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

Citation: *KR v Canada Employment Insurance Commission and X*, 2020 SST 1009

Tribunal File Number: AD-20-757

BETWEEN:

K. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: December 3, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, K. R. (the Claimant), applied for Employment Insurance benefits after his employer dismissed him. The Canada Employment Insurance Commission (Commission) decided that the Employer had dismissed the Claimant because of his misconduct. This meant that the Claimant was not able to collect Employment Insurance benefits. The Claimant requested a reconsideration, and the Commission changed its decision. It decided that the Claimant's actions had not been misconduct.

[3] The Employer (Respondent) appealed to the General Division of the Social Security Tribunal, and the General Division allowed the Employer's appeal. The Claimant is now appealing the General Division decision to the Appeal Division.

[4] The appeal is allowed. The General Division made errors in how it reached its decision. I have corrected those errors and made the decision that the General Division should have made. The Claimant is not disqualified from receiving benefits because his conduct was not misconduct within the meaning of the *Employment Insurance Act* (EI Act).

PRELIMINARY MATTERS

[5] The Employer did not participate in the appeal to the Appeal Division. On October 27, 2020, the Employer confirmed that it had received the Notice of Hearing, but said that it would not be attending the hearing. The Employer confirmed that it understood that the Appeal Division would make a decision in its absence and that this decision could affect the Employer.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[6] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[7] Did the General Division make an important error of fact by ignoring contradictions in the Employer's evidence?

[8] Did the General Division make an error of law by not using an objective standard to evaluate the nature of the Claimant's verbal comments or text message to his dispatcher (B)?

[9] Did the General Division make an error of law by not explaining why it gave little or no weight to the evidence in which the Claimant denied having made a verbal threat to B?

ANALYSIS

[10] The General Division had to decide whether the Employer dismissed the Claimant for misconduct. A number of higher court decisions have defined misconduct for the purposes of the EI Act.[2] To be misconduct, a claimant's actions or omissions must be willful. This means that the claimant would have known, or should have known, that the conduct would impair a duty that he or she owed to the employer and that, as a consequence, dismissal was a real possibility. The misconduct must also be the reason that the employer dismisses its employee.[3]

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[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] Some of these decisions are outlined in *Masic v Canada (Attorney General)*, 2011 FCA 212.
[3] Section 30(1) of the EI Act.

[11] At the General Division, the Employer argued that it had dismissed the Claimant because the Claimant made two threats. The Employer said that the Claimant made a verbal threat to B and that he followed this with a text message threat to B. The Employer also argued that the Claimant's threatening conduct violated its policies and that the Claimant knew that this kind of conduct was prohibited. It argued that the Claimant knew the Employer could dismiss him.[4]

[12] The Claimant told the General Division that he had had a normal telephone conversation with B and had not threatened him.[5] He said that the threat in his text message was a threat that he would quit his job.[6] He believed that the real reason the Employer dismissed him was that it was upset that he did not dump his load at the end of the day. He also said that the employer did not like that he could not work longer hours.[7]

[13] The General Division found that the Claimant made threats, which the Employer understood as threats of violence. It found that these threats were misconduct under the EI Act. The General Division also found that the Employer had dismissed the Claimant because he made these threats.

Issue 1: Conflicting Evidence of When the Claimant Made the Verbal Threat

[14] The Claimant argued that the General Division misunderstood the February 21, 2020, Incident Investigation report (investigation report). The Employer submitted this report to the General Division as part of its evidence.[8]

[15] I find that there is an arguable case that the General Division misunderstood or ignored the investigation report evidence.

[16] The General Division stated that the investigation report, "[did] not provide details about when and how the Claimant made verbal threats."[9] However, the Claimant pointed out that the

[4] GD15-2, 3: paras 4 and 7.
[5] Audio recording of General Division hearing at timestamp 00:44:30.
[6] Audio recording of General Division hearing at timestamp 00:44:35; see also GD3-41.
[7] Audio recording of General Division hearing at timestamp 00:46:50; see also GD3-40.
[8] GD11-502.
[9] General Division decision, para 22.

investigation report did provide details. The report addresses when the Claimant was supposed to have made the verbal threat and to whom.

