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

Citation: *W. W. v Canada Employment Insurance Commission*, 2019 SST 849

Tribunal File Number: GE-19-1022

BETWEEN:

W. W.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Raelene R. Thomas

HEARD ON: April 17, 2019

DATE OF DECISION: May 3, 3019

Canada

DECISION

[1] The appeal is allowed. The Canada Employment Insurance Commission (Commission) has not met its burden of proving the Claimant lost his employment because of his misconduct.

OVERVIEW

[2] The Appellant, who I refer to as the Claimant, was employed as a X with a X, when he and another employee were observed committing an unsafe act. The Claimant was standing on a platform held aloft by a forklift at a height of approximately 10 to 15 feet with no fall protection. The employer investigated the incident and dismissed the Claimant for violation of its safety policy and the provincial *Occupational Health and Safety Regulations*. The Claimant made a claim for employment insurance (EI) benefits. The Respondent, the Commission, disqualified the Claimant from receiving EI benefits because it concluded the Claimant lost his job due to his own misconduct. The Claimant requested a reconsideration of that decision and the Commission upheld its decision. The Claimant appeals to the Social Security Tribunal (Tribunal).

ISSUES

Issue 1: What conduct led to the Claimant's loss of employment?

Issue 2: Did the Claimant commit the conduct which led to the loss of employment?

Issue 3: If so, is the conduct misconduct within the meaning of the *Employment Insurance Act* (Act)?

ANALYSIS

[3] A claimant is disqualified from receiving any benefits if he lost his employment because of his own misconduct.[1] Misconduct is defined, for the purposes of subsection 30(1) of the Act, as "wilful misconduct" where the claimant knew or ought to have known that his conduct was such that it would result in his dismissal. To determine whether the misconduct could result in

[1] Sections 29 and 30, *Employment Insurance Act*

dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment.[2]

[4] The burden of proof is with the Commission to prove that misconduct occurred.[3] The burden of proof in this case is a balance of probabilities, which means is it "more likely than not" the events occurred as described.

Issue 1: What conduct led to the Claimant's loss of employment?

[5] There is no dispute the conduct that led to the Claimant's loss of employment was standing on a platform held aloft by a forklift at a height of approximately 10 to 15 feet without taking any fall arrest safety measures.

Issue 2: Did the Claimant commit the conduct which led to the loss of his employment?

[6] Yes, the Claimant admits that he was on the platform, being held up by the forklift, retrieving product from a shelf at a height of 10 feet. The Claimant admits that he did not use any fall arrest equipment while he was on the platform.

Issue 3: Is the conduct misconduct within the meaning of the *Employment Insurance Act*?

[7] No, I find that, on a balance of probabilities, the Claimant's action, is not misconduct within the meaning of the Act because, given the culture of the workplace with respect to safety, he did not know nor reasonably would have known his conduct could result in his dismissal.

[8] The legal test for misconduct requires a causal relationship between the misconduct of which the claimant is accused and the loss of employment. The conduct must cause the loss of employment, have been committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the employment contract.[4]

[9] Misconduct requires a mental element of wilfulness on the part of the claimant, or conduct so negligent or reckless as to approach wilfulness.[5] Wilfulness has been defined in a

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[2] *Canada (Attorney General) v. Lemire*, 2010 FCA 314
[3] *Lepretre v. Canada (Attorney General),* 2011 FCA 30
[4] *Canada (Attorney General) v. Cartier,* 2001 FCA 274
[5] *Canada (Attorney General) v. Tucker,* A-381-85

number of ways, but generally requires the claimant to have acted consciously, deliberately, or intentionally.

[10] The Commission submitted that the Claimant's termination constituted misconduct within the meaning of the Act because he ignored the appropriate safety requirements. The Commission submitted the Claimant acknowledged that he disregarded the safety requirements of the employer suggesting it was a "senseless" and "spur of the moment decision" and this supports that the Claimant's breaching of the safety rules was a deliberate choice he made. The Commission submitted that although the Claimant suggested he was aware of the employer's safety policy, following the negative decision on his EI benefits he suggested he was not familiar with the policy. The Commission noted that when an employer has a safety policy in place, it is the responsibility of every employee to be aware of that policy and adhere to it; this is even more so important when in a supervisory position as was the Claimant.

[11] The employer told the Commission that the Claimant had several reprimands on his file for incidents pertaining to harassment, bullying and the final event was when he was working at a height of over 16 feet without any fall protection and "almost fell off a couple of times." The employer stated to the Commission that he asked the Claimant to get down a couple of times but he refused using language the employer did not want to repeat. The employer told the Commission that he would not leave the area until the Claimant stepped down which he finally did. The employer followed up his conversation with the Commission with written documentation he stated he asked the Claimant to get down twice and that the "lift moved aggressively back and forth." The employer wrote "everyone in the building is aware that the cage is to be used at all times when getting product from height." The employer wrote that the Claimant signed an orientation form for Health and Safety on June 23, 2016, and that the Claimant had also signed off on the [employer] Health and Safety program. The employer provided some policy documents and some documents signed by the Claimant with this letter.

