



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *BG v Canada Employment Insurance Commission*, 2021 SST 71

Tribunal File Number: GE-20-2397

BETWEEN:

B. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Mark Leonard

HEARD ON: January 19, 2021

DATE OF DECISION: January 21, 2021

DECISION

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (the Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

OVERVIEW

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he sent a threatening text to a supervisor. It told the Commission that it has a zero tolerance policy on violence and harassment in the workplace.

[4] Even though the Claimant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. The Claimant says that the real reason that the employer let him go because he stood up to his supervisor who he claims was harassing him. He says that he was targeted for greater scrutiny of his behaviour after making a harassment complaint against his supervisor.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

PRELIMINARY MATTERS

[6] The Claimant raised the issue that he wished to have access to the Canada Emergency Response Benefit (CERB). He believes that he is entitled to the CERB, and asked the Commission to withdraw his EI claim and allow him to request CERB. He further believes that regardless of any decision on misconduct at work, he is entitled to the CERB. He says he has bills to pay and needs the money.

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

[7] The Canada Revenue Agency administers the CERB program. Whether the Claimant is eligible to CERB is outside of my jurisdiction. I can only decide matters that fall within *EI Act*. The only issue at hand within my jurisdiction is whether the Claimant lost his job due to misconduct.

ISSUE

[8] Did the Claimant lose his job because of misconduct?

ANALYSIS

[9] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[10] I find that the Claimant lost his job because he sent a threatening text to a supervisor in violation of the employer's policy on harassment and violence in the workplace.

[11] The Claimant and the Commission do not agree on why the Claimant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant sent a text to a supervisor telling the supervisor to keep the Claimant's name out of his mouth (stop spreading rumours about him). His text included the supervisor's home address and suggested that the supervisor would be easy to find and that he should remember that. The supervisor filed a harassment complaint against the Claimant. After a formal investigation, the employer concluded that the Claimant had violated its zero-tolerance policy on violence and harassment in the workplace. It issued a termination letter detailing the reason for the dismissal was a violation of the harassment policy because of the text he sent.

[12] The employer also submitted a document listing several other conduct issues such as smoking where it was not permitted, not wearing his seatbelt on a tow-motor, and scavenging from the refuse. The Claimant received warnings and a suspension for these matters. However,

the employer claims that the primary reason for the dismissal is the text, which violated its harassment policy.

[13] The Claimant disagrees.

[14] The Claimant stated that he is a heavy equipment operator in a refuse processing facility. The Claimant says that the real reason he lost his job is that he stood up to his supervisor who was harassing him. He testified that on a previous occasion, he was subject to a racial slur from this same supervisor. He says that he complained to the “boss,” who is above the supervisor, and the incident was addressed by moving the Claimant and giving him a raise. The Claimant did not make a complaint outside of the organization, because he did not want to go to “Human Rights” at that time. The Claimant claims that it was after this incident that he was targeted for every conduct issue. He says that the supervisor was never sanctioned for his racist remark. The Claimant suggests that the employer showed negative bias against him because of the complaint.

[15] The Claimant addressed the other listed transgressions. He claims that everyone smokes just outside the door. He provided pictures taken after his dismissal showing cigarette butts in the snow allegedly at the same door where he was caught and sanctioned. He claims this shows that management is not serious about this issue and condones the behaviour, only, not from him. He also offered that other machine operators do not wear the seatbelt and they do not receive suspensions. He added that everyone, including managers, “garbage pick,” although he admits that there is a policy that forbids scavenging.

[16] The Claimant went on to detail that he observed unusual behaviour from his supervisor. The Claimant claims that the supervisor was hiding the tow-motor keys making it difficult for him to do his job. The Claimant said that he informed the “boss” but it was again the Claimant who was moved. The Claimant considered the move a demotion from his previous functions. The Claimant says that this supervisor was then spreading rumours about him claiming that he could get the Claimant moved or fired.

[17] The Claimant says that he was frustrated and angry and that is why he sent the text. He claims they were just words and that he was not serious. He says that he was a good employee and that all his trouble started after the complaint he filed.

[18] Contrary to the assertions of the Claimant, he did have incidents prior to the founded harassment against his supervisor. He was verbally warned twice about scavenging in the workplace before the harassment issue with his supervisor. The Claimant says that the employer did nothing to address the harassment that the Claimant had endured. However, the employer submitted documentation confirming that the supervisor received a 2-day suspension and was given sensitivity training for the harassment against the Claimant (GD3-27).

[19] The Claimant received a warning and a suspension resulting from smoking violations as well as a written warning regarding wearing a seatbelt on the tow-motor since the incident with his supervisor. The most recent was September 14, 2020, when after being caught smoking, the Claimant was sent home and suspended one day. Two days later on September 16, 2020, he sent the supervisor the threatening text.

