



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *BS v Canada Employment Insurance Commission*, 2020 SST 1157

Tribunal File Number: GE-20-887

BETWEEN:

B. S.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: November 5, 2020

DATE OF DECISION: November 20, 2020

Decision

[1] The Canada Employment Insurance Commission (the Commission) has proven that the Claimant lost his job because of misconduct. This means the Claimant is disqualified from receiving EI benefits.¹

Overview

[2] The Claimant worked as a truck driver. He lost his job and applied for EI benefits. The employer said he was dismissed for several reasons. It said he was not recording his time correctly, that he refused assigned work, and that he violated transportation rules. The Claimant disputes this and says discrimination played a role in his dismissal.

[3] The Commission accepted the employer's reasons for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits. The Claimant is appealing this decision to the Social Security Tribunal (the Tribunal).

Matters I have to consider first

Potential Added Party

[4] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

The Claimant sent in documents after the hearing

[5] At the hearing, the Claimant said that he had received a judgment from the federal Labour Program regarding his dismissal from the employer. He said this document found the employer guilty of wrongful dismissal and ordered them to pay the Claimant as a result. I asked

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

the Claimant to provide this document to the Tribunal and the Claimant sent it by email immediately following the hearing.

[6] After reviewing the document, I do not consider it relevant to the issue under appeal. This is because the document relates only to the Claimant's entitlement to termination pay after the severance of his employment. This document does not relate to the circumstances around the Claimant's dismissal. So, I will not consider this document as part of this decision.

Issue

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

Analysis

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

Why did the Claimant lose his job?

[9] I find that the Claimant lost his job for several cumulative reasons, namely:

- ongoing issues meeting the required minimum time for pre-trip inspections;
- the employer believed he had violated traffic laws;
- he took an unauthorized route during several trucking runs; and
- he did not attend the office as directed by the employer on November 20, 2019.

[10] The Claimant and the Commission do not agree on why the Claimant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant was dismissed because he repeatedly chose not to follow company policy and transportation laws.

[11] The Claimant disagrees. The Claimant says that the real reason he lost his job is that one of the dispatchers targeted him because of his race.

[12] The employer told the Commission that the Claimant had violated company policy and transportation laws by not recording the minimum required time for his pre-trip inspections. It provided the Commission with an excerpt of the Federal Motor Carrier Safety Administration rules, which supports that the Claimant must perform and log a pre-trip inspection.² It also provided six emails from the employer to the Claimant dated from August 21 to October 21, 2019. In these emails, the employer tells the Claimant that he has failed to log the required 15-minute pre-trip inspection time.

[13] The Claimant does not dispute that he was required to log a 15-minute pre-trip inspection. He says that it was common practice for the drivers to perform the pre-trip inspection before starting the timer, and then edit the electronic log of the inspection to reflect the 15 minutes later.

[14] The employer told the Commission that the Claimant had violated transportation laws when he took an unauthorized route and then reversed his vehicle on a highway on October 15, 2019. The employer said the Claimant was following two other trucks when he went off-route. The Claimant contacted the employer and told them he would back up and take a different ramp. The employer provided a written statement dated October 15, 2019, and signed by one of its dispatchers.³ The note states the Claimant failed to follow his routing and ended up going to the destination via an unauthorized route. It says the Claimant “then proceeded to back up on interstate traffic.”

[15] The Claimant agrees that he took a different route than the two other trucks that he was following. This was because he was unfamiliar with the route and had lost sight of the two trucks he was supposed to be following. When the ramp approached, he was not in the correct lane to take the ramp. So he continued on the highway and pulled off on a different ramp to contact the employer. He denies that he reversed his truck on the highway. He said the employer was upset

² The excerpt of the Federal Motor Carrier Safety Administration rules provided by the employer is found at GD3-95 to GD3-102.

³ This statement is found at GD3-51.

that he was on a different route and misunderstood when he told them that he could not reverse to get back to the correct ramp.

[16] I find it is most likely that the events on October 15, 2019, occurred as the Claimant described. At the hearing, the Claimant gave a detailed account of what happened that day. He was able to answer direct questions about why he lost track of the two trucks he was following and what choices he made as a result. I put more weight on the Claimant's testimony about these events because he was in the truck when they occurred.

[17] The employer told the Commission that the Claimant had violated company policy when he took an unauthorized route on November 14, 2019. The employer says the Claimant drove through Connecticut, which is not allowed. The employer provided a text message sent to the Claimant on November 14, 2019, that tells the Claimant they have checked on his location and see that he is traveling illegally in Connecticut.⁴ It says they have had this discussion with the Claimant before. The employer tells him "this practice of doing as you please with no respect for the rules will not be tolerated."

