



Citation: *AL v Canada Employment Insurance Commission*, 2023 SST 1154

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: A. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (546072) dated November 1, 2022 (issued by Service Canada)

Tribunal member: Paula Turtle

Type of hearing: Videoconference

Hearing date: March 14, 2023

Hearing participant: Appellant

Decision date: April 6, 2023

File number: GE-22-3857

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (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

[3] The Claimant argues that he quit his job. I do not find that the Claimant quit his job. But, if the Claimant did quit his job, he did not have just cause to quit his job because he had reasonable alternatives to leaving. So, he would still be disqualified from receiving EI benefits.

Overview

[4] The Claimant lost his job as a social worker at a hospital. The Claimant's employer said that he was let go for the following reasons:

- He harassed a co-worker. This violated the employer's harassment policy.
- He did not protect the privacy of his hospital e-mail. This violated the employer's privacy policy.

[5] The Claimant does not agree that he harassed a co-worker. He says he had a personal relationship with the co-worker that spilled over into the workplace. He says most of the things that the co-worker complained about were not harassment.

[6] The Claimant also says he filed a grievance after he was let go. His union settled the grievance. The settlement said that the Claimant had resigned from his job effective June 17, 2022. The Claimant says I should find that he quit his job and that he had just cause to quit his job when he did.

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

[7] The Commission first decided that the Claimant was entitled to benefits because he did not lose his job because of misconduct. The employer filed a request for reconsideration. The Commission got more information from the employer and from the Claimant and decided that he was not entitled to benefits because he lost his job because of misconduct.

[8] The Claimant has appealed the reconsideration decision to the Tribunal.

Issues

[9] I have to decide whether the Claimant quit his job. If I find that he quit his job, I then have to decide whether he had just cause for quitting.

[10] I also have to decide whether the Claimant lost his job because of misconduct.

Analysis

[11] To answer the question of whether the Claimant had just cause for quitting, I must first address whether the Claimant quit his job. I then have to decide whether he had reasonable alternatives to quitting when he did.

[12] 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.

Did the Claimant quit his job?

[13] I find that the Claimant did not quit his job.

[14] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you did not have just cause.²

² Section 30 of the *Act* explains this.

[15] The law explains what “just cause” means. The law says that you have just cause if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all of the circumstances.³

[16] It is up to the Claimant to prove that he had just cause. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to quit.⁴

[17] When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when the Claimant quit. The law sets out some of the circumstances I have to look at.⁵

[18] After I decide which circumstances apply to the Claimant, he then has to show that he had no reasonable alternative to leaving at that time.⁶

[19] The Federal Court of Appeal (FCA) says that, to decide whether the Claimant quit, I have to determine whether the Claimant had a choice to keep working.⁷ He did not have a choice to keep working because he was let go. So he did not quit.

[20] The Claimant argues that, even though he was let go, I should find that he quit his job. He settled his grievance. He agreed to quit his job as part of the settlement.

[21] The Claimant says the main reason he agreed to settle his grievance and quit his job was because he did not want a public decision about his grievance. The information in a public decision about his relationship with a co-worker could embarrass him and his family. And he was concerned that it could affect his career. He also told me that, when he settled his grievance, he already had a new job. He thought it was better to cut his ties with his employer.

³ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.

⁴ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.

⁵ See section 29(c) of the Act.

⁶ See section 29(c) of the Act.

⁷ *Canada (Attorney General) v Peace*, 2004 FCA 56.

[22] The FCA has said that the Tribunal is not bound to accept what an employer and union have agreed to in a settlement. Even if there is a settlement that says a claimant has quit, the Tribunal has to look at all the evidence and decide whether the Claimant's actions were misconduct.⁸

[23] The Claimant says he thought that, when he settled his grievance, it meant that the reasons for his dismissal were withdrawn. I cannot rely on the settlement to find that the Claimant quit. I find that the Claimant did not quit his job.

[24] Even if the Claimant had quit his job, I would find that he did not have just cause for quitting when he did. The Claimant decided to quit his job to avoid negative consequences (a public decision) of the arbitration process. He had other reasonable alternatives. For example, he could have continued to fight the grievance.

Why did the Claimant lose his job?

[25] I find that the Claimant lost his job because he violated two of the employer's policies. He harassed a co-worker, and his spouse was able to access his work e-mail because she knew his password. The employer says that it fired the Claimant for both violations but that it would have let the Claimant go for either one of these violations.

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

[26] 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.⁹ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁰ The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹¹

⁸ See *Boulton v Canada (Attorney General)*, A-45-96.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹¹ See *Attorney General of Canada v Secours*, A-352-94.

