



[TRANSLATION]

Citation: *PT v Canada Employment Insurance Commission*, 2023 SST 50

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: P. T.
Representative: Sylvain Bergeron

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (547379) dated November 8, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Videoconference
Hearing date: January 24, 2023
Hearing participants: Appellant
Appellant's representative
Observer

Decision date: January 25, 2023
File number: GE-23-11

Decision

[1] The appeal is allowed.

[2] The Claimant didn't stop working because of misconduct under the *Employment Insurance Act* (Act). This means that he can receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. His employer, the X School Board, let him go after finding that his criminal record was incompatible with his job as a janitor.

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

[5] The Claimant disagrees. Essentially, he explains that he filled out the criminal record form the employer asked him to fill out and that he didn't commit offences that are incompatible with his job. He also says that he was previously employed in this job on a temporary basis through a private company.

[6] I have to decide whether the Claimant stopped working because of misconduct.

Issue

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

Analysis

[8] 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

¹ Section 30 of the *Employment Insurance Act* says that a claimant who loses their job because of misconduct is disqualified from receiving benefits.

his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[9] I find that the Claimant lost his job because the employer found that his criminal record was incompatible with his job as a janitor.

[10] On June 28, 2022, the employer sent the Claimant a dismissal letter. This letter says that the school board reviewed his file in connection with the criminal record declaration form he filled out. The employer says that it found that his criminal record was incompatible with his job as a janitor.

[11] The Commission and the Claimant agree on why he lost his job.

[12] The Claimant admits that he filled out a criminal record form. The employer told him on June 28, 2022, that, after reviewing his criminal record, it was letting him go.

[13] The Claimant lost his job because the employer found that his criminal record was incompatible with his job.

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

[14] The reason for the Claimant's dismissal isn't misconduct under the Act. I note that I am not assessing the seriousness of his actions, but rather whether the Claimant's actions amount to misconduct.

[15] To be misconduct under the Act, 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 Act.⁴

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

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

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

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

[17] I also point out that reprehensible conduct doesn't necessarily constitute misconduct. Misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in dismissal.⁶

[18] The Commission has to prove, on a balance of probabilities, that the Claimant lost his job because of misconduct. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁷

[19] A manager at the employer told the Commission that the Claimant was let go after a committee looked at the results of his criminal record. She says that the Claimant has several convictions in his criminal record, as well as one charge. She is of the view that these are serious and repetitive offences. She says that the committee found that the Claimant's criminal record was incompatible with his job as a janitor. The committee allegedly met with the Claimant on June 22, 2022, and heard his story. Finally, the manager says that the fact that the Claimant was responsible for the institution's keys was also considered in the review of his file.

[20] The Claimant explained at the hearing that, on April 5, 2022, the employer asked him to fill out a criminal record declaration form. The Claimant indicated an offence in 2011 when he drove while under the influence of alcohol. Even though he had committed certain offences between 1990 and 1998, he didn't indicate them on the form because his evidence wasn't recent or relevant. He also says that he was charged with assault in 2021 but that he wasn't convicted of that charge. But he authorized the employer to investigate his criminal record. He explains that he was honest about the fact that he had a criminal record.

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

⁶ See *Locke* 2003 FCA 262; *Cartier* 2001 FCA 274; *Gauthier*, A-6-98; *Meunier*, A-130-96.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Claimant also explains that he didn't think the employer would let him go because of this. He says that he worked as a janitor for that school board between July 2019 and September 2019 through an independent company. He also worked as a replacement as of March 2022. He explained to the Commission that he was fit for work, that his work was impeccable, and that he was on good terms with his employer.

[22] The Claimant says that the independent company he worked for was closing permanently on June 30, 2022. He was offered a job outside X, and the school board also offered him a permanent job on April 5, 2022.

[23] The Claimant argues that, had he known that the employer could let him go because of this, he would have accepted the other job he was offered. On this point, the Claimant's representative argues that an employer can't refuse to hire a worker because they have a criminal record. Unless the criminal record offences are incompatible with the position. He argues that the Claimant's criminal record offences aren't incompatible with his job as a school janitor. On this point, he argues that the employer didn't provide the evidence from its investigation that determined that these offences were related to the Claimant's job and that the Commission can't replace the employer in the absence of such evidence.