[18] The Claimant does not dispute that he drove through Connecticut on November 14, 2019. He told the Commission and the Tribunal that he was following a route in his GPS to find a rest area. He said the United States Department of Transportation later told him that commercial carriers must pay a highway fee to drive through the state. He was told that the employer had not paid this highway fee, so their trucks are not allowed to drive through. The Claimant says the employer never informed him that he could not travel along this route.

[19] It is undisputed that the Claimant drove through Connecticut. Based on the Claimant's evidence, the employer was not allowed to send trucks along this route because it had not paid the highway fees for this state. If the employer had not paid the fees to travel through Connecticut, it is most likely the employer would not have directed the Claimant to travel on that route. The employer's text messages indicates that they had discussed traveling through Connecticut before with the Claimant. So, I find as fact that the Claimant took an unauthorized route through Connecticut on November 14, 2019.

⁴ This text message is found at GD3-49.

[20] The employer also stated the Claimant had left work for personal reasons on several occasions while he still had available hours. On September 26, 2019, the Claimant told them he had to go home for an emergency repair on his house.⁵ The employer told him that it was not acceptable, because they had work to do and the Claimant still had available hours left in his cycle. Yet, the Claimant took the time off anyway, leaving work at 2:30 PM on September 26, 2019, and not resuming duty until the next morning.⁶

[21] The Claimant agrees that he left work on September 26, 2019, to repair the water pump at his house. He said that he told the employer it would take him a couple of hours to repair and then he would be back at work. The Claimant said this is an example of how the employer discriminated against him based on his race. He said the employer would not have had a problem giving other employees time off if they had an emergency at home.

[22] The employer told the Commission that the Claimant had refused to attend work on November 20, 2019. It provided text messages from the previous day in which the dispatcher told the Claimant to pick up a load at 11:00 AM on November 20th for a run to New Hampshire and Massachusetts.⁷ The Claimant responded that he thought he was scheduled for a local run. He had a family obligation on Friday, so he could not take that long run as he would not return in time. The dispatcher said that he should schedule his personal appointments on his off-time and asked the Claimant again if he would pick up the load the next day. The Claimant responded that the dispatcher should find him something local. The dispatcher then told the Claimant to be in the office with the truck at 9:00 AM sharp. The Claimant responded that he took that as a threat and that the dispatcher could not talk to him this way.

[23] The Claimant said the dispatcher continued texting him the next day. The text messages show the dispatcher says the Claimant was asked to be at the office at 9:00 AM, and that the General Manager had asked the Claimant to call the dispatcher between 7:30-8:00 AM that morning to discuss “a game plan.” He says the Claimant has not called and has not attended the office. The dispatcher asked the Claimant to tell him what his plan is, as he is trying to do his job

⁵ This series of text messages is found at GD3-53 and GD3-54.

⁶ The employer provided two electronic logs showing the Claimant’s hours of work on September 26 and September 27, 2019.

⁷ These text messages are found at GD3-47. The Claimant also provided these text messages to the Commission in the form of a video.

and does not know whether the Claimant is available or not. The Claimant says he will be at the office after lunch to put his snow tires on.

[24] At the hearing, the Claimant explained that if he had picked up the load to drive to New Hampshire and Massachusetts, he would have run out of available hours on his cycle partway through the run. Even so, he said that he did not refuse the job on November 20th, but had asked the employer to find something local instead because he had told the employer two weeks prior that he had an appointment on Friday.

[25] The Claimant said that he received the text messages on November 19th and knew the dispatcher was threatening to dismiss him. He called the General Manager that evening and she told him to call the dispatcher in the morning. The Claimant said the call was just to get the dispatcher off his back, so he refused to do that. He said he did not want to play any games. So he did not call the dispatcher and did not attend work in the morning. Instead, he went into the office in the afternoon to have his snow tires installed.

[26] The Claimant said that he noticed he was locked out of his electronic logbook at that time, so he went into the office to have it fixed. He said both of the dispatchers “blew up” at him and told him that they could not work with him. He said one of the dispatchers had a box ready behind his desk. He handed the Claimant the box, told him to take his stuff and leave.

[27] The Claimant said that one of the dispatchers discriminated against him based on his race, and that is the real reason he was dismissed. I will refer to this dispatcher as D. The Claimant had worked with D in a previous job. In that employment, D had constantly targeted the Claimant by saying that he had performance issues and blaming him for the mechanical problems in his truck.

