



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PH v Canada Employment Insurance Commission and X*, 2020 SST 1184

Tribunal File Number: GE-20-1809

BETWEEN:

P. H.

Appellant
(Claimant)

and

Canada Employment Insurance Commission

Respondent
(Commission)

and

X

Added Party
(Employer)

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: September 15, 2020

DATE OF DECISION: September 17, 2020

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended for two-weeks). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from March 2, 2020, until March 6, 2020.¹

Overview

[3] The Claimant was suspended from his employment for two-weeks for an incident he indicated occurred on February 25, 2020 (GD3-147). The Claimant's employer said the Claimant was suspended for failing to report a small fire that he accidentally caused while doing restoration work inside an apartment. The Claimant does not dispute the incident occurred, but says there was no fire but only some debris and food particles that were accidentally heated on a stove and caused some smoke. The Claimant's representative submitted the employer suspended the Claimant for not withdrawing an earlier claim to "Work Safe BC."

[4] The Commission accepted the employer's reason for the suspension. The Commission decided that the Claimant was suspended for two-weeks because of misconduct. As a result, the Commission decided the Claimant was disentitled from receiving EI benefits from March 2, 2020, to March 6, 2020.

Matters I have to consider first

The Commission's recommendation on the issues under appeal

[5] In their written representations, the Commission explained that the issue of voluntary leaving was not formally reconsidered under the law due to their error (GD4-6). The

¹A claimant who is suspended from his employment because of his misconduct is not entitled to receive employment insurance benefits until the claimant meets one of the provisions in Section 31 of the *Employment Insurance Act* (EI Act), which are:

- (a) that the period of suspension expires;
- (b) that the claimant loses or voluntarily leaves the employment; or
- (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits

Commission recommended the Tribunal render a decision on the issue of the Claimant's suspension (misconduct) and that the file be returned to the Commission for reconsideration on the issue of voluntary leaving.

[6] I have accepted the Commission's recommendation on this matter. As a result, I have rendered a decision on the issue of misconduct and the file will be returned to the Commission for reconsideration on the issue of voluntary leaving.

Documents from the Added Party that arrived after the hearing

[7] A few minutes prior to the commencement of the hearing, the Added Party's counsel explained that on the morning of the hearing she submitted additional documents to the Tribunal. I advised the Added Party's counsel I did not have these documents. The Claimant's representative also confirmed she did not have these documents. The Added Party's counsel indicated she was ready to proceed with the hearing and present her case without referring to these documents. The Added Party's counsel did not make any submission on why these post-hearing documents should be included as evidence.

[8] The Added Party's documents were placed on the file by the Tribunal after the hearing (GD12). I have not accepted these post-hearing documents as evidence, because the Added Party's counsel did not make any specific submissions as to why the documents should be included or why they would be relevant to the issue under appeal.

Issue

[9] Was the Claimant suspended because of misconduct?

[10] To answer the question of whether the Claimant was suspended because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[11] I find that the Claimant was suspended from his job for two-weeks, because he failed to report a small fire (or the burning of food particles and debris) that he accidentally started in an apartment he was renovating.

[12] The Claimant and the Commission do not agree on why the Claimant was suspended from his job. The Commission says the reason the employer gave is the real reason for the dismissal. The employer (M. G./President) told the Commission the Claimant was suspended for failing to report a small fire that he accidently caused in an apartment he was working on.

[13] The Claimant disagrees. The Claimant's representative submitted that the real reason the Claimant was suspended was that he did not withdraw a previous claim he filed with "Work Safe BC."

[14] I find the Claimant was suspended for failing to report a small fire that he accidentally caused in an apartment he was working on. During the hearing, the provincial manager for the employer (M. H.) and the president (M. G.) both testified the Claimant was suspended for not telling the employer about a small fire that occurred while the Claimant was renovating an apartment. Furthermore, the employer provided the "Disciplinary Action Form" that was signed by the Claimant on February 27, 2020. This form included the reason (misconduct) why the Claimant was suspended (GD3-35). Furthermore, the employer submitted an e-mail sent to the Claimant on February 26, 2020, which included further details on why he was suspended for two-weeks (GD3-36 to 37).

[15] I realize the Claimant's representative submitted that the Claimant was actually suspended for not withdrawing a previous claim to "Work Safe BC." Nevertheless, I prefer the testimony from the employer (both M. H. and M. G.) that the Claimant was suspended for two-weeks for not reporting a small fire to them because their statements were reasonably consistent, detailed, and plausible. The employer also provided supporting documentation that there was a fire accidentally caused by the Claimant which he did not report to them (GD9 and GD10-4 to GD10-7). In short, I find the submission that the Claimant was suspended for not withdrawing a previous claim to "Work Safe BC" to be speculative and unsupported by the evidence.

