



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. L. v. Canada Employment Insurance Commission*, 2018 SST 106

Tribunal File Number: GE-17-3202

BETWEEN:

H. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace Salmon

HEARD ON: February 21, 2018

DATE OF DECISION: March 15, 2018

DECISION AND REASONS

OVERVIEW

[1] The Appellant was the captain of a fishing boat owned by his employer, which was in the fish business. The Appellant admitted to being in possession of fish belonging to his employer. The Appellant was terminated from his job as the employer determined he violated its policy on theft. The Appellant applied for Employment Insurance (EI) benefits after being terminated from his employment and was denied as the Canada Employment Insurance Commission (Respondent) determined he lost his job due to his own misconduct. The Tribunal must determine whether the Appellant lost his job for this reason.

DECISION

[2] The appeal is allowed because the Respondent failed to meet its burden: it did not show that on a balance of probabilities the Appellant lost his job for misconduct.

PRELIMINARY MATTERS

[3] The Appellant did not appear at the hearing, but the Tribunal is satisfied that he received notice of the hearing and was therefore aware as he sent an authorized representative to make submissions on his behalf. The hearing proceeded in accordance with *Social Security Tribunal Regulations*, subsection 12(1), which states that if a party fails to appear, the Tribunal may proceed if it is satisfied that the party received notice of the hearing.

ISSUE

[4] Was the Appellant's employment terminated for misconduct because he breached the employer's policy on theft?

ANALYSIS

[5] A claimant is disqualified from receiving any benefits if the claimant lost his employment because of his own misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act). Misconduct for the purposes of ss. 30(1) of the Act has been defined as "wilful misconduct,"

where the claimant knew or ought to have known that his conduct was such that it would result in dismissal. 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 (*Canada (Attorney General) v. Lemire*, 2010 FCA 314).

[6] The burden of proof lay with the Respondent to prove that misconduct occurred (*Lepretre v. Canada (Attorney General)*, 2011 FCA 30). The term "burden" is used to describe which party must provide sufficient proof of its position to overcome the legal test. The burden of proof in this case is a balance of probabilities, which means is it "more likely than not" that the events occurred as described.

What is the alleged conduct that led to the dismissal and did the Appellant commit the conduct?

[7] The conduct in question is the Appellants' taking of fish from company cages, which he admits that he took onto the employer's boat for personal use.

Was there a relationship between the conduct and the termination?

[8] There must be a causal relationship between the conduct and the loss of employment: the conduct must have been committed by the Appellant while employed by the employer, it must constitute a breach of a duty that is express or implied in the employment contract, and it must have caused the loss of employment (*Canada (Attorney General) v. Cartier*, 2001 FCA 274, *Lemire, Supra*).

[9] The Appellant was on board the employer's boat overseeing the removal of dead and injured fish from the employer's fish cages. The employer states that a supervisor saw the Appellant and coworkers taking fish from the cages onto the boat, filleting them, and putting the fillets on ice. The Appellant admitted he took dead fish onto the boat, and put the fish in a fish pan. He states in evidence that he did not remove the fish from the employer's property, but was planning on taking two of the fish.

[10] I find there is a relationship between the conduct and the loss of employment. Evidence establishes the employer caught the Appellant violating its policy on theft, though the Respondent was unable to get a copy of the policy and the Tribunal is unaware of the exact

phrasing and inclusions. There is a causal relationship between the conduct and the loss of employment as the employer terminated the Appellant because he admitted to taking the fish, which were the company's property.

Was the conduct wilful, or so careless or negligent as to approach wilful?

[11] Misconduct requires a mental element of wilfulness on the part of the Appellant, or conduct so negligent or reckless as to approach wilfulness (*Canada (Attorney General) v. Tucker*, A-381-85). Wilfulness has been defined in a number of ways, but generally requires the Appellant to have acted consciously, deliberately, or intentionally.

[12] The Appellant agreed that he took the fish, but consistently stated in evidence that he did not intend to steal from his employer and believed taking dead fish was acceptable conduct because it happened so frequently and because the fish were of no use to the employer and would be garbage. However, the Appellant's intent is not the relevant measure of wilful misconduct; it is sufficient that the misconduct be conscious, deliberate or intentional (*Canada (AG) v. Hastings*, 2007 FCA 372).

[13] The Appellant admits he decided to take the fish; therefore, the act was wilfully committed.

Did the Appellant know or ought to have known that his conduct could to impair the performance of his duties and that dismissal was a real possibility?

[14] The Tribunal finds the Appellant showed on a balance of probabilities that he did not know nor ought he to have known that he could be dismissed for taking the fish (*Canada (Attorney General) v. Mishibinijima*, 2007 FCA 36).

[15] The Appellant submitted that he knew there was a company policy on theft, but that he did not consider taking these dead fish to be theft. He also stated that if he had been warned not to take the fish, he would not have taken them; however, because many employees in the past had taken dead fish home and he was not aware of other employees being dismissed for this, he thought it was acceptable. The Appellant's representative confirmed that the fish were the property of the company, and the Appellant knew this.

[16] The Respondent's evidence is that the employer terminated the Appellant's employment for misconduct because he breached its policy on theft, and that the Appellant originally agreed with the employer's version of events. The Respondent was aware the Appellant later said he did not know his conduct violated the employer's policy, but it did not find the Appellant's evidence sufficiently compelling to find in his favour.

[17] The Tribunal finds the Appellant held a reasonable belief that his employment would not be terminated for taking these fish. The Appellant's evidence is reliable and he was consistent throughout the record. He may have initially agreed with the employer's statement that he violated its policy, but the Appellant tried many times to explain what happened, why he took the fish, and that he did not know it was not acceptable conduct. The Appellant knew a policy on theft existed, but did not know that taking these unusable fish intended for the landfill constituted theft and could therefore result in his termination.

CONCLUSION

[18] The Appellant's conduct does not qualify as misconduct under the Act; while he may have taken the dead fish onto the boat for personal use, he did not know nor ought he to have known that this was conduct which would likely lead to his dismissal.

[19] The appeal is allowed. The Respondent has not met its burden of proving, on a balance of probabilities, that the Appellant has correctly been imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

Candace Salmon

Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. L., Representative for the Appellant

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

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.