



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *W. C. v Canada Employment Insurance Commission*, 2019 SST 253

Tribunal File Number: GE-18-2691

BETWEEN:

**W. C.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: John Gillis

HEARD ON: February 15, 2019

DATE OF DECISION: February 20, 2019

## **DECISION**

[1] The appeal is allowed.

## **OVERVIEW**

[2] The Appellant, a hotel restaurant dishwasher, worked for his employer for over a decade. His employer accused the Appellant of leaving work without permission. The Appellant alleges that he had his supervisor's permission to leave work early.

[3] The Appellant applied for benefits. The Canada Employment Insurance Commission (Commission) determined that the Appellant was disqualified from receiving regular employment insurance benefits, under section 30 of the *Employment Insurance Act* (Act), because he lost his employment due to his own misconduct. The Appellant requested a reconsideration and the Commission maintained its initial decision. The Appellant appealed to the Tribunal.

[4] The Tribunal finds that the Appellant lost his employment because he left work. The Tribunal also finds that the Appellant believed he had permission to leave work and so the alleged misconduct was not wilful. The Tribunal finds that the Appellant is not disqualified from receiving regular employment insurance benefits because of his losing his employment.

## **ISSUES**

[5] The issues to be determined are:

Issue #1 – Why did the Appellant lose his employment?

Issue #2 – Did the Appellant commit the conduct that led to his loss of employment?

Issue #3 – If so, does the conduct constitute misconduct?

## **ANALYSIS**

[6] A claimant can be disqualified from receiving employment insurance benefits if they lost their employment because of their misconduct. It is important to keep in mind that the purpose of

employment insurance benefits is to compensate workers who involuntarily lost their jobs and are unable to work (*Canada v. Gagnon* [1988] 2 SCR 29).

[7] The Commission bears the burden of proving that the loss of employment was because of a claimant's misconduct. This burden of proof is on a balance of probabilities, which means that the facts or events are more likely than not to have occurred as described.

[8] The Tribunal does not have to determine whether the dismissal was justified. Rather, the Tribunal's role is solely to determine whether a claimant's conduct amounted to misconduct within the meaning of the Act (*Canada (A.G.) v. Marion*, 2002 FCA 185).

### **Issue 1: Why did the Appellant lose his employment?**

[9] The Commission provided evidence that the Appellant lost his employment because the Appellant left his work without approval from his supervisor. The Appellant's supervisor advised the Commission that she dismissed the Appellant because he walked out without approval (GD3-27).

[10] The Appellant admitted that the reason he lost his job because he was accused of not getting permission to leave work before his scheduled break on a single occasion. This admission was in his initial application for benefits (GD3-8, GD3-10), his Request for Reconsideration (GD3-35) and his statement to the Commission (GD3-25). The Appellant testified that he was fired from his job because his employer alleged that he left for his lunch break early.

[11] Accordingly, the Tribunal finds that the Appellant lost his employment because he was accused of leaving work on one occasion without approval from his supervisor.

### **Issue 2: Did the Appellant commit the conduct that lead to his loss of employment?**

[12] The Tribunal finds that the Appellant did not commit the conduct that the Commission alleges he did. In particular, the Tribunal finds that the Appellant did not leave his work without approval from his supervisor. Rather, the Tribunal finds that the Appellant had prior approval from his supervisor to leave work early.

[13] There must be sufficiently detailed evidence to know whether the Appellant acted in the manner that he is accused of, and then, a determination whether this behaviour is considered misconduct (*Joseph v. Canada (Attorney General)*, A-636-85).

[14] The Commission's evidence is that the Appellant requested time off and it was not approved. The Appellant's supervisor advised the Commission that the Appellant had an appointment at 11:00 a.m on June 13, 2017 and asked for time off to attend the appointment. The Appellant's supervisor advised that this request was made the week before the appointment and that she had refused the Appellant's request (GD3-27).

[15] The Appellant's supervisor advised that on June 13, 2017 she arrived at work at approximately 10:30 a.m. and found that the Appellant had left without approval. (GD3-36). The Appellant's supervisor further advised that she met with the Appellant in the afternoon of June 13, 2018 and advised him that he was dismissed for leaving work without approval.

[16] The Claimant testified that he did submit a request to attend his appointment on June 13, 2017 the week before the appointment. The Claimant testified that he submitted a written request but that it was lost by his employer so he immediately submitted another written request. The Claimant testified that the week before June 13, 2017 he passed his second written request directly to his supervisor. The Appellant testified that he told his supervisor that his appointment was at the local police station. The Appellant testified that the local police station was approximately a 20 minute walk from his work.

