects his or her actions would have on job performance. (*Attorney General of Canada v. Tucker*, A-381-85).

[33] The Respondent argues the Appellant's abusive behavior towards a co-worker constituted misconduct within the meaning of the Act because his actions were willful, harassing and they contravened the employer's Statement of Policies and Procedures.

[34] I find the Respondent has established that the Appellant lost his employment by reason of his own misconduct.

[35] The Appellant wilfully initiated a verbal altercation with the other staff member. He chose to initiate an unprovoked confrontation with the relief cook, and behaved in a verbally abusive manner towards her. The Appellant confirmed to the Respondent on February 13, 2017, that the relief cook did not say anything to him. The employer advised there was an on-call phone number for Human Resources that the Appellant could have called if he felt unsafe.

[36] The Appellant's employer provided its "Harassment and Discrimination" policy dated October 19, 2008 that says it applies to all managers and staff (GD3-25). The policy states that an act of harassment/discrimination by an employee will be considered misconduct. The policy provides that discipline will be imposed relative to the seriousness of the offense, up to and including termination for cause without notice or payment in lieu of notice. "Harassment" is defined to include "threats, intimidation or verbal abuse". It is noted that harassment or discrimination can consist of a single incident or several incidents over a period of time. The policy provides that someone who has harassed another person will be subject to one or more of the following forms of discipline, depending on the severity of the harassment/discrimination: a written reprimand; a suspension, with or without pay; a transfer, if it is not reasonable for the people involved to continue working together; a demotion; or, termination of employment, with cause.

[37] No information was provided by the employer when this policy was brought to the Appellant's attention. However, I note that the Appellant did not submit that he was unaware of this policy. The policy makes clear that harassment of another person, even occurring from one incident, can result in dismissal. Harassment is defined to include verbal abuse. The Appellant clearly was engaging in verbal abuse of the relief cook.

[38] I find that the Appellant knew or ought to have known, due to the employer's policy regarding harassment, that his conduct in verbally abusing another staff member was conduct that could lead to dismissal.

[39] However, I find that, even if the employer's harassment policy was not brought to the Appellant's attention, the Appellant still ought to have known that behaving in such a manner could result in dismissal. The Appellant was a cook working at a camp. The material on file indicates the Human Resources Department was not on site to immediately resolve issues. Rather, there was an on-call phone number to reach that department. Given the environment in which the Appellant was working, where the staff at the camp were isolated from the Human Resources department, I find that an essential duty implied into the Appellant's employment contract was the duty to behave in a respectful manner towards other employees at that camp. The Appellant's verbal abuse of the relief cook was clearly inconsistent with that essential duty.

[40] I find, therefore, that even if he was not aware of the employer's harassment policy, the Appellant wilfully engaged in conduct that was a breach of the essential implied duty in his contract to treat other employees with respect. He ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[41] I find the Appellant was dismissed for misconduct and therefore the disqualification from regular benefits is maintained.

CONCLUSION

[42] The appeal is dismissed.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	March 11, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	None