



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *P. L. v Canada Employment Insurance Commission*, 2019 SST 481

Tribunal File Number: GE-19-954

BETWEEN:

P. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: March 27, 2019

DATE OF DECISION: April 25, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, P. L., worked as the director of marketing for the X (employer) starting in 2016. He was dismissed on September 17, 2018.

[3] The Appellant filed a claim for Employment Insurance benefits with the Commission. After an investigation, the Commission denied the Appellant Employment Insurance benefits because he had lost his employment due to his misconduct.

[4] The employer alleges that the Appellant behaved inappropriately toward staff members. On October 27, 2017, the Appellant received a written warning about his misconduct, his lack of respect, and his lack of co-operation with the marketing team. If he behaved inappropriately again, he could be dismissed.

[5] On September 13, 2018, the employer was informed that one of the employees under the Appellant's supervision resigned because of comments about the way she dressed and her weight. After conducting an investigation, the employer decided to dismiss the Appellant.

[6] The Appellant does not deny the facts alleged by the employer. However, they do not amount to misconduct within the meaning of the *Employment Insurance Act* (Act). He did not even know that he would be dismissed for his remarks. Moreover, the branch manager was not dismissed. Therefore, they were a pretext for the employer to dismiss him.

ISSUES

[7] What is the Appellant alleged to have done?

[8] Did the Appellant commit the alleged act?

[9] Does the act constitute misconduct within the meaning of the Act?

ANALYSIS

[10] The Tribunal must decide whether the Appellant lost his employment because of his misconduct and whether he must therefore be disqualified from receiving benefits within the meaning of sections 29 and 30 of the Act.

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

[12] Instead, the Tribunal must determine what the Appellant is alleged to have done, whether the Appellant committed that act, and whether that act constitutes misconduct within the meaning of the Act.

[13] The Commission has an obligation to prove on a balance of probabilities that there was misconduct.² The term [translation] "balance of probabilities" means that the Commission must prove that it is more likely than not that the Appellant was dismissed because of his misconduct.

What is the Appellant alleged to have done?

[14] The Tribunal is of the view that the Appellant is alleged to have made inappropriate remarks about an employee under his supervision.

[15] The Tribunal notes that, on August 6, 2018, an employee went to one of the employer's branches to bring back some equipment. A friend of the employee overheard the conversation between the Appellant and the branch manager. The manager alluded to the employee's clothing. The Appellant commented saying, [translation] "It's not like she has the body to wear that."

[16] The Tribunal also notes that the Appellant recognizes that that is the act he is alleged to have done.

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

² *Bartone*, A-369-88.

Did the Appellant commit the alleged act?

[17] The Tribunal notes that, during the employer's investigation, the branch manager was also interviewed. She admitted that the Appellant and she had made remarks about the employee's appearance. She was suspended for her action. That was the first time she received a warning.

[18] The Tribunal also notes that, during a meeting with his employer, the Appellant admitted to making remarks about the employee's appearance.

[19] The Tribunal is of the view that the Appellant committed the alleged act, even though the Appellant attempted to qualify his remarks during the hearing. He still admitted that it was not his best comment.

Does the alleged act constitute misconduct?

[20] The Tribunal must determine whether the Appellant's acts constitute misconduct within the meaning of the Act.

[21] The Commission must prove on a balance of probabilities that the Appellant knew that he could be dismissed for acting as he did.³

[22] To find that the acts committed constitute misconduct, the Appellant's alleged act must be "wilful," that is conscious, deliberate, or intentional.⁴ 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 willfulness, or conduct so reckless as to approach willfulness."⁵

³ *Canada (Attorney General) v Larivée*, 2007 FCA 312 (CanLII).

⁴ *Canada (Attorney General) v Tucker*, A-381-85; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII).

⁵ *Canada (Attorney General) v Tucker*, A-381-85; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII).

[23] The Tribunal would like to remind the Appellant that its role is not to determine whether a dismissal was justified. It must consider whether the Appellant's alleged act constitutes misconduct.⁶

[24] The Tribunal notes that the Appellant worked as the director of marketing for the employer.

[25] The Appellant previously met with the vice-president about inappropriate remarks that he made toward co-workers. On October 27, 2017, he received a written warning about his misconduct, his lack of respect, and his lack of co-operation with the marketing team. He signed the notice on November 7, 2017.

[26] In December 2016, during a meeting with several people, the Appellant told a joke about pork to an employee who was Muslim.

[27] In August 2017, the employer refused to sign a birthday card for a secretary from the Appellant. It contained a photomontage that an employee made of the secretary's head on a "sexy" body. All the employees signed it, including the Appellant, who brought the card to the employer. The employer refused to sign it and said that signing the birthday card showed a lack of judgement on the part of the Appellant.

[28] A co-worker said that he preferred being called "X" instead of "X," the Appellant called him by the name "X" several times. The Appellant's superior met with him about this.

[29] The Appellant told his employees that they were his marketing [translation] "babes" and that one employee had a [translation] "nice butt."

[30] The Appellant wrote his head of marketing questionable emails. He also yelled at her, only to ask for her dismissal.

⁶ *Canada (Attorney General) v Marion*, 2002 FCA 185.

