



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. M. v Canada Employment Insurance Commission*, 2019 SST 923

Tribunal File Number: GE-19-2359

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: July 30, 2019

DATE OF DECISION: July 31, 2019

DECISION

[1] The appeal is allowed. I find the Appellant did not voluntarily leave his employment. I have also considered whether the Appellant lost his job due to his own misconduct, and find that he did not. The result is that the Appellant is not disqualified from receiving employment insurance benefits.

OVERVIEW

[2] The Appellant, who I will refer to as the Claimant, worked as a delivery truck driver. When he went into work one day, he had an argument with a colleague that led to his employer believing that he quit his job. The Claimant submits that he did not quit his job, but was prevented by the employer from returning to work. The Claimant made a claim for employment insurance (EI) benefits, but the Canada Employment Insurance Commission, which I will refer to as the Commission, determined he was disqualified from receiving EI benefits because he voluntarily left his employment without just cause. The Commission upheld its decision after reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

ISSUES

[3] **Issue #1:** Did the Claimant voluntarily leave his employment?

[4] **Issue #2:** If so, did the Claimant have just cause for voluntarily leaving his employment?

[5] **Issue #3:** If the Claimant did not voluntarily leave his employment and was instead dismissed, was it due to his own misconduct?

ANALYSIS

[6] The *Employment Insurance Act* contains two distinct notions that result in a disqualification from benefits: voluntary leaving and misconduct.¹ Both notions are linked as it may not be clear whether the unemployment resulted from the employee being dismissed due to misconduct or from the employee's decision to leave. Since the legal issue is a disqualification, it

¹ *Employment Insurance Act*, section 30

is open to me to make a finding based on either of the two grounds for disqualification.² Put another way, where the reason for the Claimant's separation from his employment is unclear, I have the jurisdiction to decide whether it is based on voluntary leaving or misconduct as it does not matter who took the initiative in severing the employment relationship because both issues relate to a disqualification.³

[7] The burden is on the Commission to prove the Claimant voluntarily left his employment; if the Commission fails to prove the Claimant voluntarily left his employment, the burden remains with the Commission to prove the Claimant lost his employment because of his own misconduct.⁴

Issue 1: Did the Claimant voluntarily leave his employment?

[8] When determining whether a claimant voluntarily left his employment, the question to be answered is: did the employee have a choice to stay or leave?⁵

[9] The Claimant worked as a delivery truck driver. He made a claim for EI benefits effective March 3, 2019. He stated on the initial claim form that he was dismissed from his employment on March 1, 2019, because the employer's sales person told him to leave immediately or she would call the police. He submitted that he could not return to work because of that threat.

[10] The Claimant explained on the initial claim form that he went to work on Friday, March 1, 2019, and encountered a colleague who made comments that caused a verbal argument. The Claimant stated he removed himself from the situation and went back outside to prepare his truck for deliveries and get a coffee. He submitted that when he walked back into the factory, the employee who had been part of the verbal argument was speaking to the sales person, and the sales person told the Claimant that he should leave or she would call the police. The Claimant submitted that he left and contacted the owner on the following Monday, who was under the impression that the Claimant quit his job. The Claimant submitted that he explained the situation to the employer and said that he did not quit, and the employer said he would look into the issue and get back to

² *Canada (Attorney General) v. Borden*, 2004 FCA 176

³ Both issues relate to disqualification under section 30(1) of the *Employment Insurance Act*. This is also reflected in the Court's findings in *Canada (Attorney General) v. Easson*, A-1598-92 and *Canada (Attorney General) v. Desson*, 2004 FCA 303

⁴ *Canada (Attorney General) v. White*, 2011 FCA 190; *Canada (Attorney General) v. Bartone*, A-369-88

⁵ *Canada (Attorney General) v. Peace*, 2004 FCA 56

him. The Claimant said he did not hear from the employer again, and was shocked by the situation because he had no issues with the employment prior to this. The Claimant stated that once he was threatened with the police being called, he did not feel he could return to the workplace.

