



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: D. F. v Canada Employment Insurance Commission, 2019 SST 867

Tribunal File Number: GE-18-3431

BETWEEN:

**D. F.**

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: Angela Ryan Bourgeois

HEARD ON: February 4, 2019

DATE OF DECISION: March 1, 2019

## **DECISION**

[1] The appeal is dismissed. The Canada Employment Insurance Commission (Commission) has proven that it is more likely than not that the Claimant lost his job because of his misconduct.

## **OVERVIEW**

[2] The Claimant, D. F., had worked as a X for X for over seven years when his employer put him on leave.

[3] The Commission determined that the Claimant had been suspended from work because of his misconduct and disentitled him from benefits under section 31 of the *Employment Insurance Act* (Act).

[4] I must decide if the Claimant was suspended from his job, and if so, if the conduct that led to his suspension is misconduct under the Act.

## **ISSUES**

[5] Was the Claimant suspended from his job?

[6] Why was the Claimant suspended?

[7] Is the Claimant's failure to go to work and perform his duties misconduct under the Act?

## **ANALYSIS**

[8] If the Commission proves that it is more likely than not that the Claimant is suspended from his job because of his misconduct then he will not be entitled to receive benefits until:

(a) the suspension ends;

(b) he loses or voluntarily leaves the job; or

(c) he accumulates enough hours of insurable employment with another employer to qualify for benefits.<sup>1</sup>

**Was the Claimant suspended from his job?**

[9] Yes. I find that the Claimant was suspended from his job because he did not have a choice to stay employed and he has a job to return to when he is able.

[10] I find that the Claimant did not have a choice to stay employed because:

- a) his direct supervisor told the Commission that she personally placed him on a leave of absence and that he did not have a choice in the matter;
- b) the Claimant's request for reconsideration stated that he was "placed" on leave, which implies he did not have a choice; and
- c) the X manager, G. F., testified that the Claimant did not have a choice as to whether he took a leave.

[11] I find that the employer and the Claimant's intention is for the Claimant's leave to be temporary and that he will be able to return to his employment should he meet the employer's conditions because:

- a) his record of employment shows that he is on a leave of absence which implies that his leave is temporary;
- b) the X manager testified that the Claimant can return to work in August 2019;
- c) the employer's September 13, 2018 letter states that they are confident that the Claimant will be able to return to work in one year;
- d) the employer's September 21, 2018 letter states that the Claimant has a position waiting for him; and

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<sup>1</sup> This is a disentitlement from receiving benefits under section 31 of the Act. The onus is on the Commission to prove that this section applies to the Claimant. See *Minister of Employment and Immigration v. Bartone*, A-369-88.

- e) the Claimant indicated in his request for reconsideration that he has a job waiting for him when he is in a position to return.

[12] I considered the Claimant's application for benefits and his initial statements to the Commission that he took a leave of absence because of family issues. However, I find it more plausible that he was forced to take a leave, or in other words, was suspended from his work. I prefer the evidence set out above to the Claimant's initial statements because it is consistent and provided from three different people for the employer.

### **Why was the Claimant suspended?**

[13] I find that the Claimant was suspended from his job because of poor attendance and failure to do his work duties. The letters from the employer state that his "performance was less than what we needed and expected from his position," and that he failed to perform his designated duties. The Claimant's direct supervisor told the Commission that the Claimant had poor attendance at work, which affected his ability to do the job.

[14] According to the Commission's notes, the Claimant's direct supervisor, reported that the Claimant was not performing his work duties because of problems at home, he had lost his driver's licence, he was drinking more, and he was not going to work. She stated that she simply needed him to show up for work and perform his duties.

[15] I find that the Claimant had problems going to work and fulfilling his work duties because he did not have a driver's licence. Both the Claimant and the X manager testified that his problems at work and at home were because he lost his driver's licence. The Claimant testified that not being able to drive affected his ability to perform his work duties, caused him to miss work, and caused conflicts between him and his wife, which also affected his work.

[16] The X manager testified that the Claimant was not dismissed for any one incident, but that the Claimant had problems fulfilling his duties because he could not drive. He explained that driving is a requirement and that since the Claimant lost his licence he was missing work and was not able to properly perform his duties. The X manager testified that the employer had no problem with the Claimant trying to fulfill his duties by having others drive him. Although the

Claimant tried to work by having others drive him, he was unable to fulfill his duties without being able to drive himself.

