



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. V. v Canada Employment Insurance Commission*, 2020 SST 804

Tribunal File Number: GE-20-1802

BETWEEN:

S. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: August 21, 2020

DATE OF DECISION: September 11, 2020

Decision

[1] The appeal is dismissed. I find the Commission has proven that the Claimant lost his job because of misconduct. This means the Claimant is disqualified from being paid benefits.¹

Overview

[2] The Claimant lost his job. The employer said the Claimant was dismissed because he breached the trust between them by demanding to be paid a commission in exchange for providing the name of a potential investor. The Claimant disputes this, and testified that he was fired due to a contractual dispute and his refusal to break the law. The Claimant submits that he did not solicit any investors and his employer fired him because he refused to solicit his network for investment opportunities, despite it being illegal for him to use his influence in that way.

[3] The Canada Employment Insurance Commission (Commission) initially allowed the claim for regular benefits, but later accepted the employer's reasons for the dismissal during the reconsideration process. It decided that the Claimant lost his job because of misconduct, and disqualified him from being paid employment insurance (EI) benefits. The Claimant appeals this decision to the Social Security Tribunal (Tribunal).

Preliminary Issues

[4] The Claimant submitted that a previous Tribunal decision should be "upheld" because he met the requirements to receive EI benefits.² I note that the previous Tribunal decision related to antedate. Antedate was granted by the Tribunal's Appeal Division, and is not under appeal in this case. The issue before me is whether the Claimant lost his employment due to his own misconduct, which could impact whether he was entitled to receive the EI benefits addressed by the antedate decision. The antedate decision itself is not before me.

[5] The Claimant submitted that the appeal should be dismissed because it is out of time. He stated that his antedate case ran from August 2019, until March 2020, and the Commission had

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

² GD6-1

ample time to communicate with his employer or any relevant party to determine his eligibility before he was paid EI benefits.

[6] I agree that it appears the Commission did not immediately consider the reason for the Claimant's separation when it assessed his eligibility for EI benefits. However, this does not mean that the Commission cannot investigate and retroactively deny benefits.

[7] The limitation period is set by the *Employment Insurance Act*, and is not the same as provincial limitation laws. Under the *Employment Insurance Act*, a Claimant is liable to repay an amount paid by the Commission to the Claimant as benefits to which the Claimant was not entitled.³ If the Claimant was not eligible to receive the EI benefits he received, the Commission has up to 12 years in certain circumstances to recover the overpayment.⁴ This means I cannot dismiss the appeal due to being out of time, because it is not.

[8] Finally, the Claimant submitted that he applied for EI after leaving a job with Employer B, so his reasons for leaving Employer A should not be relevant. The Claimant left Employer B on May 13, 2019, due to a shortage of work. However, when he applied for EI benefits, his employment over the previous 52 weeks was considered, which included Employer A. Further, the Claimant could not have qualified for EI benefits based solely on his employment with Employer B, because he accumulated only 380 hours of insurable employment. Since the Claimant was employed with Employer A in the 52 weeks prior to applying for EI benefits, and because he did not accumulate enough hours of insurable employment with Employer B to establish a claim solely on that employment, I find the employment with Employer A is relevant.

Issue

[9] Did the Claimant lose his job because of misconduct? To determine this, I will first decide the reason why the Claimant lost his job.

³ *Employment Insurance Act*, paragraph 43(b)

⁴ Section 52(1) of the *Employment Insurance Act*, allows 36 months to reconsider a claim, while section 52(5) allows 72 months to reconsider a claim where a false or misleading statement has been made. Section 47 of the *Employment Insurance Act* allows the Commission 72 months to recover the overpayment. These sections operate together, meaning the Commission has 144 months to recover overpayments where false or misleading statements were made, or 108 months in cases where no false or misleading representations were made. Time exhausted by appeals or reviews is additional to the time limits noted here.

Analysis

[10] The Claimant worked for the relevant employer from August 21, 2017, until January 14, 2019. He had a period of employment with the previously noted Employer B from March 11, 2019, until May 13, 2019, and applied for regular EI benefits on September 9, 2019. The Claimant submits that when he applied for EI benefits, he met the criteria because his Record of Employment (ROE) for the second employment shows his employment ended due to a shortage of work. However, the Claimant accumulated only 380 hours of insurable employment at the second employment and cannot qualify for benefits without including the 2160 hours of insurable employment earned at the first employment. The ROE for the first employment initially showed the Claimant's employment ended due to a shortage of work, but was changed to show it ended due to the Claimant's dismissal.

