



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *D. D. v Canada Employment Insurance Commission*, 2019 SST 1304

Tribunal File Number: GE-19-2290

BETWEEN:

**D. D.**

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: Manon Sauvé

HEARD ON: August 29, 2019

DATE OF DECISION: September 17, 2019

## **DECISION**

[1] The appeal is allowed.

## **OVERVIEW**

[2] The Appellant, D. D., started working as an executive chef at X on October 26, 2017. On December 21, 2018, the Appellant was dismissed.

[3] He applied to the Commission to receive Employment Insurance benefits. The Commission denied the Appellant benefits because he had lost his employment due to his misconduct.

[4] According to the Commission, the Appellant was dismissed because he refused to go to work when his employer required him to be there and because the employer had not given the Appellant permission to leave his employment for vacation starting on December 21, 2018, but on December 26, 2018.

[5] According to the Appellant, he informed his employer that he was leaving for a trip on December 21, 2018, instead of on December 26, 2018. It was not his vacation but his leave period. He wanted to inform his employer that it would not be easy to reach him as of that date.

## **ISSUES**

1. What is the Appellant's alleged act?
2. Did the Appellant commit the alleged act?
3. Does the Appellant's alleged act constitute misconduct?

## **ANALYSIS**

[6] I must decide whether the Appellant lost his employment because of his misconduct and should therefore be disqualified from receiving benefits under sections 29 and 30 of the *Employment Insurance Act* (Act).

[7] My role is not to determine whether the dismissal was justified or was the appropriate action.<sup>1</sup>

[8] I must determine what the Appellant is alleged to have done, whether the Appellant committed the alleged acts, and whether this constitutes misconduct under the Act.

[9] The Commission has a duty to show, on the balance of probabilities, that there was misconduct.<sup>2</sup> The term “balance of probabilities” means that the Commission must show that it is more likely than not that the Appellant was dismissed because of his misconduct.

[10] To do so, I must therefore be satisfied that the misconduct was the reason for the dismissal, not the excuse for it, and this requirement necessitates a factual determination after weighing all of the evidence.<sup>3</sup>

[11] There must be a causal relationship between the alleged misconduct and the loss of employment. The misconduct must cause the loss of employment and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the Appellant while employed by the employer, and it must constitute a breach of a duty that is express or implied in the contract of employment.<sup>4</sup>

### **Issue 1: What is the Appellant’s alleged act?**

[12] I note from the Appellant’s testimony that, since October 26, 2017, he worked as an executive chef for the employer, who owns three restaurants. As part of his work duties, he developed recipes and menus for the employer. He determined staff work schedules and the number of people required to perform the tasks at the three restaurants.

[13] Based on the evidence in the file and the Appellant’s testimony, I accept that he worked Monday to Friday, usually from 8 a.m. to 5 p.m. I note that he worked on the weekend on one occasion, on Saturday, December 15, 2018. He worked from 6:25 p.m. to 7:57 p.m. to ensure

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<sup>1</sup> *Canada (Attorney General) v Caul*, 2006 FCA 251.

<sup>2</sup> *Bartone*, A-369-88.

<sup>3</sup> *Bartone*, A-369-88; *Davlut*, A-241-82.

<sup>4</sup> *Cartier*, 2001 FCA 274.

that the restaurant was operating properly. It was an exception because each of the three restaurants has their own head chef.

[14] Also according to the Appellant's testimony, his vacation had been postponed twice by the employer. Finally, he asked his employer if he could take vacation from December 26, 2018, to January 10, 2019. I note that the Appellant provided the Commission with proof of the purchase of his plane ticket on November 14, 2018, for a trip to Italy with a departure date of December 26, 2018. He could not leave before that date because of the higher cost of airfare. It is not disputed that the employer granted this vacation period to the Appellant.

[15] I accept that, on December 20, 2018, the Appellant informed the manager that he would not be available as of the end of day on December 21 because he was going on a trip. He had obtained a plane ticket for travel the night of December 21, 2018. He does not normally work evenings or weekends. The restaurants were also closed on December 24 and 25 for Christmas.

