



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. G. v Canada Employment Insurance Commission*, 2020 SST 77

Tribunal File Number: GE-19-4223

BETWEEN:

C. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Christianna Scott

HEARD ON: January 7, 2020

DATE OF DECISION: January 15, 2020

DECISION

[1] The appeal is allowed. The Canada Employment Insurance Commission (“the Commission”) has not proven that C. G. (the Claimant) lost his job because of misconduct. This means that the Claimant is not disqualified from being paid regular employment insurance (EI) benefits.¹

PRELIMINARY MATTERS

[2] During the hearing, the Claimant referred to his letter of termination. I asked the Claimant to send this letter to the Tribunal, which he did. I have considered this evidence as it is relevant to the appeal.

OVERVIEW

[3] The Claimant was dismissed from his job at a waste recycling centre. His employer says that he was dismissed because he was seen removing salvaged equipment from the premises. The employer says that the Claimant’s conduct went against a zero tolerance policy regarding theft.

[4] The Commission decided that the Claimant lost his job because of misconduct and disqualified him from being paid regular EI benefits. The Claimant has appealed this decision before the Social Security Tribunal.

Facts agreed upon

[5] The Claimant says that he removed an electronic item from the employer’s premises and was going to put it in his car. This item had been brought in for recycling by a member of the public. The Claimant wanted to take it home to see if the item worked. The Claimant was stopped by the General Manager and the Claimant returned the item. The Claimant completed

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

his shift and also worked in the morning of the following day. He was then given a letter of termination and dismissed.

[6] In short, everyone involved in this appeal agrees that the Claimant removed the item and this was the reason for his dismissal.²

Issues in this appeal

[7] The Commission says that the Claimant lost his job due to misconduct because he knew or ought to have known that termination would likely result from his actions. The Claimant says that his actions are not misconduct because he did not know that he would be dismissed for his conduct and never thought that dismissal would follow.

What I have to decide

[8] To be misconduct under the law, the actions of the Claimant have to be willful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it approaches willfulness.⁴

[9] There is misconduct if the Claimant knew or ought to have known that his conduct could get in the way of the performance of the Claimant's duties and, as a result, that dismissal was a real possibility.⁵

[10] So, I have to decide if the Commission has proven that it is more likely than not⁶ that the Claimant lost his job because of misconduct.⁷

REASONS

² I note that the Claimant does not consider that his actions were caused by his bipolar condition. He submitted a doctor's note to show that he has this condition and that is why he was not able to give a full explanation to his manager about why he took the item.

³ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

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.

[11] I find that the Commission has not proven that the Claimant lost his job because of misconduct.

Did the Claimant know or ought to have known that his conduct could get in the way of the performance of the Claimant's duties and, as a result, that dismissal was a real possibility?

[12] I find that the Claimant did not know and ought not to have known that his conduct would lead to termination.

The Commission has not proven that the Claimant knew he would be dismissed for taking the recycled item.

[13] The Commission argues that the Claimant knew that he would be dismissed if he removed any items from the recycling centre that were brought in by the general public. The Commission relies on the statement from the CEO of the company and the General Manager of the recycling centre. Both representatives from the employer say that there were posters in the workplace that told employees not to remove recycling items from the workplace. The CEO says that this was a zero tolerance policy. However, the General Manager simply referenced the poster and did not confirm that the Company had zero tolerance for such actions.

[14] At the hearing, the Claimant says that he did not know about the policy. He says that he worked in the front of the office with the general public and there were no posters there. He says that he would walk through the warehouse to go to the employee kitchen but he did not pay any particular attention to the posters in the warehouse. The Claimant also says that he did not get any training about a policy regarding the removal of items that were brought in for recycling. Also, he was never advised of the policy or given a copy of the document.

[15] I find that the Commission has not proven that the Claimant knew that there was a zero-tolerance policy about the removal of items. The Claimant said at the hearing that he did not know about the policy and would not have removed the item if he knew about it. I asked the Claimant to explain the following comments written by the Commission's agent:

- "he [the Claimant] was well aware that he was not allowed to take any items that were recycled from the general public"; and

- he [the Claimant] “confirmed that there were signs posted in the warehouse which stated that employees are not allowed to take recycling materials home.”

[16] The Claimant answered that when he made those statements, he was repeating to the Commission’s agent what he had been told by his manager at the time of dismissal. He was not affirming that he was aware at the time he took the item that he was not allowed to do so and that there was a policy to this effect. He said that was the reason for the dismissal, but he was not aware of the posters and the policy when he took the item.