[11] The Commission spoke to the owner of the employer company on April 9, 2019. The owner stated that the Claimant quit, and was not dismissed. He stated that he was not present on March 1, 2019, but was told by three employees that the Claimant quit and stated that he would finish the day but would not come back. The owner was unsure whether the Claimant had made a statement about quitting before or after the threat to call the police was made, so he transferred the Commission agent's call to the sales person involved in the March 1, 2019, issue.

[12] The sales person spoke to the Commission and stated that the Claimant came into her office yelling and said, "I am out of here," and then left. She stated she was, "under the impression that the client had quit the job," but he later returned with a coffee in hand and continued yelling. The sales person stated the Claimant said he was not going to do anything she told him to do, and would finish the day but should not be expected to return on Monday. The sales person stated the Claimant continued yelling and was getting closer to the colleague he initially started arguing with, so she intervened and said she would call the police if he did not leave.

[13] The Commission spoke to the Claimant on April 9, 2019, after speaking with the employer. The Commission noted that the employer's version of events was quite similar to the Claimant's. The Commission asked the Claimant if he went into the office and spoke to the sales person after the argument with his colleague and said, "I am out of here," and left. The Claimant confirmed that was accurate. The Commission then asked if the Claimant returned approximately 30 minutes later and went into the office, where the sales person and other employee were speaking. The Claimant replied that that was also true, and said he tried to speak with the employee to explain the situation, but the other employee was not willing to listen. At this time, the Claimant stated that the sales person told him to leave or she would call the police. The Commission stated the employer took the Claimant's statement that he was, "out of here," to mean that he quit, which the Claimant said was not his intention. The Commission stated that, "I am out of here," is equal to, "telling your employer that you have quit," and also noted that the behaviour he was exhibiting in the workplace was unacceptable.

[14] On April 20, 2019, the Commission issued a decision finding the Claimant was disqualified from receiving EI benefits because he voluntarily left his employment without just cause. The Claimant requested reconsideration on April 12, 2019, stating that his words were taken out of context and the Commission relied on false testimony from the employer. The Claimant also stated that he did not tell anyone that he quit the job, and had text messages with his employer proving that he was surprised by the statement that he quit. He stated that he had a short argument with a co-worker and decided to remove himself from the situation by going outside, but when he returned he was threatened with the police being called. He stated he was scared by the threat of being arrested.

[15] The Claimant submitted copies of text messages between himself and the owner to the Tribunal, which show that he communicated with the employer on March 7, 2019, at 1:07pm asking about termination pay. The employer responded that he was not entitled to termination pay because he quit. The Claimant replied that he, “never quit,” and instead wanted to do his deliveries but was told to leave or the sales person would call the police. The Claimant told the employer that he would not come back to work and risk being arrested. The employer responded that he would “look into it,” and added, “you stated that you would finish the Friday and not be returning on Monday. That is quitting.” The Claimant replied that he “never said that.”

[16] The Commission spoke to the Claimant on May 21, 2019, during the reconsideration process. The Claimant explained that he had asked for the day off on March 1, 2019, but was told he had to work because the other delivery driver was off on that day. The Claimant stated he walked into the warehouse and a co-worker, who was senior to him because the manager was off on leave, told him to speak to the sales person in the office regarding a delivery. The Claimant stated that he replied, “I’m not asking her anything,” and continued towards the office. At the hearing, the Claimant testified that the sales person was the only person in the office so he thought it was clear that he was going to speak with her, and that he was joking. The Claimant stated to the Commission that the co-worker then said, “then why the [expletive] did you come in to work then?” The Claimant stated that he was surprised and said, “what?” to which the co-worker repeated his statement. The Claimant said that he disregarded this and continued into the office, but was frustrated and said, “I’m out of here.” He stated that the sales person was in the office and did not know what had happened with the argument. The Claimant added that he usually joked

around with his colleagues, and testified that he recognized he did not handle the situation as well as he could have, but felt it best to go outside and cool off instead of escalating the argument with a colleague.

