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

[TRANSLATION]

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 731

Tribunal File Number: GE-19-1859

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: June 21, 2019

DATE OF DECISION: July 20, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked for X, a glass products company. The employer states that the Appellant was dismissed in late October 2018 for spraying alcohol in the air and creating a fireball at his workstation. The employer also states that the act was a danger to the health and safety of the employees around him and that the relationship of trust was broken. The Appellant in turn states that he defended himself against a co-worker's harassment and constant intimidation.

[3] The Employment Insurance Commission determined that the Appellant had lost his employment due to his own misconduct within the meaning of the *Employment Insurance Act* (Act). As a result, it disqualified him from receiving benefits.

ISSUE

[4] The Tribunal must determine whether the Appellant lost his employment due to his own misconduct.

ANALYSIS

[5] Generally, section 30 of the *Employment Insurance Act* (Act) provides that a claimant who loses their employment because of their misconduct is not entitled to receive benefits.

Issue: Did the Appellant lose his employment due to his own misconduct?

[6] Each case is a case unto itself and must be analyzed based on its particular facts. In terms of misconduct, the burden of proof rests on the Commission, which must prove, on a balance of probabilities, that the evidence supports the alleged misconduct (*Crichlow*, A-562-97).

[7] For the following reasons, I find in this case that the Appellant did not lose his employment due to his own misconduct.

Did he commit the alleged acts?

[8] Before being able to determine whether certain acts or behaviour constitute misconduct, I must first ask myself whether the Appellant actually committed the alleged acts. For the Tribunal to conclude that there was misconduct, it must have before it relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour constituted misconduct (*Meunier*, A-130-96).

[9] I note in this case that the dismissal letter puts forward two dangerous behaviours, setting a flammable material on fire and spraying flammable alcohol into the air and igniting it, causing a cloud of fire near an employee's face. During his testimony, the Appellant described the acts that led to his dismissal in detail. He states with certainty that there was only one event. He confirms that he sprayed a product with a high concentration of alcohol into the air while lighting his lighter. The Appellant indicated that the product in question contains 99% alcohol and is used by the plant's employees on the tempered glass assembly line. He therefore admitted that he committed the act that caused a flame in the air. The Appellant admitted that he surprised himself with the flame and immediately stopped after a fraction of a second.

[10] I give significant weight to the Appellant's testimony, and I accept that only one incident led to the Appellant's dismissal and that it consisted of making a flame in the air using his lighter and a highly flammable product. The Appellant admitted committing that act.

Do the alleged acts constitute misconduct under the Act?

[11] The word "misconduct" is not defined as such in the Act, but the courts have established principles to guide decision-makers throughout case law. It is largely a question of circumstances (*Bedell*, A-1716-83). To arrive at a finding of misconduct, the Tribunal must analyze the facts and arrive at the finding that the alleged breach is of such scope that the employee would normally foresee that it would be likely to result in their dismissal (*Locke*, 2003 FCA 262; *Cartier*, 2001 FCA 274; *Gauthier*, A-6-98).

[12] I give significant weight to the Appellant's testimony. He explained his version of the facts clearly, logically, and coherently and did not appear to be exaggerating or embellishing. His

explanations helped me understand the circumstances and the context surrounding the incident of October 25, 2018.

[13] The Appellant indicated first that there was no one near or around him when he committed his act. He described his workplace and the eight-foot-wide table that separated him from the co-worker toward whom he committed the act, in addition to a few additional feet between the table and the co-worker. Without saying that his act was not dangerous, he still indicated that there were no other flammable products around that could have ignited.

[14] I find that taking his lighter and spraying a flammable liquid in the air causing a flame is unmistakably reprehensible. The Appellant admitted that he was not very proud of his act and that he himself was afraid when he saw the flame. The use of fire on work premises would generally qualify as reckless. It is even more so in a place where there are flammable products, even though the Appellant stated that those products were not near him. There is clear evidence that the consequences of his acts could have been much worse. Admittedly, the Appellant committed reprehensible conduct by acting thoughtlessly and in anger by sending that flame into the air. However, reprehensible conduct does not automatically lead to a finding of misconduct (*Locke*, 2003 FCA 262).

[15] In *Canada (Attorney General) v Hastings* (2007 FCA 372), the Court reaffirms the principles of *Tucker* (A-381-85) on the concept of misconduct and the need for the mental element to be present. The Court has established that "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."

[16] I therefore asked myself whether the Appellant acted deliberately when he created a flame in the air with a flammable product and his lighter on October 25, 2018, risking the loss of his employment.

[17] On this fundamental aspect of the notion of misconduct, I am not satisfied that, in his very specific circumstances, the Appellant could normally expect that his behaviour would be

likely to result in his dismissal. The Appellant's state of mind is relevant to this analysis (*Locke*, 2003 FCA 262).