[17] According to the investigation report, the Claimant had a telephone call with the dispatcher (B) on the evening of February 20, 2020. In that call, the Claimant and B discussed the employer's expectations about dumping loads and work hours. At the end of the call, B told the Claimant to come into the office before his morning shift to clarify policies and expectations. The investigation report states that there was some kind of discussion after the call. "Management" decided that the Claimant should come in for a morning meeting with the shop steward to investigate whether he should be disciplined. The reports says that the Claimant "**replied** with written and verbal threats" [10](emphasis added). Therefore, the alleged threats would have had to follow **after** the Claimant's telephone discussion with B, after B discussed the call with management, and after B sent the Claimant a second text message telling him to come in at 6:00 a.m.

[18] The General Division ignored or misunderstood that the sequence of events described in the investigation report evidence is different from much of the Employer's other evidence. It is different from the sequence that the Employer related to the General Division in the Notice of Appeal,[11] and through the testimony of B and the Vice President of Operations (R). It is also different from the sequence detailed in the Employer's arguments to the General Division.[12]

[19] B testified that he had a single evening telephone conversation with the Claimant and that the Claimant threatened him verbally during that call. B said he discussed the call with R and then sent a text message confirming the Claimant's dispatch for the next morning. B followed his dispatch text message with a second text message asking the Claimant to come in for a meeting in the morning.[13] B said the Claimant's text response to the meeting request was the second threat.

[20] R testified that he had called the shop steward before giving B instructions to have the Claimant come in. He said that he intended to discuss the Claimant's threatening behaviour and

[10] GD11-502.
[11] GD2-14.
[12] GD11-189, 190, paras 22–26.
[13] Audio recording of General Division hearing at timestamp 00:34:50.

"the disposal." However, when R learned that the Claimant had responded to the meeting invitation with a threatening text message to B, he phoned the Claimant back and dismissed him.[14]

[21] The General Division made an important error of fact. It relied on the Employer's version of events without considering that the investigation report contradicted B and R's testimony. There are contradictions about when (or in which conversation) the verbal threat occurred and whether the Claimant directed threats just to B, or to both B and R. These contradictions are relevant to whether the testimony of B and R was credible or reliable.

Issue 2: Nature of the Threat or Threats

[22] The Claimant argues that there was no evidence that he meant his text message to be threatening. He asserts that he was only threatening to quit.

[23] The General Division acknowledged that the Claimant had been consistent in asserting that he had only been threatening to quit. However, the General Division accepted that the Claimant was threatening violence.

[24] I agree that a threat of violence would be misconduct. The Employer's policy clearly states that it can discharge an employee immediately in the case of a threat of violence.[15] I accept that any threat of violence or of harm to the Employer, its employees, or its property would be a breach of the Claimant's duty to his employer and could be misconduct.

[25] However, the General Division made an error of law. A claimant's actions or inaction can only be misconduct if it is **objectively misconduct.** The General Division did not determine whether the Claimant's threat or threats were objectively misconduct.

[26] The Federal Court of Appeal has suggested that conduct can only be found to be misconduct if it is objectively misconduct. In one decision, the Court stated that misconduct must be established on the evidence, "irrespective of the opinion of the employer." Misconduct could

[14]Audio recording of General Division hearing at timestamp 00:36:50.
[15] GD11-229.

not be found based on "speculation and suppositions."[16] In another decision, the Court rejected the Umpire's[17] reasoning that the employer needs only to be "satisfied that the misconduct complained of warranted dismissal […]". The Court held that "an employer's mere assurance that it believes the conduct in question is misconduct" does not satisfy the onus of proof.[18]

[27] To find that the Claimant's text message amounted to misconduct, the General Division would have had to find that the Claimant knew or ought to have known his remarks could result in his dismissal. Using an objective standard, this would mean that the Claimant should have known that a reasonable person would conclude that he was threatening violence or harm to the Employer, its employees, or its property. (I will refer to this simply as "harm".)

[28] The General Division recognized this. It initially framed the question by asking whether a "reasonable person [would] understand that someone would probably lose their job if they acted the same way?"[19] However, the General Division did not answer the question that it asked.

