



[TRANSLATION]

Citation: *SH v Canada Employment Insurance Commission*, 2023 SST 995

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (566905) dated February 24, 2023 (issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing: Videoconference

Hearing date: June 15, 2023

Hearing participant: Appellant

Decision date: July 19, 2023

File number: GE-23-842

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct. This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] In September 2018, the Appellant started working as a product manager for an engineering company.

[4] In June 2019, he was charged with sexual assault and voyeurism. In November 2021, he pleaded guilty to those charges. On June 21, 2022, he was sentenced to a conditional discharge.

[5] On July 5, 2022, the Appellant's case received media attention. That same day, his employer let him go. On July 11, 2022, the parties signed a settlement agreement.

[6] On July 21, 2022, the Appellant applied for EI benefits. After investigating, the Commission denied him benefits, since he lost his job because of misconduct. He knew or should have known that committing a criminal act would get him dismissed.

[7] The Appellant disagrees with the Commission. The employer had known about his situation since May 2019, when a complaint was filed. The employer accommodated him throughout the process, even after his sentencing. It wasn't until his sentence was publicized that the employer decided to let him go. So, it had nothing to do with the acts of sexual assault and voyeurism.

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

Issue

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

Analysis

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

Why did the Appellant lose his job?

[10] I note that the Appellant started working as a product manager for the employer on September 17, 2018.²

[11] In May 2019, a complaint was filed against him about a sexual assault that happened in April 2019. A co-worker told the employer about the situation.

[12] In June 2019, criminal charges were filed against the Appellant for acts of sexual assault and voyeurism that had taken place in April 2019. He had to comply with a condition not to have contact with his co-worker.

[13] His co-worker was a friend he would travel with in the morning and in the evening. He was at the party where the Appellant sexually assaulted the victim, who was drunk at the time. He saw the images on the Appellant's cell phone. He told the victim, and they filed a complaint with the police.

[14] In November 2021, the Appellant pleaded guilty. His employer suspended him and investigated. It consulted lawyers, who recommended against dismissing the Appellant for the time being. It actually expected him to be sentenced to imprisonment. It could let him go then.

² See GD7-2 for the agreement between the employer and the Appellant. The Commission had the opportunity to make submissions on this agreement, which was filed after the hearing. It didn't make any comments.

[15] However, on June 21, 2022, the judge sentenced the Appellant to a conditional discharge. He had conditions to meet. The employer got a copy of the decision around June 27, 2022. It was advised not to let the Appellant go for the time being.

[16] On or about July 5, 2022, the media picked up the story, finding the sentence too lenient. Reporters tried to contact the employer and the Appellant.

[17] On July 5, the employer let the Appellant go. On July 11, 2022, the parties reached an agreement. No admissions were made on either side.³

[18] According to the Appellant, he lost his job because the judge's sentence had received media coverage. The employer's decision to terminate his employment was due to media pressure.

[19] The Commission, on the other hand, says that the Appellant lost his job because the employer didn't trust him anymore and because the criminal acts were contrary to company values and hurt the company.

[20] In my view, the Appellant was let go because he committed criminal acts that were contrary to the employer's values. The fact that the employer delayed letting him go doesn't support a finding that he wasn't let go because of the acts in question, that is, sexually assaulting the victim at a party with friends.

[21] I am not bound by the employer's assessment of the handling of the complaint against the Appellant.⁴ The employer's subjective assessment during the legal process isn't binding on the Tribunal.⁵ I have to assess the facts objectively to decide whether the Appellant was let go because of the acts in question. I do find that he was let go because he committed a criminal act.

³ See GD07.

⁴ See *Choinière v Canada Employment and Immigration Commission*, A-471-95, *a contrario*.

⁵ See *Fakhari v Canada (Attorney General)*, A-732-95.

[22] I have to consider the Appellant's behaviour, not the employer's. The Federal Court of Appeal stated the following in *McNamara*:⁶

In the interpretation and application of section 30 of the Act, the focus is clearly not on the behaviour of the employer, but rather on the behaviour of the employee. This appears neatly from the words "if the claimant lost any employment because of their misconduct". There are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.

[23] I will apply the test for misconduct in the next section. For now, it is important to determine why the Appellant was let go.

[24] I disagree with the Appellant's interpretation concerning the reason for his dismissal, which amounts to ignoring his actions. The causal link remains the acts he committed; otherwise, the employer would not have had to take different measures and would not have had to consult lawyers to find out how to deal with the Appellant's situation. Just because the employer followed the lawyers' advice doesn't mean that the Appellant wasn't let go because of his actions.

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

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸

[26] There is misconduct if the Appellant 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.⁹

⁶ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 (CanLII).

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

[27] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.¹⁰

[28] The Commission says that the Appellant knowingly committed acts that led to criminal charges. What he did hurt the company so much that he was let go when the court proceedings were over.

[29] When he was hired, the Appellant signed a code of conduct that set out four fundamental values, including family spirit. He acknowledged that this value existed in the company.

