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

Citation: *MD v Canada Employment Insurance Commission*, 2019 SST 1765
Tribunal File Number: GE-19-3131

BETWEEN:

M. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Mark Leonard

HEARD ON: November 1, 2019

DATE OF DECISION: November 18, 2019

Canada

Decision

[1] The Commission has not proven that the Appellant lost his job because of misconduct. This means that the Appellant is not disqualified from being paid benefits.[1]

Overview

[2] The Appellant lost his job at a day care facility. The Appellant's employer said that he was dismissed because he prepared a draft of a game that was not age appropriate for the children in his care. The outline of the game was left out on a bench and was discovered by a parent. The parent found the material offensive and reported it to the Employer. The Employer claimed that the programming (game outline) referenced robbery and contained images of violence and death. The Employer said that the Appellant violated its policies on age-appropriate programming and elected to dismiss him. The Canada Employment Insurance Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct, and disqualified him from being paid employment insurance (EI) benefits.

[3] The Appellant does not dispute that he prepared the game outline. He asserts that it did not contain images of violence and death. He says that its discovery is not the real reason why the employer dismissed him. The Appellant believes he was dismissed because the Executive Director and other female staff did not like him and because he was the only male working at the facility. The Appellant says the draft game is not offensive and cannot understand why he would be dismissed for it. He claims he did not intentionally violate any Employer policies or directions given him. He asks that the disqualification be removed and that he be entitled to regular benefits.

[1] Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

Post-Hearing Documents

[4] The Appellant provided four documents after the hearing. One document (GD8-6) is an e-mail from an anonymous source that is purported to have worked with the Appellant. The e-mail offers support to the Appellant that he was a good employee and that some of the practices of the Employer were not appropriate. I am not inclined to accept the document as evidence because of the anonymity of the writer but mostly because it offers no probative value to the issue before me. The document is not admitted as evidence.

[5] The second document (GD8-8) is a copy of a document already provided by the Commission (GD3-27). The document is an e-mail exchange between the Appellant and the Employer. The copy provided by the Commission from the Employer has an image blanked out. The copy provided by the Appellant clearly shows an image of the game outline that is the subject of the Appellant's dismissal. The document is relied upon by the Appellant in his submissions and is relevant to the credibility of the evidence of the Employer. I will admit this document.

[6] The third document (GD8A) is a copy of a letter from the Employer to the Appellant dated April 28, 2019. This letter details concerns raised by Executive Director of the programming choices by the Appellant. This letter confirms the position of the Employer and information it provided to the Commission. It also supports statements made by the Appellant in testimony. I will admit the document.

[7] The fourth document (GD11) is a clear expression of the Appellant's frustration with the Employer, the Commission and Appeal process. It offers no new or compelling evidence. I will not accept the document as evidence in this matter.

The Commission also provided a rebuttal document (GD7) to the Appellant's submissions (GD8-6). It questions the relevance of the documents. It claims that the e-mail supplied by an anonymous source should be disregarded because the person did not witness any exchanges between the Employer and the Appellant and the veracity of statements cannot be tested. I agree with the Commission and have rejected the document as I noted above. It should be noted, however, that the evidence relied upon by the Commission is likewise unable to be tested. The

Commission elected not to be present at the hearing and call witnesses in support of its case.

Issue

[8] Did the Appellant lose his job because of misconduct? To determine this, I will first decide the reason why the Appellant lost his job. Then, I will examine if the Appellant acted in an intentional or deliberate manner.

Analysis

Why did the Appellant lose his job?

[9] The Appellant and the Commission do not agree on the reason why the Appellant lost his job. The Commission says that the reason given by the employer is the real reason for the dismissal.

[10] The Commission says that the Appellant lost his job because he breached the Employer's policies regarding age appropriate programming. It claims that the Appellant knew or ought to have known that his actions in preparing the draft game in violation of the Employer's policy could result in his dismissal.

[11] The Commission interviewed the Employer (Executive Director) who informed them that they had a folder an inch and a half thick of warnings to the Appellant about his inappropriate programming. The Employer told the Commission that the Appellant had been spoken to and given warnings "a hundred times" about this issue.

[12] She claimed that the draft game was found on the premises by a parent and given to the Employer. The parent was offended by the game because it referred to robbery and the parent was a banker. It further claimed that the game outline contained images of violence and death that are inappropriate for the age of the children in the care of the Appellant. The Employer claims that such images and games violate their policies on age-appropriate programming.

[13] In the letter to the Appellant dated April 28, 2019, the Employer details its concerns with the Appellant's programming choices as well as attendance issues and attitude toward his

supervisor. It states that future incidents of inappropriate programming will be documented and brought to the Appellant's attention. The Employer claims there was a meeting with the Appellant on May 2, 2019. During the meeting the Appellant became defensive and walked out. The Employer then decided to dismiss the Appellant May 9, 2019. It the letter of dismissal, it quotes the reason as broken trust, but included the statement that there was "no fault or prejudice".