[18] The context surrounding the Appellant's acts is of crucial importance. The Appellant showed, through his testimony but also through video evidence and screen captures, that he was the victim of humiliation after the posting of a video showing him in an embarrassing and degrading situation on a YouTube channel. It was entered into evidence that the video went viral on social media and that even products bearing the Appellant's face and disparaging words were created. The Appellant testified emotionally about the fact that this gratuitous [translation] "smear campaign" against him literally ruined his life. People recognize him in public and laugh at him daily.

[19] The Appellant stated that he was also recognized at work and that most employees made fun of him when he arrived, but one co-worker in particular (Jonathan) took a dislike to him and constantly harassed him by repeating phrases from the YouTube video. All of his co-workers stopped mocking the Appellant after a few days, but Jonathan continued relentlessly. The Appellant described that, several times a day, Jonathan would go behind the Appellant and spray the alcohol solution at the level of the Appellant's bottom while humiliating him verbally. The Appellant stated that he had difficulty enduring that behaviour and asked Jonathan to stop numerous times, but it was in vain. The Appellant testified that, on October 25, 2018, after it was announced that one of his long-time friend had been diagnosed with terminal cancer, he was distressed when he came back from his lunch break. When Jonathan repeated his act of spraying the alcohol at the Appellant's bottom that afternoon, the Appellant cracked, got angry, and reacted spontaneously by also spraying the alcohol solution but in front of his lighter, causing the incident described earlier.

[20] It seems evident to me that the Appellant was extremely irritated, that he was going through a period of great distress in his personal life, and that he lost his composure. I am of the view, in light of the evidence available, that the employee named Jonathan pushed the Appellant to the limit. Nothing makes the Appellant's act acceptable. However, the context and his state of mind do not enable a finding that his acts were conscious, reckless, or deliberate. On the contrary, the Appellant's conduct shows that he lost control of himself. I accept that this loss of

control originates from the fact that he was the victim of physical and verbal harassment in addition to constant humiliation from a co-worker. It seems clear to me that this spontaneous act of anger was completely unconsidered and occurred while the Appellant was making a heartfelt appeal to be left alone. It was not an act committed with the intention of deliberately causing problems.

[21] The Commission argues that the Appellant had other alternatives to making a cloud of fire to defend himself from the harassment. With respect, I note that the Commission has confused the legal test for misconduct with the one for voluntary leaving. The Appellant does not have to show in this case that he had no other alternative in order to explain his conduct. Instead, the Commission has the burden of showing that the acts committed constitute misconduct.

[22] I grant the Commission that the Appellant should have complained to his employer about the harassment he was experiencing. He admitted that he did not lodge a complaint. However, he explained that the employer should have been aware of Jonathan's behaviour because the bosses are situated right above his workstation with a big window that let them glimpse what was going on. Furthermore, he stated that he was embarrassed by the situation and was too proud to complain. While, in an ideal world, the Appellant would have reported his harasser, a victim cannot be made guilty of not complaining in time. The stigma associated with victims of harassment is real and often a barrier to reporting. In any case, it is important to remember that the question is not to analyze the Appellant's conduct in relation to the harassment experienced, but to analyze the act that led to his dismissal and determine whether it was misconduct.

[23] I take the view that, generally, a person who would manipulate fire unsafely in the workplace constitutes a breach of an implied duty of safety in the employment contract. That person should therefore expect their acts to be likely to lead to dismissal. However, I take the view that that is not the case here since the Appellant's state of mind was such that the acts leading to his dismissal were not conscious, deliberate, or intentional (*Mishibinijima*, 2007 FCA 36).

[24] The Commission finds that, because the Appellant lit his lighter and sprayed alcohol, his act was wilful and deliberate. The Commission did not explain why it found that the Appellant's

conduct wilful and deliberate. I am not satisfied that acting automatically means that the act was conscious, deliberate, or intentional.

[25] The Appellant acted in anger and out of sadness and despair. How could a person so disturbed by the harassment he experienced daily and the announcement about his friend's health really have had in mind the potential consequences of his acts on his employment? I must consider the Appellant's psychological state when he lacked judgement by spraying alcohol on the flame of his lighter.

[26] Although I do not support the Appellant's dangerous act at his workplace at all, the Commission has not satisfied me, based on all the evidence and on the balance of probabilities, that the Appellant's alleged act constitutes misconduct within the meaning of the Act. Having had the benefit of the Appellant's testimony, which I qualify as credible, the mental element of the misconduct test has not been proven.

CONCLUSION

[27] The appeal is allowed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	June 21, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	A. M., Appellant Jérémie Dhavernas, Representative for the Appellant