



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *NN v Canada Employment Insurance Commission*, 2020 SST 818

Tribunal File Number: GE-20-1328

BETWEEN:

**N. N.**

Appellant / Claimant

and

**Canada Employment Insurance Commission**

Respondent / Commission

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Raelene R. Thomas

HEARD ON: May 26, 2020

DATE OF DECISION: May 29, 2020

## **Decision**

[1] The appeal is dismissed. The Commission has proven, on a balance of probabilities, the Claimant lost his employment because of his misconduct. This means he is disqualified from receiving employment insurance (EI) regular benefits

## **Overview**

[2] The Claimant was employed driving the employer's van to pick up passengers at various locations. One night, while driving the employer's van he was ticketed by the police for speeding. He was also tested and found to have alcohol in his system. The police suspended the Claimant's license for three days and impounded the van. The employer dismissed the Claimant for violating its safety policies. The Claimant applied for EI benefits. The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost his employment because of his misconduct and disqualified him from receiving regular EI benefits. The Claimant does not agree with the Commission's decision. He says that he was not given enough time to drive to the pick up, he should not have been assigned the pick up, the amount of alcohol he had in his system was not illegal and that the dismissal was too severe.

## **Preliminary Matters**

### ***The employer is not an added party to the appeal***

[3] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. Usually, the Tribunal sends the employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal did not send the employer a letter because its administrative services are temporarily interrupted due to the public health emergency. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in the file that indicates that my decision would impose any legal obligations on the employer.

## **Issues**

[4] Did the Claimant lose his job because of misconduct?

[5] To determine this, I will first decide the reason the Claimant lost his job. Then I will consider whether the Claimant committed the conduct that led to him losing his job. If he did, I then have to decide whether his conduct is misconduct under the law.

## **Reasons for my decision**

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

[6] I find the Claimant lost his job because he violated the employer's safety policies.

[7] The Claimant wrote in his application for EI benefits that he was dismissed for violating the employer's safety policies. The letter of dismissal states the Claimant was stopped by the police for going more than 36 km/hour over the posted 90 km/hour speed limit. The police also tested the Claimant and found he had alcohol in his system. The Claimant testified that he was speeding and that he had consumed about one and one-half ounces of alcohol prior to driving. Based on the evidence before me, I find that the Claimant lost his job because he was speeding and had alcohol in his system while driving the employer's van.

### ***Did the Claimant commit the conduct which led to his dismissal?***

[8] Yes, I find the Claimant committed the conduct that led to his dismissal.

[9] The Claimant applied for EI benefits on January 21, 2020. He wrote in his application for EI benefits that he was dismissed because his employer accused him of committing a safety violation and/or causing damage to machinery or property. The application for EI benefits does not make reference to the Claimant having alcohol in his system. The Claimant testified that he was speeding and that he had drunk about one and a half ounces of alcohol prior to driving the van. The employer told the Commission the

Claimant was dismissed for speeding and for driving with alcohol in his system. I see no evidence to contradict this. As a result, I find that the Claimant did commit the misconduct that led to his dismissal.

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

[10] Yes, I find the reason for the Claimant's dismissal is misconduct under the law.

[11] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.<sup>1</sup> Misconduct also includes conduct that is so reckless that it approaches willfulness.<sup>2</sup> The Claimant does not have to have a wrongful intent for his behavior to be misconduct under the law.<sup>3</sup>

[12] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the duties he owed to his employer and, as a result, that dismissal was a real possibility.<sup>4</sup>

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

[14] The Commission says that it concluded the Claimant's actions of speeding and consuming alcohol before driving the employer's vehicle constitutes misconduct within the meaning of the *Employment Insurance Act* because the Claimant was well aware that he was violating the employer's safety policies each of which were zero tolerance. The Commission says the Claimant acted willfully, very well knowing that his actions could lead to termination of his employment if caught. It says although the Claimant advised the Commission that he felt pressure to drive at a higher speed due to insufficient time

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<sup>1</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to the court cases that I must apply to the appeal.

<sup>2</sup> *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>3</sup> *Attorney General of Canada v Secours*, A-352-94.

<sup>4</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<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.

allotment, it does not negate the Claimant's responsibility to follow safety rules in driving to protect human life and property. The Commission says in this case, the Claimant failed to follow the provincial driving rules, breached the company zero tolerance policies and lost his employment as a direct result of his action.

[15] The Claimant submitted that he did not agree that he committed misconduct that was deserving of firing. He explained his position to the Commission when he requested reconsideration and explained his position when he submitted his appeal to the Tribunal. He asked that I take into consideration his written explanations. The Claimant wrote that he believed the so-called misconduct was a result of his employer's unrealistic expectations of its drivers. The Claimant wrote that there were no scheduled trips, there were unrealistic arrival times, poor dispatch and undue pressure to arrive at a pick-up location on time.

[16] The Claimant testified that he received a call from dispatch about 11:00 p.m. to pick up passengers by 1:00 a.m. He said he had done the trip before and that it would regularly take him three hours and fifteen minutes plus 30 minutes to get ready. The Claimant testified that dispatch knew full well he could not make the trip in two hours, they knew where he was located, it was unrealistic and he should not have been called. The Claimant said dispatch argued with him that he was the only one who could do the pick up, they said "please do it." So, the Claimant agreed to do the pick up. He said that to please the company and the passengers he was speeding to the pick up location so he would not be too late.