[29] Instead, the General Division said that it was reasonable for the Employer to interpret the text message as a threat of violence.[20] Even if the Employer reasonably interpreted the text message, it would not follow that the text message was objectively misconduct. For the Claimant's text message to be misconduct, a reasonable person would have to conclude that the text message was a threat of harm, or that this was the most likely interpretation.

[30] This is not the same thing as saying that that a person may reasonably hold a certain interpretation. There could be many reasonable interpretations. One could be a threat of harm. Another could be a threat of quitting. There is nothing to say that one interpretation is more reasonable than another. It should not be misconduct for a claimant to use language that is not sufficiently precise.

[31] The General Division was concerned only with how the Employer perceived the text message. It said that it was convinced by the Employer's argument that it "could not know" the

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[16] *Crichlow v Canada (Attorney General)*, A-562-97.
[17] The Umpire was the final level of appeal in the former administrative scheme for Employment Insurance benefits.
[18] *Fakhari v Canada (Attorney General)*, A-732-95.
[19] General Division decision, para 7.
[20] General Division decision, para 18.

Claimant was simply threatening to quit.[21] It found the Claimant's threat to be a threat of violence on that basis alone.

[32] It does not matter whether the Employer could not have known for certain, could not have guessed, or might not have considered the possibility that the Claimant was only threatening to quit. As the Employer noted in its submissions to the General Division, the General Division was required to determine, "according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal."[22]

[33] The text message in question is not obviously, or necessarily, a threat of harm to B. The nature of the threat is open to interpretation. Therefore, the General Division was obliged to evaluate the circumstances in which the Claimant sent the text message and to consider what the Claimant had to say about his meaning and intentions. It should have reviewed the evidence objectively from the perspective of whether the Claimant could have foreseen that his text message would be taken as a threat of harm.

[34] I find that the General Division made an error of law because it did not apply an objective test. It did not evaluate the evidence to determine whether the Claimant's text message (or other comments) were objectively threats of harm or objectively misconduct.

[35] The Commission provided submissions in support of the Claimant's appeal that reached essentially the same conclusion. It stated that the General Division made an error of law by relying on the Employer's perception alone. It also noted that there was no evidence that the Employer had tried to clarify with the Claimant what he meant by his text message.

Issue 3: Rejecting the Claimant's Evidence Without Reasons

[36] The General Division made an error of law because it failed to justify why it rejected the Claimant's evidence that he did not make a verbal threat.

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[21] General Division decision, para 17.
[22] GD11-193, para 48, citing *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[37] The General Division acknowledged that the Employer and the Claimant had different versions of the phone call on the evening of February 20, 2020. It noted that the Claimant had been consistent in his insistence that he had not threatened B in their telephone conversation. The General Division said that the Employer had likewise maintained that the Claimant had made such a threat. The General Division said it had to consider all the evidence to determine which version of events was most likely.

[38] The General Division decided that it believed the Employer's version: that the Claimant had made a verbal threat to B. This largely depended on its other finding that the Claimant later made a threat of violence in his text message.[23] It inferred that the Claimant was more likely to have made the verbal threat because he made a similar threat in his text message.

[39] I have already found that the General Division made a legal error in how it found that the message was a threat of violence or of a kind that should be considered misconduct. This presents an obvious challenge to how the General Division found that the Claimant made a verbal threat.

[40] However, even if the General Division had not made such an error, it could not ignore the Claimant's clear and consistent statements and testimony that he did not verbally threaten B.[24]

[41] The General Division considered the verbal threat to be more likely because of how it viewed the text message threat and the Claimant's other messages after he was fired. At the same time, it apparently disregarded or gave little weight to the Claimant's insistence that he had not threatened B, even though it had not found that the Claimant was not credible or questioned the reliability of his evidence.

[42] Citing two Federal Court of Appeal decisions, the Commission submits that the General Division should have explained why it gave little or no weight to the Claimant's evidence. It characterizes this as either an error of law or a capricious finding of fact.[25]

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[23] General Division decision, para 28.
[24] GD3-20.
[25] AD3-4, citing *Bellefleur v Canada (Attorney General)*, 2008 FCA 13 and *Parks v Canada (Attorney General)*, A-321-97.

[43] I find that the General Division made an error of law by failing to give sufficient reasons. It failed to explain what weight it gave to the Claimant's evidence. If it rejected the Claimant's evidence, it did not say why.