[17] I find that the Claimant was credible during the hearing. He was open in his responses and I give weight to his testimony and his explanation about the statements that he provided to the Commission. So, I accept his statement that he did not know about the employer’s zero tolerance policy.

[18] Although the CEO said that the policy outlined that there was zero tolerance about removing items, this is not supported by the conduct of the General Manager. The General Manager did not dismiss the Claimant when he stopped him from putting the item in his car. I also accept the Claimant’s testimony that when he was seen taking the item, the General Manager told him that he “**could** be fired” (emphasis added). The General Manager consulted with the CEO and the Claimant continued to work for the afternoon and the following morning before he was dismissed. This leads me to conclude that the General Manager himself was not certain that Claimant’s conduct would end in a termination.

[19] I also note that the Commission did not submit a copy of the policy. Without the evidence of the policy itself, I cannot conclude that there was a zero-tolerance policy that the Claimant knew about.⁸

[20] So, I find that the Claimant did not know that he would be dismissed from his job for removing the item from the workplace.

⁸ *Crichlow v Canada (Attorney General)*, A-562-97.

The Commission has not proven that the Claimant ought to have known that dismissal was a real possibility.

[21] The Commission argues that the “claimant should have reasonably known that he risked being dismissed.”⁹ The Commission says that the breach was significant enough that the Claimant ought to have known that he would be dismissed.

[22] The Claimant says that he never thought that he would be dismissed for his conduct. He says that he was shocked that he was fired because so many other employees missed work without reasons and they were not dismissed. The Claimant said that while he was employed, nobody had been fired, despite that certain colleagues were not good employees. The Claimant said that he considered himself to be a good employee and never thought that he would be fired for removing the item because it was someone’s garbage. He returned the item as soon as he was told that he could not take it.

[23] First, I find that the Commission has not applied the proper test. The test applicable to misconduct is not whether the “claimant should have **reasonably known that he risked** being dismissed.” The proper test to apply is whether the “misconduct was such that its author could **normally foresee that it would be likely to result** in his or her dismissal” (emphasis added).¹⁰ Therefore, the Commission needs to prove that the Claimant could normally foresee that dismissal was likely to result rather than simply showing that dismissal was a risk.

[24] I find that the Commission has not proven this on the balance of probabilities that the Claimant ought to have known that his conduct would likely result in dismissal because:

- I find that the Claimant was credible in his description about being a good employee with a good record. The General Manager confirmed this about the Claimant’s employment history with the employer. He did not have any discipline on file. I accept this was a factor in the Claimant’s mind that made him believe that he would not be dismissed for his conduct, especially when other employees were not dismissed for other forms of unwanted workplace conduct.

⁹ GD4-3

¹⁰ *Meunier v. Canada (Employment and Immigration Commission)*, A-130-96, para. 2. Other decisions refer to a “real possibility,” See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- I also find that the Claimant was credible when he said that he genuinely thought that the item he took was someone's garbage and was of no value. He thought that there would be no consequences to taking garbage. Without the Claimant's knowledge that he would be dismissed for taking an item that was dropped off for recycling, I do not find that he ought to have known that taking the item would lead to his dismissal. I come to this conclusion in full knowledge that the Claimant worked in a waste recycling centre.
- I find that the conduct of the General Manager also confirms that the Claimant could not normally foresee that taking the item would likely lead to dismissal. I accept the Claimant's statement that when the General Manager stopped the Claimant from taking the item to his car he immediately returned the item. The General Manager said that the Claimant "**could** be fired for that" [taking the item]. The Claimant was consistent that this was the statement made by the General Manager. I find that the General Manager's use of the term "could" is indicative of a level of uncertainty about what would happen to the Claimant. It leads me to conclude that even the manager did not consider that dismissal was likely. The Claimant then continued to work for the rest of the day and the next morning. Again, this leads me to conclude that even the General Manager was uncertain about how the Claimant's conduct would be handled and had to double check with the CEO on how to proceed. If this level of uncertainty existed at the management level, I find that the Claimant could not have known that his conduct would likely result in dismissal.

[25] I find that the Commission has not proven that the Claimant lost his job due to misconduct.

CONCLUSION

[26] The appeal is allowed.

Christianna Scott
Member, General Division - Employment Insurance Section

HEARD ON:	January 7, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. G., Appellant