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

[TRANSLATION]

Citation: *A. S. v Canada Employment Insurance Commission and X*, 2019 SST 1302

Tribunal File Number: GE-18-1407

BETWEEN:

A. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: October 10, 2019

DATE OF DECISION: October 25, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, A. S., has worked for the region of X health network since 1988. He was dismissed on October 31, 2017.

[3] The Appellant filed a claim for Employment Insurance benefits with the Commission. The Commission denied the Appellant benefits because he lost his employment due to his misconduct.

[4] According to the Commission, the employer dismissed the Appellant because he did not respect the conflict of interest policy. The employer had already warned the Appellant not to maintain ties with users.

[5] According to the Appellant, he acted to help a user. He did not expect to be dismissed for his act, since he did not know the employer's policy.

PRELIMINARY MATTER

[6] The Added Party informed the Tribunal that it would not be making any submissions.

ISSUE

Do the Appellant's acts constitute misconduct under the *Employment Insurance Act* (Act)?

ANALYSIS

[7] I must decide whether the Appellant lost his employment because of his misconduct and should therefore be disqualified from receiving benefits under sections 29 and 30 of the Act.

[8] My role is not to determine whether the dismissal was justified or was the appropriate action.[1]

[9] Indeed, I must determine what the Appellant's alleged acts are, whether the Appellant committed those acts, and whether they constitute misconduct under the Act.

[10] The Commission has a duty to show, on the balance of probabilities, that there was misconduct.[2] The term "balance of probabilities" means that the Commission must show that it is more likely than not that the Appellant was dismissed because of his misconduct.

[11] To do so, I must be satisfied that the misconduct was the reason for the dismissal and not the excuse for it. This requirement necessitates a factual determination after weighing all the evidence.[3]

[12] There must be a causal relationship between the alleged misconduct and the loss of employment. The misconduct must cause the loss of employment and must be an operative cause. In addition to the causal relationship, the Appellant must have committed the misconduct while he was employed by the employer, and it must constitute a breach of a duty that is express or implied in the contract of employment.[4]

[13] It is accepted that the employer alleges that the Appellant gave his telephone number to a user and let him stay at his home. The Appellant acknowledges that he gave his telephone number to a user and let him stay at his home.

Do the Appellant's acts constitute misconduct under the Act?

[14] The Commission must show, on the balance of probabilities, that the Appellant knew he could be dismissed for his acts.[5] To find that the acts constitute misconduct, the Appellant's alleged act must have been "wilful," that is, conscious, deliberate, or intentional.[6] Indeed, the

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[1] *Canada (Attorney General) v Caul*, 2006 FCA 251.
[2] *Bartone*, A-369-88.
[3] *Bartone*, A-369-88; *Davlut*, A-241-82.
[4] *Canada (Attorney General) v Cartier*, 2001 FCA 274.
[5] *Canada (Attorney General) v Larivée*, 2007 FCA 312.
[6] *Canada (Attorney General) v Tucker*, A-381-85; *Canada (Attorney General) v Mishibinijima*, 2007 FCA 85.

notion of misconduct is not defined in the Act and must be considered on the basis of case law principles. The Act requires "for disqualification [from receiving benefits] a mental element of wilfulness, or conduct so reckless as to approach wilfulness."[7]

[15] I note that the Appellant worked for the health network since 1988. He completed a Grade 9 education. He worked for several years as a janitor for the health network. For the past two years, he has been a mental health intervention officer at the psychiatric hospital. Among other things, he intervenes when users are aggressive, he delivers meals, and he does surveillance rounds.

[16] In August 2017, while he was responsible for a user, he offered him temporary accommodation at his home. The user turned down the offer. The Appellant gave the user his telephone number. On August 30, 2017, the Appellant's supervisor met with him to discuss the incident.

[17] At the end of September 2017, the user contacted the Appellant and asked if he could stay with him. The Appellant agreed to host him as a favour. The user has personal problems.

[18] During his testimony, the Appellant explained that he was afraid that something might happen. He asked the user, through text message, whether he wanted [translation] "to cuddle." In reality, he wanted to scare him. The user left the premises and returned with his friend. They asked the Appellant to pay them $5,000 or they would tell his employer about the situation. The Appellant refused and made a statement to the police.