[30] The Appellant should have known that he would affect the relationship of trust with his employer by committing a criminal act. His actions are directly related to the breakdown of the relationship of trust and the harm suffered by the employer.

[31] The Appellant, on the other hand, says that he could not have expected to be let go, since the employer accommodated him throughout the legal process. Even when he was found guilty, he kept his job.

[32] The Appellant relies on the Umpire's decision in CUB 41256 to show that the cumulative criteria for proving misconduct aren't met in his case.

[33] The Appellant also relies on the Commission's Digest,¹¹ which sets out criteria for determining whether an act amounts to misconduct. Additionally, the Appellant says that the employer had penalized him before, when he was suspended for investigative purposes.

[34] The criteria to be met are as follows: The conduct in question constituted a breach of the employer-employee relationship, the conduct was wilful, there was a

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ Digest of Benefit Entitlement Principles.

causal relationship between the alleged misconduct and the dismissal, and the alleged conduct wasn't an excuse or pretext for the dismissal. If a single criterion is not met, then misconduct can't be found.

[35] The Appellant says that his conduct didn't affect the employer-employee relationship, because he kept his job during the court proceedings, when he pleaded guilty, and when the judge handed down his sentence. It wasn't until the case was publicized on or about July 5, 2022, that he was let go. So, the media coverage of the sentencing decision is what led to his dismissal, not his conduct. The employer didn't tell the Commission that it had told the Appellant that he would be let go if the case was publicized. During that meeting, he was alone with the employer.

[36] In addition, the employer didn't mention that, when it learned that he had pleaded guilty, it suspended him for a week for investigative purposes. After that, the employer let him work from home.

[37] The Appellant also enjoyed all the same benefits as other employees during the legal process.

[38] The employer says that it followed its lawyers' advice before letting the Appellant go. The steps it initially took were due to the presumption of innocence during the court proceedings. After the Appellant was found guilty, the employer was convinced he would be sentenced to incarceration. It just had to wait for the outcome of the case, as advised by the lawyers. That isn't what happened. The Appellant received a conditional discharge. Did the employer act correctly? Was it lenient in dealing with the situation? Was it justified in letting the Appellant go?

[39] It isn't for me to determine these things. There are specialized tribunals for dealing with the employer's behaviour. I have to decide whether what the Appellant did—which was to commit a criminal act—is misconduct. The loss of his job is related to what he did. I have to consider his behaviour, not the employer's. If I don't have to

decide that dismissing a claimant was too harsh a measure,¹² I don't have to address how the employer handled the Appellant's file.¹³

[40] I also want to point out that I am not bound by the Commission's Digest. I am bound by the *Employment Insurance Act* (Act) and the decisions of higher courts.

[41] With this in mind, and taking the context into account,¹⁴ the Appellant must have known or should have known that, if he committed a criminal act, he could possibly be let go because of that.

[42] The Federal Court of Appeal has held that it is irrelevant that the policy isn't in any written employment contract; it may be express or implied and may relate to a concrete or more abstract requirement.¹⁵ In the Appellant's case, he signed the employer's policy. He must have known that committing a criminal act went against company values. In fact, it was likely that his conduct would have serious consequences.¹⁶

[43] Moreover, in *Mishibinijima*,¹⁷ the Federal Court of Appeal reiterated that an indictable offence that results in a conviction is misconduct within the meaning of the Act:

In *Brissette, supra*, this Court again considered the meaning of the word "misconduct". At paragraphs 10 and 12 of his Reasons, Mr. Justice Létourneau wrote the following:

10. Moreover, we have no hesitation in concluding that what he did, which was to commit a summary conviction or indictable offence and resulted in a conviction under the Criminal Code, is misconduct within the meaning of subsection 28(1) of the Act. The misconduct referred to in that section may manifest itself in a violation of the law, of a regulation or of an ethical rule, and may mean that an essential condition of the employment

¹² See *Canada (Attorney General) v Caul*, 2006 FCA 251.

¹³ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102; and *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁴ See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

¹⁵ See *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at para 25.

¹⁶ See *Canada (Attorney General) v Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 FC 329.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII).

ceases to be met, resulting in dismissal. Such a condition may be express or implied and may relate to a concrete or more abstract requirement.

[44] In the Appellant's case, he committed a criminal act. His dismissal is related to his actions. If he hadn't committed a criminal act, the employer would not have let him go. In my view, morally speaking, his actions broke the relationship of trust with his employer. He caused his unemployment by committing a criminal act. He can't avoid responsibility by citing the employer's behaviour.

[45] So, I find that the Commission has proven that the Appellant was let go because of misconduct. It has shown that he was alleged to have committed a criminal act, that he committed that criminal act, and that the employer let him go because of that criminal act.

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

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

Conclusion

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

[48] This means that the appeal is dismissed.

Manon Sauvé

Member, General Division – Employment Insurance Section