



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: M. B. v Canada Employment Insurance Commission, 2019 SST 876

Tribunal File Number: GE-19-620

BETWEEN:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: March 25, 2019

DATE OF DECISION: April 27, 2019

DECISION

[1] The appeal is dismissed. The Appellant (who I refer to below as the Claimant) 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 Claimant was dismissed from his job as a hotel maintenance supervisor on April 12, 2018, after he threw his cell phone and lunch at the general manager. The Commission (the Respondent in this appeal) disqualified him from receiving benefits after finding that he lost his job because of misconduct. After he requested a reconsideration, it maintained this decision.

[3] The Claimant appealed the reconsideration decision, submitting that he had experienced a momentary loss of control due to his anxiety, depression and problems with anger management. He argued that he had not intended to hit the general manager with his cell phone and lunch.

[4] I must decide whether this action met the legal test for misconduct under the EI Act.

ISSUE

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

- a) **Why was the Claimant dismissed? What reason did the employer give?**
- b) **Does the evidence show that the Claimant 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 I must consider all the circumstances before making a finding. The Commission has the burden of proof to show, on a

¹ Subsection 30(1) of the EI Act.

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 conduct would lead to dismissal.⁴

[8] It is not my role to decide whether dismissal was the correct level of discipline for the type of 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

Did the Claimant lose his employment because of misconduct?

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

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

[10] I find that he was dismissed for violating the company's policy on workplace violence. The Commission submitted its records of its conversation with the employer, which reported that the Claimant threw his lunch and cell phone at the general manager. She stated that his cell phone hit her and his lunch spilled down the hallway. The Claimant does not dispute that he was dismissed for this reason.

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

[11] Yes. I find that there is enough evidence to show he committed this action. At the hearing, he disputed that he threw objects at the general manager, only admitting to throwing his

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.

cell phone into the laundry hamper next to her (he “put it down forcefully”). He testified that he had not intended to hit her. He also testified that he threw his lunch down the hallway, not at her.

[12] However, the Claimant had earlier admitted to the Commission that he threw these objects at her, which matches her account. I find it likely, on a balance of probabilities, that his earlier statement was more accurate since he made it much closer to the date of the incident, when his memory of what happened would have been fresher. He only later contradicted his earlier statement.⁶

[13] Moreover, even if he did not mean to hit her with his cell phone and his lunch, and only threw them in her general direction, this was still threatening behaviour under his employer’s policy banning violence in the workplace. As a result, it would still show that he committed the action that caused his dismissal.

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

[14] Yes, I find that the Claimant’s action meets this test according to the following three criteria:

Was the Claimant’s action wilful?

[15] Yes. I find that his action was wilful, since throwing his phone and lunch at the general manager was a “conscious, deliberate or intentional” act.⁷ The Claimant disputes that his action was conscious or deliberate given his history of anxiety and depression, as well as his problems with anger management. He testified that he had reacted badly when the general manager asked him a question since he believed his technical opinion was being set aside for budgetary reasons. He submitted that his violence was impulsive and beyond his control rather than a deliberate act based on rational thought.

[16] His wife, testifying as a witness, reported that he was having a medical crisis at the time and his medication needed adjusting. She described his long history of mental health challenges.

⁶ *Bellefleur v Attorney General of Canada*, 2008 FCA 13.

⁷ *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

She also reported that having to do urgent renovations for his son after working at the hotel all day had added to his stress.

[17] I acknowledge the Claimant's argument that his mental health problems made it hard for him to function on a daily basis, especially when he felt stressed. The medical evidence he submitted confirmed his history of mental health issues, including anger management problems. The evidence shows that he was aware of his problems and his doctor had recommended anger management training. However, he testified that he would have had to take time off work for this training, which he was unwilling to do.

[18] After considering all the above factors, I find that throwing his cell phone and lunch at the general manager was conscious and deliberate since it was not an accidental act. He had a rational explanation: he was frustrated that she was giving more weight to budgetary concerns than to his opinion. I accept that he may not have intended to hit her. However, there does not have to be negative intent for improper actions—including workplace violence—to count as wilful and reckless conduct under the EI Act.⁸

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

[19] Yes. I find that the Claimant breached his duty to his employer by contravening its policy on workplace violence. The Commission submitted the employer's policy, which states that the company has "a zero tolerance policy regarding workplace violence." The policy also states that the consequence is disciplinary action "up to and including termination." By his conduct, I find that the Claimant breached the duty of every employee to comply with company policy and ensure a workplace free from violence and threats of violence.

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

[20] Yes. I find that the Claimant should have known his action would cause his dismissal given his admission that he was aware of his employer's policy. I find that the wording made it

⁸ *Attorney General of Canada v Caul*, 2006 FCA 251.

clear that any workplace violence would trigger disciplinary action up to and including immediate dismissal. According to this policy, it was the employer's call when to dismiss him.⁹

[21] Moreover, the Claimant had previously violated this policy on July 6, 2017, by throwing a caulking gun at an employee he was supervising. His employer was supportive at the time, and offered him workplace accommodations. However, its disciplinary letter also included a warning that any further violation could lead to his termination.

[22] To sum up, I conclude that the Claimant's action met the test for misconduct under the EI Act. Through the evidence it provided, the Commission met its burden of proof to show that workplace violence was the action that caused his dismissal and that he committed it. I agree with the Commission's submission that this action was wilful and breached his duty to his employer. Moreover, I find that he should have known he would be dismissed for failing to comply with his employer's zero-tolerance policy, since he had been explicitly warned of this consequence.

[23] I am sympathetic to the mental health challenges the Claimant reported. However, I do not have the authority to interpret the legislation in any other way than its plain meaning.¹⁰

CONCLUSION

[24] The appeal is dismissed.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	March 25, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. B., Appellant

⁹ *Attorney General of Canada v Nguyen*, 2001 FCA 348.

¹⁰ *Attorney General of Canada v Kne*, 2011 FCA 301.