



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v Canada Employment Insurance Commission*, 2019 SST 1653

Tribunal File Number: GE-19-3497

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Mark Leonard

HEARD ON: November 15, 2019

DATE OF DECISION: December 2, 2019

DECISION

[1] The Commission has proven that the Claimant lost his job because of his own misconduct. This means that the Claimant is disqualified from being paid benefits.¹

OVERVIEW

[2] The Claimant lost his job. The Claimant's Employer said that he was dismissed because he failed to report to work on six occasions. While the Claimant does not dispute that this happened, he says that it is not the real reason why the Employer dismissed him. The Claimant says that the real reason for the dismissal was because he requested an accommodation for his medical condition. He claims that the Employer did not want to accommodate him and looked for any excuse to dismiss him.

[3] The Canada Employment Insurance 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.

[4] I find that the Employer had a reasonable expectation that the Claimant would be available for work. The Claimant did not report for the six shifts because he elected to proceed on vacation abroad without first having assured himself that he had approved leave. This is misconduct under the Act because his decision to place himself where he would be unavailable to report to work was conscious, deliberate and intentional. He knew or ought to have known such action would impair the performance of duties owed his Employer such that dismissal was a real possibility.

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

PRELIMINARY MATTERS (POST-HEARING DOCUMENTS)

[5] The Claimant provided one document of a conversation between himself and a Commission representative on June 5, 2019. It details that he was working delivering food (GD6). He brought the matter to my attention because he was offended that the Commission representative noted that there was a language barrier in their communication. The Claimant does not believe there is any language barrier and suggests that it was intended to influence the outcome of the present appeal. He considers the statement discriminatory.

[6] The Commission responded (GD7) that the interview was not conducted in relation to the present case. It claims the statement and concerns of the Claimant in no way change the facts and relies upon its previous submissions.

[7] The Claimant sent an additional response (GD8) reiterating his previous statements.

[8] During the hearing, I found the Claimant to be well spoken in English and I had no difficulties understanding him. I find that the issue of the comment concerning a language barrier during an interview between the Commission and the Claimant to have no probative value to the present case. I will not admit any of the post-hearing documents (GD6, GD7 GD8).

ISSUE

[9] Did the Claimant lose his job because of misconduct? To determine this, I will first decide the reason why the Claimant lost his/her job.

ANALYSIS

Why did the Claimant lose his job?

[10] The Claimant lost his job because he failed to report to work on six occasions.

[11] The Claimant and the Commission do not agree on the reason why the Claimant lost his job. The Commission says that the reason given by the Employer is the real reason for the dismissal. The Employer claims that the Claimant did not show up for six scheduled days of work. It confirmed that he did not have approved leave for the time off. It told the Commission that this was a breach of its "Absence Notification Policy".

[12] The Employer claims that the Claimant had been warned previously about attendance. It stated that it had disciplined the Claimant on March 5, 2019, for multiple incidents that had occurred earlier. These included;

- Leaving a client unattended in a van while collecting other clients.
- A no-show for work resulting from car trouble,
- A no-show for work when the Claimant believed he was not scheduled to work
- Two incidents of lateness.

[13] The Letter of Discipline dated March 5, 2019, notes that further incidents could lead to dismissal. When the Claimant did not show up for work on his assigned shifts in May 2019, he was dismissed. The Employer asserts that it is the breach of trust resulting from his failure to attend his scheduled shifts without approved leave that was the reason for his dismissal.

[14] The Claimant disagrees. He says that the real reason he lost his job is because he has a disability that the Employer did not want to accommodate. He testified that he has hand tremors that restricted his capacity to complete statistical reports by hand. He asked to be accommodated in 2014, but, the Employer refused. He stated that he filed a grievance that had gone through the Employer's internal review process and had been denied at three levels. The Employer did ultimately agree to accommodate the Claimant and introduced computers for completing the reports. The Employer warned the Claimant that until the computers were implemented, he was still required to complete the written statistical reports by hand or face discipline. The Claimant challenged the Employer's warning claiming that it had a duty to accommodate him before it could discipline him.

[15] The Claimant stated that after this challenge he was targeted for discipline for issues such as those enumerated in paragraph 12, and for use of his cell phone while working. The Claimant challenged the Employer to prove the cell phone incident with video from the location, but the Employer declined to do so. He claimed he had valid reasons for the incidents in question. He believes the discipline and added scrutiny he was subject to was a reprisal for having requested a duty to accommodate.

[16] He also believes that the previous discipline was not warranted. He pointed out that the discipline was given well after the events. He questioned why, if the events were so serious, were they not addressed at the time they occurred. He also noted that he was accused of an action that was never proven. He claims all of this attention occurred after he challenged the Employer regarding the duty to accommodate. He testified that he never had any issues at work prior to this. He believes that his dismissal was a reprisal for his challenge regarding duty to accommodate.

