



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. H. v Canada Employment Insurance Commission*, 2019 SST 950

Tribunal File Number: GE-19-2687

BETWEEN:

J. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: August 22, 2019

DATE OF DECISION: August 24, 2019

DECISION

[1] The Commission has not proven that the Claimant lost his job because of misconduct. This means that the Claimant is not disqualified from being paid benefits.¹

OVERVIEW

[2] The Claimant worked as a customer service representative in a call centre. He had worked with his employer for ten years. He lost his job on April 18, 2019 after returning from a three month medical leave on April 1, 2019. The Claimant's employer said that he was dismissed for call avoidance. An investigation from October to December 2018 and two days in April 2019 revealed the Claimant spent 45 to 49 per cent of his shift avoiding calls. The employer considered this fraud as the Claimant was being paid but not working his full shift.

[3] The Claimant does not dispute that he avoided calls but he says that he did not do this wilfully. He says that he had gone through four surgeries over a period of four years, each surgery requiring a three-month absence from work. He was often in pain at work and avoided calls when in pain or anticipated being pain on a call. He says he was not consciously avoiding calls or thinking about the consequences as he was just trying to deal with the pain. He also was suffering from a mental health condition such that he did not anticipate the consequences of what he was doing and the employer provided him with no warnings concerning his call volume.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct, and disqualified him from being paid employment insurance (EI) benefits. The Commission says the Claimant's actions constitute misconduct because even though the claimant received no warnings, he was a long-term employee and therefore should have known that such actions equated to dishonesty, and loss of trust, which could lead to an immediate dismissal.

¹ Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

[5] I have to decide if the Claimant should be disqualified from benefits because he lost his job due to misconduct. I find that the Claimant should not be disqualified from benefits.

ISSUES

[6] Did the Claimant lose his job because of misconduct? To determine this, I will first decide the reason why the Claimant lost his job. Then I have to decide if the Claimant committed the conduct the employer says was the reason he lost his job. Finally, I have to decide if the Claimant's conduct is considered "misconduct" under the law.

ANALYSIS

Why did the Claimant lose his job?

[7] The Claimant lost his job because he was avoiding calls at the call centre. The employer considered the Claimant's actions as fraud as he was being compensated for work he was not performing.

[8] The employer told the Commission that the Claimant was dismissed for manipulating his telephone set in order to avoid receiving in-coming calls. The Claimant would press a button on his telephone set, which would be recorded as an internal call, in order to avoid external calls. As per employer investigation, his percentage of internal calls was approximately 5000% more than the average employee. The supervisor brought it to the management's attention in October, and they started an investigation.

[9] The dismissal letter of April 18, 2019 provides that random sampling through October, November and December, 2018, along with two days in April, 2019 (shortly after the Claimant returned from leave), found that the Claimant spent 45 to 49 per cent of his shift avoiding taking calls which had a significant impact on their customers.²

[10] The employer said it gave the Claimant 48 hours notice of a meeting on April 18, 2019, and in that 48 hours, he stopped avoiding the calls and took his 60 or so calls those two days. During the meeting the Claimant was asked about his call activity and asked to explain how his

² GD3-25.

call activity is significantly higher than his colleagues. He did not come clean and was therefore dismissed.³

[11] The Claimant and the Commission both agree that the Claimant was dismissed for call avoidance. The Claimant confirmed in his testimony that he lost his job due to call avoidance.

[12] I find the Claimant was terminated for call avoidance.

Did the Claimant commit the conduct which led to his dismissal?

[13] Yes. There is no dispute as to this. I find the Claimant engaged in call avoidance.

[14] The employer has submitted data from its investigation supporting its assertion that a random sampling of days throughout October, November and December 2018 along with two days in April 2019 showed that the Claimant spent 45 to 49 per cent of his shift avoiding calls.⁴ The Claimant did not dispute this data.

[15] The Claimant admitted in his testimony that he was avoiding calls. He explained his conduct was related to medical issues he was experiencing. He explained that due to the sensitive nature of these issues, he was uncomfortable discussing these issues with his employer.

Is the reason for the Claimant's dismissal misconduct under the law?

[16] I find the Claimant's actions in engaging in call avoidance do not amount to misconduct.

[17] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it approaches willfulness.⁶ The Claimant does not have to have a wrongful intent for his behavior to be misconduct under the law.⁷

³ GD3-23.

⁴ GD3-26 to GD3-33.

⁵ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ *Attorney General of Canada v Secours*, A-352-94.