[17] The Appellant testified that his supervisor told him that she would seek approval from the employer for the Appellant's absence but that she would drive the Appellant to his appointment. The Appellant testified that his previous requests to be absent from work were for holidays or medical appointments. The Appellant would learn if his previous absences from work were approved by checking his weekly schedule. The Appellant testified that if a request to be absent was approved then he would not be assigned a shift for the requested day. The Appellant testified that he had never before requested to be absent for a portion of a scheduled shift.

[18] The Appellant testified that on June 12, 2017, he attended work only to discover that he had been given the day off. The Appellant testified that he asked his supervisor why he was not

scheduled to work and she advised him that he had asked for the time off. The Appellant denies that he requested time off on June 12, 2017.

[19] The Appellant testified that on June 13, 2017, he was scheduled to work from 8:00 a.m. to 11:00 a.m. and then from 1:00 p.m. to 3:00 p.m. The Appellant testified that he worked from 8:00 a.m. to 10:30 a.m. when he punched out and went to find his supervisor so she could drive him to his appointment. The Appellant testified that the hotel front desk staff did not know where his manager was so the Appellant left the hotel at 10:40 a.m. to walk to the police station. The Appellant completed his appointment and returned to the hotel before his afternoon shift began at 1:00 p.m.

[20] The Appellant testified that upon his return to work he went to see his supervisor to advise her of his return. The Appellant testified that his supervisor then advised him that he left work without authorization and that she would contact him later that day with his reprimand. The Appellant's supervisor eventually advised the Appellant that he had lost his job because he left work without approval.

[21] While the Appellant's supervisor advised the Commission that the Appellant was not approved to leave work, the supervisor also advised the Commission that she arrived at work on June 13, 2017 an hour early, at 10:30 a.m., to drive the Appellant to his appointment (GD3-36). The supervisor's arrival at work an hour early coincides with the Appellant's testimony that his supervisor had offered to drive the Appellant to his appointment and that the Appellant attempted to find his supervisor before leaving to walk to his appointment.

[22] Based on the evidence before the Tribunal, namely the Appellant's testimony and the statements made by the Appellant's supervisor to the Commission, the Tribunal finds that the Appellant had approval to leave work. Even if there was a misunderstanding as to if the Appellant could leave work, such a simple misunderstanding could not be the basis of the Appellant's dismissal (*Canada (A.G.) v. St.-Laurent*, A-440-83). Despite the finding on the issue of the approved absence, the Tribunal will address the issue of whether the Appellant's actions constitute misconduct.

### **Issue 3: Does the conduct constitute misconduct?**

[23] There will be misconduct where the conduct of a claimant was wilful, in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where a claimant knew or ought to have known his or her conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility (*Canada (A.G.) v. Lemire*, 2010 FCA 314).

[24] While there is no doubt that the Claimant's action of leaving work was conscious and deliberate because he readily admits that he intentionally left work to attend an appointment, the Tribunal has found that the Appellant had his supervisor's approval to leave work. The Tribunal must determine whether the Appellant knew, or ought to have known, there was a real possibility that his actions would lead to his dismissal.

[25] The Appellant stated that he did not believe that written approval was required for him to be absent from work because he would only be gone for 30 minutes before his break. The Appellant testified that his supervisor told him that she would drive him to his appointment. The supervisor advised the Commission that she arrived early to drive to Appellant to his appointment. The Appellant's supervisor also advised the Commission that the Appellant had never before left work without permission.

[26] The Appellant testified that he knew of other co-workers who had failed to show up for work. The Appellant testified that it was the Appellant's understanding that these co-workers received three warnings from the employer before losing their job.

[27] Based on the evidence before it, namely that the Appellant left work with verbal approval, that he had never left work without permission before, and that co-workers received warnings for similar conduct before being dismissed, the Tribunal finds that the Appellant could not have known that there was a possibility that his actions would lead to his dismissal.

[28] The evidence does not support a finding that the Appellant's alleged conduct is misconduct and caused his loss of employment. Therefore, there is not a causal relationship between the alleged misconduct and the loss of employment. (*Canada (A.G.) v. Cartier*, 2001 FCA 274; *Smith v. Canada (A.G.)*, A-875-96; *Canada (A.G.) v. Nolet*, A-517-91).

[29] Accordingly, the Appellant is not subject to a disqualification under section 30 of the *Act*.

**CONCLUSION**

[30] The appeal is allowed.

John Gillis

Member, General Division - Employment Insurance Section

HEARD ON:	February 15, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	W. C., Appellant