[14] The Appellant disagrees with the statements of the Employer. He says that the real reason why he lost his job is because he was the only male employee and he was not liked by other employees. He often ate his meals alone as he did not feel he was welcome in the group.

[15] The Appellant did admit that he had prepared the game outline that was discovered by the parent. He says he inadvertently left the outline in a file folder on a bench while changing his shoes. He claimed that he prepared the game outline with the intention of discussing the proposal with his supervisor. He had e-mailed her several times to arrange a meeting and had tried to drop in to see her but that she was too busy to see him. After the outline was discovered, he apologized for having left the outline where it could be discovered. He told the Employer that he did not intend to share the game with the children without first meeting with his Supervisor.

[16] The Appellant did not believe that it was the discovery of the game outline that led to his dismissal. The game was never introduced to the children. It was still in a developmental stage, and he was seeking the input of his Supervisor about it. He believes he was targeted because he was the only male on staff and that some staff were jealous of him because he was well liked by the children.

[17] The Appellant raised the issue that the Employer was biased against him. He offered that his Supervisor was under some stress regarding other matters at work when the game outline was discovered. He told the Commission and testified that the Supervisor said to him, "Your generation caused the spike in mental health." The Appellant believes the supervisor had negative feelings toward him and others of his age and that it was part of the reason for his dismissal. The Executive Director confirmed that the supervisor was under stress at the time and that her statement was out of character.

[18] I find the evidence of the Employer compelling. It is clear that the reason for the Appellant's dismissal was that he had prepared the draft game that they considered inappropriate. I also find that the Employer had a negative bias toward the Appellant that contributed to its decision to dismiss him.

[19] The dismissal letter only indicated breach of trust as the reason for dismissal. It also noted that there was no fault or jeopardy ascribed to the Appellant. Without clearly noting any specific reasons beyond the draft game programming to support a reason for dismissal, I am left to conclude that the game outline as discovered, was the primary reason he was dismissed.

Is the reason for the Appellant's dismissal misconduct under the law*?*

[20] I do not consider the reason that the Appellant was dismissed to be misconduct under the law.

[21] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it approaches willfulness.[3] The Claimant does not have to have a wrongful intent for his behaviour to be misconduct under the law.[4]

[22] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility.[5]

[23] The Commission has to prove that it is more likely than not[6] that the Claimant lost his job because of misconduct.[7]

[24] The reason the Appellant lost his job was the discovery of the draft game the Employer determined to be inappropriate. It claimed that the Appellant had a history of preparing similar

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[2] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] *Attorney General of Canada v Secours*, A-352-94.
[5] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] The Commission has to prove this on a balance of probabilities which means it is more likely than not.
[7] *The Minister of Employment and Immigration v Bartone*, A-369-88.

material and that it had warned him on numerous occasions to not present programming that was not age appropriate.

[25] The Commission is relying on the premise that the Appellant had a history of non-compliance with the Employer's instructions regarding appropriate programming that lead to his dismissal. It submits that the Appellant had been previously warned and therefore it is reasonable to conclude that he consciously prepared the draft game with the knowledge it could lead to his dismissal.

[26] For this to be true, there must be an actual history of non-compliance that lead up to the final incident for which the Appellant was dismissed.

[27] In an interview with the Commission, the Employer claimed that they had a file an inch and a half thick of warnings to the Appellant regarding inappropriate programming. They claim he had been told on numerous occasions in the past that such programming was inappropriate.

[28] In a subsequent interview between the Commission and the Employer, the Employer revealed that it did not have copies of any warnings given to the Appellant. It claimed it had notes of meetings, however, not one document was provided that confirms the Appellant was ever spoken to about his programming choices. Nor did the Employer complete a performance evaluation that identified this issue nor any expectations around changing future programming choices.

[29] The Employer told the Commission it would provide documentation supporting its claims. But, beyond the letter of termination, no other documentation that would support a history of non-compliance was provided.

[30] The Appellant says that there was no misconduct because there is no history of non-compliance regarding the Employer's wishes around programming.

[31] The Appellant conceded that he was spoken to on three occasions early in his employment about ensuring programming was age appropriate but that these discussions were cordial and no notes were taken. He stated that he was never spoken to again regarding

inappropriate programming until his dismissal. He asserted that he has never received even one warning from the employer about his choice of programming.

[32] The Employer claimed there were many incidents of lateness, but, no documentation was offered that supports the Appellant was ever spoken to about his attendance either.

