



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *ZY v Canada Employment Insurance Commission*, 2020 SST 1066

Tribunal File Number: GE-20-1263

BETWEEN:

Z. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: June 15, 2020

DATE OF DECISION: June 25, 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.¹

OVERVIEW

[2] The Claimant lost his job working as an IT technician for a food processing company and applied for regular employment insurance (EI) benefits. The Claimant's employer said that the Claimant was dismissed because he refused to do a task that his foreman asked him to do. The employer considered this insubordination. The Claimant says that he did not refuse his foreman's request and that insubordination is not the real reason why the employer dismissed him. The Claimant says that his employer discriminated against him by hiring an unqualified person as his supervisor. The Claimant filed a discrimination complaint about this in 2017 and says, after that, the employer wanted to get rid of him. The Claimant says discrimination also played a role in his firing. 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.

[3] The Claimant appeals the Commission's decision to the Tribunal. I have to decide whether the Claimant lost his job due to misconduct.

[4] I have decided, for the reasons set out below, that the Claimant lost his job due to misconduct.

PRELIMINARY MATTERS

[5] The Claimant had a previous hearing of this appeal before the Tribunal's General Division on December 13, 2019. The General Division rendered a decision on December 17, 2019, dismissing the Claimant's appeal. The Claimant appealed that decision to the Tribunal's Appeal Division. On April 23, 2019, the Appeal Division determined that the initial decision was in error, as the Claimant had not been permitted to testify as to his employer's conduct

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

towards him, which evidence was potentially relevant to the issue of whether the Claimant had committed misconduct. The Appeal Division returned the matter to the General Division for a new hearing. This decision arises from that new hearing.

[6] The Claimant was provided with a Mandarin speaking interpreter for his hearing.

[7] The Claimant referred in his testimony to a provision in his collective agreement that said that if the employer was going to ask an employee to do a job other than their own, the employer was required to first ask a more junior person first to do the job, before asking a more senior employee. I asked the Claimant if he could provide that documentation. The Claimant provided a post-hearing submission containing pages from his collective agreement with provisions relating to overtime, training and the filling of vacancies but there were no provisions relating to the temporary covering of other jobs.² A copy of this material was forwarded to the Commission.

ISSUES

[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. Then, I have to decide if the Claimant committed the conduct for which he lost his job. If he did, then I have to decide if the employer's reason for firing the Claimant constitutes misconduct under the law.

ANALYSIS

Why did the Claimant lose his job?

[9] I find the Claimant lost his job because his employer determined the Claimant refused to do a task he was asked to do by his foreman, which conduct the employer considered to be insubordination.

[10] The Claimant and the Commission do not agree on the reason why the Claimant lost his job.

² RGD2-1 to RGD2-3.

[11] The Commission says that the reason given by the employer is the real reason for the dismissal.

[12] The employer provided the Commission with “Employee Warning Records” showing the Claimant had been subject to progressive discipline for incidents of insubordination. These records show that on May 9, 2018 the Claimant was verbally warned for refusing to train in the “sausage” room.³ On July 5, 2018, the Claimant was given a written warning for refusing to help another employee in the “sausage” room.⁴ The Claimant was given a one-day suspension on September 12, 2018 for insubordination, although no details are provided what this incident relates to.⁵ On March 27, 2019, the Claimant was suspended for five days for refusing to train on “line 6” after being asked to do so several times by the foreman.⁶ On May 16, 2019, the Claimant was suspended for 20 days for insubordination occurring on May 10, 2019. This Employee Warning Record refers to the prior incidents of discipline and notes “20 day suspension (last chance) without prejudice”.⁷ A final Employee Warning Record of July 25, 2019 notes the Claimant is being terminated for insubordination “as per Company policy.”⁸

[13] The employer told the Commission that the Claimant was dismissed for insubordination. The Claimant had received several warnings and the termination was the result of his failing to change his conduct after the progressive disciplinary procedures. The employer said the Claimant had been advised in a meeting the week prior to his dismissal that he may be required to do an electrical job the following week, as he had his electrician ticket and they were short on workers. The following week the Claimant was asked to work on a machine with an electrical problem and refused his foreman's request. The employer states this was the final incident that led to the Claimant’s dismissal.⁹

[14] The Claimant says that insubordination is not the real reason he was fired. The Claimant says he filed a discrimination complaint in 2017 and since then, the employer was trying to get

³ GD3-37.