[44] I have found errors of law and fact in how the General Division reached its decision. This means that I must now consider the appropriate remedy.

REMEDY

Nature of Remedy

[45] I have the authority to change the General Division decision or make the decision that the General Division should have made.[26] I could also send the matter back to the General Division for it to reconsider its decision.

[46] Both the Claimant and the Commission agree that the record is complete and that I should make the decision that the General Division should have made. I agree.

[47] The party claiming that a person was dismissed for misconduct has the burden of proof (must show that this is true). The Commission's reconsideration decision accepted that it could not establish misconduct on the evidence. It has continued to support its reconsideration decision since the Employer appealed to the General Division. The Employer argued that the Claimant's conduct was misconduct and that it dismissed the Claimant because of his misconduct.

[48] The Employer did not participate in this appeal to argue in support of the General Division decision. The Commission maintained that its original reconsideration decision was correct. Like the Claimant, the Commission does not believe that misconduct was established before the General Division.

[49] I agree with both the Claimant and the Commission. The evidence before the General Division does not establish, on a balance of probabilities, that the Claimant's conversation with B or his text message were misconduct.[27] Specifically, the evidence does not prove that the

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[26] My authority is set out in sections 59(1) and 64(1) of the DESD Act.
[27] Balance of probabilities is the applicable standard in this case. It means "more likely than not."

Claimant's verbal and text communications represented threats of harm or that they were of a kind that the Claimant should have known he could be dismissed.

Verbal threat

[50] I do not accept that the Claimant made verbal threats in his initial phone conversation with B on the evening of February 20, 2020.

[51] The Claimant specifically denied making a verbal threat in his initial telephone conversation with B. He said that he and B had discussed when he should dispose of his load and that this had been a normal and cordial conversation. He did not deny sending a later text message to B. However, he said this was in reaction to the text message summoning him to the morning disciplinary meeting. The Claimant suspected that the Employer had called the meeting in response to his dissatisfaction with the Employer's hours-of-work demands. He maintained that he was thinking about quitting and that this was what he meant by his text message.

[52] There was no evidence that the Claimant had any history of conflict with B and no evidence that he was predisposed to threaten B. The Claimant had once before received a verbal warning for getting into a "shouting match" with someone at work, but the warning report found neither party to the "match" to be primarily responsible.[28] With reference to that warning, the Employer asserted that the Claimant became "highly aggravated," raised his voice, and "stormed out of the office" without signing the warning, but the Employer did not say that B was present to observe this or that he even overheard it.[29]

[53] The Claimant pointed to what appears to be a good-natured exchange of texts with B the day before the Employer dismissed him.[30] He suggests that this is evidence that he had a normal working relationship with B. B's evidence was that the threat arose out of B's insistence that the Claimant dump his load in the evening which would mean longer days for the Claimant. However, the text exchange seems to confirm that B had previously given the Claimant instructions in the evening to dispose of his load in the morning, without any apparent dispute. The timing of the Claimant's load disposal may have been a thorny issue between the Claimant

[28] GD11-520.
[29] GD11-513.
[30] GD8-2.

and the Employer, but there is little evidence that it was had been an issue between the Claimant and B before B's February 20, 2020, telephone conversation with the Claimant.

[54] The best evidence that the Claimant verbally threatened B comes from B's direct testimony about that conversation. R supported B's version of events, testifying about what B told him at the time. However, there are inconsistencies between the testimonial evidence about how the events unfolded and the sequence of events described in some of the other documentation.

[55] The testimony of B and the Employer's Vice President of Operations (R) is not consistent with the investigation report dated February 21, 2020, the day after the conversation and texts in question.[31] B testified that the Claimant told him on the phone that, if B tried to make him work certain hours, he had "better be prepared for what happens next" in a "more than aggravated" tone of voice.[32] R also testified that B told him about the call and said that the Claimant had threatened him. R said that he had consulted with the shop steward and that they had jointly agreed to bring the Claimant in to discuss the threatening behaviour as well as the disposal issue.[33]

[56] The investigation report says that the Claimant threatened **both B and R** verbally and by text message. According to the report, all of this occurred **after** the Claimant's conversation with B and after the employer had decided to have the Claimant come in for a morning investigation and possible discipline.