[17] The Claimant testified that he was ticketed for going 129 km/hr in a 90 km/hr zone. The police also administered a test to determine the amount of alcohol in his system. He said he was found to have alcohol in his system but was not over the legal limit of .08.<sup>7</sup> The Claimant said that his alcohol consumption was well below the legal limit and it was legal because he was not charged with anything. Nonetheless, the police

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<sup>7</sup> 80 milligrams of alcohol in 100 millilitres of blood

suspended the Claimant's license for three days and impounded the employer's van. The Claimant faxed a copy of the police report to the company.

[18] The Claimant testified that he drank approximately one and one-half ounces of alcohol before he was called by dispatch at 11:00 p.m. When asked if he told dispatch when they called him that night that he had consumed alcohol, the Claimant replied that he does not tell anyone he consumes alcohol; he said you can't expect anyone to not drink 24/7. When asked if he could have refused the assignment the Claimant replied that he accepted the assignment to make money; he said he could have said no and he has the option to say no if he has had a drink.

[19] The Claimant submitted that he did not think it was realistic for an employer to expect anyone to be on call 24/7. He did not think that the incident should have been treated so seriously; the employer should have given him a letter or a short suspension. The Claimant said that he had been working for the company for over six years and had gone above and beyond. The Company could have avoided firing him. He said it was just a speeding ticket, that people get tickets all the time. The Claimant was not aware if other drivers had been fired for getting speeding tickets. He said that because he has not seen his job reposted he thought the employer might be using the speeding as an excuse to get rid of him. The Claimant later clarified that the company was not trying to get rid of him. He said if that was the case, the company could have laid him off, because that would be the right thing to do.

[20] The Claimant wrote in his application for EI benefits that he was "well aware" of the Employer's Safety Policy. The employer sent the Commission its safety policies. The Claimant said that he had not seen these policies but did see policies when he was hired six years ago but not to the level of detail of what was sent to the Commission. The Claimant is a member of union, but did not grieve the termination of his employment. The Claimant testified he is not an alcoholic and that he has not received treatment for

alcoholism.

[21] I find that the Claimant's conduct in this case was so negligent or reckless as to approach willfulness. The Claimant was aware that he could not make the trip in the two hours that dispatch had allocated. He was also aware that he had consumed alcohol prior to being contacted by dispatch. He testified that he could refuse the assignment. He chose to accept the assignment. In doing so the Claimant made the conscious decision to drive with alcohol in his system and to drive over the posted speed limit when he was aware that both actions were in violation of the employer's safety policies. As a result, I find that the Claimant's conduct was both so negligent and reckless that it was willful.

[22] The Claimant disagrees that he should have been dismissed for the speeding ticket. He said that a warning letter or a short suspension would have been appropriate. It is not my role to determine whether the employer's discipline was appropriate. The Claimant's suggestion that a lesser penalty would be appropriate tells me that he was aware that he could be disciplined for speeding and for having alcohol in his system while driving. As a result, I find that the Claimant knew, or ought reasonably to have known, that dismissal was a possibility when he drove the employer's van in excess of the speed limit and while he was aware he had alcohol in his system.

[23] The legal test for misconduct requires a causal relationship between the misconduct of which the Claimant is accused and the loss of employment. The conduct must cause the loss of employment, have been committed by the Claimant while employed by the employer, and must constitute a duty that is express or implied in the employment contract.<sup>8</sup>

[24] I find that it is an express and an implied duty for an employee who is operating a company vehicle to do so in accordance with the employer's policy and the law. The Claimant admits he was speeding. He says that he was speeding because he was not

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<sup>8</sup> *Canada (Attorney General) v. Cartier*, 2001 FCA 274.

given enough time to reach the destination and he wanted to please the company by not being too late. The Claimant argued that the amount of alcohol in his system was legal because he was not charged. Whether the Claimant is given enough time to arrive at a destination or is charged or not charged for an alcohol driving related offence is not determinative of the issue. It is the Claimant's duty to follow the employer's safety policies and the law when operating its vehicles. The employer's policies require that drivers obey the posted speed limits and not consume alcohol prior to reporting to work. The law requires that drivers not exceed the speed limit and to not drive with alcohol in their system. The Claimant was aware that he could not reach the pick up location in the time allotted. The Claimant was aware that he had consumed alcohol prior to accepting the assignment. He testified that he could refuse the assignment because he had consumed alcohol. Instead, he chose to accept the assignment and drove the employer's van above the posted speed limit with alcohol in his system. As a result, I find that the Claimant's actions of consuming alcohol prior to accepting the assignment and driving over the posted speed limit violated an express and implied duty to his employer. The evidence tells me that the Claimant's actions of speeding and driving with alcohol in his system were the cause of his dismissal. Accordingly, I find that the Claimant's conduct is misconduct within the meaning of the *Employment Insurance Act*.

**Conclusion**

[25] The appeal is dismissed.

Raelene R. Thomas  
Member, General Division - Employment Insurance Section

HEARD ON:	May 26, 2020
METHOD OF PROCEEDING:	Teleconference



APPEARANCES:	N. N., Appellant
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