



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. B. v Canada Employment Insurance Commission*, 2020 SST 419

Tribunal File Number: GE-20-142

BETWEEN:

**D. B.**

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: Angela Ryan Bourgeois

HEARD ON: February 4, 2020

DATE OF DECISION: February 10, 2020

## **DECISION**

[1] The appeal is allowed. The Commission hasn't proven the Claimant lost his job because of misconduct. This means the Claimant isn't disqualified from being paid employment insurance benefits.<sup>1</sup>

## **OVERVIEW**

[2] Claimants who lose their jobs because of their misconduct are indefinitely disqualified from receiving employment insurance benefits.<sup>2</sup>

[3] The Claimant lost his job. The Claimant's employer said it dismissed him because of culpable absences under its attendance management program. The Claimant says he didn't know where he stood on the attendance program, though he had repeatedly asked his employer.

[4] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost his job because of continued lateness after completing the employer's attendance program. The Commission disqualified him from being paid employment insurance benefits.

[5] I have to decide if the Claimant lost his job because of misconduct.

## **ISSUE**

[6] To decide if the Claimant lost his job because of misconduct, I have to answer these questions:

- a) Why did the Claimant lose his job?
- b) Is the reason he lost his job misconduct under the law?

- Did he do what caused his dismissal?

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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.

<sup>2</sup> Section 30 of the *Employment Insurance Act*.

- If so, should he have known that the employer was likely to dismiss him for what he did?

## **ANALYSIS**

[7] Because misconduct is the exception to the general rule that insured, unemployed individuals are entitled to benefits, I have to interpret strictly the relevant provisions of the Act.<sup>3</sup>

### **Why did the Claimant lose his job?**

[8] I find the Claimant lost his job because he had too many incidents under the employer's attendance management program.

[9] The employer says it dismissed the Claimant under its attendance management program.

[10] On his application for benefits, the Claimant said he was dismissed because of lateness (which is an incident under the attendance management program). The Commission submitted that the Claimant lost his job because of lateness under the attendance management program.

[11] I agree that the employer dismissed the Claimant because of incidents under the attendance management program. However, I don't agree that lateness was the only, or even the main issue. The most significant issue, as shown on the attendance report, was unapproved sick days.

[12] With the Claimant's dismissal letter, the employer provided his attendance report which highlighted four unapproved sick days and one late call in (when he called in sick but gave less than an hour's notice) between March<sup>4</sup> and when the Claimant was dismissed in August. I believe the highlighting shows which incidents the employer relied upon to dismiss the Claimant under the attendance management program. The late call in was on August 23, the same day as an unapproved sick day. It was this sick day that triggered the employer to dismiss the Claimant.

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<sup>3</sup> *Goulet v Canada Employment Insurance Commission*, [1984] 1F.C.653; *Canada (Attorney General) v McLaughlin*, A-244-94.

<sup>4</sup> All references to dates are to the year 2019, unless otherwise stated.

[13] Further, in response to the Union's assertion that the Claimant's incidents were mostly about "late punches" and not absences, the Employer said that the attendance records showed excessive absenteeism.

[14] The Claimant acknowledged that he had trouble meeting the attendance and lateness requirements. The attendance report confirms this. The Claimant didn't dispute that he missed the days shown on the attendance report or that he was late calling in sick.

[15] The Claimant told the Commission and testified that when he was off on sick leave one of his co-workers told him he should start looking for another job because the employer planned to get rid of him when he returned to work. The Claimant testified that this co-worker was friends with and talked to management a lot. The Claimant said he didn't know if the co-worker was telling the truth, so he didn't look for a new job or mention this in his application for benefits.

[16] Even if the employer told the Claimant's co-worker that it wanted to get rid of the Claimant, given the Claimant's difficulties under the attendance management program, I find the employer likely wanted to get rid of him because of his attendance issues.

[17] The Claimant didn't suggest that the employer treated him differently from other employees. The human resources person told the Commission that she liked the Claimant. This is evidence that there was no reason other than his attendance to want to dismiss him.