[17] Regarding the absence without leave for which he was allegedly dismissed, he offered the following. He applied for both vacation and a leave of absence in December 2018. He intended to travel to Africa to visit family. While his vacation period from April 13 to May 3, 2019, was approved, his leave of absence for May 4, to June 1, 2019, was not.

[18] After he requested an accommodation for his disability, he claims he was targeted for discipline that he believes would not otherwise have been noted. This situation caused him considerable stress and he saw a doctor who provided him notes that he was unfit for work resulting in medical leave. A portion of his medical leave extended into the period when his vacation leave was to start. It was during this time on sick leave that the Employer also transferred the Claimant to a new location reporting to a different Supervisor.

[19] The Claimant testified that he contacted his old Supervisor by text message. He asked about changing the dates of his vacation leave. Text message exchanges show the Claimant asking this Supervisor about vacation leave and her response that she would get back to him. These exchanges occurred over five days between April 12 and April 16, 2019, leading up to when the Claimant was scheduled to leave on his trip. The last message is from his Supervisor stating she would get back to him with an answer the evening of April 16, 2019. He did not receive a message from the Supervisor before starting his voyage abroad.

[20] The Claimant claims that he was entitled to a response regarding his request. If he was not following the correct procedure, why did his previous Supervisor not inform him of this so he could go to the new Supervisor? He says he is entitled to vacation leave and the Employer should have notified him one way or the other as it promised. He believed that since he was not specifically denied the leave, that he could proceed.

[21] The Employer claims that the Claimant's original vacation approval did carry over to his new location but not changes. Any changes required a new request be submitted. He was expected to contact the new Supervisor for any leave requests. The Commission claims that the Claimant was informed of this in March 2019 by e-mail. He did not follow the correct procedure and he did not have approved leave being May 3, 2019.

[22] The Claimant left on his trip abroad on April 16, 2019, and did not return until May 30, 2019. He had neither an approved change to his vacation nor an approved leave of absence. During this period, he was scheduled for six work shifts by the Employer. When he did not attend these shifts or call in, the Employer dismissed him.

[23] The Employer supplied a letter of termination. It states that it dismissed the Claimant for breached of its attendance policy. It notes that the Claimant had been previously disciplined for not showing up for work. The notice of discipline dated March 5, 2019, had warned him that further incidents of not reporting absences could lead to dismissal.

[24] I do not agree with the Claimant that his dismissal was a reprisal because he had challenged the Employer over a duty to accommodate request. While the Employer may have been tardy in accommodating the Claimant, it did ultimately do so. The Appellant did not deny the incidents that led to the discipline occurred. He believed that he was being targeted and that the discipline was not warranted. The Claimant's assertions that he was targeted after he challenged the Employer was a matter best resolved through the Employer's redress system and ultimately to an adjudication. Whether the discipline was warranted or not, it served as a warning to the Claimant that the Employer was concerned about issues of absenteeism and tardiness. I cannot find any reason to conclude that they were created to disguise an alternate reason for dismissal such as a reprisal for challenging the Employer on a matter of accommodation.

[25] I do have concerns regarding the lack of a clear response from the Employer to the Claimant's leave requests. I agree that he was entitled to a decision prior to beginning his travels. A management representative promised to respond to the Appellant's request.

[26] But the lack of a response from the Employer does not negate the responsibilities of the Claimant. He had every reason to believe that he did not have approved leave. His Employer

expected him to be available for work after May 3, 2019. Those expectations were reasonable given he was deemed fit for work by his doctor and the fact that he did not have approved leave beyond May 3, 2019. Examination of the evidence shows that the Claimant was aware of the Employer's expectation that he would be available after May 3, 2019. It had sent him an e-mail to select a scheduling line. He did select a line and it is reasonable to conclude he knew he would be scheduled for work after that date.

[27] When he did not show up or call in regarding these shifts, the Employer considered it a serious violation of its attendance policy and dismissed him.

[28] I prefer the evidence of the Commission as supplied by the Employer. The Employer had conveyed its concerns with the Claimant's attendance. When he missed six scheduled shifts without approved leave, it dismissed him. I find that the Claimant's absence without leave was the reason for his dismissal.

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

[29] The reason for the Claimant's dismissal is considered misconduct under the law.

[30] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it approaches willfulness.³ The Claimant does not have to have a wrongful intent for his behaviour to be misconduct under the law.⁴

[31] 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.⁵

² *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ *Attorney General of Canada v Secours*, A-352-94.