[33] Regarding the incident that purportedly led to his dismissal, he testified that this particular programming was targeted at older children who arrive after school. It was a game he was developing based on an idea generated by the children. He prepared a draft outline of the proposed game and had attempted to speak with his supervisor about it on several occasions. He said he never intended to present the game to children without speaking to his supervisor first. He claims that he inadvertently left the outline on a bench in the "boot room" when he was changing his shoes. He did not intend for anyone to see the outline before speaking to the supervisor about it. He also denied that the outline contained any *images* of violence or death. He pointed to an e-mail exchange (GD8-8 and GD3-27) between him and his Supervisor. There is an image of what the Employer discovered. The Supervisor asked the Appellant to reconsider his programming choices. There are no images of violence or death depicted. He does not understand the Employer's reaction to dismiss him beyond that a parent was upset after finding the draft left out. The Appellant was aware that the Employer had concerns about age-appropriate programming. He stated that he had apologized for the trouble caused by the game outline being discovered. He only had it on the premises to discuss it with his supervisor.

[34] The Appellant went on to state that he never received any feedback on his programming except some pointers early in his employment. He submitted a copy of the Employer's personnel policy manual that details that new employers are to receive a performance evaluation at three months of employment and at any time after that at the discretion of the Executive Director. He stated that he never received a performance evaluation or any documentation that identified the issue of inappropriate programming. He further stated that there is no policy regarding what constitutes appropriate programming for the various ages of the children. If there is, he was never provided one. The Employer did not submit a copy of any policy on age-appropriate programming.

[35] The Appellant admitted that he argued his point with the Employer concerning what is, and is not, age appropriate. He also admitted he left the meeting on May 2, 2019. He stated that he was being demeaned in the meeting. Several management representatives were attacking him verbally while he was there alone.

[36] He also noted that when he received his dismissal he was told that he had to sign for receipt of the notice immediately or the Employer would reduce the amount of severance he received. He felt pressured to accept even though he disagreed with the reason for his dismissal.

[37] When I asked if the Appellant believed he would be dismissed as a result of the incident, he replied, “No”. He asserted that he did not intentionally leave the documents out to be discovered and would not have presented the game to the children without approval from his Supervisor.

[38] I find the testimony and submissions of the Appellant to be persuasive. Hs testimony was consistent with his previous submissions and reasons for his appeal. The Appellant testified that he had only been spoken to about age-appropriate programming on a few occasions in a friendly guidance manner and was never presented any written warnings or copies of notes about his activities. It was the Appellant that presented a copy of the warning letter he received just prior to his dismissal. It was the Appellant that provided a copy of the personnel policy manual.

[39] I find the submissions of the Commission to be lacking credibility. The employer claimed at first that it had a file an inch and a half thick of warnings to the Appellant. It then recanted and claimed only to have notes, but did not offer even one in support of its assertions. The Employer claimed that the game outline contained images of violence and death, yet did not share any proof with the Commission. In fact, the e-mail message from the Appellant’s Supervisor shows only the written outline of the game and no images at all. I find the Employer’s claims to be embellished and unsupported.

[40] The Employer was required by its own personnel manual to provide the Appellant a performance evaluation, yet, he never received one. This performance evaluation would have been the appropriate vehicle to note any concerns with the Appellant’s programming choices and

an opportunity to set clear expectations for his future programming. The Employer did not provide any evidence that it ever evaluated the Appellant's performance.

[41] The Employer claims the Appellant's programming was inappropriate. It expresses a concern for the well-being of the children in his care as part of the reason for his dismissal. I find it inconceivable that the Employer would not document his behaviour on each and every occasion where it violated policy. Yet, it did not produce a single example. I would have expected meeting notes, warnings, and notice of unmet expectations in support of his dismissal. There is no evidence of any warnings, written instruction, or expectations given to the Appellant. In the Appellant's letter of dismissal, it states that it is without prejudice and without cause. If the Appellant had truly acted in a conscious and deliberate manner to the detriment of the well-being of children, why did the Employer not clearly express this in its dismissal letter?

[42] The Employer has not shown that there was a history of non-compliance by the Appellant leading up to the event that resulted in his dismissal. Regardless of whether the game as outlined by the Appellant was inappropriate or not, the Appellant did not present it to children. He attempted to meet with his supervisor to discuss the game and seek input. He did inadvertently leave the outline where it could be discovered by anyone. But, he did not do so consciously, deliberately, or intentionally. His conduct was not so reckless that it approached willfulness

[43] I find that the Commission has not proven that there was misconduct.

Conclusion

[44] The appeal is allowed. This means that the Appellant is not disqualified from being paid EI benefits.

Mark Leonard

Member, General Division - Employment Insurance Section

HEARD ON:	November 1, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. D., Appellant