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

Citation: *J. H. v Canada Employment Insurance Commission*, 2019 SST 895

Tribunal File Number: GE-19-769

BETWEEN:

J. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: March 14, 2019

DATE OF DECISION: April 2, 2019

DECISION

[1] The appeal is dismissed. I find the Commission has proven the claimant lost his employment by reason of his own misconduct and should be disqualified from receiving EI benefits.

OVERVIEW

[2] The Appellant, J. H. (whom I will refer to as the claimant) established a claim for employment insurance benefits (EI) after he was laid off from his employer. The claimant contacted the Respondent (whom I will refer to as the Commission) to report that he had been dismissed while on a lay off because he had failed a company's pre-employment drug and alcohol test.

[3] The Commission determined that the claimant lost his employment by reason of his own misconduct and issued a disqualification as of June 24, 2018, that resulted in an overpayment. The claimant made a request for reconsideration arguing that he had informed the Commission of his termination and the reason for his dismissal and was advised by the Service Canada agent there should be no problem and to continue to complete his reports. He was upset a disqualification was imposed against his claim of the week he was terminated and he had been overpaid benefits.

[4] The Commission changed the decision and imposed the disqualification effective September 2, 2018, which eliminated the overpayment. The decision of misconduct remained. The claimant appealed the disqualification decision to the *Social Security Tribunal* (Tribunal).

PRELIMINARY MATTERS

[5] The claimant, along with his representative, requested an adjournment to follow my decision to refuse the employer to be added as a party. I requested the party to provide specific details how the employer not being added as a party or how the civil litigation process has an impact as it relates to the issue of misconduct under appeal as per the EI Act.[1]

[1] Section 30 of the *Employment Insurance Act* (EI Act) explains the principal of misconduct.

[6] The claimant's representative submitted the reason for the adjournment was that the claimant's lawyer was concerned that if the employer was denied the opportunity to participate in the Tribunal's hearing it could have a negative impact on civil litigation process with the employer.

[7] I did not find the claimant along with his representative provided sufficient details how it relates to the issue under appeal and advised the party that the adjournment request was refused. The party was advised that the hearing will proceed as scheduled, and at that, time evidence or submission can be made in support of an adjournment request. In addition, to be prepared to proceed with the appeal.

[8] At the hearing, I explained that the employer was not being denied an opportunity to participate in the hearing but only being denied being added as a party because they had not demonstrated they had a direct interest in the appeal. I advised the claimant and representative that they had the option to call the employer as a witness if they believed they could provide evidence in support of the appeal.

[9] The claimant along with the representative submitted that they did not understand what the denial meant at the time they made the request for the adjournment. They were satisfied with the explanation and were ready to go ahead with the hearing.

[10] The claimant, in addition provides a lengthy explanation in his notice of appeal, as it related to the overpayment he incurred. However, the Commission's evidence on the file, and from the claimant's oral testimony, the Commission changed the original date of disqualification, which removed the overpayment. Therefore, there is no issue of overpayment and only the issue of misconduct.

ISSUES

[11] Did the claimant lose his employment because of the alleged offence?

[12] Did the claimant commit the alleged offence?

[13] Does the alleged offence constitute misconduct?

ANALYSIS

[14] There will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts that 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.[2]

[15] I note that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.[3]

[16] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct was the real cause of the claimant's dismissal from employment.[4]

[17] The onus lies on the Commission to establish that the loss of employment by the claimant resulted from the claimant's own misconduct.[5]

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

[18] Yes, I find the claimant lost his employment because it is alleged that claimant failed a pre-access alcohol and drug test that was a condition of his employment. I find there is a causal relationship between the claimant's employment and the reason for dismissal.[6]

[19] The claimant conceded that he lost his employment after he failed the required pre-access alcohol and drug test.

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[2]*Canada (AG) v. Lemier*, 2010 FCA 314; *Hastings* 2007 FCA 372
[3] *Cau*l 2006 FCA 251
[4]*Macdonald* A-152-96
[5]*Lepretre*, 2011 FCA 30; Granstrom, 2003 FCA 485
[6]*Canada (Attorney General) v. Nolet*, FCA A-517- 91

[20] The Commission contacted the employer who stated that the claimant was terminated because he did not pass the pre-access alcohol and drug test. She stated this is a company policy and a condition of employment. She stated that the claimant was scheduled to return to work on July 3, 2018. The employer provided a copy of the termination letter and a copy of the Alcohol and Drug Policy – Fit for Work.