[18] As such, I find the Commission has proven that the Claimant lost his job because of incidents under the attendance management program.

**Is the reason he lost his job misconduct under the law?**

[19] The reason is not considered misconduct under the law.

[20] The Commission has to prove it's more likely than not<sup>5</sup> that the Claimant lost his job because of misconduct.<sup>6</sup>

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<sup>5</sup> The Commission has to prove this on a balance of probabilities which means it is more likely than not.

<sup>6</sup> *The Minister of Employment and Immigration v Bartone*, A-369-88.

[21] To be misconduct under the law, the conduct has to be willful. This means the conduct was conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless that it approaches willfulness.<sup>8</sup> The Claimant doesn't have to have a wrongful intent for his behaviour to be misconduct under the law.<sup>9</sup>

[22] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of his duties owed to his employer and, as a result, that dismissal was a real possibility.<sup>10</sup>

***Did the Claimant call in sick as shown in the employer's records?***

[23] The Claimant didn't dispute that he called in sick on the highlighted days shown on the attendance report or that he was late calling in sick. As such, I find the Commission has proven that the Claimant called in sick and was late calling in as highlighted on the attendance report.

***Should he have known that his dismissal was a real possibility when he called in sick on August 23?***

[24] No. I find the Claimant shouldn't have known that he would be dismissed when he called in sick on August 23 because:

- a) he didn't know where he stood on the attendance policy, despite his requests;
- b) he didn't know that two of his sick days in May hadn't been approved by the employer.

[25] There is no doubt that calling in sick on August 23, and doing so with less than an hour's notice, were willful and deliberate acts by the Claimant. The question is whether he knew or ought to have known that the employer was likely to dismiss him because of it.

[26] The Claimant knew or ought to have known that the employer would dismiss him if he had four more incidents under the attendance management program. The Claimant received a 5-day suspension under the attendance management program in March 2019. The employer told

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<sup>7</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>9</sup> *Attorney General of Canada v Secours*, A-352-94.

<sup>10</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

the Claimant, and the Claimant acknowledged in writing, that if he had any combination of four incidents under the program, including lateness or unapproved absences, he would be dismissed.

[27] The evidence shows the Claimant didn't know how many incidents he had under the program. The Claimant explained that sometimes the employer didn't approve sick leave, even when a doctor's note was provided. The Claimant said he always provided a sick note (except for the last incident when the employer dismissed him). The Claimant said he asked the employer more than once where he stood on attendance but the employer didn't tell him.

[28] I accept the Claimant's statements as true. He seemed genuine when he said he was surprised when the employer dismissed him in August. His testimony was direct and straightforward. When he wasn't sure about something, he said so.

[29] It's understandable that the Claimant didn't know where he stood on his attendance because he was on sick leave for 9 weeks between the time he received the warning in March and when he was dismissed, and, despite his requests, his employer didn't update him on where he stood before he was dismissed in August. There is no indication in the file that the Claimant had access to his attendance report.

[30] The evidence doesn't show that the Claimant knew the employer hadn't approved his sick days in May. The Claimant was off work for nine weeks from May to August. He was on sick leave because of stress. He said the stress was triggered by his five-day suspension in March. The attendance report shows the Claimant had two sick days immediately before his sick leave started. There is no explanation in the file as to why these sick days which ran into his approved sick leave were not approved by the employer.

[31] The Commission and Claimant focussed on the Claimant's lateness in returning from breaks. Given my finding that the Claimant's dismissal was because of the five highlighted entries in the attendance report, and not because of lateness from breaks, I don't have to decide if his actions in being late from breaks were willful and deliberate.

[32] Since the Claimant shouldn't have known the employer was likely to dismiss him when he called in sick on August 23, I find the Commission hasn't proven the Claimant lost his job because of misconduct.



**CONCLUSION**

[33] The appeal is allowed. This means the Claimant is not disqualified from being paid employment insurance benefits.

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

HEARD ON:	February 4, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	D. B., Appellant