[16] According to information the Commission obtained from the employer, it had asked the Appellant to go into work the evening of December 21, 2018, because of a staff shortage. The employer told the Appellant that, if he did not go into work, he would be dismissed. The employer needed the Appellant because two employees had quit that week.

[17] According to the Appellant, on December 21, 2018, he went to work and left in the late afternoon. At 3:47 p.m. on December 21, 2018, the employer informed the Appellant that he was dismissed for refusing to work on Friday evening and on the weekend, when he had not been authorized to take vacation as of December 21, 2018. The Appellant acknowledges that that is the act alleged by the employer.

**Issue 2: Did the Appellant commit the alleged act?**

[18] According to the Appellant, he did not commit the act alleged by the employer. He did not refuse to go to work when his employer required him to be there. He informed his employer that he was leaving the country and that it would be difficult to reach him. He was not scheduled to work, and all the necessary staff was there for the three restaurants, each with its own chef.

Furthermore, he had worked only one weekend in the last few months for barely two hours. Therefore, he did not have to ask his employer for permission.

[19] He changed his departure date because a friend, who works for an airline company, gave him a discount on an earlier flight. It was legitimate for him to leave on that date because he was not on vacation but on leave.

[20] According to the Commission, the Appellant had to remain available for his employer for every working day before his vacation. Based on the information obtained from the employer, the Commission found that the Appellant did not really have a fixed schedule and that he had to be available because of his role. Therefore, he had to be available for the employer the evening of Friday, December 21, 2018, as well as the Saturday and Sunday. He left his employment when he should have been there to meet the employer's needs.

[21] I am of the opinion that the Appellant did not commit the act alleged by the employer. I make this finding based on the Appellant's credible testimony at the hearing. He did not contradict himself and he has maintained the same version of the facts from the beginning.

[22] I give less weight to the information the Commission obtained from the employer. The employer claimed that the Appellant worked evenings or weekends quite often. The Appellant submitted the hours worked between October 23, 2018, and December 20, 2018. I cannot find that the Appellant often worked weekends, as the employer claims. He only worked on Saturday, December 15, from 6:25 p.m. to 7:57 p.m. I note that the Appellant often worked Monday to Friday and that he regularly finished work late in the afternoon on Friday. I also note that the Appellant did not have a written employment contract specifying his work conditions.

[23] I am of the opinion that the Commission did not show that the Appellant committed the alleged act. That is, that he left his employment on December 21, 2018, without permission, to go on vacation. It is true that his authorized vacation began on December 26, 2018, and ended on January 10, 2019, but he did not ask for vacation on December 20, 2018, rather he informed his employer that he was going on a trip. How could he have known that the employer would ask him to work the Friday night and entire weekend when that was not part of his work conditions

and when he was on leave because he had finished his work week? The Commission did not show that the Appellant did not respect his employment contract or an obligation.

[24] Therefore, he did not commit the alleged act, namely leaving his employment to go on vacation without his employer's permission. It was not shown that the Appellant had to be available at all times for his employer. Rather, the Appellant's schedule shows that work on the weekend was exceptional (one time) and that work in the evening was rare and usually during the week.

[25] In this context, I am of the opinion that the Commission did not show that the Appellant committed the act alleged by the employer.

[26] Therefore, I will not examine whether the act committed constitutes misconduct under the Act, since the Appellant did not commit the alleged act.

## CONCLUSION

[27] The Tribunal finds that the Commission failed to prove that the Appellant had lost his employment because of his misconduct within the meaning of sections 29 and 30 of the EI Act. As a result, the Appellant is not disqualified from receiving benefits.

[28] The appeal is allowed.

Manon Sauvé  
Member, General Division – Employment Insurance Section

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| HEARD ON:             | August 29, 2019  |
| METHOD OF PROCEEDING: | In person  |
| APPEARANCES:          | D. D., Appellant<br><br>Jérémie Dhavernas,<br>Representative for the Appellant |

