



Citation: R. K. v Canada Employment Insurance Commission and X, 2019 SST 467

Tribunal File Number: GE-19-592

BETWEEN:

R. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: April 11, 2019

DATE OF DECISION: April 12, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant established a claim for regular Employment Insurance benefits (EI benefits) on August 5, 2018. The Appellant worked as a lead hand for “X” (X) until July 25, 2018, and was suspended by the employer pending an investigation into an illegal work stoppage on July 23, 2018. On August 2, 2018, the Appellant was dismissed by the employer for instigating an illegal work stoppage on July 23, 2018. The Respondent determined they could not pay EI benefits to the Appellant, because he lost his employment by reason of his own misconduct. The Appellant testified he did not request that his co-workers walk-off the job. The Appellant’s representative submitted that the Appellant’s supervisor told the Appellant to leave. The Appellant’s representative further submitted that the Appellant’s co-worker (X) acted as spokesperson for the workers. The Added Party’s representative submitted that the Appellant was dismissed for instigating an illegal work stoppage. The Added Party’s representative also submitted that the audio recording on July 23, 2018, demonstrated the Appellant instigated the walk-off by his co-workers. I find the Appellant lost his employment by reason of his own misconduct.

ISSUE

[3] The Tribunal must decide the following issue:

Did the Appellant lose his employment by reason of his own misconduct?

ANALYSIS

[4] Section 30(1) of the *Employment Insurance Act* (EI Act) states that a claimant “is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct.”

[5] The EI Act does not define misconduct. The Federal Court of Appeal has explained the legal notion of misconduct for the purposes of this provision as acts that are willful or deliberate,

where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85).

Did the Appellant lose his employment by reason of his own misconduct?

[6] I find the Appellant did lose his employment by reason of his own misconduct, because he played a role in instigating a work stoppage and walked off the job himself along with his co-workers on July 23, 2018. I recognize the Appellant testified he did not request his co-workers to walk off the job. Nevertheless, the Appellant walked off the job himself and played a role in instigating a work stoppage with a co-worker (X). Specifically, the Appellant can be heard on an audio recording of the final incident telling co-workers “yeah come on everybody let’s go” (Exhibit GD3-53). Under the circumstances, the Appellant should have known—or ought to have known—that walking off the job and playing a role in a walk-off by his co-workers could lead to his dismissal. In short, I find the Appellant’s actions had a mental element of wilfulness and would meet the legal test for misconduct.

[7] I recognize the Appellant’s representative submitted that the Appellant’s supervisor (X) told the Appellant to leave the workplace. However, I have reviewed the audio recording and cannot conclude that the Appellant’s supervisor told the Appellant to leave. Specifically, the Appellant indicated to X: “Are you telling me to go home... is that what you are saying?” X responded: “No I didn’t. You said...” Furthermore, X’s comment must be viewed within the context of the Appellant’s previous comment to him that: “My next step is the Ministry of Labour.”

[8] The Appellant’s representative further submitted that the Appellant’s co-worker (X) acted as spokesperson for the workers. I recognize X expressed his unhappiness with the behaviour of X on the audio recording. Nevertheless, the Appellant played a role in the walk-off by his co-workers on July 23, 2018. I further realize Appellant and his co-workers eventually returned to their jobs later that day after meeting with the Operations Manager (X) at a coffee shop. Still, the issue before me was whether the Appellant’s action of walking off the job and playing a role in the work stoppage was misconduct. As cited above, I find the Appellant’s action of walking off the job—and playing a role in the walk-off—was wilful because he she should have known (or

ought to have known) that his actions would lead to his dismissal by the employer.

[9] I further recognize the Appellant's representative submitted that the walk-off by the Appellant and his co-workers was not planned or pre-determined. The Appellant's representative also argued that the plan to meet at the Appellant's home after the walk-out was only set after the walk-out. Nevertheless, the Appellant still made the decision to play a role in the walk-off and confirmed he did walk-off the job on July 23, 2018. In the final analysis, the Appellant's action of walking off the job himself—and playing a role in the walk-off by his co-workers— was wilful behaviour because he knew (or ought to have known) that his actions could result in his dismissal.

[10] The Appellant's representative also submitted that the Appellant had no intention of walking off the job and attempts were made to resolve the situation with X. I do recognize the Appellant was frustrated, upset, and unhappy with the behaviour of his supervisor X. I also recognize the Appellant filed a harassment complaint against X on the day of his dismissal. However, the issue before me is whether the Appellant's action of walking off the job—and playing a role in the walk-off by his co-workers— would meet the legal test for misconduct. In short, I find the Appellant's action on July 23, 2018, would meet the legal test for misconduct because his actions contained a mental element of wilfulness.

[11] In summary: I find the Appellant lost his employment by reason of his own misconduct.

CONCLUSION

[12] The appeal is dismissed.

Gerry McCarthy

Member, General Division - Employment Insurance Section

HEARD ON:	April 11, 2019
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METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. K., Appellant X, Representative for the Appellant X (Human Resources Manager) and X(Corporate Director Human Resources), Representatives for the Added party