



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. A. v Canada Employment Insurance Commission*, 2019 SST 1634

Tribunal File Number: GE-19-3117

BETWEEN:

J. A.

Claimant

and

Canada Employment Insurance Commission

Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: November 13, 2019

DATE OF DECISION: November 22, 2019

DECISION

[1] The appeal is dismissed. The Claimant lost his employment due to his own misconduct.

OVERVIEW

[2] The Claimant's lost his job because he did not return to work after two weeks of vacation as required. The Claimant said that he planned his trip and informed the employer. He states that the employer told him he had to return to work by March 12, 2019 or they would fire him. At first, the Commission approved the Claimant's application for employment insurance (EI) benefits. The employer asked the Commission to reconsider the decision. The Commission then refused the Claimant's application because they decided that he lost his employment due to his misconduct.

PRELIMINARY MATTERS

[3] The hearing was originally scheduled for October 8, 2019. The Claimant requested to adjourn the hearing because the hearing time conflicted with his work schedule and because he wanted to get a representative. In the interests of natural justice, I granted an adjournment.¹

[4] The Claimant request a second adjournment. I can only grant a second adjournment if the Claimant establishes that it is justified by exceptional circumstances.² In reasons sent to the Claimant and his representative, I found that the Claimant had a not acted responsibly to get counsel and refused the request for adjournment.

ISSUE

[5] Did the Claimant lose his job because of his own misconduct when he did not return to work on March 12, 2019?

- a) Did the Claimant lose his job because he did not return to work on March 12, 2019?
- b) Did the Claimant have permission to take four weeks of vacation?

¹ Subsection 11(1) of the *Social Security Tribunal Regulations*.

² Subsection 11(2) of the *Social Security Tribunal Regulations*.

- c) Did the Claimant know, or should he have known that not returning to work on March 12, 2019, could lead the employer to fire him?

ANALYSIS

[6] A claimant who loses their job because of their misconduct cannot get benefits.³

[7] There is misconduct where a claimant acts in a willful way. This means that the acts that led to the job loss were conscious, deliberate or intentional. In other words, there will be misconduct where the claimant knew or should have known the conduct could lead to dismissal. The Commission has to show that the Claimant lost his job because of his own misconduct.⁴

[8] There must be a causal relationship between the claimant's misconduct and the loss of their employment. This means that the misconduct must cause the claimant's loss of employment.⁵

Issue: Did the Claimant lose his job because of his own misconduct when he did not return to work on March 12, 2019?

- a) Did the Claimant lose his job because he did not return to work on March 12, 2019?**

[9] I find that the Claimant lost his job because he did not return to work on March 12, 2019.

[10] In his application for benefits, the Claimant said that he had spoken to the employer about having to go out of the country for four weeks. He said that after he planned his trip, he told the employer. The Claimant stated that the employer sent him a letter that he had to return to work by March 12, 2019, or they would fire him. The Claimant said that the employer sent him a letter dated March 19, 2019, saying they fired him.

[11] The employer issued a record of employment (ROE) that listed dismissal as the reason the Claimant was not working. The employer told the Commission that the Claimant did give

³ Subsection 30(1) of the *Employment Insurance Act*.

⁴ *Canada (AG) v. Tucker*, A-381-85; *Locke v. Canada (AG)*, 2003 FCA 262; *Davlut v. Canada (AG)*, A-241-82

⁵ *Canada (AG) v. Cartier*, 2001 FCA 274; *Smith v. Canada (AG)*, A-875-96; *Canada (AG) v. Nolet*, A-517-91

verbal notice of his planned trip. However, they said that the Claimant did not say when or for how long he planned to be away.

[12] The employer said that the Claimant gets two weeks' vacation. They refused to extend his leave beyond the two weeks. The employer gave the Claimant a letter dated February 19, 2019. The letter states that if he did not return to work by March 12, 2019, he would have abandoned his position.

[13] The Claimant said that the employer was looking for an excuse to get rid of him. He said this is because he fell in the workplace, he had a conflict with an accounts manager in the summer of 2018, and he got his bus driver's license.

[14] I asked the Claimant why he felt the employer would want to fire him because he fell in the workplace. He said that it was a long story and started by talking about the conflict that he had with the accounts manager, stating that since that time he has had a problem with the operations manager to whom he complained.