[28] The Claimant said that D got him fired from that job and the Claimant walked away because he did not want to be discriminated against any longer. The Claimant then started working for the employer. The Claimant said he was employed in this position for three months without an issue. He had just completed his three-month probationary period and was working with the General Manager to purchase one of their trucks and start working independently for the company. Around this time, D started working for the employer. Immediately, D told the

employer to extend the Claimant's probationary period by another three months. The Claimant said "from then on, [D] did everything he could to get me fired."

[29] The Claimant said that D treated him differently than the other drivers. He said other drivers refused loads on occasion and were not fired for it. He gave the example that he was called to pick up a load in Northern Ontario that a previous driver had refused to take. He also said D would give him a hard time, or call him difficult, if he had to take time off. He said D did not treat other drivers the same way.

[30] I am not satisfied that the Claimant was targeted for termination because of racial discrimination. The Claimant said that D was a discriminatory person who tried to get the Claimant fired. However, D did not start working for the employer until late September 2019 and records show that the Claimant was subject to multiple warnings from the employer before that time.⁸

[31] The Claimant said the employer's discrimination was subtle. He gave several examples of differential treatment between himself and other drivers with respect to refusal of loads. He pointed out that other drivers engaged in the same behaviour but were not dismissed because of it. 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 behaviour may raise a suspicion of discrimination, I find it is outweighed by the Commission's documentary evidence of the Claimant's history of non-compliance with the company's rules and his refusal to follow the employer's direction.

[32] I find as fact that the Claimant lost his job because of the cumulative effect of his refusal to attend work as directed on November 20, 2019, his job performance and his disciplinary history. I reach this conclusion based on:

- the Claimant's documented performance issues logging the minimum required time for his pre-trip inspections;

⁸ The Claimant received emails about his failure to log his minimum required pre-trip inspection time on August 21, September 17, and September 19, 2019.

- the written warning on October 15, 2019, which supports that the employer believed the Claimant had violated transportation laws;
- the text message from the employer to the Claimant on November 14, 2019, stating the Claimant took an unauthorized route;
- the text messages between the Claimant and the employer on November 19, 2019, which support that he did not attend work as directed on November 20th.

[33] I find the series of emails from the employer to the Claimant advising him that he was not meeting the minimum required pre-trip inspection times supports the Claimant had an ongoing performance issue. The Claimant said this was a common practice for drivers, but I find the repeated warnings indicate that the employer did not accept this practice.

[34] I find the employer believed the Claimant had reversed his vehicle on the highway in violation of transportation laws.⁹ I think the employer's belief that he violated transportation laws was one of the reasons it dismissed the Claimant. However, I accept the Claimant's testimony that he did not commit this conduct. So, I will not consider whether this action constituted misconduct under the law.

[35] It is undisputed that the Claimant took an unauthorized route on November 14, 2019, and that he did not attend work as directed on November 20, 2019. The employer's unhappiness with these actions was clearly documented in the text messages from those days.

[36] I am satisfied that the evidence before me supports that the Claimant's job performance, his disciplinary history, and his refusal to attend work are the essential facts that led to his dismissal. I find it is more likely this was the real reason for his dismissal, and not an excuse.

⁹ This is supported by the written warning on October 15, 2019, and the employer's statements to the Commission. The employer referenced the Claimant backing up on a highway in conversations on February 19, 2020 (GD3-65) and February 26, 2020 (GD3-109).

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

[37] The reason for the Claimant's dismissal is misconduct under the law.

[38] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.¹¹ The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹²

[39] 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 let go because of that.¹³

[40] The Commission has to prove that the Claimant lost his job 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 the Claimant lost his job because of misconduct.¹⁴

[41] The Commission says there was misconduct because the Claimant breached the fundamental conditions of his job by not showing up for work on time and by failing to follow the law of his profession.

[42] The Claimant says that there was no misconduct because he did not do anything wrong. He also did not think he could be dismissed for his actions because the employer did not follow its disciplinary policy.

[43] I find the Commission has proven there was misconduct. I find the Claimant was aware that his employer had concerns about his work regarding logging his pre-trip inspections times,

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹² See *Attorney General of Canada v Secours*, A-352-94.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

his refusal to work, and taking unauthorized routes during his runs.¹⁵ I also find the Claimant knew or reasonably should have known that he could be dismissed for this conduct.

