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

Citation: *O. R. v Canada Employment Insurance Commission and X*, 2019 SST 272

Tribunal File Number: GE-18-3800

BETWEEN:

**O. R.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**X**

Added Party

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

DECISION BY: Lilian Klein

HEARD ON: February 6, 2019

DATE OF DECISION: March 6, 2019

Canada

## DECISION

[1] The appeal is dismissed. The Appellant is disqualified from receiving regular benefits since the action that caused his dismissal met the legal test for misconduct under the *Employment Insurance Act* (EI Act).

## OVERVIEW

[2] The Appellant applied for regular benefits after he lost his job, reporting that he had been dismissed for absenteeism. The Respondent disqualified him from receiving benefits after finding that he lost his job due to misconduct on the grounds of sexual harassment against a co-worker. When he requested a reconsideration, the Respondent maintained its decision.

[3] The Appellant appealed the reconsideration decision. He did not dispute that his conduct amounted to sexual harassment but argued that he had been suffering from depression and was self-medicating with alcohol at the time. He also argued that he has been punished enough through losing his job and will face extreme financial hardship if he cannot get benefits. I must now decide whether his actions met the legal test for misconduct under the EI Act.

## PRELIMINARY MATTERS

[4] On January 3, 2019, the Appellant's former employer (Employer) asked to be added as a party to this appeal, arguing that it had a direct interest in the decision due to the circumstances of the dismissal. On January 7, 2019, I granted this request.

## ISSUE

[5] **Did the Appellant lose his employment because of misconduct?**

a) **Why was the Appellant dismissed? What reason did the employer give?**

b) **Does the evidence show that the Appellant committed the action that caused his dismissal?**

c) **If so, does this action meet the legal test for misconduct under the EI Act?**

## ANALYSIS

[6] Claimants are disqualified from receiving regular benefits if they lose their employment through misconduct.[1] The EI Act does not define misconduct so all the circumstances must be considered before making a finding. The Respondent has the burden of proof to show, on a balance of probabilities, that there was misconduct under the EI Act.[2] It cannot rely on the employer's opinion alone, but must provide clear evidence of the action that triggered the dismissal and whether the claimant committed it.[3]

[7] There is misconduct where a claimant's action was "wilful" and caused the loss of employment since it breached a duty to the employer. As well, the claimant must know or should have known that this action would lead to dismissal.[4]

[8] It is not my role to decide if the dismissal was wrongful or whether it was the correct level of discipline for the conduct. I can only consider whether the action that led to the dismissal met the criteria to be considered misconduct under the EI Act.[5]

**Issue: Did the Appellant lose his employment because of misconduct?**

[9] Yes. I find that the Respondent met its burden of proof to show, on a balance of probabilities, that the Appellant lost his job due to misconduct based on the following criteria:

a) **Why was the Appellant dismissed? What reason did the employer give?**

[10] I find that he was dismissed due to his sexual harassment of a co-worker. The Employer testified at the hearing that the Appellant was not dismissed because of absenteeism, as he had initially stated on his application for benefits. He conceded this point at the hearing. According to the termination letter that the Employer submitted after the hearing, he lost his job on October 12, 2018, for "completely inappropriate conduct which is a breach of the Workplace Sexual

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[1] Subsection 30(1) of the EI Act.
[2] *Lepretre v. Attorney General of Canada*, 2011 FCA 30.
[3] *Crichlow v. Attorney General of Canada*, A-562-97.
[4] *Attorney General of Canada v. Lemire*, 2010 FCA 314.
[5] *Attorney General of Canada v. McNamara*, 2007 FCA 107

Harassment policy." I find that this evidence proves the reason for his dismissal was sexual harassment, not absenteeism.

b) **Does the evidence show that the Appellant committed the action that caused his dismissal?**

[11] Yes. I find that there is enough evidence to show the Appellant committed the action that led to his dismissal. The Employer's representative testified that she was the recipient of the sexually explicit text messages from the Appellant. The Employer's text message records, as submitted by the Respondent, provide documentary evidence of the content and dates of these messages, the sender and recipient and the company phone numbers used for their transmission.