[15] The Claimant's representative interjected, stating that it would have been a lot easier for the employer if the Claimant no longer worked for them because of specific requirements under the law related to the Workplace Safety Insurance Board (WSIB).

[16] I pointed out to the Claimant that he had testified that the employer had allowed him to take a couple of days off work around the time of his fall and they gave him modified duties and reduced his hours of work. I asked if the employer had refused any other request to accommodate him. The Claimant testified that he went to the doctor, the doctor completed a form, and the employer agreed to the accommodations that the doctor identified.

[17] I understand that some employer's may operate to get around legal requirements as the Claimant's representative suggests. However, the Claimant said that the employer accommodated him in the way that his doctor asked. There is no evidence before me that the employer did not want to accommodate the Claimant. I am therefore not satisfied that the Claimant's employer wanted to get rid of him because he fell in the workplace.

[18] With respect to the incident that occurred in the summer of 2018, the Claimant told the Commission that the accounts manager reprimanded him for parking in a fire lane. In his application or benefits, he said that his complaint to his manager and the operations manager failed. The Claimant then went to the general manager, who “apologized” for the accounts and operations managers.

[19] The Claimant said the accounts manager called him weeks after the incident to discuss it, but he did not return the manager’s call. He testified that the conflict was not resolved the way he would have liked, but he tried not to make waves. He also downplayed his use of the word “apologized” in his application for benefits. He said that the general manager said that it would not happen again, so he just left it at that.

[20] Even though the Claimant testified that the operations manager continued to have an attitude towards him, I give a lot of weight to his description of the general manager’s response. While he clarified that the general manager did not really apologize, the Claimant did not dispute that he had a good rapport with the general manager. He said that the general manager was someone he respected because he hired the Claimant. And the general manager told the Claimant that “it [will not] happen again”

[21] I have no reason not to believe that the account manager reprimanded the Claimant and that the Claimant complained about this. However, I do not find a link between this incident and the Claimant losing his job. This is because of the distance in time between the incident and the Claimant losing his job. This is also because the Claimant seemed to resolve the incident with the general manager. Even though the Claimant testified that the operations manager has an attitude towards him, I find that there is insufficient evidence to conclude that this played into the employer’s decision that the Claimant abandoned his job.

[22] The Claimant said that the employer wanted to fire him because he got his bus driver’s license. When asked at the hearing why he thought this was so, the Claimant said that he really could not say. Without additional detail, I do not find that the employer wanted to fire the Claimant for this reason. Even taken together, I do not find that there is enough evidence to conclude that the employer wanted to get rid of the Claimant because of the three reasons he cited.

[23] The employer sent the Commission a copy of a letter dated March 19, 2019. The letter to the Claimant states that the Claimant had abandoned his job, thereby terminating his employment. In spite of the language in the letter, I find that the employer initiated the Claimant's separation from his employment. This is consistent with the ROE the employer issued, listing dismissal as the reason the Claimant is no longer working. It is also consistent with the Claimant's statement that the employer fired him.

[24] When the employer refused the Claimant's request for four weeks of time off, they told him that he had to be back at work on March 12, 2019. When he did not return, the employer ended his employment. I find that there is a link between the Claimant's action in not returning to work and the employer's decision to end his employment. For this reason, I find that the Claimant's employer fired him and that the Claimant lost his job because he did not return to work on March 12, 2019.

b) Did the Claimant have permission to take four weeks of vacation?

[25] I find that the Claimant did not have permission to take four weeks of vacation.

[26] The Claimant says that he spoke to the employer in January or February 2019 about his plan to take four weeks off work. He states that he got the employer's verbal permission to go, and then he bought his ticket. He said that after he did so, the employer asked him to complete a form to request time off work.

[27] The employer told the Commission that the Claimant told them he wanted time off, but he did not give dates or length of time. They said that the Claimant gets two weeks of vacation. The employer sent the Commission a copy of the Claimant's request for vacation from February 26, 2019 to March 30, 2019, which they refused. The letter that the employer attached to the request informed the Claimant that they approved two weeks of vacation. The letter also noted a return to work date of March 12, 2019.