Issue 2: Did the claimant commit the alleged offence?

[21] Yes, I find the claimant committed the alleged offence because he conceded that he failed the pre-access alcohol and drug test because he and his wife had been drinking the night before he went to the test.

[22] The claimant's statements to the Commission and his testimony at the hearing were consistent that he was terminated after failing a pre-access alcohol and drug test.

[23] The claimant explained that on June 27, 2018, he and his wife were up late with family problems having a few drinks. He stated he had not had much sleep that night and the following day he was scheduled to take a drug and alcohol test before he was supposed to go back to work on July 3, 2018. He stated this was 6 days before he was to return to work. He stated that the results of the test indicated his blood level was 0.059 and it went down to 0.054.

[24] The claimant explained that he received the paperwork test results advising of a company policy that employees with blood alcohol levels higher than 0.02 are prohibited from driving, perform safety sensitive duties, or operate heavy equipment. Which he had to sign. He stated he has worked for this employer for 8 years and this is the first time he had heard of this policy. If he had known, he could have scheduled my testing for a day later. They advised that he had been terminated based on test results 6 days prior to working. In the 8 years he has worked for this employer, this is the first test that was ever an issue.

[25] The claimant stated that when he learned of the results and that he had been terminated he could not believe it. He stated he was referred to Human Resources and asked if he could be retested but was told nothing could be done. He stated he could not believe there was not a process to appeal or retested.

[26] The claimant submitted in his notice of appeal that he was wrongfully dismissed.

[27] The claimant and the employer provided a copy of the letter of termination where it stated that he was dismissed because "you received a positive result from a pre-access alcohol and drug test conducted on June 28, 2018, as per recall from his lay-off. This is in violation of X's alcohol & Drug Policy - Fit for Work Policy.

[28] The claimant provided copies of his alcohol and drug test results that indicate that his first test he registered 0.059 and his second test registered at 0.054. The claimant also provided a copy of the drug company's order #837722 of the confirmation results completed by the technician that indicated the IS room to print accuracy check but it was done and checked OK at 037.

[29] The claimant argues that the company's work order number is not the same number on the test result slips.

[30] I considered the evidence of the alcohol and drug test results and the discrepancy on the work order stated the accuracy test registered at 0.037, and the work order number differs than that on the test result slips. I find that on the balance of probabilities, that the results of 0.059 and 0.054 are the correct numbers because the claimant clearly admitted to these numbers during his investigation by the Commission, and relied on these numbers to prove that his alcohol levels were going down. The claimant was not able to provide an explanation as to what the 0.037 reading was, as he testified that he never contacted the company to ask. I am satisfied that the difference in the numbers does not change the fact that the claimant was required to sign the test results if the test result was 0.02 or higher as all the numbers were higher than 0.02.

[31] The claimant's representative submitted that on June 26, 2018, the claimant was advised he was to report for a pre-access alcohol and drug test on June 28, 2018, at 1 P.M. She stated that on June 27, 2018, the claimant's dog, T., became very ill and he continued to get sicker. She stated this was causing great stress to the claimant and his wife, and they consumed a few drinks at the kitchen table until about 12:30 A.M. or 1 A.M.

[32] The representative submitted that the following morning, June 28, 2018, the couple took T. to the veterinary. She stated that the claimant's pre-access test was scheduled for 1 P.M., but they decided to go early and arrived around noon. She stated that the claimant was not worried about taking the test because he had worked for the company for 8 years and had been through many tests and never had any issues.

[33] The representative confirmed the numbers registered at 0.059 and 0.054 when the claimant took the test and he was surprised. She stated that the claimant was refused the offer to retake the test.

[34] I sympathize with the claimant's situation, dealing with his sick pet would have been difficult, and that he was not able to retake the test. However, I must determine whether the claimant's actions were the cause of his dismissal and apply the legal test of misconduct.

Issue 3: Does the alleged offence constitute misconduct?

