



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *AS v Canada Employment Insurance Commission*, 2021 SST 246

Tribunal File Number: GE-21-125

BETWEEN:

**A. S.**

Appellant/Claimant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Catherine Shaw

HEARD ON: February 15, 2021

DATE OF DECISION: February 16, 2021

## **Decision**

[1] The appeal is dismissed. The Claimant isn't entitled to receive benefits during his suspension because the employer suspended him for misconduct.<sup>1</sup>

## **Overview**

[2] The Claimant was employed as a heavy equipment operator. He is required to have a valid driver's licence for his job. His employer asked him to provide a copy of his driver's licence and found that his licence wasn't valid. The employer suspended the Claimant from his job, but later changed the suspension to a leave of absence up to one-year. He could return to work if he got his driver's licence reinstated.

[3] The Canada Employment Insurance Commission (the Commission) decided the Claimant couldn't be paid benefits because he lost his job due to his own misconduct. The Claimant disagrees. He didn't lose his job and says that losing his driver's licence wasn't misconduct. He just forgot to take care of the unpaid fines that caused his licence to be suspended.

## **Matters I have to consider first**

### **The Claimant did not attend the hearing**

[4] The Claimant did not attend the hearing. A hearing is allowed to go ahead without the Claimant if the Claimant was given the notice of the hearing.<sup>2</sup> I think that the Claimant received the notice of hearing because it was sent to the e-mail address he provided to the Tribunal and was not returned as undeliverable. The Tribunal also contacted the Claimant by telephone on February 12, 2021 to remind him about the hearing. So, the hearing proceeded on the scheduled date without the Claimant.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits for the period of their suspension.

<sup>2</sup> Section 12 of the *Social Security Tribunal Regulations*

## **The employer is not a party to this appeal**

[5] 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.

## **Issues**

[6] Why did the Claimant stop working?

[7] If the Claimant was dismissed or suspended from his job, was it because of misconduct?

## **Analysis**

### **Why did the Claimant stop working?**

[8] I find the Claimant stopped working because the employer suspended him.

[9] The basic facts aren't really in dispute. The Claimant stopped working in March 2020 when the employer discovered he didn't have a valid driver's licence. Later, in May 2020, the Claimant and his union negotiated an agreement with the employer. The employer agreed that the Claimant could take a leave of absence up to one-year. If the Claimant got his licence reinstated during this time, he could resume work. If he didn't provide a valid driver's licence by March 15, 2021, the employer would dismiss him.<sup>3</sup>

[10] The Claimant says that he initially stopped working because the employer suspended him. The employer agrees that they originally suspended the Claimant while they decided whether they would dismiss him. Ultimately, they agreed to give him up to one-year to reinstate his licence and return to work.<sup>4</sup>

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<sup>3</sup> This agreement is found at GD2-9 of the appeal file.

<sup>4</sup> The employer's statements are found at GD3-37 of the appeal file.

[11] The Commission decided the Claimant was disqualified for benefits because it said the employer dismissed the Claimant for misconduct. It based this decision on:

- The Claimant’s statements on his application for benefits. The Claimant selected that he was “dismissed/suspended” from work because he didn’t have a valid driver’s licence.
- The record of employment (ROE) issued by the employer dated April 17, 2020. It listed the reason for issuing as “other” but stated in the comments that the Claimant had been “dismissed until he can get his licence.”

[12] The employer later issued an amended ROE that removed the reference to the Claimant being dismissed. The amended comments state that the Claimant was laid off until he gets his licence back.

[13] There are two kinds of sanctions for misconduct in the *Employment Insurance Act*. If an employer dismisses a claimant for misconduct and completely ends the employment relationship, the Commission disqualifies the claimant from receiving benefits.<sup>5</sup> This means the claimant can’t receive any EI benefits until they work enough hours at a different job to qualify again for benefits.

[14] If an employer suspends a claimant for misconduct, then the Commission disentitles the claimant.<sup>6</sup> This means the claimant can’t receive benefits during the suspension, but the disentitlement ends when they return to work.

[15] Whether the employer dismisses the claimant or suspends them, the issue is still whether the claimant stopped working because of misconduct. The only thing that is different is the sanction – it is either a disqualification or a disentitlement.

[16] The Claimant says that he wasn’t dismissed from his employment. He maintains that he stopped working initially because he was suspended and is now on a leave of absence from work.

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<sup>5</sup> This disqualification is set out in section 30 of the *Employment Insurance Act*.

