



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. J. v Canada Employment Insurance Commission*, 2019 SST 263

Tribunal File Number: GE-19-335

BETWEEN:

J. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Alison Kennedy

HEARD ON: February 18, 2019

DATE OF DECISION: February 28, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant was dismissed from his job as X. He then applied for employment insurance benefits. The Canada Employment Insurance Commission (Commission) disqualified the Appellant from receiving regular benefits because he lost his employment because of his own misconduct. The Appellant requested a reconsideration of this decision. The Commission upheld its initial decision. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

ISSUES

Issue 1: Why was the Appellant dismissed from his employment?

Issue 2: Did the Appellant commit the conduct that led to his dismissal?

Issue 3: If so, did that conduct constitute misconduct?

ANALYSIS

[3] Claimants are disqualified from receiving benefits if they lose their employment because of misconduct (subsection 30(1) of the *Employment Insurance Act* (Act)). The burden is on the Commission to prove, on a balance of probabilities, that the Appellant lost his employment by reason of his misconduct (*Lepretre v. Canada (Attorney General)*, 2011 FCA 30).

Issue 1: Why was the Appellant dismissed from his employment?

[4] In his dismissal letter, the Appellant's employer noted that his dismissal was a result of:

continued misconduct and inability to comply with company policy and procedures, even after verbal warnings were given, along with written notice on March 19, 2018. Not only did you continue to refuse to take direction from X and engage in verbal confrontations with your supervisors, but you failed to provide required employee

documentation for your employee file. Your behaviour and actions at the X compromised the safety of not only yourself, but other staff and X. Finally, you had failed to show for your shift, with no notice given to your employer or house supervisor, prior to the time you were scheduled [emphasis added].

[5] Based on the dismissal letter from the employer, I find that the Appellant was terminated by his employer for “**continued misconduct and inability to comply with company policy and procedures**” as noted above by the employer in its letter of dismissal [emphasis added]. This is supported by the employer’s statement provided to the Service Canada agent that the Appellant was given three different letters addressing concerns with his employment and spoken to numerous times about different issues they were having with him at work.

Issue 2: Did the Appellant commit the conduct that led to his dismissal?

[6] While the employer stated to the Commission that the “final incident” was the Appellant’s failure to show up for a scheduled shift, the employer’s termination letter is very clear that the Appellant’s failure to show up for a shift was simply one incident in a pattern of what it deemed to be problematic behaviour which led to his termination. However, the Commission has provided very little evidence regarding this alleged pattern of behaviour, focussing instead on his failure to attend one shift.

[7] The letter on file dated March 19, 2018 provided by the employer raises concerns regarding a number of performance issues, and refers to the Appellant failing to follow company protocol, having personal discussions with other staff members, and not contributing adequately to household cleaning. His termination letter also alleges that the Appellant refused to take direction from X and engaged in verbal confrontations with his supervisors, among other concerns. In conversation with the Service Canada agent, the employer noted that several letters had been given to the Appellant outlining their concerns with his performance and that he had been spoken to several times about these issues.

[8] In this case, the final alleged incident which resulted in the Appellant losing his job was his failure to appear for a shift. There is no question that the Appellant failed to appear for this shift – he admits that he did not attend this shift because of personal issues. However, the

Commission focuses almost exclusively on the Appellant's failure to appear for a shift as the reason for his dismissal in this case. However, it is clear based on the letters on file and the Commission's conversation with the employer that this was simply one incident in a larger pattern of problematic behaviour. The Commission has failed to provide any additional evidence or information surrounding any of the other acts or concerning behaviour mentioned in the employer's March 19, 2018 letter or the Appellant's termination letter that led to the employer's assessment of "continued misconduct and inability to comply with company policy and procedures." As such, I do not have adequate information before me regarding the series of incidents and behavioural concerns alleged by the employer that led up to the Appellant's termination to determine whether he committed the conduct for which he was dismissed.

[9] In this case, the Commission has failed to provide adequate evidence regarding the Appellant's ongoing pattern of behaviour noted by the employer, instead focussing only on the Appellant's failure to attend a shift at work. While there is a letter on file dated March 19, 2018 discussing some of the employer's concerns with the Appellant, this letter alone – without important contextual information regarding the incidents briefly referred to in the letter – does not provide adequate information to confirm that the Appellant was engaging in "continued misconduct and an inability to comply with company policy" as alleged by the employer which resulted in his dismissal. As such, there is inadequate information available for me to find, on a balance of probabilities, that the Appellant committed the conduct that led to his dismissal.

[10] In order to determine that there was misconduct, there must be sufficiently detailed evidence to know whether the Appellant acted in the manner that he is accused of (*Joseph v. Canada (Attorney General)*, A-636-85). The burden of proving misconduct is on the Commission. In this case, the Commission has not provided sufficiently detailed information and evidence to demonstrate that the Appellant acted in the manner that resulted in his termination, that is, of "continued misconduct and an inability to comply with company policy."

[11] In making this decision, I am mindful of the comments of the court on the issue of misconduct in *Attorney General of Canada v. Crichlow*, A-562-97:

A finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation and suppositions, and it is for the Commission to prove the presence of such evidence [...].

[12] In this case, I find that the Commission has failed to prove that the Appellant committed the conduct that led to his dismissal, which is, as noted in the Appellant’s termination letter “continued misconduct and an inability to comply with company policy.”

[13] Given that the Commission has failed to prove that the Appellant committed the conduct that led to his dismissal in this instance, I will not consider whether the alleged conduct constituted misconduct.

CONCLUSION

[14] The appeal is allowed.

Alison Kennedy
Member, General Division - Employment Insurance Section

HEARD ON:	February 18, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. J., Appellant