



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *OS v Canada Employment Insurance Commission*, 2019 SST 1761

Tribunal File Number: GE-19-641

BETWEEN:

O. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: March 4, 2019

DATE OF DECISION: April 5, 2019

DECISION

[1] The appeal is allowed. The Canada Employment Insurance Commission (Commission) has not proven that the Claimant did the alleged conduct that led to his suspension from work.

OVERVIEW

[2] The Claimant, O. S., was working as a security worker in a six-month term position when he was charged with offences under the *Criminal Code*. The Claimant told his employer that he had been charged with possessing and transmitting child pornography. The Claimant continues to dispute the charges.

[3] The employer put the Claimant on a paid leave until his first court appearance. When the matter was not resolved, and the Claimant lost his security licence, which was a requirement for his job, the employer put him on a mandatory leave of absence, without pay. The Claimant's work term ended before the charges were resolved. His employment contract was not renewed.

[4] The Claimant applied for benefits under the *Employment Insurance Act* (Act).

[5] The Commission decided that the Claimant could not be paid benefits because he was suspended from his job because of his misconduct. Upon reconsideration, the Commission maintained their decision. The Commission argued that the Claimant was disqualified from receiving benefits because of section 30 of the Act.

[6] The Claimant appealed the Commission's decision to the Tribunal. At the time of the hearing, his charges were still outstanding; he had not been convicted of an offence under the *Criminal Code*.

PRELIMINARY MATTERS

Not deciding constitutional issues.

[7] This decision will not touch on any of the constitutional issues raised by the Claimant because he confirmed at the hearing that he did not want to pursue these challenges at the General Division level of the Tribunal.

ISSUES

[8] What is the alleged conduct that caused the Claimant to be suspended from his job?

[9] Has the Commission proven that the Claimant did the alleged conduct?

[10] Has the Commission proven misconduct under the Act?

ANALYSIS

[11] A claimant who loses his job because of misconduct cannot receive regular benefits under the Act until they have enough hours of insurable employment since losing the job to qualify for benefits. This is because of the indefinite disqualification imposed by section 30 of the Act.

[12] One exception to the indefinite disqualification under section 30 is if the claimant's job loss was a suspension for misconduct under section 31 of the Act.¹ In the case of a suspension, the Claimant is not entitled to receive regular benefits during the period of suspension, but the Claimant does not lose the hours of insurable employment he accumulated before his suspension, which he does if section 30 applies.

[13] The onus is on the Commission to prove that it is more likely than not that the reason the Claimant lost his job (including a suspension) was because of his misconduct.²

What is the alleged conduct that caused the Claimant to be suspended from his job?

[14] I find that the alleged conduct that caused the Claimant's suspension from work was possessing and transmitting child pornography.

¹ This is referred to as a disentitlement under s 31 of the Act. ¹ Section 31 of the Act reads: A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves the employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

² This is called the onus of proof, and is set out in this case, *Minister of Employment and Immigration v Bartone*, A-369-88.

[15] The alleged act of possessing and transmitting child pornography led to the Claimant being charged under the *Criminal Code*. His criminal charge led to the Province suspending his security licence. The criminal charge and the security licence suspension led to his unpaid leave of absence from work.

[16] In this chain of events, the only act or conduct that was within the Claimant's control is the alleged act of possessing and transmitting child pornography.

[17] Both the criminal charges (not an act of the Claimant), and the suspension of his security licence (not an act of the Claimant) are directly related to the alleged act of possessing and transmitting child pornography.

[18] Since the only conduct that was within the Claimant's control was the alleged act of possessing and transmitting child pornography, this is the conduct that the Commission must prove was done by the Claimant.

[19] I find that the Claimant's suspension from work is directly related to the alleged conduct of possessing and transmitting child pornography because the Claimant testified that he was put on paid leave after telling his employer that he was charged with an offence under the *Criminal Code* for possessing and transmitting child pornography. The Claimant stated that after he was charged, his employer told the Province about his criminal charges, and the Province suspended his security licence. The employer then put the Claimant on unpaid leave.