[12] Moreover, the Appellant does not dispute that he sent these texts and he has repeatedly apologized for his behaviour. He confirmed that he sent the texts in question to his co-worker's company phone using his company phone during working hours on October 11, 2018.

c) **Does this action meet the legal test for misconduct under the EI Act?**

[13] Yes, I find that the Appellant's action meets this test based on the following criteria:

***Was the Appellant's action wilful?***

[14] Yes. I find that sexual harassment of a co-worker is wilful, that is, "conscious, deliberate or intentional." [6] The Appellant testified that he felt drawn to his co-worker since she had been receptive to listening to his problems in her role as a human resources advisor. He reported that he had been depressed and had been using alcohol as a means of self-medication. He submitted a doctor's note dated December 8, 2018, which stated—without further details—that he has a "history of mental illness including alcohol dependency and major depression."

[15] The Appellant argued that sending sexually explicit texts to his co-worker was not intentional or conscious since he had been at home drinking and was therefore not fully aware of his actions. However, there does not have to be wrongful intent for an action to be considered

[6] *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36.

wilful.[7] Moreover, the courts have found that claimants cannot justify their misconduct as an act beyond their control by blaming it on an addiction.[8] His action was therefore still wilful.

***Did the Appellant's action breach his duty to his employer?***

[16] Yes. I find that the Appellant breached his duty to his employer by contravening its zero-tolerance policy on sexual harassment. The Respondent submitted as evidence the Employer's Health & Safety Workplace Discrimination, Harassment & Workplace Sexual Harassment policy, which states that sexual harassment "will not be tolerated under any circumstances." The policy also states that the consequence of a violation is disciplinary action "up to and including termination." By his conduct, I find that the Appellant breached the duty of every employee to comply with company policy.

***Should the Appellant have known that his action would cause his dismissal?***

[17] Yes. I find that the Appellant should have known that his action would cause his dismissal given his awareness of the company's no-tolerance policy on sexual harassment. I find that the wording of this policy, as submitted by the Respondent, makes it clear that sexual harassment was forbidden and could trigger dismissal.[9] The evidence includes his signed acknowledgment that he received training on this policy on January 11, 2018.

[18] The Appellant did not dispute that he received this training but argued that his awareness was clouded on the day he sent the texts because he had been drinking. However, as noted above, claimants who lose their job due to behaviour caused by an addiction cannot rely on this condition to excuse their conduct.[10] I therefore find that the Appellant cannot rely on his alcohol addiction to show that he was not aware that sending sexually explicit texts to a co-worker would violate his company's policy.

[19] To sup up, I conclude that the Appellant's action met the test for misconduct under the EI Act. Through the evidence it provided, I find that the Respondent met its burden to show, on a

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[7] *Attorney General of Canada v. Caul*, 2006 FCA 251.
[8] *Attorney General of Canada v. Wasylka*, 2004 FCA 219.
[9] *Attorney General of Canada v. Nguyen*, 2001 FCA 348.
[10] *Wasylka*, see above.

balance of probabilities, that sexual harassment was the action that caused his dismissal and that he committed it. I find that this action was wilful and breached his duty to his employer. Moreover, he should have known he would be dismissed if he failed to comply with the company's zero-tolerance policy on sexual harassment.

[20] Before concluding, I note the Appellant's submission that losing his job has been punishment enough for his behaviour. He argued that a disqualification from receiving benefits will cause him extreme financial hardship. However, I am not allowed to interpret the legislation in any other way than its plain meaning.[11] The provisions of the EI Act cannot be set aside based on financial need to allow a claimant to receive benefits when a disqualification applies.[12]

**CONCLUSION**

[21] The appeal is dismissed. The Appellant is disqualified from receiving regular benefits since the action that caused his dismissal met the legal test for misconduct under the EI Act.

Lilian Klein
Member, General Division - Employment Insurance Section

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| HEARD ON: | February 6, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | O. R., Appellant<br><br>X, Added Party<br><br>M. B., Representative for the Added party |

[11] *Attorney General of Canada v. Knee*, 2011 FCA 301.
[12] *Attorney General of Canada v. Lévesque*, 2001 FCA 304.