



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. R. v. Canada Employment Insurance Commission*, 2018 SST 105

Tribunal File Number: GE-17-2181

BETWEEN:

L. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: February 14, 2018

DATE OF DECISION: March 14, 2018

REASONS AND DECISION

OVERVIEW

[1] The Appellant was fired from his job for speaking in a derogatory manner towards guests, co-workers and the supervisor that included racial and inappropriate sexual comments. The Appellant had been given several verbal warnings that his behaviour would not be tolerated and there would be consequences. The employer had a harassment policy that the Appellant acknowledged and signed. The Appellant concedes he made the comments and knows he should not have said them and the employer had warned and reminded him of the policy but he did not believe he would be fired for it. The Appellant believed the employer was trying to get rid of him because he was having problems with his legs and that he would go on the health insurance plan. The Commission denied the Appellant's claim as they determined he lost his employment for misconduct.

DECISION

[2] The appeal is dismissed. The Appellant's actions of breaching the employer's harassment policy caused him to lose his employment.

PRELIMINARY ISSUES

[3] Neither the Appellant nor his representative attended the hearing. Canada Post delivery receipts show that the Appellant and his representative's Notice of Hearings were signed and delivered successfully on December 22, 2017. The Tribunal was satisfied that both parties received their Notice of Hearing and proceeded with the authority allowed under subsection 12(1) of the *Social Security Tribunal Regulations*.

ISSUES

[4] Did the Appellant lose his employment because of the alleged offence?

[5] Did the Appellant commit the alleged offence?

[6] Does the alleged offence constitute misconduct?

ANALYSIS

[7] The relevant legislative provisions are reproduced in the Annex to this decision.

Issue #1: Did the Appellant lose his employment because of the alleged offence?

[8] Yes. The Tribunal finds the Appellant lost his employment because he breached the employer's policy on harassment. The employer terminated the Appellant because he was rude, racist and said sexual comments about other staff and guests that were reported to the manager. There had been no written warning issues but the Appellant had been given several verbal warnings in addition to the policy posted on the Health and Safety board. The employer submitted the Appellant was aware his continued harassment would result in dismissal. The employer submitted witness statements of the Appellant's behaviour that the Appellant did not dispute.

Issue #2: Did the Appellant commit the alleged offence?

[9] Yes, the Tribunal finds Commission has proved that the Appellant breached the employer's policy on harassment when he made the derogatory statements to staff and guests. The Appellant conceded that he knew his comments were ones of harassment and he knew he should not have said them.

Issue #3: Does the alleged offence constitute misconduct?

[10] 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 (*Canada (AG) v. Lemier*, 2010 FCA 314; *Hastings* 2007 FCA 372).

[11] The onus lies on the Commission to establish that the loss of employment by the claimant resulted from the claimant's own misconduct (*Lepretre*, 2011 FCA 30; *Granstrom*, 2003 FCA 485).

[12] The Appellant did not believe he would be fired because this had been going on for years but he agreed his actions were harassment. The Appellant conceded that he was aware of the policy because the company makes sure that everyone signs off on it and he did sign it. The Appellant conceded that he had been warned and reminded of the harassment policy in the workplace and he admitted to saying inappropriate comments to and about staff and guests.

[13] The relationship between employment and misconduct is not one of timing, but one of causation (*McNamara* 2007 FCA 107).

[14] Rude or aggressive behaviour has been held to be misconduct and in particular if it is detrimental to the employer's interest. An employer cannot tolerate physical or verbal aggressive behaviour in the workplace as it threatens everyone's safety, the effectiveness of the work performed and the atmosphere. It also creates conflict between co-workers and the employee- employer relationship and thus the employer can no longer trust an employee who behaves in such a manner.

[15] In addition to the causal relationship, the misconduct must be committed by the employee while he was employed by the employer, and must constitute a breach of a duty that is expressed or implied in the contract of employment (*Canada (Attorney General) v. Nolet*, F.C.A., A-517- 91).

[16] The Tribunal finds the serious actions of the Appellant's behaviour constitute misconduct and that it was his own actions that caused his dismissal.

[17] The Tribunal finds that the Appellant's actions of making derogatory remarks were wilful and deliberate. The Appellant admitted to having made derogatory remarks about the staff and guests and his remarks were voluntary (*Auclair* 2007 FCA 19).

[18] The Tribunal finds the Appellant ought to have known he could have been fired as he conceded that he had received verbal warnings and he knew he was violating the employer's harassment policy by speaking the way he did. He knew that by violating the policy he could be terminated as he accepted the policy when he acknowledged and signed it (*Mishibinijima*, 2007 FCA 36).

[19] The Appellant argued that he believed his employer terminated him due to problems he was having with his legs.

[20] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the claimant's dismissal from employment (*Macdonald A-152-96*).

[21] The Tribunal does not find the Appellant was terminated for his health problems with his legs because when he was provided with the employer statement that they were not aware of any health issues, he agreed that he had only had a chat with his supervisor and that he did not have to take any medical leaves because of his health.

[22] The Tribunal finds the letter of termination clearly indicates the final incident that caused Appellant's termination was because he displayed a serious breach of company policy relating the Harassment in the Workplace and despite verbal warnings and counselling he still continued to act inappropriately.

[23] The Tribunal finds the Appellant is disqualified from receiving employment insurance benefits because by violating the employer's harassment policy his actions were detrimental to the employer's interest or welfare as the employer clearly felt the Appellant's actions were one of intent that impaired the employee/employer relationship.

CONCLUSION

[24] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

Method of Hearing: Teleconference

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.