[28] The Claimant said that the employer had never asked him to complete a vacation request form in the past. He said before this, he had taken "a day here or there" and verbally asked for time off work. The Claimant stated that he completed the form as requested. He said that he refused to sign the form saying that he understood that he had approval for only two weeks of

vacation. However, he did not dispute that the employer approved only two weeks of time off work.

[29] I asked the Claimant about the employer's statement that he did not tell them when or for how long he would be going on vacation. The Claimant responded that they discussed "things" verbally. He added that if the time factor was a problem, the employer could have told him. I note that the Claimant told the Commission that he told the employer he intended to go on vacation for about a month. He said that he mentioned this several times, but the employer never told him that this would be an issue, so he bought his ticket.

[30] Although the Claimant said that the employer gave him verbal permission to take the four-week vacation, I give more weight to the employer's statement to the Commission that the Claimant did not give them dates or length of time. I do so because documentary evidence supports the employer's statement. This includes the Claimant's request for vacation form and attached letter explaining why they could not approve his request for four weeks of vacation.

[31] The Claimant testified that he did not know how many weeks of vacation he should get. He did not dispute the employer's statement that he was entitled to only two weeks of vacation. Because of this, and because the employer's letter refers to the employee handbook that outlines the two-week vacation policy, I accept as fact the employer's statement concerning the two week vacation entitlement.

[32] I do not find it reasonable or credible that the employer, knowing their vacation policy, would verbally give the Claimant permission to take a vacation that was longer than the vacation time he could take. While I accept that the Claimant told the employer he wanted to take some time off, I do not find that the employer told him that he could take four weeks of vacation.

[33] I find from the employer's letter attached to the Claimant's request for vacation that the employer approved the Claimant to take only two weeks of vacation. I find that the employer told the Claimant that they expected him to return to work on March 12, 2019. I find, therefore, that the Claimant did not have permission to take four weeks of vacation.

c) Did the Claimant know, or should he have known that not returning to work on March 12, 2019, as required could lead his employer to fire him?

[34] I find that the Claimant knew or should have known that not returning to work on March 12, 2019, as required could lead his employer to fire him.

[35] The employer attached a letter to the Claimant's request for vacation. They said that if the Claimant did not return to work by March 12, 2019, the Claimant would abandon his position. The letter referred to the employer's vacation policy as outlined in the employee handbook. It said that this policy states that the Claimant was eligible for two weeks of vacation. The employer wrote that they approved two weeks of vacation.

[36] The Claimant stated that he refused to sign the letter stating that he understood the employer approved two weeks of vacation. He says that he went on his trip as planned.

[37] Even though the Claimant did not sign the employer's letter, he did not dispute that he got the letter. I note there is a hand-written comment on the bottom of the letter stating that the Claimant refused to sign, but took the original.

[38] I note that the Claimant told the Commission that while he was off work, he got a letter stating that if he did not return to work the employer would fire him. He said that after that he got a letter firing him. The evidence before me is that the employer sent the Commission only two letters related to his vacation time and the end of his employment. The first referred to what would happen if the Claimant did not return to work, and the second is the letter terminating the Claimant's employment.

[39] In the absence of other evidence, I find that the first letter to which the Claimant referred is the one that he took from the employer on February 19, 2019, but refused to sign. I find from this letter that the Claimant knew or should have known that the employer would consider that he had abandoned his job if he did not return to work by March 12, 2019, and that his job was in jeopardy.

[40] Based on the Claimant's statement about the employer's February 19, 2019 letter, I find that he knew that the employer would fire him if he did not return to work as required. I find, therefore, that the Claimant's action in not returning to work was willful. Because of this, I find that his action amounts to misconduct.

[41] The Claimant's representative submitted that I take subsection 49(2) of the *Employment Insurance Act* into consideration. He believes that the evidence on each side is equally balanced. However, I note that this subsection requires that the Commission give the benefit of the doubt. I do not find that it applies to the Tribunal, and I would commit an error to take authority from it.

[42] I find that the Claimant lost his job because of his own misconduct. Therefore, he is disqualified from receiving EI benefits.

CONCLUSION

[43] The appeal is dismissed.

Audrey Mitchell

Member, General Division - Employment Insurance Section

HEARD ON:	November 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A., Claimant John Gentile, Representative for the Claimant