⁴ GD3-34.

⁵ GD3-31.

⁶ GD3-33.

⁷ GD3-31.

⁸ GD3-29.

⁹ GD3-25.

rid of him. He says the employer kept “poking” him and this last incident was set up. He believes discrimination played a role in his firing.

[15] The Claimant explained that he had worked for his employer since 2006. He was an “IT tech”. He has both an electrical and a mechanical license, which is required in his job as a lot of the machinery in the factory is automated. The Claimant explained his duties involved controlling and fixing the automation, maintenance of machinery as well as a little work on the computer network. He pointed out that regular electricians could only handle the simpler jobs dealing with light and motors. The Claimant said he is the most qualified person in the IT tech department. However, the employer hired another IT tech four years ago to oversee the IT team. The employer told the Claimant he was not qualified for this job. The Claimant said the person who was hired over him had no licences at all and was incompetent. Despite that, this person was then promoted to lead hand after two years. The Claimant says his failure to get this supervisory job was because of discrimination. He verbally complained to management and then in 2017 filed a written complaint to the union. The Claimant said nothing happened with his complaint. However, after that, he explained, the employer wanted to get rid of him.

[16] The Claimant says he has no other way to understand what happened to him other than it is discrimination. In addition to the fact he did not get the supervisory job, the Claimant says training and overtime were unfairly allocated to that individual contrary to the collective agreement, which provides training and overtime is to be based on experience.¹⁰ The Claimant says over the last two years he has had most of his overtime and training taken away and he is owed overtime pay by the employer. The Claimant also explained there was a double standard for mistakes. If the lead hand messed up a job, there were no consequences but if the Claimant messed up, the management team was very mad at him. The Claimant says he thinks he was fired for discriminatory reasons because since he has worked with this employer, him and the two other people fired in his department were of differing ethnicities.

[17] The Claimant testified that the company was always finding excuses to discipline him. He said the discipline policy requires the employer to provide a verbal warning, a written warning, a three-day suspension, then a five days suspension and then termination. The

¹⁰ RGD2-3.

Claimant said his understanding was that after a half a year, the discipline would be removed from the employee's record. The Claimant said, because of that, once he reached a three-day suspension, he knew his day was finished with this employer. He says he thought the employer would push harder to discipline him so they would not have to start over with the progressive discipline.

[18] The Claimant explained he had a 20-day suspension on May 16, 2020 for insubordination prior to the final incident. He related that new machinery was being added to the line. The Claimant said that the company policy requires training to be done by seniority and he is a senior employee. However, two newly hired IT techs were provided with training on the new line from an engineer. The Claimant filed a grievance about the training and also unpaid overtime pay and this upset the employer. The Claimant says the employer then asked him to train with a machine operator instead of the engineer. The Claimant said this was like asking a supervisor to be trained by a secretary. The Claimant said nothing like this had ever happened in the history of his working with this employer. The Claimant told his employer that this was unfair to him and did not make sense. He told the employer if his co-workers did the same training, then he would take it. However, the employer said that he was the only one to receive this training. The Claimant said this was humiliating to him and stripped him of his dignity. He refused to do the training and the employer suspended him. The Claimant said the suspension was initially for 10 days but the employer then increased it to 20 days. The suspension document contained a "last chance" warning. The Claimant filed a grievance about this suspension but it is still pending.

[19] The Claimant testified that he understood the progressive discipline policy in the union book.¹¹ He also understood after this 20-day suspension that if there was one more incident of insubordination he could be terminated. He says this is why he agreed with his union representative that he would never say "no" to the employer.

[20] The Claimant explained what happened on his final day of July 25, 2019. The Claimant testified he had attended a meeting with his employer and his union representative the week before the incident, where he was told he would potentially have to cover some of the general electrician's work the following week. The Claimant agreed to do so. The Claimant said his

¹¹ GD3-28.

union representative had told him to never say “no” to a request. The Claimant said it was not discussed but he assumed the employer would follow the union rules if he were asked to do these duties.

