Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1442

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (499979) dated August 24, 2022 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	December 8, 2022
Hearing participants:	A. M. Appellant R. S. Witness
Decision date:	December 12, 2022
File number:	GE-22-3116

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has not 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 not disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant worked as a bartender for almost 12 years and he lost his job. The Claimant's employer said that he was let go because he engaged in sexual harassment in the workplace.

[4] The Claimant does not dispute that this is why he lost his job. The Claimant says that there was no sexual harassment because he was in a relationship with the person and it was the accepted culture at work. The Claimant also says there is no misconduct as he had no reasonable way to know that he may lose his job because this was accepted behaviour at work.

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

Matter I have to consider first

The Claimant requested an earlier hearing date

[6] The Claimant's hearing was scheduled and the Claimant requested to have an earlier hearing date. The Claimant was accommodated and an earlier hearing date was scheduled.

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

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 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 said that he did not comply with the workplace sexual harassment policy. The Claimant does not dispute that he touched a co-worker's ("the complainant") backside. I see no evidence to contradict this. The Claimant's dispute is about whether the reason for his job loss is misconduct. The Claimant says that the culture at work was one where employees regularly engaged in hugging, kissing, and touching. The Claimant disputes that it is misconduct as this has been the culture for the entire time he worked there.

[10] I find that there was an accepted culture at work of touching that would have come within the company's sexual harassment policy. Namely: kissing, hugging, and slapping backsides. The sexual harassment policy states[2]:

> sexual harassment includes unwelcome sexual advances, requests for sexual favours, or any other visual, verbal or physical conduct of a sexual nature when…:
>
> c) the harassment has the purpose or effect of unreasonably interfering with the associate's work performance or creating an environment that is intimidating, hostile or offensive to the associate.

[2] See GD3-26.

The policy later gives examples and says:

> The following are examples of conduct that would be considered sexual harassment:…
>
> 3. Physical – unwanted physical contact including touching, interfering with an individual's normal work movement or assault.

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

[11] The reason for the Claimant's dismissal is not misconduct under the law.

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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 law.[5]

[13] 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.[6]

[14] 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.[7]

[15] The Claimant had worked for the employer for almost 12 years. The Claimant does not recall signing any Harassment Policy.[8] Even if he did, the Claimant says that

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See GD3-26 employer's harassment policy.

there was a culture at work that included many employees regularly engaging in hugging, kissing, and slapping each other's backsides.

[16] The Claimant says that he was in a casual sexual relationship with the complainant. The Claimant says that this lasted during his entire time that he worked for the employer. The Claimant submitted text messages and a video to demonstrate their personal relationship.[9] There is no evidence to contradict this. I accept the Claimant's testimony that he had a personal relationship with the complainant.

[17] On January 7, 2022, the Claimant says that he and the complainant were working that night. The Claimant was bartending and the complainant was working on room service orders. The Claimant says that it is not part of his job to bring drinks back to the room service area, but he does so anyway to make things easier on other staff. On this night the Claimant says that the complainant was agitated and raising her voice at people. The Claimant says that the complainant said something about the drinks and was wondering where they were. The Claimant says that he touched the complainant's backside and pointed to where the drinks were. The Claimant says that at the end of the night the complainant hugged him.

[18] The Claimant says that this is typical normal behaviour at his workplace. He says that it has been this way the entire time he has worked there. The Claimant says that the complainant regularly engaged in the same behaviour.[10] He says that there was regular and frequent kissing, hugging and slapping of backsides. He says that even management engaged in this behaviour. The Claimant says that the Director of Food and Beverage engages in this conduct and has seen him and the complainant engaging in the behaviour. The Claimant says there were never warnings for himself or anyone else that he was aware of.

[19] The Claimant says that after he was told that the complainant lodged a complaint with management he told them to investigate video footage from the last two weeks.

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[9] See GD3-44 to 3-47 and GD-10 (video).
[10] See GD2-2.

The Claimant says that his employer would have discovered the complainant kissing him.

[20] The Claimant worked with the complainant on January 8, 2022 and on January 9, 2022. Around January 9, 2022, the Claimant became aware of the complaint lodged against him.