[18] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the Claimant's duties owed to his employer and, as a result, that dismissal was a real possibility.⁸

[19] The Commission has to prove that it is more likely than not⁹ that the Claimant lost his job because of misconduct.¹⁰

[20] The Commission says that there was misconduct because, while the claimant received no warnings, he was a long-term employee and therefore should have known that such actions equated to dishonesty, and loss of trust, which could lead to an immediate dismissal. As per employer investigation, his percentage of internal calls was approximately 5000% more than the average employee. The Commission submits with respect to the Claimant's argument that his conduct at work was a result of his medical conditions, while it is sympathetic to his personal situation, evidence from his employer is that the Claimant did not bring his health situation to their attention. Additionally, when confronted with the allegations, he provided no reasonable explanation, and was consequently dismissed from his employment.

[21] The Claimant says that there was no misconduct because his actions were not wilful. He says he was avoiding calls due to trying to manage his pain. He was not aware his conduct would lead to dismissal because he received no warnings about his call volume and because of his mental health state, he was not thinking about what he was doing or the outcome. He did not anticipate being terminated as he was focused on managing his pain. He was not thinking about call volume. He just wanted to deal with the pain. He kept thinking that he would get better and this would stop and he could get back to a regular life.

[22] The type of evidence required to support the Claimant's position that his actions were not wilful must show that that the Claimant had an inability to make a conscious or deliberate decision, which evidence would likely include medical evidence.¹¹

⁸ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ The Claimant has to prove this on a balance of probabilities which means it is more likely than not.

¹⁰ *The Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[23] I find the Respondent has not met its burden to show the Claimant's actions were wilful such that the Claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and he could be dismissed.

[24] The Claimant testified in a straightforward manner and answered questions openly. I accept his testimony in its entirety. He testified that in July 2015 he was diagnosed with a urethral condition. He had four surgeries over four years, each surgery requiring three months leave from work. All the surgeries failed to correct his condition. The final surgery was in January 2019. The Claimant testified that he went back to work on April 1, 2019. When he returned to work, he was in pain and uncomfortable. He had recently been married and had been told that as a result of his condition he could not have children. He felt defeated. In the past, he had been working as a X. In that job, he could hide the pain. However, in January 2018 he was put back in a customer service position, which required him to be on the phone all day except for two 15-minute breaks and one, 1-hour break. He was tied to the phone other than when on breaks. He could get up and stretch but that was about it. The Claimant related that the employer would watch employees and if they were not on the phone, they would come by. The phone was also monitored electronically.

[25] The Claimant explained that he had many infections and pain and he was having difficulty managing his pain while on the phone. He was also fearful of being on a call when a pain spasm came. He related that he would hit the headset button to give him some relief when he was in pain. The pain level was about 8 on a scale of 10 and on top of that, he needed to attend the washroom frequently but could not just leave the phone and go. The Claimant explained that the call avoidance was intermittent. When it was a bad pain day, he did it quite a bit. If it was a good day, then he did not do it. The Claimant denies pretending to speak into the phone or disconnecting calls as the employer also thought he was doing.

[26] The Claimant related that because of the pain and everything he had gone through, his emotional state had also deteriorated. After his final surgery, although he was not 100%, his doctor told him to return to work. He did so but he was still in pain and impacted by what was going on. He did not really think about what he was doing or the outcome. He was not thinking about the call volume. He was thinking about his health. The Claimant says the call avoidance

was almost subconscious. He kept thinking that he would get better and this would stop and he could get back to a regular life. The Claimant says he was later told he had Adjustment Disorder. He just felt trapped and had feelings of despair along with pain. Psychologically he was not doing well and he thinks now that he should not have been at work at all. He had seen a therapist for over 20 year but at the time he was going through this, he was only seeing the therapist intermittently because he was trying to deal with his physical issues. The Claimant explained that he had already been off work for three months and he did not want to take any more time off as he felt his employer would not like that. Looking back now, he thinks the employer may have granted him more time.

[27] The Claimant testified that when the employer gave him 48 hours notice of a meeting, it was a moment of clarity and snapped him into asking himself what he was doing. It scared him back into place and to consider that he needed help. The Claimant related that he wished the employer had brought the issue to his attention earlier. The Claimant explained that he did not tell the employer what he had done or why because it was really hard for him to discuss it as the matter was so personal. The Claimant explained that after he was dismissed he began seeing the therapist and he is still underdoing treatment. With support he was then able to disclose his situation to the employer as part of the grievance process.