[17] The Claimant told the Commission that he then left the office to go outside, but the co-worker asked him to come over and speak to him, and the Claimant said that he did not want to speak to anyone and continued outside. The Claimant stated that the co-worker again asked him to come over and when he did not respond, the co-worker yelled an expletive. The Claimant stated that he went to his car and drove to a restaurant for coffee, where he considered going home to cool off but decided to continue because he had already prepared his truck and would finish the day, so he returned to work. The Claimant stated that he walked back into the warehouse and the co-worker was speaking to the sales person. The Claimant stated that he tried to speak to the co-worker and explain that he had just been joking, but the co-worker did not want to discuss the issue. The Claimant stated that the sales person then told him to leave or she would call the police.

[18] The Claimant stated that in addition to the co-worker and the sales person, two other employees were also present at the warehouse. The employer obtained statements from one of these employees, as well as the sales person and co-worker involved in the argument. The Claimant testified that one of the statements is from the owner's son so is not, in his view, independent. He added at the hearing that the neutral employee who would have been able to give a fair assessment of what happened did not provide a statement.

[19] The March 27, 2019, statement is from the owner's son and states the Claimant was an hour and a half late for work and did not call or email to advise of his lateness. The dates of the incident are incorrect, as it is noted as having occurred on February 29, 2019. The witness states the Claimant asked the co-worker involved in the incident a question and the co-worker replied that the Claimant should ask the sales person. The witness adds that the Claimant replied by saying, "I'm not answering to anyone today, I'm done." The witness also stated that the co-worker in question asked the Claimant if he quit and the Claimant stated, "I don't know."

[20] The sales person wrote a statement on May 9, 2019, saying she left the Claimant a message at 8:00am on Thursday, February 28, 2019, asking if he was coming to work because his shift started at 7:30am. She stated that when she spoke to the Claimant she told him that he had to call

if he was going to be late or absent and he said he did not want to deal with it and hung up on her. She stated he arrived and punched in at 8:48am. She also stated there was a second instance of the Claimant hanging up on her because he did not want to listen to a change of route. She then stated that on Friday, March 1, 2019, the co-worker involved in the situation told the Claimant to check in and see if there were special instructions for his day. The witness stated the Claimant came into the office and said he, "wasn't putting up with this shit anymore," and walked out. The witness stated the Claimant returned a short time later and said he would finish out the day but should not be expected to return on Monday. The witness stated she told the Claimant not to bother, and to leave or she would call the police.

[21] The co-worker involved in the incident wrote a statement on May 22, 2019, stating the incident occurred on March 28, 2019, and the Claimant was an hour and a half late with no phone call or communication. The co-worker stated that when the Claimant walked by him in the warehouse, the co-worker asked him to verify with the sales person if a purchase order was ready to be picked up and the Claimant replied, "I don't have to answer to nobody." The co-worker states the Claimant then stormed out and when asked where he was going said, "I'm done with this." The witness stated that 20 to 40 minutes later the Claimant returned and said he would complete the day but not to expect him back.

[22] The owner also provided a signed statement, though he was not present at the worksite on March 1, 2019. He states that he asked the employees to write statements immediately, but for the most part they were too busy or forgot, so some of the dates and details may not be correct. The owner states that despite the inconsistencies, it is easy to put together a picture of what happened on "February 28, 2019." The employer states that he would have fired the Claimant if the Claimant had not quit, for misconduct or neglect of duty, but submits the Claimant made several statements where he "terminated himself."

[23] The Commission issued a reconsideration decision on May 29, 2019, upholding its finding that the Claimant was disqualified from receiving EI benefits because he voluntarily left his employment without just cause. The Claimant filed a Notice of Appeal on June 17, 2019, stating he disagreed with the assumption that he quit his job. The Claimant submitted that he "never told anyone that I was quitting at any point and I was told to leave or police would be called." The

Claimant stated that he has a “bad temper” and has learned that it is best to remove himself from situations when he feels they are going to escalate.

[24] The Claimant submitted a further letter to the Tribunal on July 5, 2019, providing a detailed review of the events on March 1, 2019, as he remembers them. The Claimant reiterates much of what he told the Commission on May 21, 2019, including that he made the statement, “I’m out of here.” He adds that the co-worker involved in the situation asked him if he was quitting and he said, “I don’t know, I’ll let you know,” before he walked outside to cool off from the argument. The Claimant stated that when he returned, the sales person was speaking to the co-worker, and when he tried to explain to the co-worker that he was just joking, it became clear that the co-worker would not listen to him. He stated that the sales person said, “and you hung up the phone in my face two days ago too and you don’t do that to me, just leave now!” The Claimant submitted that he tried to respond, but the sales person told him to leave or she would call the police. The Claimant reiterated that he did not quit, and had never received any discipline for any misbehaviour at work.