[20] The two letters written by the employer support the Claimant's testimony. The August letter states that the employer had cancelled his scheduled shifts, but would continue to pay the Claimant until the outcome of the court case in September. The Claimant's case was not resolved in September. The October letter states that the employer was putting the Claimant on an unpaid leave of absence. The employer advised the Claimant to let it know if he was cleared of the charges and had his security licence reinstated before his employment term ended in November.

[21] The Claimant's statements on his application for benefits is consistent with his testimony. In his application, he reported that he was not working because he had been charged with possessing and transmitting child pornography, and his security licence was suspended.

[22] At the hearing, the Claimant argued that he was not “suspended” from work. I do not agree with the Claimant. I find that he was suspended from work because it is undisputed that he was not working because of an unpaid leave of absence. I find that an unpaid leave of absence means that he was suspended from his job. Further, the Claimant reported that he was suspended from work on his application for benefits when he wrote the following, in his own words: “my organization suspended me from work” and “I was suspended from work.”³

Has the Commission proven that the Claimant possessed and transmitted child pornography?

[23] No. I find that the Commission has not proven that it is more likely than not that the Claimant possessed and transmitted child pornography, which is the alleged conduct that caused the Claimant to be suspended from his job.

[24] Since the Commission did not prove that the Claimant did the conduct that led to his suspension from work, the Commission has not proven that the Claimant was suspended from his job because of “misconduct” under the Act.

[25] The Commission argued that the Claimant knew that the act of possessing and transmitting child pornography through the internet could lead him to lose his licence, and that he knew that having a security licence was a requirement of the job.

[26] I agree with the Commission that the Claimant knew, or ought to have known, that possessing and transmitting child pornography could lead to him losing his security licence, which he knew was a requirement of his job. The Claimant did not dispute that having a security licence is a requirement of his job.

[27] However, the first question that must be asked, and answered, is if the Claimant did the alleged conduct that led to his suspension from work. If the Commission does not prove that the Claimant did the alleged act, then it does not matter if he knew that such conduct would lead to being suspended from work.

³ See pages GD3-10 and GD3-12.

[28] The evidence does not prove that the Claimant possessed and transmitted child pornography. The Commission did not do any investigations into this alleged conduct. The Claimant denies that he committed this alleged conduct.

[29] The Federal Court of Appeal has stated that it is not enough for the Commission to rely on criminal charges that have been laid and **not proven** at the time of the separation from employment without doing any other verification.⁴

[30] There is no evidence before me that the Commission did appropriate verifications of the alleged conduct of possessing and transmitting child pornography.

[31] The Commission spoke to the employer, but the employer had no first-hand knowledge of the conduct that led to the criminal charges being laid. There is no evidence that the employer had any knowledge of the charges other than what was told to it by the Claimant. It is undisputed that the alleged acts for which the criminal charges were brought happened outside the workplace. It was the Claimant who brought the charges to the employer's attention.

[32] As such, I find that the Commission's verification of the alleged charges with the employer does not prove that the Claimant did the alleged conduct that led to the criminal charges.

[33] The Claimant testified that he did not possess and transmit child pornography, but that someone else did it through his Facebook account. He returns to court to dispute the charges this month.

[34] On his application for benefits, the Claimant checked "yes" that he was involved in the alleged criminal offence.

[35] I accept the Claimant's explanation that by checking "yes" he did not mean to admit that he did the alleged offence, only that he was "involved" in the sense that he had been charged. I find his explanation is consistent with his continued action of disputing the charge in court.

⁴ *Meunier v Canada Employment and Immigration Commission*, A-130-96.

[36] I find that the Commission has not met the onus upon it of proving that the Claimant possessed or transmitted child pornography because:

- a) the Commission did not do appropriate verifications of the conduct that led to the charges;
- b) the Commission did not put forward any evidence that the Claimant did the alleged conduct; and
- c) the Claimant denied having committed the alleged conduct.

Has the Commission proven misconduct under the Act?

[37] No. Since the Commission did not prove that it is more likely than not that the Claimant did the alleged conduct that led to his suspension from work, the Commission has not proven that the Claimant was suspended from his job for misconduct under the Act.

CONCLUSION

[38] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section

HEARD ON:	March 4, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	O. S., Appellant