[17] I find that it is more likely than not that the Claimant was not suspended as a direct result of his losing his driver's licence because he lost his licence in March 2018 and was not suspended until August 2018. There is no evidence in the file that the employer only became aware that he lost his licence in August. Further, the X manager confirmed that the employer was okay with letting the Claimant continue in his employment without a driver's licence as long as he was able to get the job done.

[18] I find that the Claimant's absenteeism was not because of his drinking because the X manager testified that the Claimant's drinking was not an issue and the Claimant testified that he drank only on his own time and it did not affect his ability to work.

**Is the Claimant's failure to go to work and perform his duties misconduct under the Act?**

[19] Yes. The Claimant's failure to go to work and perform his duties is misconduct under the Act for the following two reasons:

- a) He could have reasonably foreseen that if he did not go to work and perform his duties that he could be suspended from work. I find that his failure to improve the situation was deliberate and willful, and as such, is misconduct under the Act.
- b) He could have reasonably foreseen that he would have problems getting to work and performing his duties if he did not have a driver's licence, which is an essential element to his employment. I find that his conduct that led to the loss of his driver's licence through a conviction under the *Criminal Code* was reckless as to approach willfulness, and as such, is misconduct under the Act.

[20] To find that the Claimant's suspension was because of his misconduct, I must be satisfied that the misconduct is a breach of such a scope that the Claimant could normally foresee that it

would be likely to result in his suspension.<sup>2</sup> There must be a mental element of willfulness in the conduct, or the conduct must be so reckless as to approach willfulness.<sup>3</sup>

[21] The question to be asked is: Did the Claimant believe or was he willfully blind to the fact that he was likely to be suspended if he did not go to work and perform his work duties, even if it was because he had lost his driver's licence?<sup>4</sup>

[22] By its very nature, being employed means that you go to work and that you perform your duties. I find that the Claimant knew or ought to have known that he could be suspended from work if he did not go to work and perform his work duties because failing to do so is a breach of two of the most basic terms of employment.

[23] I find that the Claimant knew that his job was at risk if he continued to miss days and not fulfill his work duties because:

- a) his direct supervisor told the Commission that she had spoken to the Claimant many times and told him exactly what he needed to do: show up and do the work;
- b) his direct supervisor stated that she had prepared an agreement setting out what the Claimant needed to do, and had the Claimant sign it; and
- c) according to the Commission's notes, the Claimant agreed that he had been placed on leave because he was not doing his job.

[24] Given the continued breach of basic terms of employment, the Claimant could have foreseen that his action (or inaction to improve the situation), would result in his suspension. Because the Claimant knew that his job was at risk if his attendance and performance did not improve, I find that his action in not improving the situation was both deliberate and willful, and as such, amounts to misconduct under the Act.

[25] I accept the Claimant's evidence that his inability to go to work and perform his duties is related to losing his driver's licence. He testified that he lost his driver's licence because of a

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<sup>2</sup> *Canada (Attorney General) v. Langlois*, [1996] F.C.J. No. 241

<sup>3</sup> *Canada (A.G.) v. Tucker*, A-381-85

<sup>4</sup> *Locke v. Canada (Attorney General)*, 2003 FCA 262

conviction under the *Criminal Code*. He did not dispute that he did the conduct that led to his conviction. As such, there is a direct link between the Claimant's suspension from work and his conviction under the *Criminal Code*.

[26] I find that his conduct that led to the loss of his driver's licence, for which he was convicted under the *Criminal Code*, was reckless to the point of approaching willfulness because he could have reasonably foreseen that he would have problems getting to work and fulfilling his work duties if he did not have a driver's licence. Because driving is a basic part of his employment, as indicated by the Claimant, his direct supervisor, and the X manager, by losing his driver's licence he knowingly put himself in a position where, as he stated, he could not go to work and fulfill his work duties. I find that this is misconduct under the Act.

## CONCLUSION

[27] The appeal is dismissed. The Claimant is suspended from work because of his misconduct. As such, he is disentitled from receiving benefits until he meets one of the criteria set out in section 31 of the Act.<sup>5</sup>

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

HEARD ON:	February 4, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. F., Appellant

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<sup>5</sup> Section 31 of the Act reads: A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves the employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.