



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. L. v Canada Employment Insurance Commission*, 2019 SST 747

Tribunal File Number: GE-19-2084

BETWEEN:

H. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: June 28, 2019

DATE OF DECISION: July 24, 2019

DECISION

[1] I am allowing the appeal. I find that the Appellant (who I refer to as the Claimant) did not voluntarily leave his job at X (X) when he asked to take vacation shortly after starting work. This means he is not disqualified from receiving his extra employment insurance (EI) benefits based on voluntarily leaving this job.

OVERVIEW

[2] After the Claimant received regular EI benefits, the Respondent (who I refer to as the commission) told him he could get the extra weeks available to claimants in certain regions with high unemployment.¹ The Commission also told him he needed to report if he had left any job between the end of his regular benefits and July 3, 2016, when his extra weeks would begin. He did not report working at X.

[3] The Commission later discovered that the Claimant had worked at this company from June 6, 2016, to June 29, 2016. The Commission looked at why the job ended and decided he had voluntarily left his employment without just cause. Its decision meant that he was disqualified from receiving his extra weeks of benefits and had to repay them.

[4] The claimant appealed the finding of voluntary leaving, submitting that his employer dismissed him when he asked to take off a week for a pre-arranged vacation. He argued that the employer was not satisfied with his work performance and used his vacation request as an excuse to fire him.

PRELIMINARY MATTERS

[5] After the hearing, on July 5, 2019, the Claimant submitted a request for clarification of his overpayment. I referred this question to the Commission. On July 11, 2019, he asked to appeal all issues relating to his overpayment. However, the only matter before me is his appeal of the Commission's decision on voluntary leaving from X.

¹ *Bill C-15*, which came into force on July 3, 2016, allowed claimants who had received regular EI benefits to collect extra weeks of benefits in some economically disadvantaged regions.

ISSUES

[6] I must decide if the Claimant left his job voluntarily, or if the employer dismissed him. If I find that his employer dismissed him, I must decide whether he was dismissed for misconduct under the *Employment Insurance Act* (EI Act).

ANALYSIS

Voluntary Leaving

[7] The law says you cannot receive benefits if you leave your job voluntarily and did not have just cause.² The Commission first has to show it is more likely than not that you left your job voluntarily. You leave voluntarily if you had the choice to stay or to leave.³

[8] If the Commission proves that that you left voluntarily, then it is up to you to prove you had just cause to leave. You can show just cause if, considering all the circumstances, you had no reasonable alternative to leaving when you did.⁴

Misconduct

[9] It may be unclear whether you left your employment voluntarily or your employer dismissed you.⁵ Sometimes an employer decides that a claimant's actions warrant dismissal and it records this as the reason for separation on the Record of Employment (ROE). However, this notation on your ROE does not prove that you were dismissed for misconduct as interpreted under the EI Act.

[10] To prove misconduct, the Commission must first identify the actions that caused your dismissal and show that you committed them.⁶ It then has to show that these actions were wilful

² This is set out at s 30 of the *Employment Insurance Act* (EI Act).

³ *Attorney General of Canada v. Peace*, 2004 FCA 56.

⁴ *Attorney General of Canada v White*, 2011 FCA 190.

⁵ *Attorney General of Canada v Easson*, A-1598-92.

⁶ *Attorney General of Canada v. Larivée*, 2007 FCA 132.

and breached your duty to your employer. You would also have to know, or should have known, that your actions would get you fired.⁷

Did the Claimant leave his job voluntarily?

[11] No. I find that Claimant did not leave his job voluntarily. You leave voluntarily when you have the choice to stay or to leave.⁸ I find that he did not have this choice once the employer dismissed him and refused to take him back.

[12] The employer issued an ROE showing that the Claimant was “dismissed” within his probationary period. The employer reported that he fired the Claimant after he brought up the issue of his vacation. The employer interpreted their conversation to mean that the Claimant had decided to take his vacation anyway even though he was fully aware that company policy did not allow it and he would be fired. The Commission accepted the employer’s account of this conversation, but the Claimant disputes this interpretation of his intentions.

[13] I find it more likely than not that the Claimant gave reliable testimony when he argued that he would not have risked his job to go to a family reunion. I note that his regular benefits had just ended. He was not yet aware that he was eligible to receive extra weeks of benefits since the Commission sent its notification letter on this issue after his last day of work at X.

[14] I find that a language barrier could account for the employer’s conclusion that the Claimant was going to go on vacation anyway, even if it meant losing his job. The Claimant’s language challenges in spoken English could also explain his mistaken belief after his interview that he would be able to take time off despite company policy requiring one year’s service first. I noted at his hearing that his communication skills were limited, even with the assistance of an interpreter.

[15] The company’s written policies also state that no employee can take off time in the summer, which is the firm’s busy season. However, you need to be able to read English to

⁷ *Attorney General of Canada v Lemire*, 2010 FCA 314.

⁸ *Attorney General of Canada v Peace*, 2004 FCA 56.

understand these policies. As noted above, the Claimant's knowledge of the English language is limited.

[16] While the Claimant was unwise bring up the issue of his one-week planned vacation, there is no evidence that he resigned his job. I accept his sworn testimony that when he realized taking a week off would get him fired, he immediately offered to give up his vacation. He testified that did not go on vacation after he lost his job.

[17] Based on these factors, I find the Claimant did not leave his employment voluntarily. His employer dismissed him. As a result, I do not need to decide whether he had just cause for leaving his employment.

Did the employer dismiss the Claimant for misconduct?

[18] No. I find that the action the employer used as the reason for the Claimant's dismissal does not meet the legal test for misconduct under the EI Act.

[19] The Claimant testified that the employer asked him to make a door on the day of his dismissal and was not satisfied with his efforts. When the Claimant later brought up his upcoming vacation, the employer became angry and dismissed him. The Claimant argued that his vacation request was not the real reason for his dismissal. He believes the employer fired him because he could not make a door properly.

[20] I find that the Claimant's testimony throws significant doubt on the reason for his dismissal. To show misconduct under the EI Act, the reason the employer gives must be the real motivation for the dismissal and not an excuse for it.⁹

[21] Even if I accept that the employer fired the Claimant because of his vacation request, I find that this action does not prove misconduct. It was not wilful to make this request even if it annoyed the employer during the firm's busy season. Taking time off without approval would be a breach of company policy and the Claimant's duty to his employer, but I accept his testimony that he told the employer he was prepared not to take the vacation. The company had written

⁹ *Davlut v Attorney General of Canada*, A-241-82.

policies about vacations, but I find it more likely than not that the Claimant's English skills were too limited for him to understand the threat of dismissal until he was actually fired.

[22] I also find, on a balance of probabilities, that the Claimant's language barrier explains the inconsistencies between what he earlier told the Commission and his later statements at his hearing.

[23] The Commission submitted that the Claimant's initial spontaneous declarations were more credible than the statements he made after it refused him benefits.¹⁰ While I would generally agree with this submission, in this appeal I give greater weight to the Claimant's later statements. When he made these statements, he had the assistance of an interpreter and the benefit of face-to-face interactions with me through a videoconference hearing. I consider this testimony more reliable than the statements he initially made in phone conversations with the Commission without the assistance of an interpreter.

[24] Based on these factors, I find that while the employer dismissed the Claimant, he did not dismiss him for misconduct under the EI Act. A disqualification for this reason does not apply.

CONCLUSION

[25] I find that the Claimant is not disqualified from receiving extra weeks of benefits based on his dismissal from X. This means that the appeal is allowed.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	June 28, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	H. L., Appellant

¹⁰ *Bellefleur v Attorney General of Canada*, 2008 FCA 13