[24] At the hearing, the Claimant explained that he was accused of fraud between 1990 and 1998. This fraud was in connection with lottery tickets from Loto-Québec. The Claimant was also charged with trespassing and theft. He was also convicted of breach of probation. The Claimant's representative argues that these offences were committed several years ago and that the Claimant has been reintegrated into society since then. He says that none of these offences are incompatible with his job as a janitor.

[25] The Claimant also indicated at the hearing that he had made a request to suspend his criminal record (pardon request) for these past events and that he was waiting for a response.

[26] The Commission says that the school board's policy is clear and that all employees must undergo security screening at the time of hiring. It argues that the

Claimant made a false statement by not indicating his previous convictions on the criminal record form provided by the employer.

[27] So, the Commission argues that the Claimant had to expect that his criminal record would be checked and that he would be let go because of it. It argues that he wilfully tried to hide certain information.

[28] The Commission's file doesn't show the results of the employer's investigation. However, we can assume that the allegations of fraud made several years ago have caused the employer concern. My role isn't to determine whether the Claimant's criminal record is incompatible with his job as a janitor or whether the dismissal was an appropriate measure.

[29] My role is to determine whether the Claimant's actions amount to misconduct under the Act. This case is about the outcome of an investigation into the Claimant's criminal record. The Claimant completed and signed the form as requested by the employer, allowing the employer to investigate his criminal record. The employer told the Commission that the outcome of such an investigation was conditional on hiring an employee. But the facts show that the employer hired the Claimant and then did the security investigation, rather than hiring the Claimant after getting the results of the investigation. The result of the investigation isn't only the details of the Claimant's offences, but also the employer's assessment of whether those offences are incompatible with the job. Even though the Commission says that the employer correctly hired the Claimant, the process wasn't actually completed before he was hired. It was after he was hired that a committee determined that the Claimant's criminal record was incompatible with the position.

[30] In my view, it would be a mistake to consider the Claimant's criminal record as what that led to the finding of misconduct. As the representative argued, this record existed before the Claimant was hired and the Claimant agreed to the employer's investigation.

[31] Of course, the employer has a policy on criminal record checks. This policy says that the worker must declare [translation] “any information relevant to their record.”⁸ The Claimant indicated that the offences committed more than 25 years ago weren’t relevant or incompatible, but that he didn’t know and authorized the employer to investigate his criminal record.

[32] The Commission says that it is the withholding of information when he filled out the form that constitutes misconduct. But the Claimant says that he acted in good faith by authorizing the employer to conduct a security investigation and that he has reintegrated into society since events between 1990 and 1998, about 25 years ago. He says that he wasn’t found guilty on the assault charge.

[33] Even though the Claimant committed a reprehensible act by failing to indicate on the form convictions that occurred several years ago and for which he hadn’t yet received a pardon, he allowed the employer to conduct a full investigation into his criminal record. In my view, the Claimant didn’t commit misconduct. The Claimant cooperated with the employer, completed the criminal record form, and allowed the employer to conduct an investigation. When the committee met with him, he explained past events.

[34] The Claimant didn’t expect to be let go. As he explained, had he known, he would have accepted another job. But he accepted the one offered by the school board because the working conditions were better for him and because he had already worked there several times through an independent company.

[35] As the Claimant’s representative points out, the results of the employer’s investigation aren’t on file and we can’t assume what evidence was submitted. The Commission has the burden of proving misconduct and, in this case, the evidence doesn’t support a finding of misconduct on the part of the Claimant. On the contrary, the facts show that the Claimant cooperated with the employer and that he completed and

⁸ GD3-28.

signed the criminal record declaration form, allowing the employer to conduct a full investigation.

[36] I have to make this decision on a balance of probabilities and, based on the facts presented, it is more likely than not that the Claimant didn't mean to deliberately break the employer's rules. The offences were committed several years ago, and even though the employer considers these factors to be incompatible with the Claimant's job now, the Claimant didn't commit misconduct. When he was hired, the Claimant cooperated and agreed to an investigation. The Claimant didn't act wilfully to harm the employer and/or break the employer's rules. He voluntarily cooperated with the employer's requests.

[37] So, I am of the view that, given the circumstances and based on the facts of the case, the Claimant's alleged actions don't constitute misconduct under the Act.

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

[38] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct.

Conclusion

[39] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section