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

Citation: *DC v Canada Employment Insurance Commission*, 2020 SST 1040

Tribunal File Number: GE-20-962

BETWEEN:

**D. C.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Employment Insurance Section

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DECISION BY: Candace R. Salmon

HEARD ON: May 6, 2020

DATE OF DECISION: May 13, 2020

Canada

## Decision

[1] The appeal is allowed. I find the Commission failed to prove the Claimant lost his employment due to his own misconduct.

## Overview

[2] The Claimant worked at a processing plant. He was dismissed because his employer believed he damaged company property, acted inappropriately towards a supervisor, refused to provide relief for breaks, and caused an issue on the production line. The Claimant disputes all of these allegations, except the allegation that he damaged company property.

[3] The Claimant made a claim for employment insurance (EI) benefits after being terminated from the job. The Canada Employment Insurance Commission (Commission) determined the Claimant was disqualified from receiving EI benefits because he lost his employment due to his own misconduct. The Commission upheld this decision after reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

## Preliminary Matters

[4] The Claimant's appeal was first heard by a different Tribunal Member at the General Division on August 28, 2019. The Tribunal Member dismissed the appeal. The Claimant sought and received leave to appeal to the Appeal Division, which issued a decision on March 16, 2020, allowing the appeal and sending the matter back to the General Division for a new hearing. Therefore, this is the second hearing of this issue before the General Division.

## Issue

[5] Was the Claimant's employment terminated for misconduct?

## Analysis

[6] A claimant is disqualified from receiving EI benefits if the claimant lost his employment because of his own misconduct.[1] Misconduct for the purposes of the *Employment Insurance Act*

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

has been defined as "wilful misconduct," where the Claimant knew or ought reasonably to have known that his conduct was such that it could result in dismissal.[2] The concept of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional.[3] To determine whether the misconduct could result in dismissal, there must be a causal link between the Claimant's misconduct and the Claimant's employment.[4]

[7] The Commission has the burden to prove that misconduct occurred.[5]

[8] I find the Commission has failed to meet its burden. It has not proven the Claimant lost his job due to his own misconduct.

[9] The Claimant was employed at a building material manufacturing plant. He lost his job because, during a shift on February 28, 2019, the employer stated that he acted in an inappropriate manner toward his supervisor, caused an upset condition on the production line, damaged company property and refused to provide relief for breaks. The Claimant acknowledges breaking a hard hat and therefore damaging company property but denies the other allegations. He states that he did provide relief for breaks but was unable to do so after he broke his hard hat as it is required that he be wearing one while on the factory floor.

[10] The Claimant testified that, on February 28, 2019, he was providing relief for another employee on a production line. He testified that he is not trained on production line set up but could run it during the other employee's breaks. On that day there appeared to be something wrong with the set up. The Claimant stated that many boards were being rejected, which meant that they were directed into a reject bin rather than continuing along the line. He stated that once the bin is full it must be emptied or it could be dangerous. The Claimant testified that he continued to report the trouble that he was having with the production line each time he covered another employee's break. The Claimant stated that nothing was done and the supervisor thought it was the Claimant's

[2] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36
[3] *Canada (Attorney General) v. Secours*, (1995) 179 N.R. 132 (FCA)
[4] *Canada (Attorney General) v. Lemire*, 2010 FCA 314
[5] *Lepretre v. Canada (Attorney General)*, 2011 FCA 30

fault. He added that he was finding this very stressful and also indicated in his Notice of Appeal that he struggles with significant anxiety.

[11] The Claimant stated that he continued to report the problems he was experiencing to his supervisor, who did nothing to fix it. During the other employee's break, the Claimant was working the production line and having to send more boards into the reject bin. He testified that each time this happens the board costs the company $30. The Claimant stated that the bin was full and that he had to shut the line off or there would have been a mess in the plant. He then threw his hard hat on the concrete floor out of frustration, breaking it. He told his supervisor that he broke his hard hat, and asked him to find someone else to cover breaks. The Claimant was put on administrative leave and notified a few days later that his employment was being terminated.

[12] At the hearing, the Claimant explained that no one else saw him throw his hard hat. He stated that he went to his supervisor and said he needed to leave the floor to get a new hat, because he was not allowed to continue working without proper personal protective equipment (PPE). This is consistent with what he told the Commission. He also told the Commission that he asked the supervisor to find someone else to cover breaks because he could not do it any longer, but denied saying anything inappropriate. At the hearing, he also disputed the employer's assertions that he yelled at his supervisor. He added that later in the day, line adjustments were made to fix the problems on the production line and everything worked properly. He stated that he relieved a break after the line was fixed, and had no problems doing that so long as the production line worked properly.