[21] The Claimant said on his final day, his shift started at 8 a.m. There was no regular electricians working that day. His two co-workers, who were junior electricians, had started at 5 a.m. When the Claimant arrive, the foreman called him over the radio and asked him to trouble shoot a motor on a machine. The Claimant said this task was part of the general electrician’s job. The Claimant said he had never worked on this machine before. The Claimant said according to the union rule book, if the employer asks him to do another job that has a qualification lower than his, the employer must start with a junior qualification first. So, in this case, the employer should have started with a junior electrician. The Claimant said when he was asked to do the job, there were three other co-workers with lower qualifications available, who they could have asked to do the job. Instead, they skipped the junior electricians and waited three hours for him to ask him to do the job. The lead hand was also there and was better suited to do the job. The Clamant said he think this was a set up. He assumed they wanted to provoke him to lose his temper as the foreman knew very clearly what the union rules were.

[22] The Claimant said a dispute occurred with the foreman, which started over the radio. The Claimant said he explained to the foreman that he did not understand the machine in question and they should find a better person to do the job. The foreman hung up the phone and came to see him. The Claimant said the foreman told him he had to obey the rules and do what he says. The foreman got angry, lost his temper, and told the Claimant he refused to obey his rules and refused to work. The Claimant says that he never said “No” to the foreman and he kept calm. The Claimant says he was not given a direct order and he did not directly refuse the job.

[23] I asked the Claimant why he did not just do the job he was asked to do and file a grievance later. The Claimant said the foreman did not give him time to explain. He yelled at him and said he disobeyed the order and shut the door and walked away. I asked him what he understood the foreman’s request to be if not a direct order. The Claimant said the task he was asked to do was not his usual work or duty and he did not understand the machine. He thought the employer should follow the union book, which says they have to first ask a junior electrician

or the employer should use common sense and find a better person to resolve the matter. The Claimant said he did not understand why they chose him. He said even though he had agreed to cover the general electrician's duties, the employer has to respect the union rules that require a junior electrician to be asked first to do the job. The Claimant says he filed a grievance regarding the termination but it is still unresolved.

[24] The Human Resources (HR) representative from the employer denied to the Commission that there was any harassment or discrimination of the Claimant. She told the Commission that, with respect to the 20-day suspension, the Claimant was offered training by the people who came to install the line but he chose not to engage. The HR representative said the Claimant was given several opportunities to correct his behaviour before termination. There was a fair process and he was not unjustly targeted. She stated that the Claimant mentioned he had some complaints about harassment but she did not see any evidence of it during her time there and she would have done something about it had she seen it. The HR representative said she thought the Claimant may have been referring about things that may have happened years ago. She was not familiar with any current incidents of workplace harassment or insults related to his dismissal.¹²

[25] I find as a fact that the Claimant lost his job because the employer believed him to be insubordinate on July 25, 2019. I reach this conclusion based on the records of progressive discipline relating to insubordination and the Claimant's acknowledgment of a dispute, which occurred on July 25, 2019 over a task, he was asked to perform.

[26] While the Claimant does not agree he was insubordinate, he does agree he would not do the training offered to him on May 10, 2019 with the machine operator, which led to a 20-day suspension and a "last chance" warning. The Claimant also agrees there was a dispute with his foreman on July 25, 2019 concerning the request that he trouble shoot a motor on a machine and that he was terminated after this disagreement.

[27] I am not satisfied that the Claimant was targeted for termination because he filed a discrimination complaint in 2017.

¹² GD3-25.

[28] It is true that the disciplinary records show that the Claimant was in fact subject to a number of disciplinary measures after in 2018 and 2019, after filing his complaint in 2017, both for insubordination and for other reasons. ¹³ However, the records show that Claimant was also subject to discipline for various reasons prior to filing his complaint in 2017 as well. In that regard, there are multiple discipline records on file from 2009 to 2015 and one in January 2017. There does not appear to have been any marked change in the manner in which the employer was imposing discipline on the Claimant after he filed his complaint in 2017.

[29] What is apparent from the discipline records and the Claimant's testimony is that the employer and Claimant were engaged in an ongoing dispute about what tasks or training it was appropriate for the Claimant to perform. The employer had asked the Claimant on a number of occasions to engage in tasks and training, which the Claimant believed were inconsistent with his qualifications and seniority and the collective agreement. The Claimant's unwillingness to perform those tasks and training was perceived by the employer as insubordination and this led to progressive discipline. ¹⁴ This ongoing issue ultimately led to the Claimant's termination on July 25, 2019 when the employer perceived the Claimant to be refusing a task he had been asked to do by his foreman.