[11] The Claimant has a separate appeal file with the Tribunal, relating to antedate. On April 3, 2020, the Tribunal's Appeal Division allowed the Claimant's appeal. This meant the Claimant was granted antedate, and could backdate his claim to May 2019, despite applying in September 2019.

[12] The relevant employer issued a revised ROE on March 28, 2019, changing the Claimant's reason for separation from shortage of work to dismissal. It appears the Commission unsuccessfully attempted to contact the employer on April 24, 2020. With no further information available, the Commission processed the claim and paid the Claimant EI benefits.

[13] On July 10, 2020, the employer requested reconsideration of the Commission's decision to allow the claim. The employer submitted that its grounds for dismissal for cause remained valid. The employer explained that it was late in requesting reconsideration due to teleworking relating to the pandemic.

Why did the Claimant lose his job?

[14] I find the Claimant lost his job due to a breach of trust.

[15] The Claimant and the Commission do not agree on the reason why the Claimant lost his job. The Commission says that the reason given by the employer is the real reason for the

dismissal. The employer told the Commission that part of the Claimant's job as Chief Financial Officer (CFO) was to find people who may be interested in investing in the company. He stated that the Claimant found someone to potentially invest, but would not give the employer the name of the person without being paid a commission. He stated part of the CFO's job was to find investors, so the Claimant could not ask to be paid a commission, and added that the Claimant ought to have known that he could be dismissed for requesting a commission because it is unethical for a CFO to make that request. The employer stated it asked the Claimant to put his demand for commission into writing, and after it was received, the employer decided to terminate the Claimant due to a breach of trust.

[16] The Claimant disagrees, and says that the real reason why he lost his job is because the employer expected him to find investors for the company but he refused. He told the Commission that the employer did not give him a clear reason why he was dismissed. He stated his dismissal letter was not specific, but he believed the dismissal was caused by a contract dispute. The Claimant stated that his employer wanted him to raise money for the company, but he could not do that because he was not licenced to raise money.

[17] The Claimant stated that he made multiple presentations to investors, when invited to do so with other members of the management team, but did not solicit investors on his own. The Commission told the Claimant that it received a copy of an email from the Claimant where he stated that he found potential investors and requested a commission. The Claimant denied knowing about the email. The Commission stated that it had no reason to believe the employer fabricated information, and found that misconduct was proven based on the employer's information.

[18] At the hearing, the Claimant testified that when the Commission telephoned him to discuss the case, it was an unscheduled call that lasted approximately three minutes. He stated he was unprepared for the conversation and felt the decision was already made. He stated that the email referred to by the Commission does exist, but is not an email where he asks for commission in exchange for a potential investor name. He stated that the email is between himself and a broker. The employer hired two brokerage companies to find investors, and agreed to pay commissions of 6% on capital investments and 2% on debt. The Claimant stated that the

employer was a start-up company and was not successful in finding investors, so the company asked management to tap their own networks to find investment opportunities. The Claimant said he refused to do that, because it is illegal in his province to act as a broker without a licence. He stated he is not licensed to do that work, and has been in the financial industry for over 30 years so knows what he cannot do.

[19] In the email exchange between the broker and the Claimant, the broker writes on January 8, 2019, that he is aware the Claimant may be able to bring some friends and family to invest and that he would like a commission for doing that. The broker asks the Claimant how much commission he expects to receive. The Claimant responds that he has two potential targets who have the required equity capacity. He states that he gave a brief verbal overview of the investment opportunity to the two potential investors, who expressed interest. He adds that, on the issue of a commission or bonus, “si je me base sur les ententes qu’on a signer récemment, je crois qu’un bonis 6% pour de l’équité et 2% pour de la dette serait fair.” This means the Claimant stated that if he based the commission or bonus request on the agreements signed between the employer and the broker, he believed a 6% equity bonus or 2% debt bonus would be fair, though he noted that the employer was not looking for debt.

[20] At the hearing, the Claimant stated that the employer mischaracterized this email. He stated it was not an email from him to the employer asking for a bonus, but from him to a broker who was hired to solicit potential investors. He stated that he never asked the employer for a commission. The Claimant stated that in the email between himself and the broker, he told the broker that if he was earning 6% or 2%, “you’d think I would be able to find a couple investors.” He stated that he was essentially telling the broker to do his job, and reiterated that he told the broker that he could not be paid a commission.

[21] I find the Claimant mischaracterized the nature of his email. The Claimant contends that he did not ask for a commission and told the broker he could not be paid a commission, but in the email he says, “about the commission/bonus, based on the agreements we have signed recently I believe a 6% equity bonus and 2% debt bonus would be fair.” There is no evidence that the Claimant told the broker that he could not be paid a bonus. Instead, the evidence supports that he responded to the broker’s request for potential investor names and commission

expectations with a percentage expectation. While the Claimant submits he did not ask the employer for a bonus, I find this is irrelevant. The Claimant communicated with the employer's broker regarding potential investors and was acting on behalf of his employer. I further find there is no evidence of the Claimant telling the broker to do its job or saying, "if I was paid a 6% bonus, I could find investors," despite this being his testimony.