[20] I am not convinced that the Claimant was dismissed because he was targeted for greater scrutiny after the harassment incident two years earlier (November 14, 2018). The Claimant had several incidents of non-compliance, but had only received verbal and written warnings as well as a suspension for them. Given the limited number and expended period of time over which these incidents occurred, I cannot conclude that they form the basis of a deliberate campaign by the employer to target the Claimant. The verbal, written warnings, and suspension, all seem to be measured responses to the identified rule breaches when they occurred. When the Claimant sent the threatening text and there was a complaint, the employer was obligated to investigate and act accordingly.

[21] The documentation provided by the employer clearly shows that the Claimant sent the text to the supervisor. The contents of the text cannot be seen as other than a veiled threat that some unwanted activity would befall the supervisor at his home unless the supervisor stopped talking about the Claimant. The Claimant admits he sent the text albeit out of frustration with the work environment. The employer conducted an investigation and concluded that the Claimant had violated its policy on harassment.

[22] I find that the Claimant did commit the acts that the employer claim were the reason for his dismissal. Whether the Claimant intended to act upon these words is not relevant. It is reasonable to conclude the superintendent who received the text would take the message seriously and report the matter.

[23] I read the employers policy on harassment and violence in the workplace. It is clear that violence includes sending threatening messages, is not acceptable and may result in dismissal. The letter of termination clearly details that it was the text message sent by the Claimant that led to his dismissal. It did not list any other reasons.

[24] I am convinced that the reason for the claimant's dismissal was a violation of the employer's harassment policy stemming from his threatening text to the supervisor.

[25] It is not for me to determine if dismissal was the appropriate response to the Claimant's behaviour. My role is to determine if the reason for his dismissal constitutes misconduct under the *EI Act*.

Is the reason for the Claimant's dismissal misconduct under the law?

[26] Yes, the reason for the Claimant's dismissal is misconduct under the law.

[27] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁴

[28] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties towards his employer and that there was a real possibility of being let go because of that.⁵

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

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

[29] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁶

[30] The Commission says that there was misconduct because the Claimant admits to sending the text. It says that the text is a clear threat towards the supervisor. The decision to dismiss the Claimant as a result of a breach of the employer's harassment policy was the real reason for his dismissal. It submits that the activity is misconduct because the Claimant actions were deliberate and that he knew or ought to have known that his actions could result in his dismissal.

[31] The Claimant says that there was no misconduct because he only listed the home address of the supervisor. He offered that he was frustrated and angry when he sent the text. He says it was not a threat. He claims that it was just words and he had no wrong intent.

[32] I don't agree with the Claimant. The meaning of his text was clear. He was attempting to intimidate the supervisor in order to stop the supervisor from doing something. There can be no other reasonable interpretation of the words. Whether he actually intended to carry out some act or just scare the supervisor, the threat was clear. There does not need to be wrong intent, only whether the act itself is considered misconduct under the *EI Act*.

[33] I am satisfied that the text was an implied threat of negative consequences aimed at the supervisor. The employer has a zero tolerance policy regarding violence and harassment in the workplace. An internal investigation confirmed that the Claimant had violated the policy. The Claimant did not dispute that he sent the text.

[34] The Claimant says he does not remember if he was aware of the employer's harassment policy. He cannot recall if he read it when he started working there. He says he would have no reason to review it because he had no intention of participating in that type of behaviour.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[35] I find that, regardless of whether the Claimant was aware of the policy or had read it, he knew or ought to have known that his text was threatening and that it would be unwelcome by the supervisor. The Claimant's actions were wilful and deliberate. In other words, he knew what he was doing when he sent it. The Claimant knew or should have known that his conduct could get in the way of carrying out his duties towards his employer and that there was a real possibility of dismissal because of that. Threatening a fellow employee is a wilful act amounting to misconduct⁷.

[36] I find that the Commission has met the burden of proof to show that the Claimant's actions were misconduct under the *EI Act*. It has established that the Claimant sent a threatening text to his supervisor. It has established that he violated the employer's harassment policy. It has shown that his actions were wilful and the real reason the Claimant was dismissed. It concludes and that the Claimant knew or ought to have known that his action could lead to dismissal and therefore constitutes misconduct under the *EI Act*. I agree.

[37] I am not without empathy for the Claimant. His testimony was both emotional and convincing as he detailed the workplace environment. Of particular concern is the inequitable application of discipline for similar transgressions of policy and rules. I can understand how he could become frustrated by the perceived lack of fairness in the way the employer treated him and conclude he was being harassed.

[38] However, mechanisms exist both within this employer's organization, and outside of it, to address instances of harassment. It was incumbent on the Claimant to exercise these options rather than try to resolve the situation using intimidation. One form of harassment cannot be used to confront another form of harassment.

⁷ See *Vo v Canada (Attorney General)*, 2013 FCA 235.

So, did the Claimant lose his job because of misconduct?

[39] Based on my findings above, I find that the Claimant lost his job because of misconduct.

CONCLUSION

[40] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[41] This means that the appeal is dismissed.

Mark Leonard

Member, General Division - Employment Insurance Section

HEARD ON:	January 19, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. G., Appellant