[57] The February 21, 2020, email between R and "Admin"[34] also contradicts details of the testimony of R and B. The email states that the Employer arranged the morning meeting to discipline the Claimant for his work ethic and for prematurely leaving work sites. It does not say that the Claimant was also being disciplined for an earlier threat arising out of his conversation with B.[35]

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[31] GD11-502.
[32] Audio recording of General Division hearing at timestamp: 00:32:30.
[33] Audio recording of General Division hearing at timestamp: 00:35:50.
[34] GD11-500.
[35] *Ibid.*

[58] This email to Admin identifies both verbal and text threats, but says that they occurred while the Employer was attempting to schedule the disciplinary meeting. Like the investigation report, the email does not describe a separate verbal threat to B that occurred at the outset.

[59] According to the email, the Employer fired the Claimant **immediately** after making threats to "senior management". I expect that R, the Vice President of Operations, is senior management, as that term is ordinarily used. B is a dispatcher. I am less certain that the Employer would considers its dispatcher to be senior management.

[60] The investigation report and the email between R and Admin are dated February 21, at about the same time as the Claimant's dismissal. I would have expected there to be some mention in those documents of the Claimant having made a verbal threat to B in the initial telephone call, since that was included in the testimony of both R and B. However, R's communication with the union is the first document in which the Employer clearly asserts that the Claimant's initial call to B involved a verbal threat.[36] This was not until March 3, 2020.

[61] A second email to the union representative also on March 3, 2020, states that R discussed with the Claimant how he had responded to B and that the Claimant then also threatened R.[37] This seems to line up with what is described in the February 21 email to Admin. However, if the Claimant threatened R, R failed to mention it in his testimony to the General Division.

[62] The fact that the Employer's evidence contains significant discrepancies (or inconsistencies) affects the weight that I can give it. The investigation report was prepared after the Claimant had been fired and presumably without his input. Therefore, it is essentially a record of the Employer's version of events at the time. I would expect it to be consistent with R and B's testimony.

[63] The Claimant denies that he made any verbal or written threat, other than to quit his job. This is also not consistent with the investigation report, but it is not surprising. This denial is at the heart of this appeal. The Claimant is no less credible or reliable because he disagrees with what the report says about making threats. Nothing in the investigation report suggests that

[36] GD11-505.
[37] GD11-506.

anyone asked the Claimant for his version of events or that he ever agreed with the investigation report. The Employer had already dismissed the Claimant by the time of the investigation, which suggests that the investigation report was likely prepared without the Claimant's input.

[64] The General Division inferred that it was more likely that the Claimant made a verbal threat of violence to B because the Claimant later sent B a text message, which B regarded as threatening. If I were to find that the text message was a clear threat of harm, I might infer that it was more likely that he had also threatened harm in his phone conversation. If the Claimant threatened violence on one occasion, it is reasonable to think he would be more likely to threaten violence on other occasions. However, the general language of the text message is not an explicit or obvious threat of harm, and the Claimant denies that it was a threat of harm.

[65] Furthermore, even if I found that the text message implicitly threatened harm, this would not necessarily mean that it was more likely than not that the Claimant had made a separate verbal threat of harm. It could only mean that it was more likely that the Claimant made the verbal than it would be if he had not sent a text message threat. The proven fact of a text message threat of harm to B could support a finding that the Claimant was likely to have also made a separate verbal threat of the same kind. However, this would require that the circumstances around the text message to B be very similar to the circumstances around the Claimant's conversation with B.

[66] In this case, there are notable differences in the circumstances of the text message and the conversation. The verbal threat apparently occurred in the course of what the Claimant described as a normal conversation with his dispatcher. They were talking about when the Claimant should dispose of his load and about his dispatch the following morning.

[67] By the time the Claimant sent B the text message, their communications had apparently become more strained. After the phone conversation, the Claimant received a follow-up text from B confirming the morning dispatch instructions. Moments later, a second text message directed the Claimant to report to the office at 6:00 a.m. the next morning, "on the dot." When the Claimant texted his response to B's second message, he repeated the "on the dot" comment back to B, in apparent irritation at the tone of B's text message. The Claimant also said that he believe the message meant the Employer was calling him in to fire him, when he responded to it.