[13] The Claimant's union grieved the termination. A Last Chance Agreement was entered into by the Claimant and the employer on August 6, 2019, reinstating the Claimant, and stating the employer had just cause to terminate him and that the time off work was considered a disciplinary suspension.

[14] The employer stated to the Commission that the Claimant was aware he could be terminated for further policy violations, because he was told in June 2018, after being suspended for smoking, that additional unsafe acts or policy violations may result in discipline up to and including termination. It added that in August 2018, the Claimant was also given a verbal warning or "coached," about absenteeism and was told further company policy violations may lead to

dismissal. The Claimant confirmed to the Commission that he was told on two previous occasions, when suspended for smoking and when coached for absenteeism, that further violations of company policy could lead to dismissal.

[15] The employer also told a Commission agent that the Claimant had previous violations of company policy, including a suspension for smoking in a prohibited area. These previous warnings and violations were outlined in a letter to the Claimant dated March 4, 2019. The employer submitted that since March 9, 2018, the Claimant had been coached about using his personal cell phone while on the plant floor, coached for absenteeism, suspended for smoking in a prohibited area and taking unapproved breaks, coached on showing up late, and coached for not wearing gloves while cutting cable ties. The employer also stated the Claimant was given a copy of the company policies when he was hired, as well as a new copy annually, and a copy was placed on the company bulletin board.

[16] The Claimant testified that he worked for the company for three years. He stated that he was generally aware that company policies existed, but submitted that while he was given copies of them, the policies were never read or reviewed in detail with him. He admitted that he broke a clip on the inside of his hard hat, which is company property, but said he was not in control of his actions at the time due to anxiety and obsessive compulsive disorder (OCD).

[17] The Claimant submitted that he was diagnosed with attention deficit hyperactivity disorder (ADHD) as a child. He added that a few years later he was diagnosed with anxiety, a sleeping disorder, and OCD. He stated that he tried many medications to control his anxiety, but was told by the employer that he would only be given a job if he stopped taking the medication because it could negatively impact his work. The Claimant testified at the hearing that he needed the job, so he stopped taking his anxiety-management medication so he could work.

[18] The Claimant testified that he told the employer about his medical condition, and stated the fact that he was told he had to stop taking the anti-anxiety medication to be able to work shows that the employer knew about the condition. The Claimant submitted in his Notice of Appeal that he has been approved for the disability tax credit in relation to his anxiety, ADHD, and related disorders. He also stated that he was not able to see his doctor to obtain medical evidence earlier, which is why he was late submitting supporting medical information.

[19] The Claimant's family doctor wrote a letter, dated November 20, 2017, confirming the Claimant's diagnosis of "extreme anxiety" as well as his low mood and insomnia. She stated the Claimant cannot perform self-care independently and relies on family members to assist him. She added that he is not able to engage in social interactions and is limited by his anxiety. She stated the Claimant also had a limited ability to process verbal information and often becomes confused.

[20] The Claimant's doctor also stated that he "makes poor decisions and judgments in everyday life." She stated the Claimant presumes "someone is against him" and has panic attacks. She stated the Claimant is not able to live independently and needs daily help with his mood, judgments, and decision making, as well as prioritizing and planning his daily activities.

[21] In a letter dated March 12, 2020, the Claimant submitted that when the boards were being rejected on February 28, 2019, he "went into a full blown anxiety attack." He stated that in that moment, his actions could not have been wilful. He added that he did not realize that he threw his hard hat when it happened, and said he did not know he could lose his job for that action. He stated his brain and body were in mental overload with anxiety and OCD thoughts and he just wanted it to stop. He submits his actions at that time were involuntary.

[22] The dismissal letter, dated March 4, 2019, reiterates the issues the Claimant was coached about, as well as his suspension on June 1, 2018, for smoking in a prohibited area and taking unapproved breaks. At the hearing, the Claimant testified that he agreed that these issues occurred, but said they should not have been held against him. The Claimant stated that when he was hired, he was told that the first level of discipline was a verbal warning which would not be documented in the employee file. He stated the initial formal warning was supposed to be a written warning, and said the only formal warning and discipline he received related to smoking and taking unapproved breaks. Nevertheless, he acknowledged to the Commission on April 26, 2019, that he was aware of the company's policies on cell phone use, smoking, absenteeism, wearing proper PPE, and damaging company property.