[30] I am also not satisfied that discrimination played a role in the Claimant's termination. The Claimant points to his failure to obtain the supervisor position and differential treatment between himself and the lead hand with respect to overtime, training and how mistakes were treated as evidence of discrimination. He also points out that he and the other two people fired from his department were all from different racial backgrounds. The Claimant has not provided any evidence to show that he was targeted for any reasons related to race or any other personal characteristic. While the employer's activities may raise a suspicion of discrimination, that is all it is.

[31] I find as a fact that it is more likely than not that the Claimant lost his job because his employer determined that the Claimant refused to do a task he was asked to do by his foreman on

¹³ GD3-31 to GD3-37.

¹⁴ GD3-31 to GD3-37.

July 25, 2019, which conduct the employer considered to be insubordination. I am satisfied this was the real reason for firing and not an excuse.

Did the Claimant committed the act for which he was fired?

[32] Yes. I find he did.

[33] The employer told the Commission that the Claimant was a ticketed electrician, millwright, and IT tech. The employer had a meeting with the Claimant, the employer, and a shop steward to give the Claimant the heads up that, because of holiday scheduling, the Claimant may be asked to work on an electrical job. The employer said that they are a production facility and cannot let the production stop. The employer said they wanted to be transparent with the Claimant and the work would not be unsafe or illegal. The employer said given his relations with his foreman and that he may be asked to check out an electrical issue, they had the meeting with the Claimant and the union representative. The Claimant had been insubordinate several times. The employer said they did not want to be put in a position where emotions might have gotten the better. At the meeting, the Claimant confirmed he was a ticketed electrician. The Claimant told the employer that they could not ask him to do this job as his bid job was as an IT tech. However, the employer told the Claimant that the collective agreement states, “the senior must, junior may.” The Claimant was the only qualified ticketed electrician. On July 24, 2019, the Claimant was asked to do a job. The Claimant told the employer he refused the request because he didn't know how to fix the machine. However, he confirmed to the employer, that as an electrician, he would be able to self-diagnose.¹⁵

[34] The Claimant says he did not refuse the job. Rather, he told the foreman he had not done that job before and asked the foreman to find someone who better knew the job. He says he was not insubordinate as he did not refuse the job and the employer was violating union rules in not first asking a junior electrician to perform the work.

[35] The Claimant says even though he had told the employer in the meeting the week before that he would cover the general electrician's job, he assumed the employer would follow the

¹⁵ GD3-73.

union book, which requires they ask a junior qualified person first to do the job. There were junior electricians who could have done the job, but they waited to ask him.

[36] I asked the Claimant if he could provide the provision in the collective agreement that said a junior person should have first been asked to do the electrical job, as opposed to him. The Claimant provided, post-hearing, provisions of the collective agreement relating to vacant positions, overtime and training.¹⁶ He did not provide any provisions relating to a situation where an employee is being asked to temporary cover another employee's duties.

[37] The employer's insubordination policy provides that if an employee has been requested by a Management personnel to perform required duties and the employee responds with a direct refusal to do said work the following discipline will apply: 1st offence: verbal warning, 2nd offence: written warning, 3rd offence: 1 day suspension, 4th offence: 5 day suspension, 5th offence: termination."¹⁷

[38] I accept the Claimant's testimony as to what he told his foreman. It is consistent with the information he provided in his application for benefits¹⁸ and what he told the Commission.¹⁹ It is also consistent with the grievance he filed.²⁰

[39] I find the Claimant was insubordinate to his foreman. The Claimant was made aware the week before he might be asked to cover some of the general electrician's work. The foreman requested that the Claimant perform a general electrician's task. While the Claimant did not outright refuse or say "No" to the job, I find his lack of agreement to do the task and his suggestion that the foreman should find someone better suited to the job was tantamount to a direct refusal when considered in the context of the fact the Claimant had been told the week prior he might be asked to do such a task, and he agreed to do so. Even though the Claimant had never worked on the machine before, the Claimant could have made some effort to comply with the foreman's request by at least going to the machine to see whether he could fix it.

¹⁶ RGD2-3.

¹⁷ GD3-28.

¹⁸ GD3-9.

¹⁹ GD3-63 and GD3-76.

²⁰ GD7-2.

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

[40] Yes. I find the reason is misconduct under the law.