[25] At the hearing, the Claimant gave evidence consistent with what he stated to the Commission and what was in his July 5, 2019, letter. He stated that he told the sales person, “I’m out of here,” and that he told the co-worker that he did not know if he was quitting and would “let you know.” The Claimant said the argument got heated quickly and he has learned in dealing with anger management issues that the best way to address problems is to remove himself from the situation. The Claimant testified that he could have stopped and talked to the co-worker and perhaps diffused the situation, but in that moment he felt it best that he leave the premises. The Claimant stated that when he learned a letter was put up at the job site directing employees to call the police if he came onto the premises, he could not return to work so he texted the owner of the company. The Claimant stated that he has no prior reprimands or issues at the employment and got along well with everyone, so he was surprised when the co-worker swore at him and asked him why he bothered to show up for work. The Claimant also testified that he did not say, “I’ll finish the day but don’t expect me back on Monday.”

[26] I have reviewed the Record of Employment, and the employer has coded the reason for separation as code E, meaning the Claimant quit. The Commission submits that the Claimant quit when he said he was, “out of here,” and left the job site. It submits that the Claimant changed his

mind and thought he would finish the day, but quit a second time when he told the employer not to expect him to return on Monday.

[27] I find, on a balance of probabilities, that the Claimant did not voluntarily leave his employment. The Claimant did not quit when he stated, "I'm out of here." It was his job to drive a delivery truck and while he was frustrated and left the job site, I find his statements were insufficient to show that he intended to quit and could just as easily have shown that he intended to go outside. The Claimant returned to the job site a few minutes after getting a coffee and continued to prepare his truck for the delivery day, which does not support that he intended to quit. As for the statement that the employer should not expect him to return on Monday, I find on the balance of probabilities that it was not stated. The Claimant testified and gave direct evidence that the statement was not made, which I find is more likely accurate testimony than the statements of the sales person and the co-worker involved in the situation because it was stated to me and is consistent with what the Claimant has stated throughout the investigation process.

[28] I have considered the witness statements and find they are not strong evidence due to numerous inconsistencies. The statements are inconsistent about the dates of occurrences, but also about the contents of the conversations. I also note that all three employee statements state the Claimant was late for work by the same amount of time and failed to notify the employer that he would be late. The first time any lateness was mentioned is in these three statements, as it was not mentioned in the Commission's initial or reconsideration fact-finding, and is disputed by the Claimant, who submits the employees are confusing situations or being untruthful. I prefer the Claimant's direct evidence because the evidence was stated to me and I was able to question and test the evidence, which is not the case with the written statements. For this reason, I have given little weight to the signed witness and owner statements.

[29] I find as fact the Claimant did not have the choice to stay in his employment once the threat of police intervention was made; therefore, I find the Claimant was dismissed from his employment.

Issue 2: If so, did the Claimant have just cause for voluntarily leaving his employment

[30] As I have determined the Claimant did not voluntarily leave his employment, this issue is moot.

Issue 3: If the Claimant did not voluntarily leave his employment and was instead dismissed, was it due to his own misconduct?

[31] Misconduct for the purposes of the *Employment Insurance Act* has been defined as “wilful misconduct,” where the Claimant knew or ought to have known that his conduct was such that it could result in dismissal.⁶ The concept of wilful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional.⁷ To determine whether the misconduct could result in dismissal, there must be a causal link between the Claimant’s misconduct and the Claimant’s employment,⁸ which means the conduct must have been committed by the Claimant while employed by the employer, it must constitute a breach of a duty that is express or implied in the employment contract, and it must have caused the loss of employment.⁹

