



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *E. C. v Canada Employment Insurance Commission*, 2018 SST 1358

Tribunal File Number: GE-18-2017

BETWEEN:

E. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: October 3, 2018

DATE OF DECISION: October 16, 2018

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant worked as X for X (employer). He was dismissed on January 15, 2018.

[3] The Appellant filed a claim for Employment Insurance benefits. The Commission denied the Appellant benefits because he had lost his employment due to his misconduct.

[4] According to the employer, the Appellant sent two women in his workplace a series of sexual and harassing emails.

[5] The Appellant also sent photos of himself nude, of his penis, and of his excrement to X.

[6] The employer suspended the Appellant with pay to investigate. The Appellant was summoned several times, yet he did not show up to give his version of events during the investigation. Therefore, the employer conducted the investigation without the Appellant appearing.

[7] The employer found that the emails the Appellant sent to the women were degrading, vexatious, and intimidating.

[8] Furthermore, the Appellant's acts go against the employer's policy on discrimination and harassment in the workplace.

[9] According to the Appellant, someone hacked his phone and had access to his photos and email. He is not responsible for the situation. The employer does not have an adequate computer system.

PRELIMINARY MATTERS

[10] The Tribunal file indicates that the Appellant was duly summoned by mail to the October 3, 2018, hearing. The Appellant received the notice of hearing on August 29, 2018.

[11] The Tribunal waited 30 minutes before starting the hearing. The Appellant did not appear.

[12] In accordance with section 12(1) of the *Social Security Tribunal Regulations* (Regulations), if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.

[13] In this context, the Tribunal was satisfied that the Appellant received notice of the hearing, so it proceeded with the hearing.

[14] **ISSUES**

- 1) What are the Appellant's alleged acts?
- 2) Did the Appellant commit the alleged acts?
- 3) Do the alleged acts constitute misconduct?

[15] **ANALYSIS**

[16] The relevant statutory provisions appear in the annex of this decision.

[17] The Tribunal must determine whether the Claimant lost his employment because of his misconduct and whether he should therefore be disqualified from receiving any benefits under sections 29 and 30 of the *Employment Insurance Act* (Act).

[18] The Tribunal's role is not to determine whether a dismissal by the employer was justified or was the appropriate action (*Canada (Attorney General) v Caul*, 2006 FCA 251).

[19] Indeed, the Tribunal must determine what the Appellant's alleged acts are, whether the Appellant committed these acts, and whether this amounts to misconduct under the Act.

[20] The Commission has the onus of proving on a balance of probabilities that there was misconduct (*Bartone*, A-369-88).

1) What are the Appellant's alleged acts?

[21] The Tribunal notes from the evidence on file that the employer alleges that the Appellant sent two employees sexual and harassing emails. He also sent photos of his penis and excrement to X.

[22] The Tribunal is of the view that these are the Appellant's alleged acts? [*sic*]

2) Did the Appellant commit the alleged acts?

[23] The Tribunal acknowledges the fact that the Appellant denies committing the alleged acts. He claims that his computer was hacked. He accuses the employer of not having an advanced computer system.

[24] The Tribunal has reviewed the voluminous documentation that the Appellant submitted to the Commission. This includes his employment letter, terms and conditions of employment, photos of his workplace, and pay stubs.

[25] The Tribunal is of the view that this information is not relevant for determining whether the Appellant committed the alleged acts or not.

[26] From the evidence on file, the Tribunal notes that, in 2011, the Appellant saw a psychiatrist in March 2011 for a work-related problem. The psychiatrist diagnosed schizotypal personality traits and a lack of interpersonal skills. She found that he posed no danger to himself or others. He was to get in touch with the employee assistance program for extra support.

[27] The Tribunal notes from the evidence on file that the Appellant refused to answer questions from a Commission agent. He was supposed to prepare for his proceeding because the employees had filed a complaint.

[28] The Appellant claims he is the victim of a smear campaign from his employer.

[29] The Tribunal finds that the Appellant committed the alleged acts. In reaching this conclusion, the Tribunal relied on the employer's investigation. According to this, nine (9) emails were sent from the Appellant's email address to his line supervisor containing vulgar,

sexual, and harassing comments, photos of his penis, and a video of his bare chest while he made inappropriate comments.

[30] The Appellant also sent a technician seven (7) emails that used vulgar and threatening language. The Appellant also sent six (6) nude photos of himself and six (6) photos of his penis. In addition, the Appellant sent his telephone number.

[31] X received several inappropriate emails and photos of the Appellant nude, of his penis, and of his excrement.

[32] The Tribunal notes that the Appellant had the opportunity to meet with the employer to explain his version of events. Nevertheless, he did not appear at the meetings the employer set up.

[33] In these circumstances, the Tribunal finds that the evidence on file shows that the Appellant committed the alleged acts. The Appellant cannot simply claim that the employer's computer system is inadequate or that he is the subject of a smear campaign. The documents the Appellant provided do not support this.

3) Do the Appellant's alleged acts constitute misconduct under the Act?

[34] The notion of misconduct is not defined in the Act and must be considered on the basis of case law principles. The Act "requir[es] for disqualification [from receiving benefits] a mental element of willfulness, or conduct so reckless as to approach willfulness" (*Canada (Attorney General) v Tucker*, A-381-85).

[35] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of section 30(1) of the Act as wilful misconduct, where the claimant knew or should have known that their misconduct was such that it would result in dismissal (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36).

[36] The Tribunal notes that the employer has a policy against harassment and that it is committed to providing employees with an environment that ensures their physical and psychological integrity.

[37] The Tribunal notes that the emails the Appellant sent go against his employer's policy. The Appellant lost the bond of trust with his employer by committing these acts.

[38] The Tribunal finds that, by deliberately sending emails with disrespectful, degrading, and harassing comments, the Appellant knew or should have known that he would be dismissed for sending those emails.

[39] In these circumstances, the Tribunal finds that the Commission proved on a balance of probabilities that the Appellant lost his employment because of his misconduct. that the Appellant [*sic*].

CONCLUSION

[40] The Tribunal finds that the Appellant must be disqualified from receiving benefits because he lost his employment due to his misconduct under sections 29 and 30 of the Act.

[41] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	October 3, 2018
METHOD OF PROCEEDING:	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

(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.