[68] Because of these differences in the circumstances, and because the meaning of the threat in the Claimant's text message is unclear, the fact that the Claimant sent the text message to B can only support only a very weak inference that the Claimant made a threat of harm to B in the earlier phone conversation. In deciding whether the Claimant made the verbal threat, I give little weight to the fact that the Claimant sent the text message to B.

[69] The General Division also relied on other text messages that the Claimant sent to B and to a co-worker, to find that the Claimant made a verbal threat to B. Those other messages do not support an inference that the Claimant made either the verbal threat to B or that the language of his text message implied a threat of harm. They were not threatening in any way, and the Claimant did not send those messages until after he had been fired.

[70] Only the Claimant and B have personal knowledge of what the Claimant said to B in their initial phone conversation. The Claimant's testimony has been consistent with his earlier statements that he did not threaten B. However, that is not true of B or of R. Both B and R testified to a version of events that is different from what they apparently described for the purpose of the internal incident investigation. Their testimony is also different from the email authored by R to Admin on the day after R dismissed the Claimant. Critically, their testimony differs from other documentation on whether the Claimant actually made the verbal threat to B in the only phone conversation that he had with B that evening. The evidence is also conflicted about whether the Employer fired the Claimant for threatening B or threatening R. For these reasons, I give less weight to the testimony of B and R than to the Claimant's testimony.

[71] I find that the Claimant did not make a verbal threat in the course of his initial telephone conversation with B.

Text message threat

[72] The Claimant does not dispute that he wrote a text in which he said that the employer "had his back up" and that he "will follow through so make sure [to be] ready for the outcome. [The Claimant] is very easy-going until pushed into a corner." However, he told the General Division that he was only threatening to quit his job. He told the Commission that he meant to

imply he would quit and; "not harming them."[38] He testified that he was upset because he thought he was in trouble for resisting the Employer's expectations to work long hours. This concern was reflected again in the text message the Claimant sent the Employer after he was fired. The Claimant texted that he could not work the 12 to 14 hours a day that he claimed the Employer was asking of him.[39]

[73] The Employer says that it fired the Claimant for abusive or threatening language.[40] However, the Employer can only speak to its (or B's) subjective reaction to what it perceived as a threat. The Employer's perception of what the Claimant meant by his text message is not the only way in which the message could be characterized. What the Employer believes about the Claimant's text message does not determine whether it is "misconduct" for the purposes of the EI Act.

[74] The Employer had the opportunity, and an obligation under its own policies, to clarify what the Claimant meant by his text message. According to the Employer's Anti-Bullying, Harassment & Violence Policy, management is supposed to meet with an alleged offender and conduct a thorough investigation.[41] There was an investigation report prepared on February 21, but the Employer had fired the Claimant over the telephone the evening before. As the Commission argued to the General Division, there is no record that the Claimant was part of any such investigation or that he was given an opportunity to explain his comments.[42]

[75] When the General Division asked R whether he had given the Claimant an opportunity to explain what he had meant, R said that he had. However, he did not say whether the Claimant offered any explanation, or what it was. R said only that the Claimant "got argumentative."[43] He provided no detail about what the Claimant may have said in response. While the Employer testified he asked the Claimant to explain himself, there is no suggestion of this in any of the Employer's other evidence or in his earlier submissions to the General Division.

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[38] GD3-40.
[39] GD11-497.
[40] GD11-190.
[41] GD11-232-234.
[42] GD14-1.
[43] Audio recording of General Division hearing at timestamp 00:37:50.

[76] The test for misconduct requires that a claimant willfully breach a duty owed to his or her employer. The Claimant acted "willfully" when he sent the text message to B, but the act of sending a text message does not breach a duty owed to the Employer. I could only find a breach of a duty if the text message itself was **objectively** misconduct.

[77] The Employer also has policies by which it may discipline employees in some fashion for harassment, intimidation, or for being abusive.[44] Therefore, the text message could be misconduct if it were a threat of harm, but it could also be misconduct if it amounted to harassment, or if it were intimidating or abusive.

