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

Citation: *B. V. v Canada Employment Insurance Commission*, 2019 SST 469

Tribunal File Number: GE-19-693

BETWEEN:

**B. V.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Lilian Klein

HEARD ON: March 11, 2019

DATE OF DECISION: April 14, 2019

Canada

## DECISION

[1] The appeal is allowed. I find that the action that caused the Appellant's dismissal did not meet the legal test for misconduct under the *Employment Insurance Act* (EI Act).

## OVERVIEW

[2] After 10 years of employment as a X, the Appellant (who I refer to below as the Claimant) was dismissed for drinking alcohol during his lunch break. The Respondent (the Commission) disqualified him from receiving benefits after finding that he lost his job through his own misconduct. After he requested a reconsideration, it maintained this decision.

[3] The Claimant appealed the reconsideration decision, arguing that his employer did not apply the progressive discipline policy applicable to his case. He submitted that his employer was looking for an excuse to dismiss him since it still had to pay him his full salary after he had to change to lighter and less well-paid duties on his return from heart surgery.

[4] I must first determine what action led to his dismissal and if he committed it. I must then decide if this action met the legal test for misconduct under the EI Act.

## PRELIMINARY MATTERS

[5] After the hearing, the Claimant submitted further documents, which I accepted as relevant to his appeal. I shared it with the Commission, which provided submissions in response.

## ISSUE

[6] **Did the Claimant lose his employment because of misconduct?**

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

b) **Did the Claimant commit the action that led to his dismissal?**

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

## ANALYSIS

[7] Claimants cannot receive regular benefits if they lose their employment due to their own misconduct.[1] The legislation does not define misconduct, so I must consider all the circumstances before making any findings.

[8] The Commission 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, but must provide clear evidence of the action that triggered the dismissal and whether the claimant committed it.[3] There is misconduct where the action causing the loss of employment was wilful and breached a duty to the employer. As well, the claimant must have known or should have known that this action would lead to dismissal.[4]

[9] It is not my role to determine if a claimant was wrongfully dismissed, or whether termination was the correct level of discipline. I can only consider whether the action that led to the dismissal met the criteria for misconduct under the EI Act.[5] I must also be satisfied that the alleged misconduct was the real reason for the dismissal, and not a pretext.[6]

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

[10] No. I find that his action did not meet the test to show misconduct under the EI Act since although it was wilful and breached his duty to his employer, he could not have known it would lead to dismissal.

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

[11] I find that the reason for his dismissal was that he had a beer at a local bar during a late lunch break on July 11, 2018. The employer told the Commission that it dismissed the Claimant

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[1] They are disqualified under section 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.
[6] *Davlut v Attorney General of Canada*, A-241-82.

for breaching its Fitness for Duty Policy (Fitness Policy), which does not allow the consumption of alcohol during working hours, including during a lunch break.

[12] In its termination letter dated July 30, 2018, the employer documented that it dismissed the Claimant because he was in "direct violation of several [company] policies and procedures." The letter states that he took an unauthorized late lunch, consumed alcohol, asked his supervisor to lie about his whereabouts, returned to the premises despite clear directions not to, and listened in to a private closed-door conversation.

[13] However, I find that the action triggering the Claimant's dismissal was his violation of the employer's Fitness Policy on July 11, 2018. The employer did not provide its code of conduct or evidence of other policies and procedures that he allegedly contravened. The evidence shows no previous policy violations of any kind.

**b) Did the Claimant commit the action that led to his dismissal?**

[14] Yes. I find that there is enough evidence to show that he committed this action, which he admits. He submitted that he had a beer while watching a World Cup match at a local bar during a late lunch break. He testified that the department head saw him, reported the incident and then his supervisor came over to the bar to suspend him from work.

c) **Does the Claimant's action meet the legal test for misconduct under the EI Act?**

[15] No. I find that he did not commit misconduct under the legislation when he breached the Fitness Policy on July 11, 2018, based on the following criteria:

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

[16] Yes. I am unconvinced by the Claimant's argument that his conduct was not conscious because he was caught up in the excitement of the World Cup. As the Commission submitted, conduct such as drinking is wilful since it is conscious and deliberate. I acknowledge his submission that his actions were not intentional; he did not plan to contravene company policy and tried to apologize right away. However, the courts have found that where a claimant acting

"on the spur of the moment" immediately regrets the action and apologizes to his/her employer, this remorse has no relevance to the question of whether there was misconduct.[7]

[17] As such, I find that the Claimant's conduct was wilful, which is one part of the test for misconduct under the EI Act.

