Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *DW v Canada Employment Insurance Commission*, 2020 SST 1038

Tribunal File Number: GE-20-795

BETWEEN:

**D. W.**

Appellant
(Claimant)

and

**Canada Employment Insurance Commission**

Respondent
(Commission)

# SOCIAL SECURITY TRIBUNAL DECISION

## General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: April 22, 2020

DATE OF DECISION: April 23, 2020

Canada

## DECISION

[1] The Commission has not proven that the Claimant lost his job because of misconduct. This means that the Claimant is not disqualified from being paid benefits.[1]

## OVERVIEW

[2] The Claimant resigned from his employment on October 24, 2017. The Claimant's employer said if the Claimant had not quit his job he would have been dismissed for breach of policy. The Commission initially determined the Claimant did not have just cause for voluntarily leaving his job and disqualified him from receiving Employment Insurance (EI) benefits. The Claimant appealed the Commission's reconsideration decision to the Tribunal. On September 18, 2018, the General Division of the Tribunal concluded the Claimant did not have just cause for voluntarily leaving his job.

[3] On November 7, 2019, the Appeal Division of the Tribunal granted the Claimant leave to appeal. On February 26, 2020, the Appeal Division returned the matter back to the General Division to determine whether the Claimant was dismissed for misconduct.

[4] The Claimant says the real reason he was going to be dismissed was political and the Director at the time (R. D.) was seeking vengeance. The Commission now submits the Claimant lost his job because of misconduct and disqualified him from being paid EI benefits.

## 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?*

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

[6] The Claimant resigned from his employment. However, the employer would have dismissed the Claimant for breach of policy if he had not resigned first.

[7] The Claimant and the Commission do not agree on the reason why the Claimant lost his job. The Commission says the reason given by the employer is the real reason for the dismissal. The employer told the Commission that the Claimant would have been dismissed for breach of policy if he had not resigned first.

[8] The Claimant disagrees and says he lost his job for political reasons and the previous Director (R. D.) was seeking vengeance.

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

[9] The reason for the Claimant's dismissal is not considered misconduct under the law.

[10] 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 behavior to be misconduct under the law.[4]

[11] 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]

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

[13] The Commission says there was misconduct, because the Claimant acknowledged he breached a policy of the employer when he accepted money from an inmate while the Claimant was a Parole Officer.

---

[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.
[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.

[14] The Claimant says there was no misconduct because the Director at the time advised the staff in 2016 that the employer's policies were "out the door" and needed to be reviewed and updated.

[15] I find the Commission has not proven there was misconduct for the following reasons:

[16] First: I accept the Claimant's sworn testimony that at the time of the incident in 2016 the acting Director (R. D.) had advised staff not to go by the employer's policies because they were under review and being updated. The Claimant has not disputed he received a loan from an inmate approximately one year before he was asked about the incident on October 24, 2017. However, the Claimant testified that he understood the employer's policies were under review in 2016 and he did not think he was breaching the employer's policy when he accepted a loan from an inmate at the time. I realize the Commission submitted the Claimant acknowledged he breached a policy of the employer when he accepted money from an inmate while the claimant was a Parole Officer. Nevertheless, the Claimant's oral testimony on this matter was plausible because the employer's policies were under review at the time of the incident in 2016. In short, the Claimant's behavior at the time of the incident lacked a mental element of willfulness because the employer's policies were under review and not being applied at the time.

[17] Second: I accept the Claimant's testimony that he was going to be dismissed for political reasons, because his statements were corroborated by M. O. (Manager). Specifically, M. O. told the Commission she had to fire the Claimant because they had to save their organization's relationship with the Correctional Service (GD3-52). M. O. further told the Commission the Claimant was one of the Indigenous staff who were "bullied and abused" by the previous Director (R. D.). Furthermore, M. O. explained that previously there had been numerous complaints about Indigenous staff from R. D.. However, M. O. stated that her experience was "very different" and that every employee was capable, forward thinking, ethical and she had a good working relationship with the Claimant.

[18] Third: The employer never submitted any policy documents or cited specific policies the Claimant had breached. I recognize the Commission submitted that the Claimant wrote in his reconsideration letter that staff were not allowed to accept gifts of any kind from parolees and inmates. However, the Claimant testified that R. D. had advised staff in 2016 that employer

policies were outdated and under review. Under these circumstances, I simply cannot conclude the Claimant's action of accepting a loan from an inmate in 2016 contained a mental element of willfulness because the Director (R. D.) advised staff that their policies were out of date and under review. Perhaps the Claimant's acceptance of a loan from an inmate in 2016 was unwise and imprudent. Nevertheless, this action would not meet the legal test for misconduct at the time.

**Additional Submissions from the Commission**

[19] I realize the Commission submitted that the Claimant's acceptance of money from an inmate when he was in the position of a Parole Officer constituted misconduct, because he knew (or ought to have known) that doing so would be a breach of the employer's policy. Nevertheless, I accept the Claimant's written submission that where he worked all staff "even the former Director" accepted gifts and favors from inmates and there was buying, borrowing, gifting of ceremonial items, drums, tipis/poles, star blankets and homemade canvas camping tents (RGD3).

[20] As cited above, I do recognize the Claimant's acceptance of a loan from an inmate in 2016 was probably unwise and imprudent. However, I cannot ignore the work culture and circumstances that existed while the Claimant was working under R. D. in 2016. For example, there was confusion around the employer's policies under R. D. in 2016 and staff members were told not to go by these policies because they were under review. Furthermore, the employer (M. O.) told the Commission that R. D. "targeted" the Claimant and it was a "political" decision to dismiss him (GD3-52). These are circumstances I cannot simply sweep aside or ignore when determining whether the Claimant's action in 2016 would meet the legal test for misconduct.

**CONCLUSION**

[21] The appeal is allowed. This means that the Claimant is not disqualified from being paid EI benefits.

*Gerry McCarthy*

Member, General Division - Employment Insurance Section

| | |
|---|---|
| HEARD ON: | April 22, 2020 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | D. W., Claimant (Appellant) |