[19] In his statement, the Appellant mentions that on September 28, 2017, the user moved into his home. He was to live with the Appellant for 15 days. On October 9, 2017, he texted the user around 3:00 a.m. that he could come [translation] "cuddle him." He left the house and returned with his friend. They threatened to report the Appellant to his employer if he did not pay them $5,000 to keep quiet. The user filed a complaint with the employer.

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[7] *Canada (Attorney General) v Tucker*, A-381-85; *Canada (Attorney General) v Mishibinijima*, 2007 FCA 85.

[20] It is in this context that the employer met with the Appellant on October 25, 2017. It dismissed the Appellant on November 1, 2017.

[21] According to the Commission, the evidence shows that the employer has a conflict of interest policy and that it asked the Appellant to comply with it, and to avoid putting himself in a situation that is prohibited by the company policy. The Appellant chose to continue what he was doing, despite the employer's warning and the policy, in addition to wilfully engaging in sexual solicitations toward the user. Although the Appellant had personal reasons for acting that way, the fact remains that his actions were deliberate, and, after he received a warning about his behaviour in relation to conflicts of interest, he should have reasonably known that he risked disciplinary action up to and including termination.

[22] According to the Appellant, his actions do not constitute misconduct because he did not know that he would be dismissed for hosting the user. The Appellant testified that the employer did not provide him with the rules on conflicts of interest. He did not discuss the situation concerning the user with the employer. Even if the Appellant knew the rules on conflicts of interest, they are too vague to apply in the Appellant's case.

[23] I note that the employer was informed that the Appellant was soliciting users and that he wanted to obtain information from a nurse. The employer met with the Appellant about this and provided him with the rules on conflicts of interest.

[24] I give little weight to the Appellant's explanations at the hearing about the meeting with his employer. The Appellant solicited the user in August 2017, and the employer met with him on August 30, 2017. I find it unlikely that the employer did not warn the Appellant not to solicit users and of the potential consequences. The Appellant's testimony about the discussion with his supervisor lacks credibility. The supervisor did not meet with the Appellant for a vague discussion without providing him with the conflict of interest policy. He should have understood after that meeting that he could not solicit users. Moreover, according to information obtained by the Commission, the Appellant admitted that the employer had warned him that he was not allowed to solicit users, and it had provided him with the conflict of interest policy (GD3-48).

[25] Yet, the Appellant agreed to host the user and made sexual propositions to him. To justify his propositions, the Appellant said that he was scared of the user. He wanted him to leave his apartment. I find that the Appellant's explanations lack credibility. Indeed, when the user threatened to make him lose his job, the Appellant was not afraid to file a complaint with the police.

[26] I find that the Appellant knew or should have known that his employer would dismiss him if he let a user stay at his home. The Appellant was warned that he could not solicit users. He still hosted the user in September 2017, shortly after the meeting with his supervisor. He acted carelessly without any regard for the consequences.

[27] I am of the opinion that the Appellant knew or should have known that he could be dismissed by agreeing to host a user and by sending him invitations of a sexual nature. The Appellant's explanations lack credibility regarding the discussion with his supervisor and his reasons for the sexual messages.

[28] By acting that way, the Appellant did not respect his implied and express duties in his contract of employment. He worked with vulnerable persons; he cannot invite them to live with him, even after their stay at the hospital centre. And he cannot make sexual propositions to them, no matter what the context.

[29] The Appellant submitted his employer's letter of recommendation. I note that the Appellant is a cheerful and punctual employee. However, that does not convince me that the Appellant did not know that he would be dismissed for his actions.

[30] After considering all the evidence, I find that the Appellant lost his employment because of his misconduct. The Commission therefore demonstrated, on the balance of probabilities, that the Appellant's acts constitute misconduct and that he was dismissed for that reason.

CONCLUSION

[31] The Tribunal finds that the Appellant must be disqualified from receiving benefits because he lost his employment due to his misconduct within the meaning of sections 29 and 30 of the Act.

[32] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	October 10, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	A. S., Appellant X, Representative for the Appellant