



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. F. v Canada Employment Insurance Commission*, 2019 SST 928

Tribunal File Number: GE-19-2103

BETWEEN:

B. F.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: July 24, 2019

DATE OF DECISION: August 5, 2019

DECISION

[1] I dismiss the appeal. Mister B. F. (Claimant) is not entitled to employment insurance benefits because he lost his employment at X due to his own misconduct.

OVERVIEW

[2] The Claimant worked at X until his employer dismissed him. The facts indicate that the Claimant lost his employment because he wrote a text message to another co-worker expressing the following regarding his manager K. G.: “K. G. sent me home. He’s not leaving me much choice but to send him to his grave. “The Claimant filed a claim for employment insurance benefits, but the Canada Employment Insurance Commission (Commission) disqualified the Claimant from receiving benefits as it concluded that he lost his employment due to his own misconduct. The Commission upheld this decision upon reconsideration. The Claimant appeals the decision to the Social Security Tribunal.

ISSUES

[3] I must determine whether the Claimant lost his employment due to his own misconduct. The issues before me are as follows:

- a) What is the conduct that led to the Claimant’s dismissal?
- b) Does that conduct constitute misconduct?

ANALYSIS

[4] Employment insurance benefits are not payable to claimants who lose their employment because of their misconduct.¹ The Commission bears the burden of proving that the loss of employment was because of misconduct.²

¹ Subsection 30 (1) of the *Employment Insurance Act* (Act)

² *Lepretre v. Canada (Attorney General)*, 2011 FCA 30.

What is the conduct that led to the Claimant’s dismissal?

[5] The following facts are undisputed: On February 16, 2019, the Claimant’s former manager, K. G., asked the Claimant to do a task, but the Claimant refused. Therefore, K. G. sent the Claimant home for the day. After this incident, the employer learned that on the day that K. G. sent the Claimant home, the Claimant sent a text message to another co-worker stating, “K. G. sent me home. He’s not leaving me much choice but to send him to his grave.”³ The employer considered this text message to be a threat of violence to another employee’s life, which violates the Workplace Violence and Harassment Prevention Policy. The employer alerted the police about this threat and the employer terminated the Claimant’s employment on February 19, 2019. Therefore, I find that the employer terminated the Claimant’s employment because the employer found that he made a threat of violence in the text message.

Does that conduct constitute misconduct?

[6] The Claimant admitted he sent the text message indicating, “K. G. sent me home. He’s not leaving me much choice but to send him to his grave,” but he argues that his employer wrongfully dismissed him. As I explained during the hearing, it would be an error for me to determine whether the Claimant’s dismissal was justified, or whether his conduct was a valid ground for dismissal. My only role is to determine whether the Claimant’s conduct constitutes misconduct within the meaning of the *Employment Insurance Act*.⁴

[7] For the purpose of this appeal for employment insurance benefits misconduct exists where the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the claimant’s employer and that, as a result, dismissal was a real possibility.⁵

[8] In this case, the employer’s Workplace Violence and Harassment Prevention Policy indicate that all acts of violence are unacceptable.⁶ Furthermore, the policy defines workplace violence as “c) a statement or behaviour that is reasonable for an employee to interpret as a threat

³ According to GD3-49.

⁴ *Attorney General of Canada v. Marion*, 2002 FCA 185.

⁵ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

⁶ According to GD3-55.

to exercise physical force against the employee, in a workplace, that could cause physical injury to the worker”.⁷ The policy also states that disciplinary action for violating the policy may include dismissal.⁸ The employer told the Commission that all employees are aware of this policy because they receive training on the subject and the policy is visible on the health and safety board at work.

[9] At the hearing, I asked the Claimant whether he was aware of the employer’s policy regarding violence in the workplace. He replied, “Not specifically, I may have encountered it at some point, I don’t specifically recall that, I know that there was some sort of training at the on-boarding, but it was so disorganized that it was difficult to retain anything. So, I assume that it was probably part of that, but I can’t say for sure that it was, I can’t say for sure that it wasn’t. It certainly was never made sufficiently clear, in my opinion.” When I asked him to explain what was unclear, he replied, “because of the way that it was delivered. Again, I don’t know anything about the policy; I can’t tell you what it states or what it doesn’t.” Therefore, the Claimant’s testimony would have me believe, he either knew or did not know of the policy, he might have seen it; he does not know anything about the policy, but he knew of its existence. However, I find that the evidence shows that the Claimant was not only aware of this policy, but he saw it, read it, and he fully understood its content because on June 25, 2018, the Claimant received a score of 100 for his participation in the course entitled Workplace Violence Harassment and Bullying.⁹ Therefore, I find that the Claimant was very much aware of the policy having successfully completed training on the subject.