<sup>6</sup> This disentitlement is set out in section 31 of the *Employment Insurance Act*.

[17] I agree with the Claimant. I find the evidence supports that the employer suspended the Claimant in March 2020. This is supported by the Claimant's consistent statements to the Commission and the Tribunal, his selection on his initial application for EI benefits, and the employer's statement to the Commission that the Claimant was suspended from his employment.

[18] I recognize that the agreement dated May 21, 2020, changed the Claimant's suspension to a leave of absence. However, this agreement doesn't change the reason that the Claimant stopped working in the first place. The Claimant stopped working because the employer suspended him.

[19] I now turn to the question of whether the Claimant was suspended because of misconduct. To answer this, I have to decide two things. First, I have to look at 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?**

[20] Both parties agree on the reason the Claimant was suspended from his job. The employer suspended the Claimant from work because he did not have a valid driver's licence. As this is not in dispute, I accept as fact that the Claimant was suspended from his job because he failed to maintain a valid driver's licence.

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

[21] Yes, the reason for the Claimant's suspension is misconduct under the law.

[22] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>7</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>8</sup> The Claimant doesn't 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.<sup>9</sup>

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<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>9</sup> See *Attorney General of Canada v Secours*, A-352-94.

[23] 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.<sup>10</sup>

[24] The Commission has to prove that the Claimant was suspended from 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 that the Claimant was suspended because of misconduct.<sup>11</sup>

[25] The Commission says that there was misconduct because the Claimant knew it was a job requirement to have a valid driver's licence and yet he let his valid licence lapse. Further, it says the Claimant should have known the consequences of losing his licence because it was a requirement of his job.

[26] The employer told the Commission that the Claimant was required to have a driver's licence for his job as a heavy equipment operator. The employer said the Claimant was aware of this requirement because it was explained to him at the time he was hired. All employees are given a policy book which also makes this requirement clear.

[27] The Claimant doesn't dispute that he was required to have a driver's licence for his job. Rather, he says there was no misconduct because he didn't know his licence had been suspended.

[28] The Claimant said that his licence was suspended due to unpaid fines from driving without insurance a long time ago. He had paid them down over the years, but the fines were substantial. He had previously asked the courts for extensions on these fines. But, he had experienced stressful life circumstances in the past several years and had forgotten to get extensions and make payments on his fines.

[29] The Claimant says that his forgetfulness doesn't constitute misconduct because he was dealing with several other important issues, including his need for an income, housing, as well as estate and custody matters.

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<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[30] I find that the Commission has proven that there was misconduct, because the Claimant knew that he couldn't keep his job without his driver's licence. He also knew about the unpaid fines that caused the suspension of his licence. So, his failure to deal with the unpaid fines to maintain his driver's licence was reckless to the point of wilfulness.<sup>12</sup>

[31] The Claimant acknowledged that he had these unpaid fines for the past decade. He had made payments on these fines in the past. He had requested extensions from the courts to deal with these fines. The Claimant clearly knew that he had these fines and what the consequences would be if he didn't deal with them. I find the Claimant's stressful personal circumstances, while understandable, do not excuse him from not taking action to maintain an essential requirement of his job, a valid driver's licence.

[32] The Claimant also stated that he had his licence suspended multiple times in the past. Despite that, he admits that he didn't check on the status of his licence to ensure that his licence was valid. The Claimant said that frequently checking on the status of your licence isn't a reasonable action. I disagree. With the multiple suspensions that he had received and his outstanding fines from long ago, the Claimant had reason to question whether his licence was valid. So, checking on the status of his licence would have been a reasonable thing to do. To not do so, contributes to the determination that the Claimant's actions were so reckless as to constitute wilfulness.

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

[33] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

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<sup>12</sup> The Federal Court of Appeal has established that employees who must hold a valid driver's licence as an essential occupational requirement who then lose their licence through their own fault therefore fail to meet an explicit contract condition. See *Canada (Attorney General) v. Cartier*, 2001 FCA 274 and *Canada (Attorney General) v. Turgeon*, A-582-98

## Conclusion

[34] The Commission has proven that the Claimant was suspended because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[35] This means that the appeal is dismissed.

Catherine Shaw

Member, General Division - Employment Insurance Section

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| HEARD ON:             | February 15, 2021 |
| METHOD OF PROCEEDING: | Teleconference    |
| APPEARANCES:          | None              |