[44] I find the Claimant wilfully refused to comply with the employer's direction about logging his pre-trip inspection time. The employer warned the Claimant six times that he was required to log a minimum of 15-minutes for his pre-trip inspection and that he was not meeting this standard. The Claimant said that he would perform his pre-trip inspection before starting the timer. He would then edit the time later to comply with the 15-minute requirement. He said that all the drivers did this. I find these statements support that the Claimant believed he was acting properly, despite the employer's numerous warnings that this practice was not acceptable. As the Claimant deliberately continued to engage in this conduct, I find his actions were wilful in the sense that they were conscious, deliberate and intentional.¹⁶

[45] I find the Claimant wilfully took an unauthorized route on November 14, 2019. The Claimant said that he was following the route on his GPS to find a rest area. He said the employer had never instructed him not to drive through Connecticut, but acknowledged that the employer was not allowed to use this highway. The text messages from the employer indicate that they had previously discussed the Claimant driving through Connecticut. Based on this evidence, I find it is most likely that the Claimant was aware that he was not authorized to travel in Connecticut. So, I find the Claimant's action of taking an unauthorized route through Connecticut on November 14, 2019, was wilful.¹⁷

[46] I also find the Claimant was aware the employer could dismiss him for refusing work. On November 19, 2019, the employer directed the Claimant to pick up a load on the following day at 11:00 AM. While the Claimant says that he did not refuse this load, his response to the employer that he had a personal appointment that conflicted with this run, followed by the

¹⁵ These concerns are noted in the employer's emails from August 21 to October 21, 2019 (GD3-57 to GD3-63), the text messages from September 26, 2019 (GD3-53) and November 19, 2019 (GD3-47), the written warning dated October 15, 2019 (GD3-51), and the text message from November 14, 2019 (GD3-49).

¹⁶ The Federal Court of Appeal (FCA) has set out that it is not necessary that there be a wrongful intent for behaviour to amount to misconduct. Rather, it is sufficient that the conduct is made wilfully, in other words, consciously, deliberately or intentionally, *Canada (Attorney General) v. Caul*, 2006 FCA 251 and *Canada (Attorney General) v. Tucker*, A-381-85

¹⁷ The FCA has also found that a claimant wilfully refusing to comply with their employer's lawful direction respecting their work as an employee amounts to misconduct, *Canada (Attorney General) v. Bedell*, A-1716-83

instruction to the employer to “find something local” for him indicates that he would not be picking up the load as directed. The employer then told the Claimant to bring his truck to the office at 9:00 AM. The Claimant responded that he took that direction as a threat. The Claimant told the Commission and the Tribunal that he knew the employer was threatening to dismiss him.

[47] The Claimant was aware that the employer had concerns about his work. The Claimant also knew the employer was threatening to dismiss him because of his refusal to do his assigned work. Despite that, the Claimant did not attend work on November 20, 2019, as he was directed to do. I find the Claimant’s behaviour in this regard was so reckless as to constitute wilfulness.¹⁸

[48] I agree with the Claimant that the employer did not follow its disciplinary policy. The employer’s Personnel and Policy Manual states that there is four-step disciplinary progression starting with two written warnings then a suspension before the employee is discharged.¹⁹ While the Claimant received numerous warnings regarding his pre-trip inspection times, refusal of work and taking unauthorized routes, there is no evidence that the Claimant was suspended before he was dismissed.

[49] Regardless of the employer’s adherence to its disciplinary policy, I find the evidence supports that the Claimant was aware that he could be dismissed for his conduct. Considering the Claimant’s disciplinary history, the Claimant should have known that his working relationship with the employer was under stress already. So, the Claimant reasonably should have known that his refusal to attend work as directed would significantly impair the employer/employee relationship to the point that such an action would result in his termination.

So, did the Claimant lose his job because of misconduct?

[50] Based on my findings above, I find that the Claimant lost his job because of misconduct.

¹⁸ The FCA has set out that absences and tardiness, after being previously warned, is considered misconduct since it is reckless and shows a lack of concern with respect to the employer, *Parsons v. Canada (Attorney General)*, 2005 FCA 248

¹⁹ The employer provided a copy of its Personnel and Policy Manual to the Commission (GD3-72 to GD3-92), the disciplinary procedure is found on GD3-92.

[51] The Claimant's conduct indicates the Claimant engaged in a variety of wilful and/or reckless actions that he knew or reasonably should have known would impair the performance of his duties owed to his employer and that he could be dismissed for it.

Conclusion

[52] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[53] This means that the appeal is dismissed.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	November 5, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. S., Appellant