[31] In this context, the Appellant received the October 27, 2017, written notice from the employer. The employer asked him to behave appropriately and reminded him that he was the face of the company. If new incidents occurred, he could be dismissed.

[32] On August 6, 2017, the Appellant was talking with the manager of a branch, and an employee was present. The manager initiated the discussion about how one of the Appellant's employees, who was at the branch the day before to bring back property borrowed from the company, was dressed.

[33] The Appellant replied to one of the manager's comments saying, [translation] "It's not like she has a body to wear that" [*sic*]. An employee overheard the conversation and told the employee who was the subject of the comment the remarks the Appellant and the manager made. That employee felt humiliated, and she could no longer trust her superior. She confronted her superior about the remarks he made. He denied making the remarks and blamed the branch manager. Shortly after, the employee decided to quit her job.

[34] The employer was informed of the situation when it met the employee to find out why she was leaving. As a result, the employer decided to question the director and the manager about this matter.

[35] When the Appellant met with his employer, he first denied the facts, then he admitted to making the remarks. The employer dismissed the Appellant because it no longer trusted him.

[36] In the Commission's view, the Appellant's comment about an employee's appearance is degrading. It constitutes misconduct because the act is disrespectful on the part of an executive who represents the company's upper management.

[37] The Commission submits that the Appellant received a warning letter for a lack of judgement as a company executive. The employer cannot tolerate the Appellant's excuse that he was joking each time.

[38] The Commission submits that the Appellant knew or should have known that he would be dismissed for acting in that manner. It is a breach of a duty that is express or implied in his contract of employment.

[39] In the Appellant's view, the employer was looking for a pretext to dismiss him. It hired a younger executive to replace him.

[40] The Appellant also believes that his act does not constitute misconduct, but rather a harmless comment. Furthermore, the branch manager was not dismissed. The Appellant is a victim of the social climate—the denouncing of inappropriate behaviour that is currently making headlines—and the employer's relentlessness.

[41] Nevertheless, the employer resolved the complaint for dismissal through an agreement before the Commission des normes de la santé et de la sécurité du travail [Québec's labour standards commission] (CNESST). The employer paid the Appellant \$15,000 in exchange for relinquishing his right to reinstatement.

[42] The Appellant also submits that the psychological harassment complaint from the head of the marketing department should not be considered because it was filed after his dismissal.

[43] The Tribunal is of the view that the Appellant lost his employment because of his misconduct. The Appellant was warned in October 2017 to change his behaviour or he could be dismissed. Yet, on August 5, 2018, he made inappropriate remarks again.

[44] The Tribunal notes that the Appellant seems to downplay or trivialize his remarks. He admitted every time to making those remarks, and he apologized saying that they were a joke. He has also expressed that he is a victim of the social climate.

[45] The Tribunal is of the view that, as soon as the Appellant was informed that his remarks were not appropriate due in part to his role in the organization, he demonstrated recklessness by continuing to make inappropriate remarks. On August 6, 2018, he made inappropriate remarks again, which hurt one of his employees. He acted so recklessly that he could have or should have expected to be dismissed.

[46] Furthermore, the Appellant suggested resigning when he met with his superior. The Tribunal notes from his testimony that, during that meeting, the employer reminded the Appellant that he had received a warning in 2017 because of his inappropriate behaviour. In the end, he was dismissed.

[47] In this respect, the Tribunal is of the view that he knew or should have known that he would be dismissed for making those remarks.

[48] Regarding the complaint filed by X, the Tribunal notes that it was indeed filed after the Appellant was dismissed. Therefore, the Tribunal will not consider the employer's statements about that complaint. That said, the Appellant was still warned on October 27, 2017, that he could not make inappropriate comments and that he could not yell at his staff members, including X. He admitted that he had perhaps raised his voice on one or two occasions.

[49] According to the Appellant, the employer's policy against violence and harassment is not realistic and is excessive. The Tribunal finds that the Appellant has failed to demonstrate that the policy on workplace harassment and violence is not realistic. Moreover, the Tribunal's role is not to determine whether the employer acted properly, but whether the act committed by the Appellant constitutes misconduct.⁷

[50] The Tribunal is of the view that the Appellant committed an act of misconduct and that he was dismissed for that reason. He made inappropriate remarks about an employee, and he denied the facts before his employer before later changing his mind. The employer had already warned the Appellant. It lost confidence in the Appellant. The Appellant was dismissed for that reason.

[51] Moreover, the Tribunal is of the view that the settlement reached between the Appellant and the employer is insufficient to rebut the employer's claims regarding misconduct. There is no admission by the employer that the Appellant did not commit misconduct, despite the fact that the employer paid \$15,000 in exchange for his relinquishment of his right to reinstatement.⁸

⁷ *Canada (Attorney General) v Marion*, 2002 FCA 185.

⁸ *Canada (Attorney General) v Boulton*, 1996 CanLII 11574 (FCA).

[52] In this respect, the Tribunal finds that the Commission has proven on a balance of probabilities that the Appellant lost his employment because of his misconduct.

CONCLUSION

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

[54] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	March 27, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	P. L., Appellant Jacques Audette (counsel), Representative for the Appellant