



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Z. Y. v Canada Employment Insurance Commission*, 2019 SST 1636

Tribunal File Number: GE-19-3585

BETWEEN:

Z. Y.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: December 13, 2019

DATE OF DECISION: December 17, 2019

DECISION

[1] The Commission has proven that the Claimant lost his job because of 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 of insubordination; he refused to do a task requested of him and he had been through a progressive discipline process and was on his last chance. The Claimant argues he did not refuse the work, only that he told his employer he had never done it before and his employer should get someone with experience to do it as there were better people to do the job. The Claimant states his employer just wanted to get rid of him.

[3] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost his job because of misconduct, and disqualified him from being paid employment insurance (EI) benefits.

[4] I will first determine why the Claimant lost his employment. Once I have determined that, I will look at whether the Claimant actually committed the act that resulted in his loss of employment, and if he did, whether that act constitutes misconduct.

ISSUE

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

ANALYSIS

Why did the Claimant lose his job?

[6] The Claimant lost his job because his employer determined he was insubordinate by not agreeing to perform the electrical repair job requested by his foreman.

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

[7] The Commission submits the Claimant was terminated as he did not agree to do the electrical job asked of him by his foreman which constitutes insubordination.

[8] The Claimant argues that he did not refuse to do the electrical job. He told his foreman that he had never worked on that machine before and that the lead hand would be the better person to do the job, amongst other issue he had with the repair job. The Claimant states his foreman got upset, stopped talking to him on the radio and got Human Resources (HR) involved and after that the Claimant was fired.

[9] The Claimant says his employer harassed him and treated him poorly and they have wanted to get rid of him for a long time and he suspects his race may have played a role in his firing.

[10] I note the Claimant talked at length about what he felt was his mistreatment by the employer. I redirected the Claimant several times in his testimony explaining to him that I was not here to judge the actions of the employer, but to look at the conduct of the Claimant.

[11] So, while the Claimant raised multiple issues regarding his treatment by the employer I find such arguments are not relevant in a situation of misconduct, as the question is not whether the employer is guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant is guilty of misconduct².

[12] I find the Claimant was dismissed from his employment for not agreeing to do the electrical job his foreman asked him to do.

[13] I rely on the statement of the Claimant that it was his protestation to his foreman that he was not the best person to do the job and that there were other people who should do it, among his other complaints, that caused his foreman to speak to HR which resulted in the Claimant being fired.

[14] I also rely on the statement of the employer to the Commission the Claimant was fired as the Claimant was insubordinate to his foreman. The employer states the Claimant had been advised the week prior to his dismissal that he may be required to do an electrical job the next

² *Canada (Attorney General) v McNamara*, 2007 FCA 107.

week as he had his electrician ticket and they were short on workers. The employer told the Commission the following week the Claimant was asked to work on a machine with an electrical problem and refused his foreman's request. The employer states this was the final incident that led to the Claimant's dismissal.

[15] I find the July 25, 2019, Employee Warning Record³ which states the Claimant was terminated due to an incident of insubordination further supports it was the Claimant not agreeing to do the electrical job that resulted in his dismissal.

[16] I further find that while the Claimant argued his employer wanted to get rid of him and he thinks his race may have played a role I find there is insufficient evidence to support he was fired for his race, or due to a personal vendetta from the employer.

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

[17] The reason is considered misconduct under the law.

[18] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it approaches willfulness.⁵ The Claimant does not have to have a wrongful intent for his behavior to be misconduct under the law.⁶

[19] 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.⁷

[20] The Commission has to prove that it is more likely than not⁸ that the Claimant lost his job because of misconduct.⁹

³ GD3-29

⁴ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ *Attorney General of Canada v Secours*, A-352-94.

⁷ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ The Commission has to prove this on a balance of probabilities which means it is more likely than not.