[78] This particular text message can only be understood to be misconduct if it is a threat of harm. If the Claimant's text message was not a threat of harm, but could be otherwise characterized as harassment, intimidation, or abuse, then I would have to take a closer look at the Employer's policies, its definitions, and its progressive discipline practices to determine whether the Claimant could or should have known that he could be dismissed. In this case, the text message cannot be characterized as any of those other things unless it is first found to be a threat of harm.

[79] The message may be understood to be intimidating, but only if it is also understood as a threat of harm. A threat to quit, is not intimidating. The Claimant did not use abusive, vulgar, or offensive language so it is not abusive. It is also not harassment. There is no suggestion that the Claimant had any previous issue with B or that this was one in a series of messages the Claimant sent B just to spite him. Unless it is read as threat of harm, this single message is not harassment.

[80] However, the text message does not threaten harm on its face. The language of the text message may plausibly be interpreted as a threat to quit or take legal job action, and it could bear other interpretations that also do not involve a threat of harm.

[81] The Employer bears the burden of proving that the Claimant's text message was threatening something more sinister than a threat to quit, such that the Claimant's text message

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[44] GD11-233.

should be considered misconduct. However, there is little evidence on which I might find that the Claimant's threat is the kind of threat the Employer says it understood it to be.

[82] The Claimant says that he was threatening to quit. He also told the Commission that he thought the Employer was trying to get rid of him.[45] He said that he suspected that the Employer arranged the morning meeting to fire him.

[83] It is clear that the Claimant was concerned about his job and felt "backed into a corner," as he wrote in his text message. This is true regardless of whether he felt that he was about to be fired, thought he should quit before he was fired, or just felt that he could not meet the Employer's work expectations. The Claimant's text message must be understood in this context.

[84] I recognize that the wording of the Claimant's text message to B and the context in which it was delivered does not exclude the possibility that the Claimant was holding the dispatcher B responsible somehow for his work problems. It is possible that the Claimant was warning B to "be ready" because he was going to "follow through" with some kind of harm affecting B or the Employer.

[85] It is possible. However, the evidence does not support a finding that it is more likely than not that the text message was a threat of harm.

[86] As it turns out, the Employer fired the Claimant by phone the same evening as the phone call with B and the text messages. If the Claimant had threatened the Employer with harm at a time when he only thought he might be fired or have to quit, one would expect that the Claimant would also react aggressively to actually being fired.

[87] However, the Claimant did not follow through on his threat with any violent or destructive action. After he was fired, he challenged the Employer, but legally. He called the Employment Standards Branch,[46] and he also grieved his dismissal with the union.[47]

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[45] GD3-40.
[46] GD3-32.
[47] GD3-27; GD11-507.

[88] The Claimant also acted calmly and reasonably when he text messaged R later in the evening, on the day of his dismissal. He took what appears to be a matter-of-fact approach to cleaning up some post-employment details. He suggested again that he thought the employer's expectations about work hours were unreasonable but messaged, "No hard feelings, I just cannot do it."

[89] The Claimant texted B the day after he was fired, as well. In that email, he appears resigned—perhaps bitter—but not obviously angry. He notes that "[R] fired [him] over nothing," and he briefly tries to show he had been right about dumping. The Claimant concludes: "Now you've lost a loyal employee over what?"

[90] In the final analysis, the Claimant is the only one who knows for certain what he was thinking when he sent the text message. There are few details of the circumstances surrounding the text message, and there is little evidence by which to interpret the Claimant's text message, other than what the Claimant says he meant. Had the Claimant made an obvious verbal threat of harm to B as alleged, this would have offered some context in which I might have assessed whether the text message was also a threat of harm. But the Employer has not established that the Claimant made any kind of threat in his discussion with B, let alone one that is objectively a threat of harm.

[91] The Employer has not established that a reasonable person would understand the Claimant to have been threatening B with harm. I find that the Claimant was not dismissed for misconduct because the nature of the threat or threats for which he was dismissed were not misconduct.

CONCLUSION

[92] The appeal is allowed. The Claimant was not dismissed for misconduct, and he is not thereby disqualified from receiving Employment Insurance benefits.

Stephen Bergen

Member, Appeal Division

HEARD ON:	November 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. R., Appellant Melanie Allen, Representative for the Respondent