[28] The Claimant says that he never had a bad review from the employer. He had never been alerted to issues with his performance by the employer. He feels if the employer had warned him, it would have snapped him back into place. He did not think he could be terminated from what he was doing. He was not thinking about call volume. He just wanted to deal with the pain. Looking back now, he knows that he should have asked for medical accommodation. The Claimant said that he did tell his doctor about the pain. However, his condition was such that he would have symptoms of infection and would see the doctor and sometimes it would be an infection and he would be given medication and sometimes it was not an infection so he would have to ride through the pain.

[29] In support of his testimony, the Claimant provided a report from his Counsellor/Psychotherapist dated July 12, 2019 ¹²who explains he has known the Claimant for

¹² GD-9 to GD-10.

the last 20 years. The Counsellor indicates that cannot give a diagnosis. However, he says that the Claimant's career and performance of his assigned duties were affected in response to a series of stressful and conflicting issues that he had experienced in the past year. The Counsellor relates that this rather abrupt and marked change in his employee profile and solid reputation was consistent with Adjustment Disorder or Stress Response Symptom. The Counsellor explains that, according to the DSM-5R* criteria for persons with Adjustment Disorder, there is a marked change in a person's emotion and behaviours including their ability to perform their duties at work, in their home life and in their inter-personal relationships as an immediate response to a series of stressors that they are not able to negotiate. The Counsellor goes on to say that with this condition, the person believes they are in fact coping even though "things" have changed "somewhat". The Counsellor notes that the individual believes they will pull it together once they have certainty that what they are facing will be resolved. The Counsellors says that these were the responses and the answers the Claimant gave in their sessions during this stressful time. His concern for his health, the outcome of a series of surgeries and the impact it would have on his recent marriage were real and significant.

[30] The Counsellor explains further that Adjustment Disorder is a short-term condition evident in a person who has great difficulty coping or adjusting to a particular source of stress, such as a major life change, loss or traumatic event. They often withdraw into themselves to a type of "situational depression". The symptoms can be and often are overwhelming emotions that lead the person to feel of hopeless, pessimistic even fatalistic which translates into profound withdrawal and isolation. The Counsellor explains further that the person often develops emotional or behavioural symptoms, such as adverse reaction to stressful events or in the Claimant's case, adverse reactions to a series of events that the individual erroneously believes they are coping with and managing when in fact they are not. A loss of interest in work, personal activities and interests is also noted. The Counsellor goes on to say that people in general and perhaps the Claimant in particular, who are used to "keeping things to themselves", believe and assure others that "once that one thing resolves itself "all will be well" until of course it proves to be otherwise.

[31] The Claimant also provided a report from his family doctor dated July 19, 2019. The family doctor relates having been the Claimant's doctor since 2012. The doctor notes the

Claimant has had multiple surgeries and had to take time off to recover from these surgeries. He explains that is aware the Claimant has been seeing a therapist to help cope with the stresses of the surgeries. The doctor notes that the Claimant's therapist has diagnosed adjustment disorder, which the doctor agrees with, given the symptomatology during the time of and around his surgeries. He says that he has seen the Claimant numerous times over the last few years for recurrent painful urinary symptoms that eventually warranted these surgeries. The doctor notes that he has seen him especially frequently over the last two years for this issue. He notes that it is reasonable to say that this ongoing medical issue could certainly have affected his productivity at work.

[32] I accept the Claimant was suffering from Adjustment Disorder prior to his termination. I also accept that despite the fact his doctor had cleared him to return to work, that the Claimant was suffering from ongoing substantial pain while at work. I am satisfied based on the Claimant's testimony and his medical documentation that the combination of pain and the Claimant's mental health condition were such that he did not know or ought to have known that his was such to impair the performance of duties owed to his employer.

[33] I acknowledge that the Claimant was a long-term employee and that his percentage of internal calls were far in excess of the average employee. However, I find his conduct was not wilful. I find he did not act deliberately or consciously in avoiding the calls. Rather his behaviour was a reaction to pain and his mental health condition was such that he believed the situation would resolve itself. He was not thinking about or even aware of what his call volume was and therefore was not aware that his conduct was impairing the performance of duties owed to his employer. The employer did not warn him about his call volume or the potential consequences of his actions. As such, the Claimant did not anticipate termination from his actions.

[34] The Commission has not met its burden to the Claimant's conduct amounted to misconduct.

CONCLUSION

[35] The Claimant did not lose his job due to misconduct so the appeal is granted. This means that the Claimant is not disqualified from being paid EI benefits.

Charlotte McQuade
Member, General Division - Employment Insurance Section

HEARD ON:	August 22, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. H., Appellant