⁹ *The Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Commission says there was misconduct because the documentation from the employer shows the Claimant had been progressively earning in writing and verbally regarding his insubordination. The Commission says the Claimant has a history of disciplinary action for insubordination and the Claimant says he was aware of the disciplinary measures and was aware he could be terminated as per company policy.

[22] The Commission says the Claimant out to have known his actions could lead to dismissal due to the repeated verbal and written warnings.

[23] The Claimant says he did not refuse to do the electrical job. The Claimant says he was speaking to his foreman over the radio, explaining why he was not the best choice to do the job but his foreman stopped talking to him and got his manager and HR involved and started saying the Claimant had refused to do the electrical job.

[24] The Claimant says he never said that he would not do the job. The Claimant says that if he was given a direct order he needed to follow it, and while he had been written up for insubordination before, such as the May 16, 2019, Employee Warning Record¹⁰, this situation was different.

[25] The Claimant says he had been told the week prior that his employer may ask him to do an electrical repair job the next week. The Claimant says he told his employer that if was able to do it he would. The Claimant says he was an electrician, but that was not what he usually did for his employer as he usually did IT work.

[26] The Claimant says the next week he was asked to do the electrical repair job. The Claimant says he tried to explain to his foreman why he was a poor choice for the job, as he did not know where the machine was and a dedicated electrician employee would be able to do the repair much faster and his lead hand was not doing anything.

[27] The Claimant says he did not think what he was doing would result in him getting fired, as while he had been given a final warning for insubordination on May 16, 2019, the Claimant

¹⁰ GD3-31

says he never refused the repair job and this was situation was different than the May 16, 2019, incident.

[28] The Claimant says the May 16, 2019, warning came about as there was supposed to be training on some new equipment and this training would have constituted overtime. The Claimant says that as he had the most seniority he should have been given first pick for the training, but they sent people that were junior to him instead. The Claimant says when he complained about this they did arrange training for him but it was not with the company representatives from the company that made the equipment, it was instead with his employer's equipment manager; the Claimant says he was training the equipment manager so he refused to attend the training. This resulted in the May 16, 2019, final warning.

[29] I find the Claimant did commit the action that resulted in his loss of employment; not agreeing to perform the electrical repair job his employer asked him to do. I find the Claimant's conduct was so reckless as to approach willfulness. I find he was aware he was on a final warning for insubordination, as he agreed he received the May 16, 2019, warning. I find the Claimant could have chosen to do the job asked of him as he agreed he was an electrician, had been told the week prior he may be asked to do so, and had agreed with his employer if he could do the repair he would, but instead starting offering reasons why he should not do the job.

[30] This action is so reckless as to approach willfulness as being on a final warning for insubordination, then not agreeing to do a job and proffering reasons why he should not do so, is inviting his employer to find him insubordinate, as his actions could easily appear as such, which he knew would result in a loss of employment as the May 16, 2019, Employee Warning Record states it is his last chance.

[31] I note the Claimant says he never told his employer he would not do the job. I find that even if this is the case, i.e. that the Claimant never explicitly refused to do the job, his actions expressed as such and he did not affirm he would do the job.

[32] I find that in a situation where the Claimant has not expressly agreed to perform the job, and is offering a myriad of reasons why he should not perform the job, he is refusing to perform the job. If the Claimant does not perform the job, or agree to do so, he cannot say simply because

he did not explicitly say “No” or “I refuse” that he has not refused to perform the job. Positive action is needed on the part of the Claimant to demonstrate he was willing to perform the job.

[33] While the Claimant may have felt another employee would have been a better choice, his employer asked him. I further find there is insufficient evidence to support he could not have done the repair job asked of him, regardless of whether he thought he was the best choice for it.

[34] I find that as the Claimant agreed he received the May 16, 2019, warning, which states he was on his last chance, and that insubordination was unacceptable, he ought to have known his action of not agreeing to do the electrical work as asked by his foreman would result in his dismissal.

CONCLUSION

[35] The appeal is dismissed. The Claimant is disqualified from being paid EI benefits.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	December 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. Y., Claimant