[12] The Claimant testified that the forklift has a platform attached to its forks on which employees stand. There is a "cage" that sits on the platform and attaches to the forklift. The cage is three feet high on the sides, does not have a top or bottom, and employees stand inside the cage and reach out to pick product off the higher shelves. The Claimant testified that when

product is not on a lower shelf, employees will restock the lower shelves with product from the higher shelves using the cage on the forklift. The Claimant stated that a step ladder would be used to get items that are above eye level. The Claimant testified that there is one safety harness in the warehouse. He stated that the harness is not fitted to him and he had never seen it used. The Claimant testified that only two people had been trained in the use of fall arrest equipment. He stated that he had not been shown how to use fall arrest equipment although he is aware that training of his former co-workers in the equipment has taken place since his dismissal.

[13] The Claimant testified that he and a subordinate were finishing picking out an order near the end of the working day. He explained that customers order a variety of X and he described the warehouse where he worked had product contained on lower shelves, accessible when standing on the floor, and higher shelves where a stepladder or the forklift / cage was used to access product on those shelves. The Claimant stated that on the last day of his employment the customer needed two cases of a product but only one was accessible from floor height. The other cases of the product were located on higher shelves. It was the last product on the customer's order. The Claimant testified that he told his subordinate to get the nearby forklift and lift him up to get the product off the higher shelf.

[14] The Claimant testified that he was on the forklift platform and about 10 feet in the air when the Vice-President of Operations and Procurement (VPOP) walked into the warehouse. The Claimant stated that the VPOP asked him and his co-worker what they were doing and he replied I need one more item before I go home. The Claimant stated that his co-worker did not lower him when the VPOP spoke to them. The Claimant stated the VPOP left the area before he was lowered to the floor. The Claimant went home for the day. He stated that when he came into work the next day he was called into the office by the VPOP and suspended pending investigation. He was not interviewed as part of the investigation and was dismissed the following day.

[15] The Claimant submitted that the penalty of dismissal was too severe. His co-worker, who was also fired, filed a grievance and was re-instated. The Claimant also filed a grievance. The Claimant stated that he attended safety meetings when it was posted that he was required to attend. Employees signed into the meeting and would listen to the two employees conducting

the meetings. They would ask if there were any safety issues and nothing else. The Claimant testified that he had never seen the "Disciplinary Policy for Violation of Company Safety Policy." The Claimant testified that the first time he saw the employer's health and safety policy was when he was in the union office after his dismissal. He stated the union representative printed out the document and commented on how large it was. The Claimant stated that the safety meetings he attended did not go over the safety book, nor was there a safety book accessible in the work place. The Claimant testified he was not a member of the workplace's health and safety committee. The Claimant testified that he had observed the VPOP enter the warehouse area without wearing the required safety vest, hard hat or correct footwear.

[16] I have reviewed the documentation the employer provided to the Commission. There are three pages following a cover page entitled "[company] Occupational Health and Safety Program." These pages are the Hazard Assessment Schedule and the Health and Safety Rules and Enforcement. The Enforcement document provides for minimum penalties for each occurrence with the penalty of suspension or dismissal for the third occurrence. The policy reserves the right to bypass the normal progressive disciplinary response where the potential consequences of the safety breach are severe. Among the 9 grounds for dismissal are deliberate violation of company safety policy and an accumulation of "Warnings." The employer provided a document that contains a list of topics numbered 4 to 6: Safety Meetings; Worker Rights; and, Emergency Procedure. There are subtopics under each main topic. The form has a line through the "[ ]" that is next to each subtopic. At the bottom of the page is the statement "I have received and reviewed the OHSP, and acknowledge that a copy of the Plan is available for my use. I also agree to abide by the terms and conditions prescribed within the OHSP" and the Claimant's signature.

[17] The employer provided two warning letters it had issued to the Claimant. The first letter is a "verbal reprimand" issued to the Claimant and two other employees on July 20, 2016. At the time the Claimant was not a X. The letter lists a number of operational requirements related to the delivery of product to customers, no insubordination would be tolerated and to schedule outside appointments on slower days of the week. The letter concluded with the warning that further incidents would lead to further disciplinary action up to and including termination. The Claimant testified this letter came out of a meeting where the policy of completing deliveries

before ending the workday was discussed. The second letter issued on March 16, 2018, stated that the claimant exhibited behaviour that was insubordinate and that it had been brought to the VPOP's (then Manager, Operations) attention he had been swearing, yelling making rude comments to other staff, slamming doors and windows during the day's duties. The letter notes the Claimant was trained in and signed off on the harassment training when the new OH&S program was launched. The letter concludes that any further unacceptable behaviour as described will result in progressive discipline up to and including termination. The Claimant states that this letter came about when he needed an invoice for an order that was time-sensitive for delivery. The office worker responsible for generating the invoice refused to give him the invoice. He stated the reference to insubordination was related to an incident where the general manager approached him about an employee who had engaged in some form of wrongdoing. The Claimant told the general manager that he had spoken to the employee but also said that everyone is human and can make mistakes. This was said in front of the office staff and the general manager got mad about it.