[10] The Workplace Violence and Harassment Prevention Policy states that its purpose is to provide employees a workplace that is free of violence.¹⁰ The Claimant’s employer included this expectation in a policy, thus placing on all employees as an express term and condition of employment, the obligation not to commit acts of violence. Given the foregoing, in making the statement “K. G. sent me home. He’s not leaving me much choice but to send him to his grave,” I find that the Claimant expressed an intention to cause physical injury to K. G. I find therefore that the words the Claimant used in his text message regarding K. G. amount to workplace

⁷ According to GD3-59.

⁸ According to GD3-51.

⁹ According to GD3-51.

¹⁰ According to GD3-54.

violence as defined in the Workplace Violence and Harassment Prevention Policy. Accordingly, I find that the Claimant violated the policy.

[11] For the foregoing reasons, I find that the Claimant breached a term of his employment when he sent this text message and he knew or ought to have known that sending this text message would impair the performance of his duties owed to his employer and that, as a result, dismissal was a real possibility.

[12] The Claimant testified that his conduct does not constitute misconduct because his text message was a private exchange with another co-worker, and he did not give his consent to the co-worker to share it with his employer. He also adds that he reached out to the co-worker in question after the fact and she confirmed the private nature of the text message. Therefore, the Claimant argues that he did not know that sending this text message to a co-worker could lead to his termination. I cannot share this view because the Workplace Violence and Harassment Prevention Policy states that every employee is responsible for reporting any threat of violence in the workplace¹¹, so once the recipient of the text message determined that it constituted a threat of violence, sharing it with the employer was inevitable. Therefore, I find that the Claimant who was aware of the policy knew or should have known that sending a text message to another co-worker stating, “He’s not leaving me much choice but to send him to his grave ‘could potentially lead to his dismissal.

[13] Misconduct also requires a mental element of willfulness on the part of the Claimant, or conduct so negligent or reckless as to approach willfulness.¹² Applying this legal test to the facts, I find the only reasonable conclusion is that the Claimant’s conduct, was willful, and constitutes misconduct.

[14] The Claimant testified that when he wrote, “He’s not leaving me much choice but to send him to his grave” he was not making a threat of violence against K. G. He was rather expressing the fact that he wanted K. G. to lose his employment. I cannot agree because in my view the statement the Claimant made via text message is not synonymous with wanting the individual in

¹¹ According to GD3-57.

¹² *Canada (Attorney General) v. Tucker*, A-381-85

question to lose his employment. I find that the after-the-fact explanations of the Claimant cannot justify his conduct for uttering threats of violence in the workplace.

[15] The Claimant argues that his conduct does not amount to misconduct because he did not intend to make threats, and that he did not directly make them to K. G. This argument cannot stand because those who are subject to threats with being put in their graves do not have the luxury of waiting to finding out whether or not the author of the threat intended to put them in their graves. Therefore, I find that whether the Claimant intended to cause harm does not alter the essence of his misconduct, which is his threatening words of violence against K. G. In fact, it is the threat of violence itself that I have to examine. Therefore, I reject the argument that the Claimant posed no real threat and that he did not really mean it when he wrote, “He’s not leaving me much choice but to send him to his grave.” The Claimant was aware of the Workplace Violence and Harassment Prevention Policy, which prohibits all forms of violence, and he knew or ought to have known that the recipient of his text message would share it with his employer, but he sent his text message nonetheless. As such, I find that given the Claimant’s knowledge of the Workplace Violence and Harassment Prevention Policy, his violation of that policy was so reckless as to approach willfulness; and that the Claimant knew or ought to have known his conduct could lead to his dismissal.

[16] The Claimant testified that the employer prohibited smoking cigarettes in the workplace but the employer was aware that employees smoked inside the workplace as well as in the company vehicle; but did not dismiss those employees. Moreover, the Claimant submits that another employee often exhibited violent and aggressive behaviour by throwing brooms and saying things like “Kill me, I want to die!” “Oh yeah, you want to fight?” “And “I hate myself and everyone else.” Nevertheless, that employee remained employed. Therefore, the Claimant argues that he could not possibly have known that sending a text message expressing, “K. G. sent me home. He’s not leaving me much choice but to send him to his grave” could lead to his dismissal because the employer did not terminate the employment of other employees who have done far worse. In that respect, I considered the Claimant’s argument in light of the case law in *Locke v. Canada (Attorney General)*¹³, where the Court allows that the employer’s response to similar

¹³ *Locke v. Canada (Attorney General)*, 2003 FCA 262

conduct of other employees is relevant to the question of what a claimant knew or may be presumed to have known. However, I find that *Locke* is not applicable to the Claimant's case, as he did not put forward any evidence depicting an incident where the employer did not dismiss an employee after they had expressed an intention to cause physical injury to another employee.

[17] For all of these reasons, I conclude the Commission has proven that the Claimant lost his employment due to his own misconduct.

CONCLUSION

[18] For the foregoing reasons, I dismiss the appeal.

Bernadette Syverin
Member, General Division - Employment Insurance Section

HEARD ON:	July 24, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. F., Claimant