[23] The Commission submits that the Claimant had multiple violations of company policy and was ultimately dismissed because of the incident on February 28, 2019, when he damaged company property. It also submits there is no indication the Claimant had to shut down the production line and certainly should not have thrown his hard hat, despite his frustration with the

progress of the working day. It finds that damaging the hard hat, which is company property, is misconduct because it violated the company's policy.

[24] The Commission further submits that the Claimant acknowledged that he was on unpaid disciplinary suspension from March 4, 2019, until August 6, 2019, when he signed the Last Change Agreement, which means he acknowledges that he committed misconduct. The Claimant submits that he acknowledges that throwing his hard hat was the reason for his dismissal, but maintains that his conduct was not wilful, conscious, or deliberate. I note that the agreement signed between the Claimant and employer may have reinstated him to his job, but it is not determinative on the issue of whether misconduct occurred. I must consider all of the facts to determine whether the Commission met the threshold of proving that the Claimant committed misconduct.

[25] The law requires a causal relationship between the misconduct 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.[6] Misconduct also requires a mental element of wilfulness on the part of the claimant, or conduct so negligent or reckless as to approach wilfulness.[7]

[26] While the main issue which caused the termination was the damage to company property, I find the conduct that caused the loss of employment was a combination of the Claimant's actions towards his supervisor, causing an upset condition on the production line, damaging company property and refusing to provide relief for breaks. I further find the Commission has failed to prove that the Claimant committed misconduct.

[27] The Claimant testified that he did not yell at his supervisor or act inappropriately. He submits that he went to his supervisor and stated that he broke his hard hat, and left the floor to get a new one because remaining on the floor with broken PPE would have been a policy violation. He also stated that he did not refuse to provide breaks, and in fact provided a break after he asked his supervisor to find another person to do the breaks. He submitted that he did ask to be replaced for break coverage, because the stress of dealing with the malfunctioning production line was too much for him. He stated to the Commission that he told the supervisor that he could not relieve

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[6] *Canada (Attorney General) v. Cartier,* 2001 FCA 274
[7] *Canada (Attorney General) v. Tucker,* A-381-85

any more breaks, meaning he could not do the work because the production line was not functioning properly. After the line was fixed, he testified that he had no problem covering breaks.

[28] I prefer the Claimant's evidence on these points because it was stated directly to me and I was able to question the Claimant and test the evidence. I give the Claimant's evidence more weight than the employer's statements, which were stated to a Commission agent and transmitted to me through that agent's notes. This means I find as fact that the Claimant did not act inappropriately towards his supervisor or refuse to cover breaks.

[29] The Claimant also testified that he did not cause an upset condition on the production line. While the Commission submits there is no indication the Claimant had to shut down the production line, the Claimant testified that the reject bin of boards was full and this necessitated the stopping of the production line to empty the bin. He testified that he did not know how to fix the problem with the production line and was not trained to do that. I find, on a balance of probabilities, that the Claimant had to stop production to deal with the full bin of rejected boards because I find his direct evidence has more weight than the statements the employer made to the Commission.

[30] The Claimant admits that he damaged company property, and that this was a policy violation. He disputes, however, that his actions were wilful or that he knew or ought to have known that he could be fired for the incident.

[31] The Commission submits that the Claimant's act of throwing his hard hat was wilful, because the action was a conscious, deliberate, or intentional act. It considered the Claimant's medical evidence, but still finds the Claimant's actions were not accidental, so were wilful.

[32] I disagree with the Commission's position. The medical evidence supports that the Claimant has "extreme anxiety" that affects his entire life. His doctor stated his anxiety limits his ability to interact socially, his ability to process verbal information, and increases his level of confusion. She also stated that the Claimant, "makes poor decisions and judgments in everyday life," and perceives the world to be against him, which causes panic attacks. The Claimant testified that he believes he had a "full blown panic attack" on the day he threw his hard hat. He stated that his supervisor ignored his repeated statements that something was wrong with the production line

and he was stressed about the amount of money being lost in rejected boards. He stated he felt like his employer was against him, and the frustration overwhelmed him.

[33] Given the Claimant's diagnosed mental health condition and his doctor's description of how that condition impacts his ability to reason and understand social interactions, I find on a balance or probabilities that the Commission has failed to prove that he committed misconduct because I cannot find that his actions were conscious, deliberate, intentional, or so negligent that they approached wilful.

**Conclusion**

[34] The appeal is allowed. I find the Commission has failed to prove the Claimant lost his employment due to his own misconduct.

Candace R. Salmon
Member, General Division - Employment Insurance Section

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| HEARD ON: | May 6, 2020 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | D. C., Appellant |