[18] The letter of termination notes the Claimant was observed working at a height of approximately 15 feet with no fall arrest or safety equipment and the Claimant's insubordinate response to the VPOP when asked to get down. The letter states, "You were made aware of our Health and Safety policies and have been reminded as recently as March 2018 (when you received a disciplinary notice for not complying with the harassment policy which is part of the [company] Safety policy) that you must follow all of the policies and procedures outlined in the [company] Occupational Health and Safety Policy."

[19] In this case, the answer to the question whether the Claimant's unsafe actions may be considered misconduct is largely dependent upon the degree to which the claimant can be held responsible for his own unsafe actions (which must therefore consider the degree to which his actions were encouraged, enabled or permitted by the employer's workplace culture, training or processes).[6] The employer told the Commission "everyone in the building is aware that the cage is to be used at all times when getting product form height." However, the documentation provided from the safety manual does not confirm this and, further, the documentation

[6] *J. R. v. Canada Employment Insurance*, 2018 SST 212. Although not bound by the Tribunal Appeal Division's decision, I am relying on this decision for guidance.

concerning the training sessions attended by the Claimant do not show fall arrest training was given to the Claimant. The Claimant testified that health and safety training occurred when the employees were instructed to attend a session. He stated the employees simply listened to the presenters / trainers. The Claimant testified the VPOP instructed an employee to place a ladder in the cage, attached to a scissors lift and stand on the ladder so the employee could reach the top of the building's exterior to paint. The Claimant stated when the safety "guy" said "no" the VPOP told him to mind his own business. The Claimant testified that he did not receive training in fall arrest measures. In addition, the Claimant testified that the "walls" of the cage were three feet high. I do not think that a three foot high barrier would be sufficient to stop a fall if the person in the cage decided to lean far over the barrier. The Claimant testified there was one safety harness in the warehouse area. It was not fitted to any particular employee. He stated that he has since learned in his current employment that a safety harness must be fitted properly or when used it may cut off circulation to the legs. The Claimant testified the VPOP would enter the warehouse area without wearing the required hardhat, safety vest or protective footwear. In light of the foregoing testimony, I find the employer's workplace culture was such as to permit the Claimant to believe it was acceptable for him to stand on the forklift platform to retrieve one item. I base this finding on the employer's failure to instruct the Claimant in the required use of fall arrest equipment, the VPOP's conduct in having an employee engage in a practice that was deemed unsafe, and the VPOP's entering the warehouse with the required safety gear. As a result, I find that it reasonable to conclude the workplace culture was such as to diminish the Claimant's responsibility for his actions in this case.

[20] The Claimant testified that on the "spur of the moment" he chose to stand on the platform and, as such, I find his action to be conscious and wilful. Nonetheless, I find that the Claimant did not know, nor reasonably would have known that his actions could have led to his dismissal. The employer provided the Commission with two warning letters issued to the Claimant and a policy stating employees could be dismissed for accumulating "warnings." I note that the first warning is a record of a verbal warning in relation to the timely delivery of product. The second warning makes reference to insubordination and the behaviour of the Claimant being a violation of the Harassment Policy as part of the company's health and safety policy. Both letters note that any further incidents of the behaviour cited may lead to discipline up to and including termination. The Claimant's use of the forklift platform to retrieve product from a height of

approximately 10 feet is not similar to, nor is it related to the behaviours referenced in the warning letters. As a result, given that a prior safety policy violation was addressed with a warning letter it is reasonable to conclude the Claimant believed he could expect the same treatment when the VPOP saw him using the forklift platform. As a result, I find that the Claimant did not know nor reasonably would have known that the use of forklift platform to retrieve product from a higher shelf could result in his dismissal.

[21] The employer told the Commission that he spoke to the Claimant while he was aloft. There is no evidence the employer spoke to the employee operating the forklift to lower the forklift. The employer stated that he waited for the Claimant to return to the floor before he, the VPOP, left the area. The Claimant testified the VPOP left the area before the Claimant was at floor level. The employer's policy states that where the potential consequences of the safety breach are severe, the normal progressive disciplinary response may be by-passed, resulting in immediate suspension or dismissal. The Claimant testified that after he was finished picking the product off the higher shelf he returned to floor level and went home. I accept the Claimant's testimony that the VPOP left the area prior to him returning to ground level because had he not done so, given the Claimant's later dismissal, the VPOP would have at the very least immediately suspended the Claimant in accordance with the safety policy. I find that, on a balance of probabilities, the VPOP's lack of immediate action when observing the Claimant, taken together with my finding concerning the warnings, is sufficient evidence that the Claimant did not know nor reasonably would have know that he could be dismissed for his actions of using the forklift without fall arrest equipment. As a result, I find that the Commission has failed to establish the Claimant's conduct was misconduct within the meaning of the Act.

CONCLUSION

[22] The appeal is allowed.

Raelene R. Thomas

Member, General Division - Employment Insurance Section

HEARD ON:	April 17, 2019

METHOD OF PROCEEDING:	In person
APPEARANCES:	W. W., Appellant S. W., Representative for the Appellant