



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. R v Canada Employment Insurance Commission*, 2020 SST 78

Tribunal File Number: GE-19-3580

BETWEEN:

**A. R.**

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: Teresa Jaenen

HEARD ON: December 5, 2019

DATE OF DECISION: January 5, 2020

## 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.<sup>1</sup>

## OVERVIEW

[2] A. R. is the Claimant and he lost his job. The Claimant's employer said that he was dismissed because of unexcused absences. 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 has sustained an injury, and required accommodations from his employer to return to work. He says he was not accommodated as required and was terminated when he did not return to work.

[3] The Claimant was working for the X and had been unable to work due to an injury from June 5, 2018, to June 20, 2018. The Claimant returned to his job on June 21, 2018, with a guarantee return to work agreement (GRTW). In late October 2018, the Claimant visited his doctor to schedule an evaluation with an orthopedic specialist. However, his doctor did not have any recommendations for such a specialist in Manitoba. The Claimant says he made an appointment at a facility in Connecticut USA. The Claimant says he requested the time off and he was refused. He says that he attended his appointment. He says that he provided his employer with additional medical information and believed he was going to be returning to the GRTW that would allow him to be absent from work to attend the medical appointment. The Claimant says that his employer sent him an email that if he did not return to work he would be dismissed.

[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.

[5] The Claimant disagrees with the decision and appealed to the *Social Security Tribunal* (Tribunal).

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

## **PRELIMINARY MATTERS**

[6] An initial hearing was scheduled on November 28, 2018, as the Claimant also had a claim with the Human Rights Tribunal. It was explained that I was not bound by a decision made by the Human Rights Tribunal but on the legislation of the Employment Insurance Act. The Claimant was granted an adjournment to better prepare himself for his appeal.

[7] The Claimant at the hearing says that he wanted to mention that he is still dealing with another agency (Human Rights Tribunal) regarding his dismissal. He understands that I am not bound by a decision they would make. He is also not going to focus on the issue of his employer violating federal laws and he understands that the issue is on the EI laws. He says he will focus on the false premises he was terminated on.

## **ISSUE**

[8] 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?**

[9] The Claimant lost his job because he took a leave from his job after his employer denied his request.

[10] 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.

[11] The employer told the Commission that the Claimant initially asked for vacation time in October 2018, to be taken in November 2018. She says his request was denied due to operation requirements. She says the Claimant then requested to take an unpaid leave but did not comply with the requirements to substantiate the requirement for leave. She says because he did not provide the documentation his absence from work was an authorized leave. She says prior to the Claimant taking the unauthorized leave there was much discussion.

[12] The Claimant disagrees and says the real reason he lost his job was because that employer rationalized his termination under false premise. His employer violated federal labour laws on progressive discipline. And the employer circumvented its own protocols for safeguarding the health and employees resuming work under medical guidance.

[13] I find that the Claimant lost his job because he did not return to work. I find that there is no dispute that the Claimant did not return to work. The evidence shows that the Claimant was out of Canada to attend a medical appointment. The employer's email correspondence shows that the Claimant was advised his leave was not authorized and that if he did not return to work on November 7, 2018, he could be terminated.

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

[14] I find the reason is considered misconduct under the law because the Claimant's actions were deliberate and willful when he clearly made the decision to take the unauthorized leave. The employer's emails clearly show that if he did not come to work as scheduled he could be terminated. Thus, the Claimant knew or ought to have known his actions could cause him to lose his job.

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

[16] 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.<sup>5</sup>

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<sup>2</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

[17] The Commission has to prove that it is more likely than not<sup>6</sup> that the Claimant lost his job because of misconduct.<sup>7</sup>

[18] The Commission says that there was misconduct because the Claimant willfully and deliberately chose to attend his consultation with a physician at Yale rather than attending work as scheduled. Despite the fact that his employer clearly advised him his absence would be considered unauthorized.

[19] The Claimant's dismissal from his employment was the direct failure to attend work on the morning on November 7, 2018.

[20] The Claimant says that there was no misconduct because he did not request time off. He says that on November 1, 2018, he had a meeting and it was confirmed that he would be returning to the GRTW program. He says that he believed that because of being on the program he was allowed to be away from work until they came to an agreement about his back to work schedule. He says fundamentally he did not ask for leave because he did not have to. He says that he was approved for the program and he thought things would be the same as they were in June. He says the employer assumed he was asking for time off in the letter dated October 29, 2018.

[21] The Claimant says that he was anticipating a meeting with his employer and occupational health and safety (OHS) to discuss his GRTW. He says he did not know when this meeting would take place so he went to Yale. He said that he was able to send medical information to OHS after he had been seen at Yale. The Claimant says that if his file had not been reopened and was not being returned to the GRTW program then his employer should have told him this on November 1, 2018, and then he would not have gone.