[35] Yes, I find the alleged offence constitutes misconduct because the claimant failed the pre-access alcohol and drug test that he knew was a condition of his employment. The claimant had received prior notice that a test was scheduled but he made a choice to consume alcohol prior to his testing. In acting as he did, he ought to have known that his conduct could cause him to fail the test and by failing the test might lead to his dismissal.

[36] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employee's conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[37] The Commission submits although this is not a case where the claimant was found impaired by alcohol while on the work site. Nonetheless, the claimant was well aware that he was scheduled to undergo alcohol and drug testing, since he was being recalled back to work. Yet, he still consumed alcohol, the night before his scheduled test, which resulted in him failing the test. Even though he argues that he was not aware of this policy or that he would be tested for alcohol, this is not credible. The company has employed the claimant for 8 years and he himself

said this is the first test that he has ever had with issues and he has had no previous violations or any treatment.

[38] The Commission concluded that the claimant breached the employer's Alcohol and Drug Policy - Fit for Work Policy as demonstrated by the employer and a condition of employment is that one must pass these pre-access alcohol and drug tests and by failing this resulted in his termination. The claimant's actions were willful or so negligent as to be considered willful and were a direct cause for his termination, which constitutes misconduct within the meaning of the EI Act.

[39] I am satisfied that the Commission has proven misconduct because the facts are undisputed; the claimant was an employee of X and was on a seasonal lay-off. On June 26, 2018, the claimant was contacted and advised he was being recalled returning to work on July 3, 2018, and he was required to take a pre-access alcohol and drug test on June 28, 2018, at 1 P.M. The claimant conceded that the night before the test, he and his spouse consumed alcohol and when he reported for his test his breath samples were 0.059 and 0.054 thus he failed the test and was terminated.

[40] The representative submitted that the claimant did not violate the policy because the incident did not happen while he was working. She stated that the policy states (GD3-22) in the Scope and Application, this policy applies to all employees while they are engaged in Company business, at all times when on Company premises and work site, and when operating Company vehicles and equipment. This is stated again in Standards (GD3-23) employees are expected to comply with the following standards, and to report fit and remain fit for work throughout their work day shift. In addition (GD3-32) Fitness for Work in the context of this policy means being able to safely and acceptably perform assigned duties without any limitations due to the use or after-effects of alcohol, illicit drugs, medications or other mood-altering substances.

[41] I considered the claimant's argument that failing the pre-access alcohol and drug test does not violate the policy because he was not actually working yet and this test was taken 6 days before he was scheduled to fly out to work. However, I cannot accept the argument because although the claimant was not actually working, he was still employed by the company and the pre-access alcohol and drug testing was a condition of employment.

[42] I find from the claimant's testimony that he was aware of the pre-access testing requirement because he stated that in the 8 years he had worked there, there were times he was required to take it and then other times not. He stated that maybe this occurred 3 or 4 times and the test would be administered by different outside agencies.

[43] I also rely on the Courts that the claimant while employed by the employer must commit the misconduct and that it constitutes a breach of duty that is express or implied in the employment contract. It is not necessary that the misconduct be committed at work, in the workplace or in the course of the employment relationship.[7]

[44] I find the claimant's, perhaps poor judgment has placed him in an unfortunate situation; however I find the irreprehensible behavior of the claimant by breaching the company policy, breached the trust with his employer.

[45] The representative submitted that the totality of the circumstances must be considered and there was no willful intent on the part of the action.

[46] I have considered the totality of the circumstances and the fact that the claimant decided to drink because his family pet was ill. I cannot agree with the representative that there was no willful intent.

[47] Unfortunately, for the claimant, his actions were willful because consuming alcohol prior to a scheduled pre-access alcohol and drug test, that is contrary to the company policy and a condition of employment constitutes misconduct within the meaning of the EI Act. In acting as he did the claimant knew or ought to have known that the conduct was such as to impair the performance of his duties owed to the employer, and that as a result, dismissal was a real possibility.[8]

[48] I find the claimant's actions constitute misconduct because he was aware of the company policies when it came to alcohol and drug testing. In addition, he was given two days' notice that

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[7] *Canada (Attorney General) v. Brissette* (A-1342-92)
[8] *Mishibinijima v. Canada* 2007 FCA 36)

he was to report for a pre-access alcohol and drug test that he confirmed he had been required to do in previous years of being recalled for work.