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

[32] The Commission has to prove that it is more likely than not⁶ that the Claimant lost his job because of misconduct.⁷

[33] The Commission says that there was misconduct because the Claimant was aware he did not have approved leave beyond May 3, 2019. The Employer had a reasonable expectation that he would be available for work when his doctor deemed him fit. The Claimant also knew he was to be available for work after that date. He had received and responded to an e-mail confirming his availability and selected a shift line at his new work location. He had been previously disciplined for not reporting to work without approved leave and not calling in. He proceeded on vacation and travelled abroad knowing he did not have sufficient approved leave to cover his absence. It asserts that the Claimant's actions were conscious, deliberate, and intentional and that he knew or reasonably ought to have known that his actions could lead to dismissal.

[34] The Claimant says his actions were not misconduct. He claims that he is entitled to his vacation. He added that he needed to make his travel arrangements well in advance. He claimed that he had never received an actual approval for the vacation leave he had requested in December 2018. When he sought to renegotiate his vacation leave while still on medical leave, he believes he should have received an answer and it should have been granted. When he did not receive a response from his Supervisor, he assumed he was authorized to take the leave.

[35] My concerns rest with the Claimant's expectations surrounding his leave. In December 2018, the Claimant requested his leave. In the e-mail he sent to his Supervisor, he asked for the leave and noted his intention to travel to Africa. He was told that his request for a leave of absence was denied. Only his vacation was approved. He made arrangements to travel to Africa beginning April 16, 2019, until May 30, 2019. During the period from December 2018 to April 2019, he knew he did not have approved leave for the entire period of his travels abroad. He then tried to make changes to his leave just prior to his departure. When he did not receive an answer to his request, he travelled anyway. The Claimant knew he was expected to be available for work

⁶ The Commission has to prove this on a balance of probabilities which means it is more likely than not.

⁷ *The Minister of Employment and Immigration v Bartone*, A-369-88.

after May 3, 2019. He travelled to Africa knowing he would not return to Canada until May 30, 2019.

[36] I find that the Claimant was aware in December 2018, that his request for a leave of absence was not approved. His vacation was approved but only covered him until May 3, 2019. He knew at that time that he did not have sufficient days of approved leave to cover the time he intended to be travelling abroad. He went ahead and made travel arrangements to Africa that would make him unavailable for work beyond the period for which he had approved leave.

[37] In April 2019, the Claimant was placed on medical leave resulting from stress. The medical leave carried into his approved vacation leave period. He did attempt to renegotiate his vacation leave with his previous Supervisor before leaving. She promised she would get the Claimant an answer. By April 16, 2019, she had not provided the Claimant a response. He was scheduled to begin his travels the next day. He proceeded to travel abroad without having resolved the issue of whether he had approved leave to cover his absence.

[38] The Claimant should not have presumed he could adjust his leave at the last minute to accommodate travel arrangements he had already made. Given the discipline he had received earlier; he also knew that unauthorized absences could lead to his dismissal. He should have sought a change to his leave the moment he knew he was expected to return to work May 2, 2019.

[39] The Claimant made an assumption that because he was on medical leave, his vacation leave would automatically be moved to the end of his medical leave and begin on May 2, 2019. The problem with this assumption is that even if the 3 weeks of vacation leave were added beginning May 2, 2019, he still would only have approved leave until May 24, 2019. The Claimant did not return to Canada until June 30, 2019. He still would not have had sufficient approved leave to cover his entire period of absence. He was aware of this when he left on his trip.

[40] The Claimant offered that a leave of absence must be granted for emergencies under Ontario law. He claims it was an obligation for the Employer to grant him this leave. With this leave provision added to his expected vacation leave changes, he would have had sufficient

approved leave to cover the entire period of his absence. It should be noted that the Claimant never applied to the Employer for an emergency leave of absence.

[41] The issue before me is not whether the Claimant should have been granted changes to his vacation leave or access to an emergency leave of absence. These decisions fall squarely within the discretion of the Employer subject to any rights of recourse available to the Claimant. At issue are the actions of the Claimant and whether they constitute misconduct under the *Act*.

[42] While it would have been appropriate for the Employer to respond to the Claimant's request for a change to his vacation leave, when it did not, the Claimant had no choice but to accept the original decision. He had been informed in writing that he did not have approval for a leave of absence nor did he have approval for amended vacation leave. He should not have begun his journey knowing this.

[43] I find that the actions of the Claimant were willful. He was conscious of the attendance concerns, and the fact he did not have approved leave before proceeding on his journey. His decision to travel knowing this was intentional and deliberate. He knew or ought to have known that his conduct could impair the duties he owed his Employer and that as a result, dismissal was a real possibility.

[44] I find that the Commission has proven that there was misconduct.

CONCLUSION

[45] The appeal is dismissed.

Mark Leonard

Member, General Division - Employment Insurance Section

HEARD ON:	November 15, 2019
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METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	J. M., Appellant