[16] I recognize the Claimant submitted a transcript of a telephone call he had with M. G. that was listed in GD7-4. The transcript indicated M. G. said: “You know the whole suspension thing was because we didn’t have any work for you, right?” However, M. G. explained this “transcript” did not reflect what he said to the Claimant and was misinterpreted. M. G. further testified that the Claimant’s suspension did not align with the Claimant not having any work. M. G. specifically testified they were planning to send the Claimant to another location for work. Furthermore, M. G. testified that the fire that occurred in the apartment was a serious incident and there was a cover-up and lack of acknowledgement from the Claimant. I prefer M. G.’s testimony on this matter, because his statements were forthright, plausible, and supported by the documentation.

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

[17] The reason for the Claimant’s suspension is misconduct under the law.

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant does not have to have wrongful intent (in other words, he doesn’t have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁴

[19] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended or let go because of that.⁵

[20] The Commission has to prove that the Claimant was suspended because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct.⁶

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Commission says there was misconduct because the Claimant ought to have known that failing to report the incident –no matter how small– and then denying that it happened would break the bond of trust that must exist in an employee-employer relationship.

[22] The Claimant says that there was no misconduct because the accidental burning of food and dust in the apartment was a minor incident that happened all the time.

[23] I find the Commission has proven there was misconduct for the following reasons:

[24] First: The Claimant should have known (or ought to have known) to report the fire –or the burning of food and dust particles– to the employer. I realize the Claimant testified that he disclosed the incident to the site manager. However, the text messaging listed in GD11-2 indicates that site manager was the one that asked the Claimant about a burning smell in the apartment he was working on. Furthermore, the Claimant confirmed in his testimony that he did not report the incident to the employer.

[25] Second: The Claimant confirmed in his testimony that he was aware of the employer's disciplinary policy and Code of Conduct. Based on his own testimony, the Claimant should have known to report the fire or burning incident to the employer. I recognize the Claimant testified that it was not a fire, but a minor incident involving some burning of food and dust. Nevertheless, the incident was a health and safety matter which the Claimant should have known to report immediately to the provincial manager (M. H.).

Additional Submissions from the Claimant's Representative

[26] I realize the Claimant's representative submitted the Claimant accidentally turned a stove on while working on an apartment and caused a minor incident that lasted less than sixty-seconds. However, the incident created smoke which was noticed by the site manager (GD11-2). Furthermore, the Claimant confirmed he was aware of (and signed) the company's Code of Conduct (GD3-52 to GD3-55) and should have known (or ought to have known) to report the incident to the provincial manager (M. H.).

[27] I further recognize the Claimant's representative submitted the employer did not include the Claimant in their investigation on the incident and verbally abused him over the telephone

when they spoke to him about the incident. However, the employer (M. H.) testified he called the Claimant after the “Strata Manager” asked him about a fire in their building. Furthermore, whether the Claimant was verbally berated by the employer over the telephone was not the issue before me. As cited above, I have to decide whether the Claimant’s two-week suspension was the result of his misconduct.

[28] The Claimant’s representative also submitted that the Claimant’s two-week suspension was connected to him not withdrawing a previous claim to “Work Safe BC.” As cited above, I find this submission to be speculative. Both M. H. and M. G. provided credible testimony that the reason for the Claimant’s two-week suspension was his failure to report a fire in the apartment he was working on. The Claimant insists the incident was not a fire, but the burning of food and dust on a store. Still, the Claimant should have known (or ought to have known) to report the incident to the employer because he confirmed he was aware of the employer’s disciplinary policy and Code of Conduct.

[29] Finally: The Claimant’s representative provided submissions on the issue of voluntary leaving. Specifically, the Claimant’s representative argued that the Claimant did not abandon his job but was dismissed. Nevertheless, the only issue before was whether the Claimant was suspended for misconduct. As cited earlier, I have accepted the Commission’s recommendation that I render a decision on the issue of the Claimant’s suspension (misconduct) and return the file to them for reconsideration on the issue of voluntary leaving.

So, was the Claimant suspended from his job because of misconduct?

[30] Based on my findings above, I find that the Claimant was suspended because of misconduct.

Conclusion

[31] The Commission has proven that the Claimant was suspended from his job for two-weeks because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits from March 2, 2020, until March 6, 2020.

[32] This means that the appeal is dismissed

Gerry McCarthy

Member, General Division - Employment Insurance Section

HEARD ON:	September 15, 2020
METHOD OF PROCEEDING:	Videoconference (Zoom)
APPEARANCES:	P. H., Appellant S. H., Representative for the Appellant “X,” Added Party Amy-Lynn Kosick, Representative for the Added party (Gowling WLG, Canada)