[32] I note that the signed witness statements from the three employees all say the Claimant was an hour and a half late for work and did not call in with a reason for that lateness. The Claimant testified that he was at work on time on March 1, 2019, and that the employees are confusing different situations. Specifically, he referenced the sales person stating that he was late and hung up on her when they spoke. He testified that there was an instance where he was driving in poor weather conditions and the sales person called to give him routing instructions, but he said he had to go because he could not talk and drive and hung up on her. He submitted that she did not mention being angry about this until March 1, 2019, so he expected she felt disrespected for a while before this incident. He submitted that on the day in question, he was on time and punched into a time clock at 7:00am. The Claimant stated that there is no formal process to follow if workers are going to be late or absent, but generally they are to call in to the office and advise of their issue. I find,

⁶ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36

⁷ *Canada (Attorney General) v. Secours*, (1995) 179 N.R. 132 (FCA)

⁸ *Canada (Attorney General) v. Lemire*, 2010 FCA 314

⁹ *Canada (Attorney General) v. Cartier*, 2001 FCA 274; *Canada (Attorney General) v. Lemire*, 2010 FCA 314

on a balance of probabilities, that the Claimant was not late on March 1, 2019, and there is no evidence that a history of absenteeism or tardiness impacted his termination.

[33] The Commission submitted that the reason that the Claimant gave for being upset and angry was that he did not feel like being at work that day, which it submits is no reason to behave with hostility. I disagree with the Commission's characterization of the Claimant's reason to being "upset and angry." The Claimant did state that he asked for the day off and was told he had to work, and said that he did not particularly want to be at work on March 1, 2019. However, the Claimant's testimony has been consistent that there was no issue until he made a joking statement to a colleague that precipitated an argument and caused him to lose his temper and have to leave the work site.

[34] The Claimant testified that he was shocked that he was fired. He stated that when he started the job, he signed a number of documents but does not know if the employer had a formal code of conduct. He stated there was no training related to a code of conduct or company policies on conduct. He stated that while the co-worker involved in the situation did not have a history of using profanity in the workplace, the environment was casual and they all "joked around." The Claimant stated he had a good relationship with his coworkers, and does not know what happened on March 1, 2019. He stated that the co-worker involved in the argument may have been having a bad day, but the way he responded to the Claimant caused the Claimant to get angry and have to take steps to diffuse the situation.

[35] Misconduct is not defined in the *Employment Insurance Act*, and whether it has occurred is largely a "question of circumstance."¹⁰ I find based on the circumstances in this case that I cannot conclude the Claimant's conduct amounted to misconduct. The Claimant committed the conduct of having an argument with a colleague, and left the premises for a short break. I cannot find that he neglected his duty in taking a short break from the worksite, or in having an argument. There is no evidence the Claimant broke a company policy, and while he admits to having an argument with a colleague, it does not appear that the Claimant was the aggressor in the situation, but both parties were becoming increasingly agitated and the Claimant made the decision to walk away. I find the Claimant did not know, nor ought he to have known, that he could be dismissed for leaving

¹⁰ *Attorney General of Canada v. Gauthier*, A-6-98

the job site to get a coffee, or having an argument with a colleague. Additionally, the Claimant had no history of discipline and would not have expected this single incident to lead to his termination.

[36] These cases require a balancing of multiple considerations, which is reflected by the lengthy recounting of the evidentiary record included in this decision. I find the Commission did not meet its burden as it failed to prove, on a balance of probabilities, that the Claimant committed misconduct. I am mindful of the court's comments on this subject:

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 irrespective of the opinion of the employer.¹¹

[37] I note that the Claimant submitted a copy of the decision he received from the Ontario Ministry of Labour to the Tribunal, which determined he did not quit his job and had not committed misconduct. I mention this document because the Claimant referred to it at the hearing, but note that it has no bearing on my decision. The Ministry's decision is based off of its interpretation of the provincial *Employment Standards Act, 2000*, while my decision is based on the provisions and case law relating to the federal *Employment Insurance Act*.

¹¹ *Attorney General of Canada v. Crichlow*, A-562-97

CONCLUSION

[38] The appeal is allowed. I find the Claimant did not voluntarily leave his employment. I have also considered whether the Claimant lost his job due to his own misconduct, and find that he did not.

Candace R. Salmon

Member, General Division - Employment Insurance Section

HEARD ON:	July 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. M., Appellant