



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation : *S. K. v Canada Employment Insurance Commission*, 2019 SST 737

Tribunal File Number: GE-19-2293

BETWEEN:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: John Gillis

HEARD ON: July 11, 2019

DATE OF DECISION: July 23, 2019

DECISION

[1] I allow S. K.'s appeal. While the Claimant's employer fired him for misconduct, the Claimant could not have known that his action would lead to his dismissal.

OVERVIEW

[2] The Claimant was a customer service supervisor. The Claimant's employer assigned the Claimant a company cellular phone. The Claimant's employer allowed the Claimant to use the cellular phone for personal use. The Claimant took inappropriate photos with the cellular phone. The Claimant's employer fired him. The Claimant applied for employment insurance benefits. The Canada Employment Insurance Commission denied the application. The Commission denied the application because the Claimant's employer fired him due to misconduct.¹ The Claimant appeals the Commission's decision.

ISSUES

[3] Why did the Claimant's employer fire him?

[4] Did the Claimant take inappropriate photos with the company cellular phone?

[5] Was it misconduct for the Claimant to take inappropriate photos?

ANALYSIS

[6] The Commission bears the burden of proving that the loss of employment was because of the Claimant's misconduct. This burden of proof is on a balance of probabilities. That means that the facts or events are more likely than not to have occurred.

[7] I do not have to determine whether the firing was justified. My role is to determine if the Claimant committed the act as described by their employer. I must also determine if that action amounts to misconduct within the meaning of the legislation.²

¹ Section 30 of the *Employment Insurance Act*.

² *Canada (Attorney General) v Marion*, 2002 FCA 185.

Issue 1: Why did the Claimant's employer fire him?

[8] The Claimant's employer fired him for taking inappropriate photos on a company cellular phone.

[9] The Commission submits that the Claimant's employer fired the Claimant for taking inappropriate photos of individuals on a company cellular phone. The Claimant's employer says that the Claimant used the phone inappropriately. They say that they fired the Claimant because of his inappropriate use of the phone.

[10] The Claimant admits that his employer fired him because of his inappropriate use of the cellular phone.

Issue 2: Did the Claimant take inappropriate photos with the company cellular phone?

[11] Yes, the Claimant took inappropriate photographs with the company cellular phone.

[12] There must be sufficiently detailed evidence to know if the Claimant did what his employer says he did. Then I must determine whether this behavior is misconduct.³

[13] The Commission submits that the Claimant used the company phone to take inappropriate photographs of individuals without their consent. The Claimant admits that he did use the company phone to take photographs of individuals without them knowing. He admits to using the phone to photograph individuals while they were in a tanning salon.

[14] Based on the Claimant's admissions, I find that he did take inappropriate photographs with the company cellular phone.

Issue 3: Was it misconduct for the Claimant to take inappropriate photos?

[15] No. The Claimant's conduct was not misconduct under the Employment Insurance Act.

[16] There will be misconduct where the conduct of a claimant was wilful, in the sense that the acts, which led to the dismissal, were conscious, deliberate, or intentional. Put another way,

³ *Joseph v. Canada (Attorney General)*, A-636-85.

there will be misconduct where the Claimant knew, or ought to have known, his conduct was such as to impair the performance of the duties owed to his employer and, as a result, dismissal was a real possibility.⁴ Although reprehensible, criminal conduct is not necessarily misconduct.⁵

[17] While I have no doubt that the Claimant's conduct of taking inappropriate photographs with the phone was intentional, I must determine if the Claimant knew, or ought to have known, that there was a real possibility that his conduct could lead to his dismissal.

[18] The Commission submits that the Claimant's employer had a company policy with regard to cell phone usage. The Claimant's employer stated that they allow personal use of company phones. They stated that the personal use had to be within reason. As an example, the employer did not permit international calls. The employer did not provide any written policy to the Commission and, as such, the Commission did not offer any such policy as evidence.

[19] The Claimant submits that he does not recall signing any policy or document with respect to personal usage of the cell phone. He does recall signing some policies when his employer merged with another company. He did not read the policies. The Claimant testified that when his employer hired him, his supervisor told him that he could use the company cell phone for personal reasons.

[20] The Claimant testified that his co-workers used their company cell phones for personal use as well. They took personal pictures with their company cell phones. The Claimant says that his co-workers would show him personal photographs they took with their company cell phones.

[21] Based on the Claimant's admission and the lack of any written policy before me, I find that the Claimant's employer had a policy that allowed employees to use company cell phones for personal use.

[22] It was not necessary that the Claimant use a cell phone to do his work. In addition to a cell phone, his employer gave him the use of a landline and computer. There is no evidence

⁴ *Canada (Attorney General) v Lemire*, 2010 FCA 314.

⁵ *Locke v Canada (Attorney General)*, 2003 FCA 262.

before me to suggest that the Claimant's employer would fire him if he lost or broke the cell phone.

[23] The Claimant used the company cell phone during his lunch break for personal reasons. He testified that he used the cell phone to take photographs inside a tanning salon. He says he only used the phone for this personal, albeit shameful, use when he was not working. He says that the police arrested him and they charged him with voyeurism. The police seized the cell phone as evidence in their case against the Claimant. He alerted his employer of the charges and his employer fired him.

[24] The Claimant says that he was unaware that his employer would fire him if the police charged him with a crime. The Claimant testified that the police had charged another employee with driving under the influence. His employer did not fire that employee but instead they helped him.

[25] While the Claimant's conduct may have been socially unacceptable and resulted in the police charging him with a crime, a reasonable person in his position would not know that it could result in his dismissal. The Claimant's employer gave him a cell phone and told him that he could use it for personal use. The Claimant's co-workers used their cell phones to take personal photographs when not working. The Claimant used the cell phone to take pictures while on his lunch break. The Claimant committed a crime and the police seized the cell phone as evidence.

[26] I find that the Claimant did not know, and could not have known, that taking personal pictures with the company cell phone and / or committing a crime and / or losing the company cell phone could lead to his dismissal. Hence, the Claimant's conduct was not misconduct under the *Employment Insurance Act*.

[27] The Claimant is entitled to regular benefits. He is not subject to a disqualification because he did not cause his loss of employment by his own misconduct.⁶

⁶ *Choinier v Canada (Attorney General)*, A-471-95.

CONCLUSION

[28] I allow the Claimant's appeal.

John Gillis

Member, General Division - Employment Insurance Section

HEARD ON:	July 11, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. K., Appellant