[22] The Employment Agreement states that part of the CFO's job will be to seek "financing opportunities" for the employer.⁵ It also states that any business opportunities an employee receives that relate to the employer's business belong to the employer. The termination letter lacks detail, and simply says, "the following is to confirm our exchanges of this date concerning the termination of your employment as Chief Financial Officer...as of this date...because of the serious reasons given to you during the said exchanges." The Commission spoke to the employer on July 29, 2020, who stated the Claimant said he identified potential investors, but wanted to be paid a commission before giving the name to the employer. The employer stated that since this was part of the Claimant's job, he could not ask for a commission on top of his salary for doing something he was already required to do. The employer stated that the bond of trust between the employer and Claimant was broken by the Claimant's actions, because the employer did not know whose interests the Claimant was protecting.

[23] I find, on a balance of probabilities, that the Claimant was terminated from his employment due to a breach of trust. I find the Claimant requested to be paid a commission in exchange for the names of two potential investors in the employer's company because I prefer the evidence contained in the email of January 9, 2019, to the Claimant's testimony. While the Claimant denied writing the email when speaking with the Commission, at the hearing he admitted that he wrote it but submitted it did not mean what it appears to mean. I am unconvinced by this argument and find it is more likely than not that the document speaks for itself and shows that the Claimant sought a commission in exchange for providing the names of potential investors to the employer, through its broker.

⁵ GD3-28

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

[24] The reason is considered misconduct under the law.

[25] To be misconduct under the law, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it approaches willfulness.⁷ The Claimant does not have to have a wrongful intent for his behavior to be misconduct under the law.⁸

[26] There is misconduct if the Claimant knew or ought to have known that his conduct could impair the performance of the duties owed to his employer and, as a result, that dismissal was a real possibility.⁹

[27] The Commission has to prove that it is more likely than not¹⁰ that the Claimant lost his job because of misconduct.¹¹

[28] The Commission says that there was misconduct because the Claimant wilfully acted in a way that he knew or ought to have known would have a negative impact on his employment relationship. It submits the Claimant was terminated from his employment due to a breach of trust, and that the employer provided evidence supporting that it had cause to dismiss the Claimant. The Commission submits the Claimant breached a part of the ethics implied in his profession as a CFO, by asking to receive a commission on work he was contractually obligated to do.

[29] The Claimant says that there was no misconduct because he did not solicit investors on his own and did not ask for a commission in exchange for providing names of potential investors to the employer. The Claimant stated he could not legally approach investors, because he is not licenced as a broker and it would create a conflict of interest. He submitted that he did not have any potential investors, and never told the employer that he had any potential investors. He submits the employer was required to pay him six months of severance if he was terminated

⁶ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ *Attorney General of Canada v Secours*, A-352-94.

⁹ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ The Claimant has to prove this on a balance of probabilities which means it is more likely than not.

¹¹ *The Minister of Employment and Immigration v Bartone*, A-369-88.

without cause, so the employer created a story to justify termination with cause. He further submits there is no correspondence between him and the employer showing that he asked for a commission, and says the email he sent to the broker is not “the same thing.”

[30] I find that the Commission has proven that there was misconduct, because the Claimant’s employment contract states that part of his job as CFO is to be responsible for seeking financing opportunities for the employer. The contract also states that all business opportunities offered to the Claimant during his employment that relate to the employer’s business will be disclosed to the employer and will belong to the employer. Further, it states that the Claimant will devote all of his business time and skills to the performance of his employment duties in the furtherance of the employer’s business interests and agreed to perform his duties in good faith.

[31] I find the Claimant violated the terms of his employment contract when he communicated with the employer’s broker and stated he had two potential investors but wanted to be paid a commission to provide their information to the broker. The employer told the Commission that it did not know who the Claimant was working for, implying the Claimant may have been working for his own interests instead of the employer’s interests. While the Claimant disputed that he asked for a commission, and testified multiple times that he was not allowed to solicit investors because he is not a broker, I have already found that the evidence supports that he spoke with two potential investors and would not provide their names to the employer’s broker without a commission for the information. I find the Claimant knew or ought to have known that this would impair his employment relationship and could lead to his dismissal because it was a breach of trust.

Conclusion

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

Candace R. Salmon

Member, General Division - Employment Insurance Section

HEARD ON:	August 21, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. V., Appellant