[41] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.²¹ Misconduct also includes conduct that is so reckless that it approaches willfulness.²² The Claimant does not have to have a wrongful intent for his behavior to be misconduct under the law.²³

[42] 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.²⁴

[43] The Commission has to prove that it is more likely than not²⁵ that the Claimant lost his job because of misconduct.²⁶

[44] Where harassment is alleged, an analysis of the alleged harassment before the misconduct occurred is relevant to whether or not the conduct by the Claimant was intentional or not.²⁷

[45] The Commission says there was misconduct because the Claimant had received ongoing verbal and written warnings and disciplinary actions advising him of possible termination for insubordination. The Commission says the Claimant knew or ought to have known that this final act of insubordination would lead to his dismissal.

[46] The Claimant says he did not think he would be fired because he did not refuse to do the task and the employer did not comply with the union rules to ask a junior person to do the task first.

[47] I find that the Commission has proven that there was misconduct. The Claimant confirmed in his testimony he was aware of the progressive discipline policy in the union

²¹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² *McKay-Eden v Her Majesty the Queen*, A-402-96.

²³ *Attorney General of Canada v Secours*, A-352-94

²⁴ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ The Commission has to prove this on a balance of probabilities which means it is more likely than not.

²⁶ *The Minister of Employment and Immigration v Bartone*, A-369-88.

²⁷ *Astolfi v. Canada (Attorney General)* 2020 FC 30.

rulebook. The Claimant had received progressive discipline for insubordination. The Claimant received a verbal warning on May 9, 2018, a written warning on July 5, 2018, a one-day suspension on September 12, 2018, a five-day suspension on March 27, 2019 and a 20-day suspension on May 16, 2019. The Employee Warning Record of that date said it was the Claimant's last chance. The Claimant testified that he knew that a further act of insubordination after the May 16, 2019 20 day suspension could lead to dismissal.

[48] I find the Claimant's actions to be wilful in refusing the foreman's request on July 25, 2019 to perform the general electrician's task. The Claimant was aware that further insubordination could result in his dismissal. Even though the Claimant did not say outright "No" to the request, as above, he did not agree to do the task. Given the Claimant's prior discipline history and the meeting with the employer the prior week in which he agreed to perform such tasks, the Claimant ought to have known that by trying to avoid the task requested of him, that his conduct could be considered insubordination and he could lose his job as a result. I find the Claimant's conduct to be reckless to the point of wilfulness, given these circumstances.

[49] The Claimant argues that the employer did not follow the union rules in requesting that a junior electrician perform the task instead of him. The Claimant did not provide a copy of any such rule in the collective agreement. However, regardless of whether or not the Claimant thought the employer was breaching the collective agreement in asking him to perform task in question, the Claimant still acted recklessly by not performing the task and then later filing a grievance. In that regard, the Claimant's union representative had attended the meeting with the employer, and the union representative had told the Claimant to never say "No" to a task. The Claimant ought to have known, in light of that instruction, that behaving in a manner that was tantamount to refusing the task could result in his dismissal.

[50] I have considered whether the Claimant's allegations of discrimination and allegations that the employer was out to fire him are relevant to whether his conduct was intentional or not. In a recent decision of the Federal Court²⁸, an employee had refused to attend the workplace, despite being ordered to by his employer, as he considered the workplace unsafe due to harassment by his employer. The Court that in that case, it was necessary to consider the

²⁸ *Astolfi v. Canada (Attorney General)*, 2020 FC 30 (CanLII).

employer's conduct prior to the "misconduct" in order to properly assess whether the employee's conduct was intentional or not.

[51] As above, I do not accept that the employer was targeting the Claimant with termination and there is no evidence that discrimination was a reason for the termination. I do accept that the Claimant believed his employer was not complying with the collective agreement concerning issues such as promotion, overtime, training and the tasks he was being assigned. However, the Claimant's belief the employer was not complying with the collective agreement does not make his conduct on the last day in refusing the assigned task, any less intentional. The Claimant was aware he had agreed to do the general electrician's tasks, if needed, and he was aware of his union representative's advice to not say "No" to such a request. The Claimant was also aware that he could have performed the task and still filed a grievance without putting his employment at risk. Instead, the Claimant acted recklessly to the point of wilfulness by not performing the task requested of him.

[52] I find the Commission has proven the Claimant lost his employment due to his misconduct.

CONCLUSION

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

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	June 15, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. Y., Appellant