[21] The Claimant says that the complainant has never said to him in all the time they have worked together that she did not want him to engage in this behaviour. The Claimant says their relationship outside of the workplace also shows that this was not unwanted behaviour.

[22] The Claimant says that the complaint was a complete shock to him. He says that there was an investigation and that he was suspended from his duties. The Claimant says that he has never disputed that he touched the complainant. However, the Claimant disputes that he was ever given a warning for this.[11]

[23] The Commission found that the Claimant had previously been warned for a similar incident in March 2021.[12] However, the records from conversations with the Human Resources (HR) manager do not show this.[13] The HR manager told the Commission that there had been a prior incident in March 2021 in which a co-worker had complained to a manager and the manager did not follow protocol so it never reached the HR department. The Commission requested that the employer provide them with any supporting documentation. None was provided.[14] The Claimant says that the HR manager was not working for the employer in March 2021 and therefore did not have first-hand information.[15] The Claimant denies that there was any previous sexual harassment-type conduct for which he received a warning.

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[11] See GD3-28 Disciplinary Action Form dated January 19, 2022.
[12] See GD4-1.
[13] See GD3-23 and GD3-37.
[14] See GD3-38.
[15] See GD12-2.

[24] The Claimant says that the only time he has received a warning was for something completely unrelated. He says that while he was off-duty he was drinking at the bar.[16] He says that he did not know that this was not permissible. He was told it was and was given a warning. He says that he never engaged in that conduct again.

[25] On balance, I prefer the Claimant's explanation about the warning. I prefer his explanation because the person that the Commission interviewed was not employed with his workplace at the time of the alleged event. The employer did not provide any documentation to substantiate that the Claimant was given any kind of warning. Further, the Claimant gave under oath testimony regarding the warning.

[26] The Claimant had several witnesses but before they could testify they had to leave to go to work or leave for other appointments. The Claimant provided many statements of support that expressed that the behaviour the Claimant engaged in was common in the workplace and no one was fired for it.[17]

[27] The Claimant's witness, R. S., also testified. R. S. has worked for the employer for 23 years. He worked there the entire time that the Claimant did. R. S. is familiar with the Claimant and with the complainant. R. S. testified that there is a culture of hugging, kissing and playing around. R. S. testified that he saw the complainant engage in this type of behaviour with frequency. R. S. testified that the complainant not only engaged in this type of conduct with the Claimant but he also saw her frequently engaging in the same behaviour with others.

[28] For misconduct to be proven the Commission must show, on a balance of probabilities, that the Claimant knew or ought to know that there was a real possibility that he might be fired for the conduct in question. I do not find, on a balance of probabilities, that the Commission has established that the Claimant knew or ought to have known that he could be dismissed.

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[16] See GD3-39.
[17] See, for example, GD2-4; GD2-5; GD2-7; and GD6-5.

[29] The Claimant has never denied touching the complainant's backside. I accept this as fact as there is no evidence to the contrary.

[30] I find that the Claimant has established, on a balance of probabilities, that there was a culture of sexual touching (hugging, kissing, slapping backsides) in his workplace. I find that the Claimant's testimony and his witness's testimony support this. I also find that the Claimant's letters of support by co-workers corroborate this. Further, the Commission does not have any information to the contrary that this was not culture at the Claimant's workplace. As such, I find that there was an acceptance, and tolerance, by the Claimant's employer of this type of behaviour.

[31] I find that, on a balance of probabilities, the Claimant could not have known that by touching the complainant's backside that he was infringing on his employer's policy. I make that finding based on the Claimant's under oath testimony along with his witness's testimony and supporting documentation. I find that there was an accepted culture at his work of this type of behaviour. I find that this type of behaviour was not isolated and that the complainant and his supervisor engaging in similar conduct would have made the conduct appear tolerated.

[32] I find that, on a balance of probabilities, the Claimant could not have reasonably understood that this commonplace behaviour would be putting his employment at risk. As a result, I find that the Commission has not proven that the Claimant's behaviour amounted to misconduct within the meaning of the EI Act.

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

[33] Based on my findings above, I find that the Claimant did not lose his job because of misconduct.

Conclusion

[34] The Commission has not proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is not disqualified from receiving EI benefits.

[35] This means that the appeal is allowed.

Elizabeth Usprich

Member, General Division – Employment Insurance Section