[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 toward his employer and that there was a real possibility of being let go because of that.¹²

[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.¹³

[30] The Tribunal's role is not to decide whether the employer's decision to let an employee go was justified or was the appropriate response.¹⁴

[31] The Commission says that there was misconduct because the Claimant violated the employer's harassment policy when he harassed a co-worker. The Claimant's co-worker complained to the employer that the Claimant was harassing her. The employer retained a professional investigator to investigate the co-worker's complaint. The investigator found that the Claimant harassed his co-worker.

[32] The Claimant says that there was no misconduct because he did not harass his co-worker. He says the harassment investigation was unfair. He also says his spouse caused some of the harassment.

[33] The Commission also says there was misconduct because the Claimant breached the employer's privacy policy.

[34] The Claimant agrees his spouse knew his password to his work e-mails. He agrees she should not have accessed his work e-mail.

[35] The Claimant says the policy means he has to take reasonable steps to protect his work e-mail. The Claimant says having the same password—that his wife knows—for everything does not violate the privacy policy.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁴ *Canada (Attorney General) v Caul*, 2006 FCA 251.

[36] I find that the Commission has proven that there was misconduct.

[37] The Claimant knew his employer had a harassment policy that said employees should not harass their co-workers. He knew his employer had a privacy policy that required him to protect the privacy of his work e-mail.

[38] The Claimant knew or should have known that, if he violated either of these policies, he could be let go.

– **The Claimant violated the employer’s harassment policy**

[39] The Claimant had an intimate relationship with a co-worker. The relationship ended. After that, the co-worker complained to the employer that the Claimant was harassing her.

[40] The Claimant complained to his employer that the co-worker was harassing him. The employer retained an independent investigator to investigate both complaints.

[41] The investigator spoke to the Claimant, the co-worker, and two other witnesses. She issued a 44-page report with 24 pages of attachments. The report finds that the Claimant harassed his co-worker and recommends that he be disciplined. The report sets out what the Claimant, the co-worker, and the witnesses told the investigator. It explains how the investigator decided that the Claimant harassed his co-worker.

[42] The Claimant disagrees with the investigator’s report. The Claimant says the report is unfair because it is not based on what happened, but on credibility and what was most probable.

[43] The investigator found that the Claimant harassed his co-worker several different times. The Claimant said his spouse followed the co-worker in her car after work and confronted her. The Claimant was in the car, and he asked his spouse to stop. He said he should not have been let go for that. The Claimant also denied he was harassing his co-worker when he did these other things that the investigator found to be harassment:

- Asked his employer to arrange his work communications so he would not have to communicate with the co-worker. He did not communicate with his co-worker about work-related issues after that, and he sent angry e-mails to his co-worker about not following the rules for not communicating with him.
- E-mailed his co-worker when she parked behind his vehicle.
- Parked near his co-worker's car so she would see him and his spouse.

[44] The Claimant agreed that he phoned his co-worker's spouse and said something upsetting and sexist to him.

[45] The Claimant said he did not do all the things that the investigator said he did. His spouse followed the co-worker and confronted her while he was in the car with her. He tried to get her to stop.

[46] There are many good reasons for me to prefer the investigator's finding that the Claimant harassed his co-worker several times instead of the Claimant's denials that he harassed her. The most important reason is that the investigator talked to the Claimant, the co-worker, and witnesses. So, she is in a much better position than I am to decide what happened between the Claimant and his co-worker.

[47] But I do not need to find that the Claimant did everything he was accused of to find that his actions were misconduct. The Claimant agreed that his spouse confronted his co-worker while he was in the car and that he phoned his co-worker's spouse and said upsetting and sexist things to him. Those things are violations of the harassment policy.

– **The Claimant violated the employer’s privacy policy**

[48] The second and separate reason the Claimant was let go was because he did not keep his work e-mail password secret.

[49] The Claimant agreed that his spouse knew his work e-mail password because he uses the same password for everything. He agreed it was against the policy for her to look at his work e-mails.

[50] Using a password for your work e-mail that is the same as all your other passwords that your spouse knows is not a reasonable way to keep your work e-mail secure.

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

[51] Based on my findings above, I find that the Claimant lost his job because of misconduct. The Commission has shown that the Claimant knew about his employer’s harassment and privacy policies. He violated those policies. He knew or should have known that those violations could lead to his dismissal.

Conclusion

[52] I find that the Claimant did not quit his job. If he had quit his job, he would not have had just cause to do so.

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

[54] This means that the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section