[22] I find that the Commission has proven that there was misconduct, because

- a) On October 4, 2018, the Claimant requested a period of unpaid leave, commencing early November 2018. The employer refused the leave citing operational requirements and the lack of a medical certificate indicating the time off was for medical reasons.
- b) On October 30, 2018, the Claimant gave his employer a written letter dated October 29,

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

<sup>7</sup> The *Minister of Employment and Immigration v Bartone*, A-369-88

2018, stating he had booked an appointment with a specialist in the United States. In his letter, the Claimant says, "I am going to require time away from work, on a temporary basis, effective November 5, 2018. Your support behind me will be appreciated."<sup>8</sup>

- c) On November 1, 2018, the Claimant was advised his request for time off on November 5, 2018, was denied. The employer stated the Claimant did not provide medical information to support the leave and that an unexcused leave may result in his termination.
- d) The Claimant did not attend work on November 2, 2018. The Claimant says it was an authorized leave, the employer says it was not.
- e) The Claimant did not attend work on November 5, 2018, and November 6, 2018. On November 6, 2018, the employer sent the Claimant an email saying if he did not attend work on November 7, 2018, they would review his employment and he may be terminated.
- f) The Claimant sent an email to his employer on November 7, 2018, saying he reaffirmed he has a medical condition and was preoccupied seeking expert advice on. In further support he says, he communicated new confidential information to the occupational health department.
- g) The Claimant failed to come to work on November 7, 2018, and he was dismissed the next day.

[23] I considered the Claimant's argument that November 2, 2018, was an authorized leave. I find that the evidence of the email<sup>9</sup> from T. H. that she would submit a PEF if the Claimant could not come into work. Therefore, I find the Claimant's version of the events and he was approved to take off November 2, 2018, credible.

[24] However, I find that the Claimant did not lose his job because of the November 2, 2018, event but rather when he did not come to work on November 7, 2019. And after his employer denied his request for time off.

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<sup>8</sup> GD3-76

<sup>9</sup> GD3-38

[25] I considered the Claimant's argument that he did not ask for time off and that he believed he was on a GTRW less credible. I find the Claimant's letter dated October 29, 2018, clearly contradicts his statement that he did not ask for time. And the Claimant has not provided any evidence to support that on November 1, 2018, he had received confirmation that he had been approved to return to the GRTW.

[26] I find the employer has provided documentary evidence of email correspondence<sup>10</sup> on October 17, 2018, that clearly shows that OSH had closed his file. And that if there was a change to his restrictions to please provide medical documentation and his file would be reopened. I find the doctors letter dated October 18, 2018,<sup>11</sup> does provide medical information of his limitations but it does not support that the employer had reopened his file. And that he was approved to be back on the GRTW program. I note the letter does not say he needs time off to attend a medical appointment in the United States.

[27] I considered the Claimant's argument that he did not ask for time off. However, I find his statements are conflicting. The letter dated October 29, 2018,<sup>12</sup> clearly states, in an indented paragraph, "I am going to require time away from work, on a temporary basis, effective November 5, 2018" (date is bolded).

[28] I find that in the letter October 29, 2019, the Claimant did not make any reference to being back on the GRTW or that he was or had been in consultation with the OHS. I considered the Claimant's statement that he had a meeting on November 1, 2018, and was confirmed to be back on the GRTW. However, I am giving more weight to the employer's email dated November 1, 2018,<sup>13</sup> that he had not been approved to return to the GRTW as it makes no mention of this issue. However, it clearly states that the Claimant had not provided satisfactory medical documentation to support a medical leave of absence. And it clearly states his request to be off commencing November 5, 2018, is denied.

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<sup>10</sup> GD3-34

<sup>11</sup> GD3-75

<sup>12</sup> GD3-76

<sup>13</sup> GD3-77

[29] I find the email the Claimant sent on November 2, 2018, does not support his argument that he had been approved to go on the leave. And he did not make any specific mention of being on the GRTW or that it was being considered.<sup>14</sup> Nor does he make any reference if he believed to be on the GRTW program he would be allowed time off.

[30] I find that the Claimant was provided with an opportunity to provide his employer with medical documentation to have his leave approved prior to him leaving. However, the Claimant by his own admission says that he only provided the medical information from Yale after his leave was not approved.

[31] I find the Claimant lost his job because he did not come to work on November 7, 2018. I am giving weight to the employer's evidence on the file that the employer provided in writing, that the Claimant's leave was denied and if he failed to come to work on November 7, 2018, he could be terminated.

[32] I find from the Claimant's testimony that he had received the verbal and written notice that his leave was not approved. He agrees that he received the email saying he was to report to work and he did not. Therefore, I find the Claimant knew or ought to have known that if he did not come to work on November 7, 2018, he could lose his job.

[33] I find the Claimant still chose to go to his medical appointment on the assumption that his employer would be putting him back on the GRTW. Therefore, his actions were willful and deliberate.

## **CONCLUSION**

[34] The appeal is dismissed. This means that the Claimant is disqualified from being paid EI benefits.

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<sup>14</sup> GD3-83



Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	December 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. R., Appellant