[49] I accept the claimant testimony to support my finding because he admitted that he had been laid off and on June 26, 2018, received a call that he was being recalled to work on July 3, 2018, and he was to report for an alcohol and drug test. He stated that he took the test maybe 3 or 4 times, but it was always for drugs by providing a urine test. He stated that he had never been given a breathalyzer before. He stated he was not concerned with taking the test and he went an hour earlier than scheduled.

[50] The claimant testified that he was aware, there was a policy and if you tested over 0.04, but this was the first time he had ever seen the policy. He had never read it before. He stated that the policy has always had to do with working and if he had known they considered a reading of 0.02 to be cause for termination, he would never have gone in for the test at that time and would have rescheduled it for the next day.

[51] I considered the claimant's argument that he had never read the policy. However, I find on the balance of probabilities, that he was very much aware of the policy because he admitted that he had several tests over the years and never had an issue. I find, his argument that he had never been tested for alcohol, or if he could recall if he had, does not change the fact that it was included in the company policy. I also find that from the claimant's testimony that he was aware of the 0.04 alcohol limit supports he was aware of the alcohol component of the policy. I find the undisputed evidence supports that the claimant had test results of 0.059 and 0.054 which are clearly over the 0.04 alcohol limit allowed.

[52] I considered the claimant's argument that he had always been given tests for drugs and not alcohol and that this was the first time he ever had to blow into a breathalyzer. However, I do not find this would change the fact that he was required to take a pre-access alcohol and drug test. The name of the test speaks for itself and on the balance of probabilities; the test could be for either or both.

[53] The claimant testified that he was not allowed to retake the test and there was no progressive discipline. He stated that when his dog got sick he completely forgot about having to

take the test the next day. He stated that if he had known he would fail the test he would have rescheduled it for the following day.

[54] The notion of willful 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. The fact that the claimant was not concerned he would fail the test and then attempted to retake the test by contacting his employer is of no relevance, to whether his conduct constitutes misconduct.[9]

[55] I am entitled to accept hearsay evidence, as we are not bound by the same strict rules of evidence, as are the Courts.[10] I find the employer's statements to the Commission credible in that the claimant was on a seasonal lay-off and he was still considered an employee of the company. His benefits were still payable and his seniority remained in place. The employer confirmed the claimant had been recalled for July 3, 2018, and was required to submit a return to work, drug and alcohol test on June 28, 2018. He stated that the claimant was given ample notice of the test date and time. The claimant failed the testing and was terminated effective June 28, 2019. There was no opportunity for retesting.

[56] The employer provided a copy of the company alcohol and drug policy that states Company Business, refers to all business activities undertaken by employees in the course of the Company's operations, whether conducted on or off Company premises.

[57] In this case, the claimant's loss of employment was the result of his misconduct and the community need not bear the consequences of that by paying him employment insurance benefits, as he is requesting. In the present matter, the claimant was dismissed because he breached the employer's alcohol and drug policy, which was proven by the positive alcohol test over the allowed limit.[11]

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[9] *Canada (AG) v. Hastings*, 2007 FCA 372
[10] *Canada v. Mills*, A-1873-83 FCA
[11] *Canada (Attorney) v. Richard*, 2005 FCA 335

[58] I considered the claimant's argument that he was not allowed to retake the test, or was never given any progressive discipline and believes he was wrongfully dismissed. However, I must rely on the Court that ruled that the role of the Board was not to question whether the severity of the sanction was justified or whether the employee's gesture constituted valid grounds for dismissal,[12] but whether the gesture constituted misconduct within the meaning of the EI Act.[13]

CONCLUSION

[59] I conclude that a disqualification should be imposed pursuant to section 30(1) of the EI Act because the claimant knew or ought to have known passing the pre access test was a condition of his employment and by failing to do so constitutes misconduct within the meaning of the EI Act.

[60] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	March 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. H., Appellant Erin Lyle, Representative for the Appellant

[12] In particular *Fahkari* (A-0732.95), *Namaro* (A-0834.82) and *Secours* (A-0352.94)
[13] *Canada (AG) v Marion*, 2001, FCA 135