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

[18] Yes. The evidence shows that he breached this duty when he drank alcohol during his late lunch break on July 11, 2018, even though he only had a half-pint of beer. Breaching this duty is another part of the test to show misconduct under the EI Act.

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

[19] No. I find that there is insufficient evidence to show the Claimant knew or should have known that his action would lead to his dismissal. In making this finding, I give greater weight to his sworn testimony than to the incomplete evidence provided by the Commission since it has not shown he was warned that he would be dismissed for a first infraction.

[20] The Commission reported the employer's statement that everyone knew employees violating the Fitness Policy would be terminated, but there is no evidence to support this assertion. The employer reported that the Claimant would have known this as well through corporate communications about drug and alcohol testing and his documented training on these policies on April 1, 2014, and June 1, 2015. However, there is no evidence the employer warned him that an alcohol violation would lead to dismissal without post-incident drug testing and progressive discipline first.

[21] I find that the Claimant could not have known he would be dismissed for a first offence because of inconsistencies between the Fitness Policy section that the Commission provided and the full Random Drug and Alcohol Testing Policy (Alcohol Policy) that he submitted after the hearing. The courts have held that where the Commission relies on the employer's reports of

[7] *Attorney General of Canada v Hastings*, 2007 FCA 372.

zero tolerance but the company's written policy appears at odds with this approach, it is unreasonable to conclude that a claimant lost his/her job because of misconduct.[8]

[22] I find that the Commission relied on one part of the Alcohol Policy, which repeats the ban in the Fitness Policy on consuming alcohol during work hours. However, the Alcohol Policy applicable to all employees states that different alcohol levels lead to different sanctions. Employees with readings between 0.02.-0.039 "are subject to progressive discipline," while those with readings of over 0.04 are "subject to discipline up to and including dismissal." Another situation that leads to dismissal rather than progressive discipline is consuming alcohol on the premises or at work sites, or when wearing the company's uniform.

[23] I find that the Claimant could not have predicted dismissal based on these policies since, as he argued, it was more likely than not that his alcohol readings would have been minimal, he was not on company premises or at a work site, and he was not in uniform.

[24] As such, I find that he could not have been aware his action would lead to his dismissal. This awareness is required to show misconduct under the EI Act.

[25] I also find the evidence supports the Claimant's argument that drinking a beer at a bar on July 11, 2018, was a pretext for his dismissal rather than the real reason. The evidence shows his employer decided to proceed straight to dismissal while its policies suggest other employees in similar circumstances would have been tested for alcohol as part of a full investigation and would have faced progressive discipline before termination.

[26] I give significant weight to the Claimant's sworn testimony that when he returned to work after heart surgery the previous year, he was put on different—and less well-paid—duties, but his employer still had to pay him his usual salary. He argued that the department head did not like him and wanted to get rid of him. I found his testimony credible since his statements were consistent throughout the hearing and he answered my questions in an open and forthright way.

[27] In this context, I find that the employer's actions support the Claimant's argument that the company used his first infraction in 10 years of service as an excuse to fire him.

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[8] *Lepretre*, see above.

[28] To sum up, I find that the Commission met its burden of proof to identify the action that led to the Claimant's dismissal. It checked with him that he committed this action. It also showed that his conduct was wilful and breached his duty to his employer. However, it did not show that he knew or should have known that drinking a beer on July 11, 2018, would lead to his dismissal. As such, this action does not meet the test for misconduct under the EI Act.

[29] Based on all the circumstances, I also find that the Claimant has cast valid doubt on whether his conduct was the real reason for his dismissal. I find it more likely, on a balance of probabilities, that it was a pretext.

**CONCLUSION**

[30] The appeal is allowed.

Lilian Klein

Member, General Division - Employment Insurance Section

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| HEARD ON: | March 11, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | B. V., Appellant |